Reply Form

**to the Consultation Paper on Draft technical standards amending Regulation (EU) 149/2013 to further detail the new EMIR clearing thresholds regime**

Responding to this Consultation Paper

ESMA invites comments on all matters in this Consultation Paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

* respond to the question stated;
* indicate the specific question to which the comment relates;
* contain a clear rationale; and
* describe any alternatives ESMA should consider.

ESMA will consider all comments received by **16 June 2025.**

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input - Consultations’.

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

• Insert your responses to the questions in the Consultation Paper in this reply form.

• Please **do not remove** tags of the type < ESMA\_QUESTION\_CPCT\_0>. Your response to each question has to be framed by the two tags corresponding to the question.

• If you do not wish to respond to a given question, please **do not delete it but simply leave the text** “TYPE YOUR TEXT HERE” between the tags.

• When you have drafted your responses, save the reply form according to the following convention: ESMA\_CP1\_ CPCT\_nameofrespondent.

For example, for a respondent named ABCD, the reply form would be saved with the following name: ESMA\_CP1\_ CPCT\_ABCD.

• Upload the Word reply form containing your responses to ESMA’s website (**pdf documents will not be considered except for annexes**). All contributions should be submitted online at *www.esma.europa.eu* under the heading *‘Your input - Consultations’.*

**Publication of responses**

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

**Data protection**

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘[Data protection](https://www.esma.europa.eu/about-esma/data-protection)’.

**Who should read this paper?**

All interested stakeholders are invited to respond to this consultation paper. In particular, responses are sought from financial and non-financial counterparties entering into OTC derivative transactions, as well as from central counterparties (CCPs).

# General information about respondent

|  |  |
| --- | --- |
| Name of the company / organisation | Deutsches Aktieninstitut |
| Activity | Issuer (Other than SME) |
| Are you representing an association? |  |
| Country / Region | Germany |

# Questions

1. Do you agree that the aggregate thresholds should only be set for those asset classes subject to the CO i.e. IRDs and credit derivatives? If not, please elaborate.

<ESMA\_QUESTION\_CPCT\_1>

No answer.

<ESMA\_QUESTION\_CPCT\_1>

1. Do you agree with ESMA’s proposal to maintain the aggregate thresholds at the current level i.e. 3 billion EUR for IRDs and 1 billion EUR for credit derivatives? If not, please elaborate.

<ESMA\_QUESTION\_CPCT\_2>

No answer.

<ESMA\_QUESTION\_CPCT\_2>

1. Do you agree with the proposed uncleared thresholds? If not, please elaborate, explain for which asset class(es) and, where possible, provide supporting data and elements.

<ESMA\_QUESTION\_CPCT\_3>

No, we do not agree with the proposed reduction in uncleared thresholds for any of the asset classes. At a minimum, the currently applicable thresholds should be maintained across all asset classes, including interest rate derivatives, credit derivatives, equity derivatives, and commodity derivatives. We would like to remind ESMA that the current clearing threshold level has not been adjusted for inflation purposes since its adoption in the last decade (except for the clearing threshold for commodity derivatives which was increased following the energy crisis from 3 to 4 billion Euro). We believe the reduction of thresholds would have disproportionately negative effects on non-financial counterparties (NFCs).

Appropriate clearing thresholds are important even for those companies using derivatives exclusively for risk mitigating purposes:

* The clearing thresholds should provide companies sufficient leeway for cases of doubt. This applies, e.g. for derivatives which cannot be subjected to IFRS hedge accounting or to national accounting rules. Although we very much appreciate that the definition “hedging” is not only restricted to the above-mentioned accounting rules, for some of these instruments the proof “risk mitigating” is technically complicated. This might lead to lengthy discussions with external auditors (who are in charge to monitor whether the non-financial company complies with the EMIR requirement in Germany), for which sometimes the time is not available as hedges must be booked on short notice. To avoid these efforts, companies classify these “cases of doubt” as non-hedging – provided that the clearing thresholds are leaving room for this option (See also answer to Q9.)
* Unlike the banking industry non-financial companies do hedge risks resulting from forecasted/planned operative cash flows (e.g. delivery contract, future turnover, future supplier payments). It is in the nature of the risk management of non-financial companies that a derivative contract which was entered into for a risk-mitigating purpose might become superfluous before its expiry, e.g. because business plans do not evolve as originally expected. However, it is technically impossible and commercially disadvantageous to timely react to each change of each individual contract due to an underlying business not realized as expected. Furthermore, if an unwinding of existing positions is indeed appropriate this may take some time, especially for more exotic or large hedges. As there is legal uncertainty among market participants as regards the period in which the derivatives must be closed out, companies sometimes calculate the respective instruments against their threshold to not endanger their EMIR compliance. Sufficient clearing thresholds are the prerequisite for this procedure.
* We do not agree that the level of cleared derivatives allows to reduce the clearing thresholds for NFCs, as many NFCs do not use cleared derivatives on a substantial basis (companies from the energy sector may be a special case). Hedging with cleared and more standardised derivatives does not concern the typical corporate hedge, which tries to address very specific underlying business cases with regard to the individual volume, maturity etc. Cleared derivatives are rather inflexible, and tend to hedge only on a macro level, which does not adequately reflect the needs of many NFCs.
* A competitive level-playing-field especially with U.S. companies should be ensured. In the U.S. the thresholds to be licensed as Major Swap Participant, the U.S. equivalent to the European non-financial exceeding the clearing thresholds (NFC+), are significantly less strict than the comparable clearing thresholds under EMIR, as those are calculated in market values, not nominal ones as under EMIR.[[1]](#footnote-2)
* Market making should be allowed within appropriate clearing thresholds to preserve liquidity in the markets. This is especially relevant for companies stemming from the energy sector. Otherwise, to avoid the additional burden to comply with the clearing obligation, non-financial market makers would leave the market or restrict their activities to the detriment of liquidity and with the result of increasing transaction costs for all non-financial companies using derivatives for hedging purposes.
* The existing thresholds proved to be justified and did not endanger the resilience of the financial system.

