

ESMA public consultation on the new EMIR clearing thresholds regime

A Eurelectric response paper

Eurelectric represents the interests of the electricity industry in Europe. Our work covers all major issues affecting our sector. Our members represent the electricity industry in over 30 European countries.

We cover the entire industry from electricity generation and markets to distribution networks and customer issues. We also have affiliates active on several other continents and business associates from a wide variety of sectors with a direct interest in the electricity industry.

We stand for

The vision of the European power sector is to enable and sustain:

- A vibrant competitive European economy, reliably powered by clean, carbon-neutral energy
- A smart, energy efficient and truly sustainable society for all citizens of Europe

We are committed to lead a cost-effective energy transition by:

investing in clean power generation and transition-enabling solutions, to reduce emissions and actively pursue efforts to become carbon-neutral well before mid-century, taking into account different starting points and commercial availability of key transition technologies;

transforming the energy system to make it more responsive, resilient and efficient. This includes increased use of renewable energy, digitalisation, demand side response and reinforcement of grids so they can function as platforms and enablers for customers, cities and communities;

accelerating the energy transition in other economic sectors by offering competitive electricity as a transformation tool for transport, heating and industry;

embedding sustainability in all parts of our value chain and take measures to support the transformation of existing assets towards a zero carbon society;

innovating to discover the cutting-edge business models and develop the breakthrough technologies that are indispensable to allow our industry to lead this transition.

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KEY MESSAGES

Electricity utilities rely extensively on commodity derivative markets to hedge risks in relation to their physical assets and to provide tailored financing solutions to their clients and project developers.

Clearing thresholds should reflect the fundamental role that commodity derivatives play in enabling the energy transition, and in ensuring predictable electricity prices for producers and end-consumers alike.

Eurelectric therefore supports the general direction of ESMA's public consultation on clearing thresholds and calls on policymakers to avoid burdening utilities with overly restrictive or granular clearing thresholds, which would require a reorganisation of centralised and portfolio-based risk management.

The implementation of key EMIR implementing rules should not be delayed in the context of the European Commission's simplification agenda. Importantly, the revised clearing threshold calculation must be fast-tracked to prevent renewed stress on cleared markets.

1. **Preserve the current level of the commodity clearing threshold (EUR 4 billion) and increase it to EUR 7 billion** to account for energy commodity inflation and increased market volatility in the context of the energy transition. The level of other clearing thresholds should also be retained to allow for prudent risk management.
2. **Keep a unified clearing threshold for commodity derivatives**: granular thresholds for different sub-asset classes disrupt utilities' centralised risk management strategies and could lead to unintended consequences such as liquidity splits.
3. **Account for innovative hedging tools in the definition for risk-reducing OTC derivatives** by recognising utilities' key role in facilitating renewables' build-out through virtual power purchase agreements (vPPAs).
4. **Define criteria to periodically assess whether clearing thresholds** are adapted to market conditions and adapt thresholds dynamically to ensure that only systemically relevant risk takers are captured by the clearing obligation.

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

Q1: 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.

Yes. While this is not a priority topic for electricity utilities, we agree to ensuring regulatory stability as regards aggregate thresholds subject to the clearing obligation.

Q2: 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.

Yes. While this is not a priority topic for electricity utilities, clearing thresholds should be maintained at the same level to allow for prudent risk management.

Q3: 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.

Commodity derivative markets are key in enabling utilities' core business activity of electricity generation and supply. **Eurelectric strongly supports recent changes to the clearing threshold calculation aligning the calculation with risk management practices, such as the entity-level calculation and the move from an exchange-traded vs. OTC to a cleared-uncleared distinction of commodity derivatives.** In this context, **it is key that market participants can already use these new methodologies even before the relevant RTS has been adopted.** Otherwise, this may lead to a significant delay of application for market participants for reasons not related to the substance of the matter. This is even more relevant, as the RTS has been put on an EC list to potentially even further delay it.

