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.

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**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 | FIA |
| Activity | Other |
| Are you representing an association? |[x]
| Country / Region | Europe |

# 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>

We note that as Questions 1 and 2 are interlinked, we have included our responses to both questions here.

We agree with ESMA's proposal to establish aggregate thresholds only for asset classes currently subject to the clearing obligation and to maintaining the current thresholds for both IRDs and credit derivatives.

However, we note that ESMA's proposal does not clarify the anticipated timings for market participants to make calculations. This point is of wider application than Question 1 but we raise it here.

It is unclear from EMIR 3.0 when market participants are expected to make calculations against the new thresholds. Article 5 of EMIR 3.0 states that the changes to the clearing thresholds under Article 4(a) and Article 10 shall not apply until the entry into force of the RTS that are the subject of this consultation paper. However, we would ask ESMA to note that under the current pre-EMIR 3.0 position, and in line with OTC Answer 2 of ESMA's Questions and Answers on the Implementation of Regulation (EU) No 648/2012 on OTC derivatives (the "**OTC Q&A**"), central counterparties and trade repositories (EMIR), most market participants make calculations every 12 months on 17 June (the day EMIR Refit came into force) by reference to the 12 month period ending on that date in order to determine their classification for the next following 12 month period.1 As such it is unclear how the current timing and determinations interact with the entry into force of this RTS and the new thresholds.

We would therefore welcome guidance from ESMA as part of the finalisation of the RTS as to what market participants should expect in this respect.

Given the calculation methodologies introduced by EMIR 3.0 are different for FCs and NFCs (in that FCs will be subject to both the aggregate threshold and the uncleared threshold), we would strongly encourage ESMA to consider the differing impacts of any proposed timeframe on these entities when issuing any guidance. For FCs, the new methodology will require a higher implementation lift for compliance and we would stress that FCs will therefore need sufficient time to comply. While FCs will be expected to calculate positions against two different sets of thresholds, they will not be aware of the new clearing thresholds until potentially as late as when the RTS is entered into the Official Journal. If implementation is rushed, this will increase the risk of non-compliance. Moreover, this implementation is not just in an individual entity's control as potential outreach to establish the classification of counterparties will also be required (we set out our proposal with respect to counterparty representations below).

At the same time, many NFCs will want to take immediate advantage of the new calculation methodology given that the shift away from the ETD vs OTC distinction to focus on non-centrally cleared derivative contracts is a welcome change for NFCs. As discussed in more detail in respect of commodity derivatives (see further our response to Question 3), NFCs have been forced to withhold or limit their trading to avoid exceeding the clearing thresholds, which is withdrawing liquidity from the market. The new calculation methodology will help to alleviate this and, in turn, be better for EU market liquidity, aligning with the European Commission's growth agenda to ensure the international competitiveness of EU market participants. NFCs will want to take immediate advantage notwithstanding that they also will not be aware of the new clearing thresholds until as late as when the RTS is entered into the Official Journal. We note in this respect that NFCs will only have one threshold to monitor and also that the number and reach of trading counterparties will likely be lower.

On this basis, we strongly recommend that ESMA introduce a different implementation timeframe for FCs and NFCs. FCs should be provided with a set implementation date providing for a sufficient transitional period from entry into force of the RTS to allow FCs to make the necessary operational changes to compute calculations in respect of the updated thresholds and calculation methodology. On the other hand, NFCs should be given the choice immediately to apply the new methodology upon the RTS entering into force with a back-stop date by which all NFCs must comply which aligns with the implementation date for FCs. We note that this optionality will benefit certain smaller NFC entities who may need additional time to implement the updated calculation methodology correctly. This "phase-in" period will provide the necessary flexibility for these entities while not disadvantaging the rest of the NFC community who are understandably keen to transition to the new methodology as soon as possible.

