18 December 2014

European Banking Authority
Floor 46
One Canada Square
London
E14 5AA

Submitted via the EBA website

Consultation paper on draft guidelines on triggers for the use of early intervention measures under Article 27(4) of Directive 2014/59/EU

Dear Sir / Madam

Please find enclosed AFME's response to the EBA consultation paper on draft guidelines on the triggers for the use of early intervention measures under Article 27(4) of Directive 2014/59/EU (EBA/CP/2014/21).

Please do not hesitate to contact us if you have any questions.

Yours faithfully

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AFME

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Consultation response

EBA consultation paper on draft guidelines on triggers for the use of early intervention measures under Article 27(4) of Directive 2014/59/EU (EBA/CP/2014/21)

18 December 2014

The Association for Financial Markets in Europe ("**AFME**") welcomes the opportunity to comment on the European Banking Authority ("**EBA**") Consultation Paper (the "**CP**") on draft guidelines on the triggers for the use of early intervention measures under article 27(4) of Directive 2014/59/EU (the "**BRRD**") (EBA/CP/2014/21).

AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.[1]

We set out below our comments in response to questions raised in the CP. Unless otherwise indicated, references to paragraphs are references to paragraphs of the draft guidelines and references to articles are to articles of the BRRD.

Q1. Do you have any general comments on the draft Guidelines on triggers for the use of early intervention measures?

We are broadly supportive of the draft guidelines. We welcome the consistency with the BCBS Core Principles of Effective Banking Supervision definition of early intervention as being focused on preventing an identified weakness from developing into a threat to safety and soundness.

We welcome the confirmation in paragraph 7 that breaching the "triggers" identified in the guidelines should not automatically lead to the application of early intervention measures but rather prompt further investigation and consideration by the competent authority. We suggest that this consideration should include an assessment by the competent authority as to whether the issue identified by the relevant indicator is being adequately addressed by the institution already, for example through activation of its recovery plan.

We also strongly support the emphasis in paragraph 9 that when taking any early intervention measures, competent authorities should choose the most appropriate measure and act proportionately.

While not addressed in the draft guidelines, we note that article 27(1) includes a reference to early intervention measures being triggered where the institution infringes or is likely in the

[1] AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia. AFME is listed on the EU Register of Interest Representatives, registration number 65110063986-76.

near future to infringe, inter alia, the requirements of articles 3 to 7, 14 to 17 and 24 to 26 of Regulation 600/2014 (MiFIR). These articles of MiFIR relate to requirements for pre- and post-trade transparency for equity instruments and transaction reporting that would not appear to be relevant to the need to apply early intervention measures. We assume that this is an error that should be corrected or clarified.

We would like to stress the importance of the dialogue between institutions and their supervisors as part of the SREP. However, the proposed guidelines are silent on this dialogue and on the framework supporting it. It is our view that the guidelines should emphasise dialogue as a key aspect of the assessment for early intervention.

Q2. Do you consider the level of detail used in the draft Guidelines to be appropriate?

We consider that the level of detail in the draft guidelines is generally appropriate. One aspect where further guidance would be beneficial is the interaction between the competent authorities and resolution authorities when taking early intervention action, for example under article 27(1)(h).

Q3. Do you have any comments on the proposed specification of early intervention triggers based on the outcomes of SREP?

The interaction between (i) the SREP process and supervisory measures imposed in response to the SREP assessment; and (ii) early intervention measures, should be carefully considered. While the outcome of SREP assessments is a relevant consideration when competent authorities are considering taking early intervention action, we view early intervention as a distinct process with a different purpose. Therefore a particular SREP score should not automatically lead to early intervention measures being taken.[2]

We support the requirement in paragraph 14 for any early intervention measures applied as a result of SREP scores to be targeted at addressing the particular weakness or weaknesses identified. However, we note that not all factors considered in SREP, such as strategy or deviation from budget are likely to be relevant to determining whether early intervention is appropriate.

Q4. Do you have any comments on the proposed approach to use material deterioration or anomalies in key indicators in deciding whether there is a need to apply early intervention measures?

We support the requirement in paragraph 19 for indicators to be tailored to the particular institution. This is important for all indicators, but particularly important for market-based and macroeconomic indicators. In this regard we also support the requirement in paragraph 22 for competent authorities to assess the relevance of market based indicators and macroeconomic

[2] As AFME stated in our response to the EBA consultation on guidelines on SREP, “We fully agree with the idea that the work performed by competent authorities in the context of the SREP must inform competent authorities with respect to potential threats on the viability of institutions. In this respect, such work may for example contribute to analysis of circumstances where early intervention measures should be considered. However, for the sake of clarity and consistency, we think that a clear separation must be established between matters relating to the SREP as described by Directive 2013/36/EU, and matters relating to the implementation of the BRRD and, more generally, to decisions pertaining to recovery and resolution.”

indicators to the particular institution. In the event that these types of indicators are deemed relevant for an institution, we suggest a cautious approach, as setting “objective” thresholds is likely to be very challenging. We propose that, in a similar manner to the proposed paragraph 18 of the draft guidelines on when an institution is considered as failing or likely to fail proposed in EBA consultation paper 2014/22, these indicators should always be considered together with other indicators and temporary deteriorations should be excluded.

We note that article 27(1) refers to triggers potentially including 1.5% above an institution’s own funds requirement. For these purposes an institution’s own funds requirement is defined as the requirements in articles 92 to 98 of the Capital Requirements Regulation (No 575/2013). While we recognise that an indicator based upon total capital requirements including buffers may make more sense than 9.5% for banks that have buffers and Pillar 2 requirements, it is necessary to consider the potential unintended consequences of this proposed trigger. We are concerned that this would hard-wire the level of total capital plus 1.5% in stakeholders’ minds and in practice create a new regulatory capital buffer. Further, we believe that the trigger for early intervention should be consistent with the supervisory powers under article 102 of Directive 2013/36 (CRDIV) which is set at the total capital level (including Pillar 2 and buffers). We do not see why early intervention measures should be imposed at an earlier stage than these supervisory powers.

When establishing monitoring systems pursuant to paragraph 16, it should be emphasised that competent authorities should rely on existing processes and information already collected where possible to avoid duplication.

Q5. Do you have any comments on the proposed description of significant events that should be considered as possible triggers for the decision whether to apply early intervention measures?

While significant events could trigger early intervention measures, the guidelines should emphasise that they should only do so where the relevant “significant event” leads to the institution infringing or being likely to infringe the requirements set out in Article 27(1) of the BRRD. For example, a credit rating downgrade should not in itself automatically trigger a decision on whether to apply early intervention measures, but the focus should be of the impact of the relevant significant event on the institution.