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19/12/2023

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Additional Information

Level 1 Regulation
European Market Infrastructure Regulation (EMIR) Regulation (EU) No 648/2012- PTR-Derivatives

Level 2 Regulation
Regulation 149/2013 on indirect clearing arrangements, the clearing obligation, the public register, access to a TV, non-financial ctps, and risk mitigation for OTC derivatives not CCP cleared

Topic
OTC Derivatives questions - Other

Additional Legal Reference
Article 10(3)(1) of EMIR and Article 10 of Commission Delegated Regulation (EU) No 149/2013

Subject Matter
Hedging definition and virtual power purchase agreements

Question
Can virtual power purchase agreements be considered as “risk reducing transactions” under EMIR?

ESMA Answer

19-12-2023

Original language

Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation

In general, a transaction through which a counterparty A takes on market risk to allow counterparty B to hedge risk related to counterparty’s B commercial activity cannot be considered as “risk reducing” under EMIR for counterparty A. Assuming counterparty A (‘the buyer’) buys the environmental attributes and benefits associated with the renewable energy generated by counterparty B (‘the seller’) through a virtual power purchase agreement (PPA), counterparty B may claim that the virtual PPA is objectively measurable as reducing risks directly relating to its commercial activity, assuming its main commercial activity is to produce renewable energy and the virtual PPA provides a stable long-term financial income to compensate from the variable output of renewable energy production. With regard to counterparty A, and subject to compliance with other legislative texts such as Directive 2014/65/EU of the European Parliament and of the Council (MiFID) 3 , and in particular with the ancillary activity exemption therein, the provision of a hedge through a virtual PPA may be considered as directly related to the commercial activity of counterparty A. In accordance with Article 10 of Commission Delegated Regulation (EU) No 149/2013, a derivatives

contract concluded by counterparty A to offset risks resulting from the virtual PPA concluded with counterparty B could be considered as “risk reducing” under EMIR and therefore the resulting position in those derivatives does not have to be included in the calculation of counterparty A’s position towards the clearing thresholds. Hedging strategies have to be well documented and need to be supplemented by evidence of the actual risk directly related to the commercial or treasury financing activity that the contract is covering.

The answers clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that the European Commission might take before the Union and national courts.