We have suggested the following drafting amendment to Article 2 of the proposed RTS in order to implement our above proposal:

***Article 2***

***Entry into force and application***

*This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.*

***It shall apply from 17 June 2026, from which date counterparties are to begin calculating their aggregate month-end average positions in accordance with this Regulation in order to apply these positions on 17 June 2027 retrospectively, with the exception of counterparties identified in Article 10(1) of Regulation (EU) No 648/2012, who may elect to adhere to this Regulation at any time until 17 June 2026.***

In consideration of the above, we note the guidance in OTC Answers 4 and 13 of the OTC Q&A with regards to obtaining representations as to counterparty status, which market participants generally follow. In the absence of guidance to the contrary, it will be difficult for parties to refresh these representations on entry into force of the RTS. We would therefore encourage ESMA to produce updated or interim guidance confirming that parties may continue to rely on existing representations unless and until they are notified by their counterparty that these representations are no longer correct. As noted by ESMA in the consultation paper and as mandated by Recital 9 of EMIR 3.0 (see paragraphs 31 and 58 of the consultation paper), the changes to the clearing thresholds are not expected to lead to substantial changes. On this basis, we would hope that ESMA would be happy for counterparties to take the benefit of existing representations.

**Footnotes:**

1. We appreciate that the timeframe for making calculations may vary for any entity established after 17 June 2019.

<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>

Please see our response to Question 1. We agree with ESMA's proposal in respect of the aggregate threshold levels.

However, we would like to reiterate that, as a consequence of the new requirement, FCs will have to calculate positions against two different sets of thresholds which will inevitably add complexity and we would, therefore, support minimising the burden on firms by only setting an aggregate threshold where strictly necessary. We also re-emphasise our recommendation under Question 1 that ESMA provides FCs with a sufficient transitional period for implementation to avoid the risk of non-compliance while these entities make preparations to apply the new methodology.

<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 broadly agree with ESMA's proposed uncleared thresholds, with the exception of the proposed uncleared threshold for each of IRDs and commodity derivatives. We acknowledge that the amendment to the calculation methodology for uncleared derivatives shifts away from the ETD vs OTC distinction and instead ensures that only non-centrally cleared derivative contracts are counted for the purpose of calculating positions in respect of the clearing thresholds. We therefore understand why ESMA concluded that the existing thresholds should be decreased from (a) EUR 3 billion to EUR 1.8 billion for IRDs; and (b) EUR 4 billion to EUR 3 billion for commodity derivatives. We also acknowledge that the NFC test has changed from a NFC group test to a single entity NFC test and anticipate that may also have influenced ESMA's conclusion to decrease the thresholds. Finally, we also appreciate that ESMA has proposed reducing the scope of the commodity asset class from "commodity and other derivatives" to "commodity and emission allowance derivatives."

We would, however, invite ESMA to provide further evidence to justify the revision of the level of the clearing thresholds, including scenarios and simulations. For example, the consultation paper does not disclose the impact of the new clearing thresholds in terms of number of FCs/NFCs and the notional which would be captured by them. In this respect, we would draw to ESMA's attention that they have previously provided more detailed and granular data1 allowing market participants to observe the impact of increasing and decreasing the thresholds for FCs and NFCs and for each asset class. In light of this, we would invite ESMA to do something similar in the context of this consultation paper.

Further, notwithstanding the above, we would strongly advise against reducing the threshold for IRD and commodity derivatives from their current level for the reasons set out below.

In addition to the below rationale on the IRD and commodity derivatives markets and in the context of the change to the NFC test from group to single entity, we note that NFCs in fact typically centralise their derivative trading activities through a single entity in the group. This is in order to present a single "face" to the external market for OTC derivative trading. Where this is the case, we emphasise that the shift in the calculation methodology for NFCs to an entity specific focus would be of limited benefit in respect of the activity to be included in the calculation. The proposed IRD and commodity threshold reductions would represent a significant reduction in the amount of trading activity that a group with an EU-established centralised trading entity could undertake without becoming an NFC+ which would have a detrimental impact on these markets. This is contrary to the European Commission's growth agenda.

**IRDs**

We recognise that ESMA has referred to data/ simulations in respect of the population of entities and notional captured under the current methodology to propose new uncleared thresholds that capture a similar population.

However, we would encourage ESMA also to consider the significant inflationary pressures in the IRD market and the fact that the IRD threshold has not changed since it was set in 2012. The current interest rate environment, in particular, has also significantly increased nominal cash flows leading to greater need to manage risks through derivative trading even when real exposures remain constant. This is particularly relevant for inflation-sensitive sectors, where notionals have increased due to rising real costs rather than speculation. This type of risk management will not generally qualify for the hedging exemption and will continue to count against the clearing threshold.

