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:

1. respond to the question stated;
2. indicate the specific question to which the comment relates;
3. contain a clear rationale; and
4. 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 | CEZ Group |
| Activity | Utility company |
| Are you representing an association? |[ ]
| Country / Region | Czech Republic |

# 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>

TYPE YOUR TEXT HERE

<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>

TYPE YOUR TEXT HERE

<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>

We believe that the current regulatory framework should be preserved at *a minimum* to ensure that energy market participants involved in trading commodities, emission allowances, and other derivatives are not disadvantaged.

Many corporate groups centralize all their derivative trading activities within a single legal entity, hence conducting all of their trading volume through that entity. This set up often results from an organisational choice to present a unified face to the market and optimize costs. It is typically driven by considerations such as risk management, as well as the centralization of steering, netting exposures, and enhancing margin efficiency.

The uncleared OTC derivatives trading activity of a centralized trading entity can quickly surpass the proposed lower threshold. This situation arises because the entity would not benefit from the amended requirements of Article 10 of EMIR 3.0. The proposed reduction of the commodity derivatives threshold from €4 billion to €3 billion would significantly restrict the trading activity that a group with a centrally established entity in the EU can undertake without pushing all the non-financial entities in its group into NFC+ status. This transition comes with additional regulatory implications. To avoid disproportionately impacting these entities and energy market participants, it is essential to at least maintain the current threshold of €4 billion and ideally consider an increase. This approach would allow them to operate efficiently and contribute to the resilience and robustness of the EU energy markets without facing unnecessary regulatory burdens.

First, these changes are justified, proportionate and necessary for the following reasons:

* **To better align with EMIR’s objective to reduce systemic risk**: the purpose of EMIR is to reduce systemic risk, which is understood to be the risk of a breakdown of an entire system rather than simply the failure of individual parts thereof. In this context, systemic risk refers to the risk of cascading failures within the financial sector, which could lead to a significant economic downturn. The thorough data analysis conducted by ESMA highlights the current distribution of NFC+ and NFC- in European derivatives markets and demonstrates how to maintain this balance by establishing appropriate clearing thresholds. However, it does not provide relevant evidence to illustrate any systemic risk stemming from the activities of energy market participants in the commodity and emission allowances derivatives market.
* **To align with current market realities and ensure that the thresholds account for price inflation and international competitiveness** (as suggested by the indicators proposed by ESMA in Article 11b): we believe that the existing threshold for commodity derivatives, set at €3 billion in 2012 and raised to €4 billion in 2022, no longer reflects today’s market conditions. Price inflation and increased volatility, particularly in energy markets, have significantly affected trading volumes. For example, the original €3 billion threshold allowed for trading approximately 70 TWh in OTC derivatives, while by 2022, it permitted only 11 TWh, representing a decline of over 80%. Increasing the threshold would help counteract inflation, enable effective portfolio optimization, enhance market liquidity and resilience, align with international standards, and support investments in renewable energy.

Additionally, it is important to consider inflationary pressures and the depreciation of the euro, which has weakened from an exchange rate of 1.39 against the USD on December 31, 2013, to 1.04 by December 31, 2024. This depreciation has influenced overall market dynamics and should be reflected in a recalibration of the clearing threshold.

* **To finance private (non-public) investments into energy generation facilities**: energy market participants are well-positioned to offer a set of agreements that can help reduce the commodity risks faced by their counterparties and support their investment activities. In this context, the ability to engage in over-the-counter (OTC) derivatives, which do not reduce risk, is essential for EU energy firms. This capability enables them to meet the needs of renewable energy investors and actively bolster the resilience of energy markets. Through these efforts, energy market participants can effectively contribute to the energy transition and encourage additional private investments in renewable production capacity, thereby facilitating affordable energy pricing. This aligns with the goals outlined in the Clean Industrial Deal and the Affordable Energy Action Plan.
* **To strengthen the competitiveness of EU energy market participants:** As recognised by the Draghi Report, the Clean Industrial deal and the Affordable Energy Action Plan, currently, the EU energy market is behind other competing jurisdictions, particularly the U.S. In the U.S., energy firms can engage in unlimited cash-settled derivatives for hedging purposes and can conduct yearly trading activities of up to $8 billion for non-hedging purposes under the Dodd-Frank Act (DFA). The U.S. employs a 12-month rolling window for threshold calculations, which differs from the stricter approach taken by the EU. As a result, swaps only count towards the Dodd-Frank threshold for a period of 12 months following their execution. In contrast, over-the-counter (OTC) derivatives count towards the European Market Infrastructure Regulation (EMIR) threshold until their expiry. In effect, this difference in regulatory approaches can be a showstopper for EU firms, in particular in the context of those virtual PPAs which firms don’t qualify as “objectively measurable as risk reducing for the firm or its group” in accordance with Article 10 of Commission Delegated Regulation (EU) No 149/2013 (as opposed to some virtual PPAs which clearly are risk reducing and can be excluded from the clearing threshold calculation on that basis), and the renewable transition (see Section 4 of the Frontier Economics “[Review of the EMIR clearing thresholds for commodities](https://cms.energytraderseurope.org/storage/uploads/media/220531-msc-rep-frontier-emir-cct-review.pdf)” published in May 2022 – hereafter the “Frontier EMIR review”)