However, we caution against reducing the current clearing threshold for commodity derivatives and believe that the developments in energy markets over the last decade justify a substantial increase of the current threshold.

Indeed, statistics presented by ESMA show that the overall notional amount in the commodity derivative asset class is significantly larger than EUR 3 billion. This implies that a EUR 3 billion threshold would force many market participants into mandatory clearing, including those that are capable of managing such exposures without additional risk controls. This would in turn increase liquidity constraints for electricity utilities. In any case, the current EUR 4 bn. threshold therefore needs to stay as the basis for further evaluation.

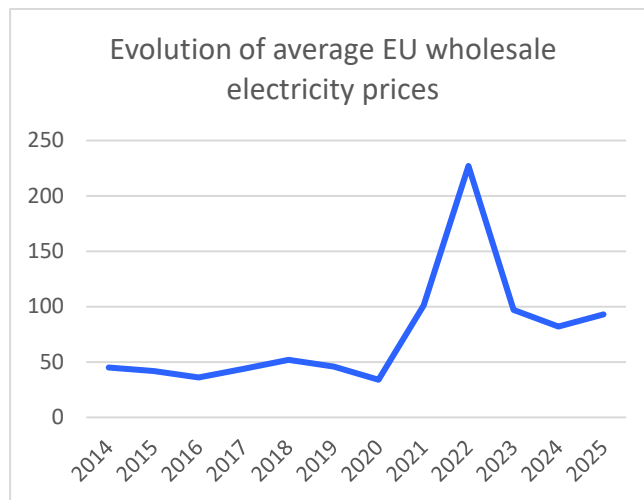
A higher threshold would allow firms to continue using bilateral OTC markets for risk management in line with actual market practices, ensuring that only truly systemically significant exposures trigger the clearing obligation.

The following points support our claim to maintain the current commodity clearing threshold and even increase it to at least EUR 7 billion:

1. Inflation in electricity markets

Recital 3 of Commission Delegated Regulation EU 2022/2310, which increased the value of the OTC commodity derivative clearing threshold to EUR 4 billion, justifies this increase by a significant increase in commodity prices, among other things.

As regards electricity prices, and excluding the 2022 energy price crisis year, wholesale market prices have stabilised at a substantially higher level than in 2013, when clearing thresholds were introduced. Indeed, electricity prices for the period 2023-2025 currently average around 90 EUR/MWh in the EU (Source: [Elda](#)), compared to 35 – 50 EUR/MWh between 2013-2019 (approximation based on different online sources).



In addition, volatility in electricity markets has increased due to supply shocks and a more diverse generation mix, leading to an increasing reliance on commodity derivatives.

2. Avoiding liquidity squeezes in cleared markets

Electricity utilities' risk management needs to navigate the triad of liquidity, credit and market risks. During the energy crisis, many market participants strategically shifted positions from exchanges to OTC markets to reduce cash margin pressures. This strategy was however constrained by the clearing threshold limit. If the threshold is set too low, firms would quickly exceed it in high-price environments and be forced into clearing and mandatory collateralisation at the worst possible time, exacerbating liquidity strains. Utilities should keep sufficient flexibility to transact below the clearing threshold and to balance credit risk with liquidity risks in cleared markets.

3. Recent EMIR 3 improvements show the way

We fully acknowledge positive changes brought by EMIR 3 to the clearing threshold calculation for NFCs under Art. 10(3). The restriction of the clearing threshold calculation to EU-based non-financial entities aligns with utilities' risk management practices and creates a regulatory level playing field with other jurisdictions. However, this change will not provide more breathing space to utilities with a centralised execution on the market via one legal entity of the group.

In addition, we remind about the increased need for derivatives trading in the context of massive electricity system investments and increased volatility. Further adaptations to the clearing

threshold are warranted to recognise the enabling role of electricity utilities in financing electricity generation projects and mitigating market risks.