We also note that the revised methodology does not reduce the practical regulatory burden for NFCs. Transactions, which are typically bilateral under an ISDA Master Agreement and which are CSA-backed, have always been uncleared and continue to count fully toward the threshold (except where they count as hedging or treasury financing for NFCs). Therefore, in practice, the burden remains unchanged and there does not appear to be any compelling reasoning put forward to justify the threshold reduction.

In our view, these factors require a higher uncleared threshold to be set than proposed.

Based on the above, we would strongly recommend that ESMA set the uncleared threshold in respect of IRDs at EUR 3 billion as opposed to lowering this to EUR 1.8 billion.

**Commodities**

1. **The commodities market has burgeoned both in terms of demand and pricing since the thresholds were initially set in 2012**.

In 2022, Energy Traders Europe commissioned Frontier Economics to conduct a study on the EMIR commodity clearing threshold (the "**EMIR Study**"). The EMIR Study flags that energy prices have been inflated to a multiple of their value in 2012.2 There is therefore a drastic decline in tradable quantities under a EUR 3 billion threshold in comparison to 2012. To compare, in 2012, the EUR 3 billion threshold allowed trading in OTC derivatives of approximately 70 TWh compared to 11 TWh in 2022.3 The EMIR Study recommended that in order to offset historical energy price inflation, support the EU energy transition, including the EU Green Deal, and enable competition with entities from other G20 jurisdictions, there should be an immediate increase of the EMIR commodity clearing threshold applicable to NFCs to a minimum of EUR 12 billion.4 This is a four-fold increase to ESMA's proposed threshold.

While we acknowledge that ESMA has revised the calculation methodology and asset classes since this study was published, we emphasise the continuing inflationary pressures in this market in 2023 and 2024.

1. **The European commodities market will otherwise be put at a competitive disadvantage in comparison to other commodities markets**.

As noted above, the EMIR Study emphasises that increasing the uncleared threshold for commodity derivatives is necessary to enable competition with entities from other G20 jurisdictions.

A 2021 memorandum delivered by Luther Law confirmed that the EU commodity clearing threshold was the most onerous in terms of both threshold and the entities/ products to which the threshold is applicable.5 While we again acknowledge the revisions to the calculation method and in-scope entities for the purposes of the calculations since this memorandum was drafted, we note that the commodity threshold remains much lower in the EU than in other jurisdictions.

As a comparator, under the Commercial End-User Exemption of the Dodd-Frank Act, a non-financial energy trading firm can trade cash settled derivatives for hedging in an unlimited manner and for non-hedging purposes up to a de minimis threshold of USD 8 billion.6 The U.S. Commodity Futures Trading Commission (the "**CFTC**") has previously decided against reducing the threshold from USD 8 billion to USD 3 billion. The CFTC considered the availability of efficient hedging opportunities for the real economy, amongst other factors, in coming to its decision to maintain the USD 8 billion threshold.7 We also note that Singapore and Australia respectively offer a SGD 20 billion and AUD 100 billion threshold per entity.8

In addition, we would emphasise that ESMA itself has acknowledged and recommended accounting for the EU's global competitiveness in policy making in its position paper on strengthening EU capital markets from June 2024.9

1. **The consequences of NFCs breaching the uncleared threshold for any asset class is substantive and prohibitive in some cases**.

These entities must, following notification of a breach, comply with operationally burdensome risk mitigation obligations which, even for large and sophisticated energy players could trigger significant costs.10 In particular, the impact of exceeding the threshold in the commodity derivative asset class would bring all OTC derivative transactions (whether commodity derivatives or otherwise) in scope of the margining requirements for non-centrally cleared OTC derivatives, including those for hedging purposes. This could result in a cliff-edge effect for EU NFCs who have large hedging requirements. We appreciate that EMIR 3.0 gives these entities 4 months to comply with additional risk mitigation obligations as a result of changing classification. However, in view of what needs to be undertaken, this is still an extremely tight timeframe.

The combined effect of inflationary pressures on the commodities market and a lower uncleared threshold for commodity derivatives means that NFCs are forced to withhold or limit their trading in commodity derivatives to avoid exceeding this threshold. This could in turn withdraw liquidity from the market which could have implications for the EU's strategic energy autonomy and market resilience.11 This would put EU entities at a competitive disadvantage to NFCs in other jurisdictions (see further the discussion under (2) above in respect of the competitiveness of the European commodities market).