For example, if an energy market participant offers a renewable investor a vPPA that cannot be classified as risk-reducing from the perspective of that energy market participant, with a volume of 300 MW baseload at €45/MWh over 10 years, the notional value for the purpose of clearing threshold calculation would be the product of the volume (in MWh) multiplied by the price. Under U.S. regulations, this market participant would contribute €1.183 billion to their Dodd-Frank Act (DFA) clearing threshold calculation for just one year after the transaction execution. In contrast, under EU regulations, the same participant would contribute €1.183 billion to their European Market Infrastructure Regulation (EMIR) clearing threshold as of the date of execution of the transaction. That outstanding gross notional value only reduces gradually and proportionately to the deliveries / settlements under the vPPA during the lifetime of the contract starting from the commencement of delivery. This is particularly relevant for a vPPA associated with a new renewable energy generation project that is still under construction, as deliveries may begin significantly after the execution of the agreement. This regulatory discrepancy creates an imbalance that hampers the EU’s ability to foster a liquid and competitive energy market.

Second, the proposed increase does not introduce any systemic risks (such as counterparty or credit risk) which is required to be contained under EMIR. While OTC derivatives may be considered unmargined in terms of the eligible collateral exchanged according to EMIR's uncleared OTC margin requirements, they are frequently secured through credit lines and other forms of credit support.

OTC derivatives are managed according to a prudent risk framework, as outlined in the Liquidity Manual guidance from Energy Traders Europe. The commodity derivatives market is relatively small compared to other asset classes, making it unlikely to disrupt the stability of the financial sector.

Non-Financial Counterparties (NFCs) are not considered systemically important to the financial system. They operate as commercial entities that do not finance their activities through repayable deposits, do not engage in interbank lending, and do not provide loans to consumers, which would make them vulnerable to sudden cash demands. As such, their activity or its impairment doesn’t present any risk of disruption of financial services. The volume of financial services they provide and their interconnectedness with financial institutions is marginal, accounting for less than 1% of the total notional traded across all asset classes. This diminishes the likelihood of causing a disruption to the broader financial system (data from ESMA’s [EU derivatives market report 2023](https://www.esma.europa.eu/sites/default/files/2023-12/ESMA50-524821-2930_EU_Derivatives_Markets_2023.pdf)).

We therefore advocate for a forward-looking and comprehensive approach to establishing clearing thresholds under EMIR 3.0, one that considers changing market conditions and international competitiveness. In conclusion, we believe it is essential to revise the commodity thresholds and methodologies. At a minimum, we should maintain the current threshold of €4 billion, with the ideal scenario being an increase. This could empower energy market participants and foster the private investment needed for the renewable energy transition, reinforcing the EU's competitive position in the global energy landscape.

<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>

We support ESMA's proposal to retain the current approach of a single clearing threshold for commodity derivatives sub-asset classes, rather than introducing separate thresholds. Recital 21 of EMIR 3.0 suggests, but does not mandate, the introduction of more granular thresholds, which, at this stage, offer no clear supervisory benefit.

The aggregated threshold aligns with real-economy risk management practices, as energy market participants do not trade in isolation within a single commodity market but engage across multiple markets.

Disaggregating the threshold would lead to several negative consequences:

1. **Increased Compliance Costs:** It would unnecessarily raise compliance burdens, particularly for NFCs involved in cross-commodity transactions, without offering clear benefits for these firms or the EU domestic market.
2. **Complex Risk Reduction Controls:** It would complicate the qualitative and quantitative controls on risk-reducing transactions outlined in Article 7 of Commission Delegated Regulation 2021/1833, making transaction reporting unnecessarily complex.
3. **Impaired Market Liquidity:** It could increase the risk of hampering market liquidity, as market participants will find themselves obliged to actively administer their various threshold consumption per sub asset class. To avoid exceeding one of the sub asset thresholds, market participants will ultimately withhold their trading in that particular sub asset class, hence withdrawing liquidity with potential consequences on the robustness and resilience of the EU energy markets.
4. **Increased Pressure on NCAs:** It could place additional demands on National Competent Authorities (NCAs), potentially undermining their ability to effectively monitor derivatives markets and their participants.