Conclusion: increase the commodity clearing threshold

ESMA itself recognised the need to increase the commodity clearing threshold to EUR 4 billion in 2022 to avoid liquidity squeezes. We recommend preserving this change and further increasing the threshold to at least EUR 7 billion, reflecting the growth in notional values due to inflation and market volatility since the original threshold was set. In addition, we believe that further calculation improvements could be introduced, for example to focus only on annual notional, especially for multi-annual contracts such as virtual Power Purchase Agreements. In any case, the adoption of positive changes to the EMIR clearing threshold calculation should not be delayed or de-prioritised; these measures are part of the European Commission's strategy to increase the liquidity of forward markets and must be implemented to prevent a repeat of the 2022 energy crisis.

Q4: 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.

Eurelectric agrees with ESMA's proposal not to introduce separate clearing thresholds for commodity derivative sub-asset classes. Such a change would unnecessarily introduce additional complexity in utilities' risk management and require frequent recalibration to align with market developments.

The current single threshold for commodity derivatives aligns with the established practice of portfolio-based risk management that electricity producers perform via their centralised hedging function. Indeed, utilities may trade simultaneously in multiple commodity asset classes to manage their own risks (e.g., cross-commodity hedging) or to provide liquidity to energy markets.

Utilities have today adapted their trading practices to the centralised threshold; fragmenting it would effectively reduce the usable headroom in each segment, possibly forcing some market participants to reconsider their market presence to avoid the compliance costs involved with mandatory clearing. The risk to market liquidity in relation to more granular clearing thresholds should therefore be considered when deciding about more granular thresholds.

We therefore agree with ESMA's assessment that "adding more complexity to the framework regarding the determination of the various sub-asset classes does not seem to be necessary at this stage".

Q5: 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.

We agree with ESMA's proposal to include commodity and emission allowance derivatives together in the fifth threshold bucket, rather than splitting them into separate categories.

In practice, trading in emission allowance derivatives is often conducted by the same firms that trade other commodity derivatives such as power and gas. For example, an energy producer may trade natural gas and EU Emission Allowances in tandem as part of its electricity generation business. Combining these instruments under one threshold category recognizes that they are closely related components of the energy markets and are managed together by market participants. This approach avoids adding a new threshold category (and associated compliance overhead) for emission allowances alone, which aligns with the consultation opinion's call for regulators to treat the energy commodity and emissions markets in a coordinated way.

Considering the relatively small size of the emission allowance derivative market and the integrated strategies for derivatives trading that utilities perform, we do not see any benefit in segregating these two sub-asset classes into separate buckets.

Absent a clear impact assessment showing the benefits of such a change, we believe that a prudent approach would consist in keeping the current status quo and increasing the current commodity derivative clearing threshold in line with our response to question 3.

Q6: Do you agree with ESMA's proposal not to introduce a sixth bucket for other derivatives at this stage? If not, please elaborate.

Yes, we concur with ESMA's proposal not to introduce a sixth "other derivatives" bucket at this stage. Creating an additional residual category for any exotic or uncategorised derivatives would add complexity to the framework and to firms' calculations, while yielding little practical benefit given the low volumes and early stage of development of such instruments.

As ESMA rightly notes, a sixth bucket would require counterparties to perform yet another threshold computation "with no obvious benefits at this stage." This aligns with ESMA's general opinion that new regulatory requirements should only be added if they demonstrably improve market stability or oversight.

Q7: 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.

We agree with ESMA's proposal not to introduce more granular clearing thresholds for commodity derivatives based on ESG (environmental, social, governance) factors at this stage.

Differentiating commodity derivatives based on ESG factors would be a major shift which should not be considered before a full assessment of impacts on risk management is completed.

In the short term, differentiating clearing thresholds based on ESG factors would sign a departure from accepted risk management practices, which focus on the size and risk of positions. At this stage, there is absolutely no evidence that commodity derivatives with ESG-friendly underlying pose less counterparty or systemic risk than other commodity derivatives.