NFCs participating in the commodity derivatives market are not of systemic importance12 and so while a higher threshold would allow for a greater volume of OTC trading by NFCs in the commodity derivatives market that is not subject to the EMIR margin requirements for non-centrally cleared OTC derivatives, this would not pose a systemic risk to the wider financial markets.13

Based on all of these factors, we would strongly recommend that ESMA consider in fact increasing the threshold for commodity and emission allowance derivatives but at a minimum to maintain it at EUR 4 billion. In addition to the above discussion, we refer to our response to Question 5 below which details the pressures in the emission allowance derivatives market and gives more support to increasing, or at least maintaining, the clearing threshold for this bucket.

**Active Account Requirement**

As ESMA will be aware, the proposed clearing thresholds have an impact in the context of the Active Account Requirement ("**AAR**") under Article 7a(1) of EMIR 3.0. In particular, we would draw ESMA's attention to the application of the uncleared threshold in respect of IRDs. The proposed uncleared threshold would mean that the threshold for the in-scope derivative contracts referred to in Article 7a(6) is lowered from EUR 3 billion to EUR 1.8 billion. This is an unfortunate consequence that may have been overlooked when introducing the AAR.

We would strongly recommend that ESMA keep the AAR test unchanged and apply the existing threshold of EUR 3 billion for this purpose. Considering that the AAR is a test that applies in respect of cleared transactions, it is inadvisable to revise the threshold in respect of the AAR if ESMA adopts the proposed uncleared threshold of EUR 1.8 billion. We also note that the application of the EUR 3 billion threshold would minimise the gap to the EUR 6 billion threshold that applies with respect to the representativeness obligation.

**Footnotes:**

1. See the [Report on the review of the clearing thresholds](https://www.esma.europa.eu/sites/default/files/library/esma70-451-502_report_on_the_review_of_the_clearing_thresholds_under_emir.pdf) published on 28 September 2022.

2. Frontier Economics, [Review of the EMIR Clearing Thresholds for Commodities (CTT)](https://cms.energytraderseurope.org/storage/uploads/media/220531-msc-rep-frontier-emir-cct-review.pdf), May 2022 (pages 5, 58).

3. Joint Energy Associations Group position paper, [Efficient ESMA level 2 measures are needed to achieve EMIR 3.0 goals for resilient markets](https://www.eurogas.org/wp-content/uploads/2024/10/JEAG-EMIR-3.0-PP-on-level2-measures-20241014.pdf) (footnote 9, paragraph 1.2, page 4)

4. Frontier Economics, [Review of the EMIR Clearing Thresholds for Commodities (CTT)](https://cms.energytraderseurope.org/storage/uploads/media/220531-msc-rep-frontier-emir-cct-review.pdf), May 2022 (page 5)

5. Luther, [Memorandum on commodity derivative clearing under EMIR](https://cms.energytraderseurope.org/storage/uploads/media/efet-memorandum-commodity-derivative-clearing-under-emir-a-cross-jurisdictional-analysis-041021.pdf), Oct 2021 (page 4)

6. Frontier Economics, Luther, [Principles of Energy Market Regulation - Securing Efficient & Resilient Energy Trading](https://cms.energytraderseurope.org/storage/uploads/media/frontier-luther---principles-of-energy-market-regulation-19042024.pdf) (pages 193 – 195)

7. Federal register p. 56666-56693, [De Minimis Exception to the Swap Dealer Definition – A Rule by the Commodity Futures Trading Commission](https://www.federalregister.gov/documents/2018/11/13/2018-24579/de-minimis), November 2018 (C. Final Rule and Commission Response, Paragraph 1)

8. Luther, [Memorandum on commodity derivative clearing under EMIR](https://cms.energytraderseurope.org/storage/uploads/media/efet-memorandum-commodity-derivative-clearing-under-emir-a-cross-jurisdictional-analysis-041021.pdf), Oct 2021 (page 4)

9. ESMA, [Building more effective and attractive capital markets in the EU](https://www.esma.europa.eu/sites/default/files/2024-05/ESMA24-450544452-2130_Position_paper_Building_more_effective_and_attractive_capital_markets_in_the_EU.pdf), June 2024 (Recommendation 20)