We, therefore, believe that ESMA's cautious approach is both reasonable and practical. The integrated approach facilitates effective risk warehousing and hedging. Disaggregating the thresholds would fragment risk management practices, reducing flexibility and potentially discouraging efficient hedging. It could also distort overall exposure assessments and drive firms to withdraw from certain markets once a sub-threshold is reached. Furthermore, we support ESMA’s conclusion that further data collection and market engagement are necessary before reconsidering this issue.

<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>

We support the proposal to maintain commodity and emission allowance derivatives within a combined fifth bucket, as this approach ensures operational simplicity. It aligns with current practices for clearing threshold calculations, where energy market participants treat all OTC derivatives defined under Sections C(4), C(5), C(6), C(7), and C(10) as relevant for the purposes of Article 10.3 of EMIR.

Since the entry into force of EMIR, MiFIR Article 2.1(30) provides a definition of commodity derivatives that includes all financial instruments under Sections C(5), C(6), C(7), and C(10). We support using this definition of “commodity derivatives” when determining clearing thresholds under EMIR. To maintain the current scope, we also support the inclusion of "emission allowance derivatives" to cover OTC derivatives under C(4).

Additionally, ESMA’s proposal:

* Aligns with the existing EMIR Refit reporting framework, specifically Field 11, Table 2 of Regulation 2022/1860.
* Promotes consistency and reduces operational burdens by:
	1. Facilitating the use of a shared classification system;
	2. Avoiding the creation of parallel structures for threshold calculations, thereby minimizing reconciliation issues, reducing operational fragmentation, and preventing duplication of compliance efforts;
	3. Ensuring national competent authorities are not burdened with additional oversight complexities at this stage.

Furthermore, emission allowances (EUAs) are frequently tied to commodity price hedging, such as CO₂ price fluctuations affecting gas and electricity prices. Separating these derivatives could artificially divide risks within firms' hedging strategies, complicating overall risk management.

<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>

We agree with the decision not to introduce a sixth bucket for any other specific asset classes and share ESMA’s view that any such change should be carefully assessed in light of market developments and future dynamics, underpinned by robust data collection. It is crucial for ESMA to continue relying on industry-specific expertise, as this ensures informed discussions and strengthens our association’s position as a knowledgeable and trusted partner. <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>

We agree with ESMA’s proposal not to introduce more granular thresholds for commodity derivatives based on ESG factors, as this would be inconsistent with EMIR’s core objective of mitigating counterparty and systemic risk, and the framework should not be repurposed to address environmental, social, and governance (ESG) considerations. These regulatory frameworks serve distinct purposes and should remain separate. Introducing sustainability-related considerations into EMIR at this stage would be premature and misaligned with its core mandate.

The ESG impact of commodity derivatives is already addressed through dedicated instruments such as the Renewable Energy Directive (RED II) and the Corporate Sustainability Reporting Directive (CSRD). Incorporating ESG-based criteria into EMIR risks regulatory overlap, confusion, and unnecessary complexity.

Specifically, introducing ESG-based thresholds would:

1. be inconsistent with existing energy and commodity trading practices;
2. be impractical due to the absence of a harmonised and operational ESG classification system;
3. risk fragmenting market liquidity and increasing compliance burdens, without delivering clear or proportionate benefits.

Moreover, ESG-labelled commodity derivatives remain at an early stage of development, lacking standardised definitions, robust data, and market maturity. Prematurely incorporating ESG considerations into EMIR could result in unclear classifications, excessive red tape, and unintended consequences, particularly for non-financial Counterparties (NFCs) already adapting to the EMIR 3.0 reforms.

<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>

TYPE YOUR TEXT HERE

<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>

We believe it is important to clarify the treatment of derivatives trading and virtual Power Purchase Agreements (vPPAs) in relation to commercial activities.

First, we recommend that the interpretation provided by the EU Commission in its response from December 2023 be incorporated into the Regulatory Technical Standards (RTS) to ensure a consistent and uniform understanding across EU member states and market participants. In this context, Article 10 should explicitly state that:

* Trading in derivatives may be considered a part of a firm's commercial activity and could be subject to risk reduction.
* The risks associated with this commercial activity can be mitigated through the execution of additional derivatives contracts. If these contracts meet the conditions outlined in Article 10 of [Regulation RTS 149/2013], they should be recognized as risk-reducing for the purposes of compliance with the European Market Infrastructure Regulation (EMIR).