ESG-based clearing thresholds would also conflict with utilities' portfolio-based risk management practice, which combines different commodity derivative types to mitigate risk exposure. They could also have knock-on effects on companies' overall ability to hedge risks: for example, a company hedging conventional fuel price risk might find itself constrained by a lower threshold, potentially impeding its ability to also hedge renewable assets or vice versa. This runs contrary to ESMA's objective to facilitate efficient risk management and not create new barriers in the implementation of clearing thresholds.

Considering the above, we believe that unified clearing thresholds for commodity derivatives should be preserved regardless of ESG attributes at this stage and until future data strongly justifies it.

Q8: 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.

We agree with ESMA's proposal not to introduce more granular thresholds for commodity derivatives based on crypto-related features at this time.

Q9: 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.

Yes, we believe that additional clarifications to Article 10 of Commission Delegated Regulation (EU) No 149/2013 are needed to support utilities' enabling role in the energy transition:

1. Enabling procurement new risk-reducing contracts

Virtual PPAs play an increasing role in the hedging of market risks faced by renewable electricity producers who sell their electricity at market price. These contracts allow RES operators to receive financial compensation if the market price drops below an agreed strike price, thereby achieving the same result as a physical PPA and contributing to the de-risking of RES projects. The value of virtual PPAs, which are financial instruments, is counted towards the EMIR commodity clearing threshold of utilities that offer such contracts to RES operators in need of a hedge. Due to their understanding of electricity markets, utilities are in an ideal position to provide such contracts and meet the hedging needs of third parties.

Considering the contracted volume a single PPA can amount to, the level of the EMIR clearing threshold can disincentivise utilities from offering them to remain below the threshold. The review of Delegated Regulation EU 149/2013 offers the opportunity to improve this situation by amending the definition of risk-reducing derivatives to ensure that utilities offering virtual PPAs can account them as hedging transactions.

We recommend updating Article 10 to explicitly list that derivatives associated with long-term supply agreements, renewable PPAs, or similar contracts qualify as hedging for both counterparties if they are used to stabilize prices or revenues from commercial activities of a renewable energy producer. This would remove ambiguity and support the EU's sustainability

goals by not discouraging risk management for renewable projects. It also aligns with recent EU initiatives aiming to reduce barriers to PPA usage in the energy sector.

Drafting proposal for Art. 10 of EU 149/2013:

“An OTC derivative contract shall be objectively measurable as reducing risks directly relating to the commercial activity 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:

[...]

(d) in particular, any virtual power purchase agreement (vPPA)—including those structured as fix for floating swaps or contracts for differences—shall be deemed to be a risk-reducing transaction if such virtual PPA is executed to hedge market risk directly related to energy production and is well documented as an integral component of the counterparty’s commercial or treasury financing activity.”

2. Group Hedging Exemption

It should be explicitly clarified that the hedging exemption for non-financial counterparties (NFCs) can be applied on a group-wide basis, not just at the individual entity level, as foreseen by the revised Art. 10(3) of EMIR. EMIR 3 introduced the concept that the clearing threshold calculation for NFCs is now done at the entity level and “renders the hedging exemption available on group level to promote a centralised risk management.” This is a very welcome change. It is important that utilities with a centralised risk management function can continue to conduct hedging operations on behalf of their subsidiaries, such as e.g., wind farms.

To implement it, Article 10 of EU 149/2013 should spell out that if an NFC within a corporate group enters an OTC derivative contract to hedge risks of the group (e.g. a central treasury hedging on behalf of affiliates), that contract can be considered risk-reducing (hedging) for the threshold calculation. This clarification will encourage centralised hedging strategies, which are commonly used by energy firms to manage risk efficiently across their business units. It prevents penalising corporates that concentrate their hedging for the sake of efficiency and transparency in one entity.