10. Frontier Economics, [Review of the EMIR Clearing Thresholds for Commodities (CTT)](https://cms.energytraderseurope.org/storage/uploads/media/220531-msc-rep-frontier-emir-cct-review.pdf), May 2022 (pages 45 - 47)

11. Joint Energy Associations Group position paper, [Efficient ESMA level 2 measures are needed to achieve EMIR 3.0 goals for resilient markets](https://www.eurogas.org/wp-content/uploads/2024/10/JEAG-EMIR-3.0-PP-on-level2-measures-20241014.pdf) (paragraph 2, page 8)

12. Frontier Economics, [Review of the EMIR Clearing Thresholds for Commodities (CTT)](https://cms.energytraderseurope.org/storage/uploads/media/220531-msc-rep-frontier-emir-cct-review.pdf), May 2022 (pages 62 - 63)

13. We would further emphasise that although these transactions would not be subject to the EMIR margin requirements, it is nevertheless commonplace for collateral to be exchanged.

<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 agree and welcome ESMA's proposal not to introduce more granular sub-asset classes for commodity derivatives but to maintain an aggregated threshold for commodities generally. Although note our response to Question 5 in relation to emission allowance derivatives.

In case of future consultations in respect of commodity sub-asset classes, we would encourage ESMA to consider the following challenges, operational and otherwise, that may arise by introducing commodity derivative sub-asset classes:

1. **Activity across multiple commodity sub-asset classes**.

Trading firms are often simultaneously active in multiple commodity asset classes. Energy firms, for example, are active in various energy markets (power, gas, coal, oil) to manage their commercial energy production and supply (market) risks. However, they may also be active in other commodity markets (metals, raw materials) to mitigate commercial risks related to their renewable energy businesses. Given what the clearing thresholds seek to achieve, an aggregated commodity threshold aligns better with this practice. Setting separate commodity clearing thresholds would be artificial and increase the complexity of compliance for market participants (see (3) below for more on the feasibility for market participants).1

1. **Identifying applicable sub-asset classes.**

A commodity derivative transaction may fall under multiple sub-asset classes. For example, biodiesel from an agricultural source could potentially fall under multiple sub-asset classes. It is unclear how market participants would be expected to decide the relevant sub-asset class for a particular transaction or whether one transaction would form part of calculations for multiple sub-asset classes. This would then increase the operational burden (see further (3) below) and inevitably require detailed guidance.

1. **Feasibility for market participants:**

It would be overly burdensome and inefficient, from an operational perspective, for market participants to comply with the obligation to calculate against separate uncleared commodity thresholds. There are also no obvious benefits for market participants to compute calculations for multiple sub-asset classes.

1. **Practicability of supervision by National Competent Authorities ("NCAs")**:

It is unclear how NCAs would effectively monitor compliance with different uncleared commodity thresholds.

**Footnotes:**

1. Joint Energy Associations Group position paper, [Efficient ESMA level 2 measures are needed to achieve EMIR 3.0 goals for resilient markets](https://www.eurogas.org/wp-content/uploads/2024/10/JEAG-EMIR-3.0-PP-on-level2-measures-20241014.pdf) (paragraph 2, page 7)

<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 agree with ESMA's proposal to remove the catch-all "other" category from the commodity bucket (see further our response to Question 6). However, we recommend that ESMA introduce a separate bucket for emission allowance derivatives with an appropriate threshold separate to the EUR 4 billion threshold for commodity derivatives. This recommendation is based on the assumption that ESMA at least maintains the threshold for commodities at EUR 4 billion (see further our response to Question 3).

However, we would prefer ESMA maintain the current proposal of a fifth bucket for both commodity and emission allowance derivatives than create a separate bucket for emissions allowance derivatives but do so at the expense of reducing the threshold for commodity derivatives.1 A combined bucket would facilitate the ability for market participants to monitor these transactions against a single clearing threshold; align with market practice, simplify operations; and reflect how energy and commodity trading is structured in reality. This would also support coherent risk management, as emission allowance derivatives are often used in integrated hedging strategies alongside commodity instruments. However, we re-emphasise, pursuant to our response to Question 3, that a EUR 3 billion threshold in respect of commodity and emission allowance derivatives is too low. We would instead recommend at least maintaining this threshold at EUR 4 billion. Otherwise, the combined bucket would stifle investment in the emission allowance derivatives market.