<ESMA\_QUESTION\_CPCT\_3>

1. Do you agree with ESMA’s proposal not to introduce in the RTS separate thresholds for the various commodity derivatives sub-asset classes at this stage? If not, please elaborate.

<ESMA\_QUESTION\_CPCT\_4>

Yes, we agree.

<ESMA\_QUESTION\_CPCT\_4>

1. Do you agree with ESMA’s proposal to have in the fifth bucket only commodity and emission allowance derivatives? Or do you consider that commodity derivatives should be singled out as a stand-alone category and another category for emission allowance derivatives introduced? Please elaborate.

<ESMA\_QUESTION\_CPCT\_5>

Yes, we agree.

<ESMA\_QUESTION\_CPCT\_5>

1. Do you agree with ESMA’s proposal not to introduce a sixth bucket for other derivatives at this stage? If not, please elaborate.

<ESMA\_QUESTION\_CPCT\_6>

Yes, we agree.

<ESMA\_QUESTION\_CPCT\_6>

1. Do you agree with ESMA’s proposal not to introduce more granular thresholds for commodity derivatives based on ESG factors at this stage? If not, please elaborate.

<ESMA\_QUESTION\_CPCT\_7>

Yes, we agree.

<ESMA\_QUESTION\_CPCT\_7>

1. Do you agree with ESMA’s proposal not to introduce more granular thresholds for commodity derivatives based on crypto-related features at this stage? If not, please elaborate.

<ESMA\_QUESTION\_CPCT\_8>

Yes, we agree.

<ESMA\_QUESTION\_CPCT\_8>

1. Do you consider clarifications should be included in Article 10 of Commission Delegated Regulation (EU) No 149/2013? If yes, please specify and if possible, provide arguments and drafting suggestions.

<ESMA\_QUESTION\_CPCT\_9>

Basically, the hedging definition in Article 10 of Commission Delegated Regulation (EU) No 149/2013 works well. As regards virtual power purchase agreements (VPPAs), we welcome the clarification of the European Commission Q&A that these instruments can be regarded as hedging for both, the producer and the buyer, if it may be considered as directly related to its commercial activity. However, we note this is rarely the case as the buyer would need a corresponding underlying commercial activity and commodity risk to link this to. Usually, energy firms are unable to link this to their commercial activities of power or gas supply and production. On this basis, they would not be able to rely on the hedging exemption and therefore the provision of the hedge would count against the clearing threshold. As ESMA has identified in paragraph 94 of the consultation paper, these VPPAs can quickly add up in terms of contribution towards the clearing thresholds.

The Frontier Economics EMIR Study underscores the importance of VPPAs in meeting EU Green Deal and energy transition objectives and highlights that the current hedging exemption is not fit-for-purpose in the context of such arrangements. As VPPAs are often high in notional value and long-dated (10 to 15 years), they significantly inflate clearing threshold calculations - despite posing no systemic risk - if not treated as risk-reducing because they need to be considered for their entire lifetime as opposed to a 12-months period from the date of their execution (as is the case under the Dodd Frank Act in the US). The EMIR Study calculates that a single large-scale offshore wind park with a contracted capacity over 12 years of more than 900 MW would lead to a clearing threshold usage of 3 billion Euro and hence a further large-scale VPPA could not be accommodated by a single NFC- under the current CCT. Additionally, these contracts often serve as a substitute for physical infrastructure investments by energy market participants. Structurally, they mirror the risk profile of direct energy procurement or physical power purchase agreements, without involving grid access or ownership. In this way, they enable competition, flexibility, and cost-effective participation in the energy transition. This case, by the way, is an example for our answers to Q3 (need to keep sufficient space in clearing thresholds for cases of doubt, etc.)

<ESMA\_QUESTION\_CPCT\_9>

1. Do you consider other indicators should be monitored and assessed? If yes, please specify and if possible provide drafting suggestion.

<ESMA\_QUESTION\_CPCT\_10>

No answer.

<ESMA\_QUESTION\_CPCT\_10>

1. See CFTC/SEC: Further Definition of ‘‘Swap Dealer,’’ ‘‘Security-Based Swap Dealer,’’ ‘‘Major Swap Participant,’’ ‘‘Major Security- Based Swap Participant’’ and ‘‘Eligible Contract Participant’’, Federal Register, May 2012, p. 30671. [↑](#footnote-ref-2)