Furthermore, we would like to clarify the conditions surrounding the execution of vPPAs to facilitate efficient decision-making by the ESMA.

The activity of energy market participants can be depicted using the below graphic representation, set out in the Frontier Economics Study “[Principles of Energy Market Regulation](https://cms.energytraderseurope.org/storage/uploads/media/frontier-luther---principles-of-energy-market-regulation-19042024.pdf)” published in April 2024 (Figure 8, Page 55)



The roles of "Counterparty A" and "Counterparty B," as described in Paragraph 91 and subsequent sections of the Consultation Paper, are less distinct in practice. There are numerous scenarios in which energy market participants may act as hedge providers, rather than solely as off-takers, as is often assumed.

Renewable plants are long-term investments with a lifetime of more than 20 years. Uncertainty about the profitability of a project (from price, volume and availability risk) can be a major impediment to the ability to finance such large-scale renewable investments. Investors (which would act as Counterparty B in ESMA’s scenario) require hedging solutions as pre-condition to the development of their project (see for more details Section 3.2 of the Frontier EMIR Review). These solutions are usually provided by energy market participants (acting as Counterparty A in ESMA’s scenario) who could warehouse these risks without causing any systemic risk to the financial markets:

* All activity of energy market participants is framed by strict risk mandates and governance, as described in the Liquidity Manual, which ensure a controlled exposure of firms to market, liquidity and counterparty risks.
* Their activity is asset backed and not funded through the financial markets.

OTC Derivatives become a pillar of the financing of renewable investments. Because this activity can count towards the clearing thresholds of the hedge provider, the regulatory framework becomes part of commercial considerations for EU market participants only, as it increases their costs for accessing the hedging market and optimising their physical assets.

vPPAs for example, are an integral part of an energy market participant’s intrinsic and natural commercial operations as the contractual structure allows to effectively mirror physical power generation business without representing any investment risks linked to the development, operation and maintenance of new facilities. These agreements function as legal constructs, allowing energy market participants to operate in a manner analogous to a physical investment in a power plant without bearing the investment risk or a physical power purchase agreement which requires the market participant to access the power transmission system. This can be important in markets where firms don’t at this stage have access to the physical grid and enables to strengthen competition by offering investors a varied choice of potential counterparties for their risk reduction. As such, we believe these contracts should be assessed according to their true nature as energy sourcing and excluded from the CCT calculation.

*Proposed new drafting of Article 10 RTS 149/2013:*

1. *An OTC derivative contract shall be objectively measurable as reducing risks directly relating to the commercial activity (which includes the provision of derivatives hedges) or treasury financing activity of the non-financial counterparty or of that group, when, by itself or in combination with other derivative contracts, directly or through closely correlated instruments, it meets one of the following criteria:*
	* 1. *(a)* *it covers the risks arising from the potential change in the value of assets, services, inputs, products, commodities, commodity and emission allowance derivatives**or liabilities that the non-financial counterparty or its group owns, produces, manufactures, processes, provides, purchases, merchandises, leases, sells or incurs or reasonably anticipates owning, producing, manufacturing, processing, providing, purchasing, merchandising, leasing, selling or incurring in the normal course of its business.*

*(d) insofar as not otherwise covered by any of the paragraphs above, it is entered into by an energy market participant with an entity engaged in the production of electricity from renewable energy sources, as defined by Directive (EU) 2018/2001 (Renewable Energy Directive) to reduce the risks directly linked to the energy production activity, actual or reasonably expected to occur, of that entity.*

<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>

When considering the indicators that may trigger a review of the clearing thresholds, it is essential that ESMA refrains from lowering the applicable thresholds. Energy market participants often hold positions that cannot be significantly reduced due to long-term contractual commitments, which continue to count toward the clearing threshold calculation until contract expiry. A reduction in thresholds would risk creating cliff-edge effects, as it could:

1. Automatically push some NFC- entities into NFC+ status, or
2. prompt NFC- entities to unwind or exit long-term contracts to avoid breaching the new thresholds, potentially incurring high compensation costs and creating uncertainty for counterparties, thereby weakening the energy markets.

In terms of making the clearing threshold framework more agile, we advocate for a dynamic and responsive regime, one that is not distorted by legacy transactions. Specifically, we suggest adopting a model like the De Minimis threshold under the Dodd-Frank Act, where uncleared OTC derivatives would only count toward the clearing threshold for 12 months post-execution. Such an approach would simplify administration, mitigate cliff-edge effects, and better reflect evolving risk exposures, particularly with respect to long-term hedging strategies (see also our explanation under Question 3 above).

<ESMA\_QUESTION\_CPCT\_10>