3. Intragroup Transactions

We suggest clarifying that intragroup OTC derivative transactions (transactions between entities within the same group that are exempt from clearing under EMIR Article 4(2)) need not be included in the clearing threshold calculation for NFCs. Since intragroup trades do not increase external counterparty risk (they stay within the corporate group) and are already exempt from the clearing obligation subject to conditions, excluding them from threshold counts would be logical.

This was implied in EMIR 3’s recalibration towards entity-level calculation for NFCs, but we recommend ESMA to confirm this in the RTS to ensure consistent application by all counterparties and national regulators. Not counting intragroup trades toward the threshold will further facilitate centralised risk management, as groups can transact internally (for example, a subsidiary laying off risk to a central treasury centre) without inadvertently pushing the group over the threshold.

4. Calculation Methodology and Timing

Finally, ESMA should clarify the procedure and frequency for calculating positions against the thresholds under the new regime. Article 10(1) of EMIR indicates that NFCs may calculate positions every 12 months. With separate uncleared and aggregate thresholds now, guidance on how and when exactly to perform these calculations (e.g. at year-end using a 30-day average or specific day snapshot) would be useful to harmonise practices. Additionally, a clear statement on how soon a counterparty must notify and begin clearing after a threshold breach, and how it can revert to NFC-status (e.g. remain below for a defined period), would provide certainty. These procedural clarifications will help counterparties plan and implement the new rules properly. They also ensure a uniform application across the EU, which is important for fairness and was suggested in the consultation paper.

In summary, we see a need for ESMA to update Article 10 of the Level 2 Regulation to reflect the new EMIR 3.0 framework and evolving market practices. **The key clarifications are to broaden the recognised hedging arrangements (supporting group-level risk mitigation and new contract types used for hedging) and to refine which trades count towards thresholds.** These changes will preserve the clearing threshold as a tool for systemic risk control, without unintentionally capturing transactions that do not increase systemic risk.

Q10: Do you consider other indicators should be monitored and assessed? If yes, please specify and if possible provide drafting suggestion.

Eurelectric supports a more flexible approach to setting the level of clearing thresholds.

At the same time, a more flexible approach based on qualitative analysis of key market trends should be “based on a careful assessment of the situation”, as ESMA rightly notes. We therefore agree with the proposal to consider price evolutions of underlying assets for different OTC derivative classes and financial stability risks in a risk-based trigger approach. If any reduction of thresholds is considered, it should take established contracts at higher price levels into account.

Based on recent market developments in energy markets, we believe that the following factors could be taken into account:

- **Market price levels and volatility:** Extreme movements in underlying market prices (especially in commodities) can rapidly increase the notional size of positions even if the actual volume remains constant. As noted in the consultation analysis, during the 2021–2022 energy crisis, surging commodity prices caused firms to reach the clearing threshold with much lower volumes of trades. We suggest ESMA monitor commodity price indices and volatility indicators to avoid unintended impacts of commodity price hikes on hedging opportunities for the real economy.
- **Clearing vs. bilateral market trends:** ESMA could track the proportion of trading that is cleared vs. uncleared in the key asset classes, and the number of entities nearing the thresholds. Increased trading in OTC markets can help mitigating liquidity risks for utilities due to high margin calls. In such situations, pushing more counterparties towards cleared markets risks causing unintended consequences.

- **Market Liquidity and Stability Metrics:** another indicator to watch is the overall liquidity and volatility in the OTC markets, especially for commodities. Restrictive clearing thresholds for commodity derivatives risk depressing OTC market liquidity with knock-on effects on bid-ask spreads.
- **Counterparty Risk Exposure Data:** in addition to notional values, ESMA might consider monitoring more risk-sensitive measures, such as gross and net counterparty credit exposures or margin levels for firms below vs. above the threshold. Over time, this could provide a more nuanced picture of whether the threshold is capturing entities whose default could be systemically significant.

Eurelectric pursues in all its activities the application of the following sustainable development values:

Economic Development

- Growth, added-value, efficiency

Environmental Leadership

- Commitment, innovation, pro-activeness

Social Responsibility

- Transparency, ethics, accountability



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