We elaborate on our reasons below.

1. **Increase liquidity in the market and encourage better pricing.**

A separate/ higher threshold would increase liquidity in the emission allowance derivative market and encourage better pricing.The emission allowance market is naturally seeing substantial growth and resultant inflationary pressure on pricing as a result of the global push to a more renewable and sustainable economy. We also note the growing need for emission allowances across industries. For example, the recent introduction of maritime activities to the EU Emissions Trading System imposes an obligation on shipping companies to surrender allowances.2 Furthermore, the emission allowance system is designed so that the supply of allowances gradually decreases over time, which drives up their price, especially as demand is likely to remain steady due to ongoing economic growth.

This growth and increased demand will result in emission allowance derivatives encompassing a larger proportion of the clearing threshold for commodity derivative transactions where, as noted in our response to Question 3, we believe the clearing threshold is already too low.

1. **Stifle activity in the emission allowance market.**

We note that while market participants are seeing increased activity in the emission allowance market they are already limiting themselves from trading emission allowance derivatives as the existing clearing threshold for commodity derivatives does not provide the necessary scope for them to engage in this market.

**Footnotes:**

1. We refer to our response to Question 3 which discusses the pressures in the commodity market/ impact of a lower threshold on the market which is equally applicable here.

2. European Commission Guidance Document[, The EU ETS and MRV Maritime General Guidance For Shipping Companies](https://climate.ec.europa.eu/document/download/31875b4f-39b9-4cde-a4e2-fbb8f65ee703_en?filename=policy_transport_shipping_gd1_maritime_en.pdf) (Guidance document No. 1, Updated Version, 5 November 2024, pages 7-8)

<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 ESMA's proposal not to introduce a sixth catch-all bucket for "other derivatives." We appreciate ESMA's recognition at paragraph 75 of the consultation paper that there is insufficient data to define other derivative asset classes and would add that defining additional asset classes in markets that have not developed sufficiently/ matured risks discouraging growth and innovation in EU markets.

<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. We refer to our response to Question 4 which sets out the difficulties (operational and otherwise) associated with introducing more granular thresholds which would equally apply here. We would add that introducing an ESG threshold would require ESMA to define what constitutes a "commodity derivative based on ESG factors" which may be challenging, particularly where there is no clear market consensus. We also reference our response to Question 6 in respect of discouraging innovation in developing markets. Where there is a push in the EU to drive clean energy products, it would be counterproductive to impose thresholds which could reduce investment/ activity in ESG related commodity derivatives.

<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>

We agree with ESMA's proposal not to introduce more granular thresholds for commodity derivatives based on crypto-related features. In line with our response to Question 7, we do not see a benefit of imposing thresholds in respect of developing markets which could have the unintended consequence of discouraging innovation. We would also add that where crypto has very volatile pricing, we anticipate that it would be challenging for ESMA to determine the appropriate threshold for derivatives based on crypto-related features at this stage.

<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 generally do not consider that further clarifications should be included in Article 10 of Commission Delegated Regulation (EU) No 149/2013 (the "**hedging exemption**"). However, we would encourage ESMA to consider extending the hedging exemption to ensure that both non-financial counterparties to a virtual power purchase agreement ("**virtual PPA**") can exclude it from their clearing threshold calculations, even where a counterparty may not be comfortable concluding that the virtual PPA is objectively measurable as risk reducing in accordance with the hedging exemption.

We appreciate that some virtual PPAs are clearly considered risk reducing. One potential instance of this is covered in the European Commission Q&A referred to at paragraph 93 of the consultation paper. However, we note that this guidance only suggests that the provision of a hedge by the buyer **may** be considered directly related to its commercial activity (therefore falling under the hedging exemption). The uncertainty of this position, particularly given buyers are not always able to link the provision of a virtual PPA to a corresponding commercial activity, has meant that NFCs are not always able to rely on the hedging exemption. These virtual PPAs can quickly add up in terms of contribution towards the clearing thresholds, as highlighted by ESMA at paragraph 94 of the consultation paper. The quantity of trading possible under the proposed commodity clearing threshold is barely sufficient for a single NFC to provide a long-term price hedge for a single large-scale offshore wind park.1 As identified by the European Commission, this discourages energy firms from providing these hedges which is counterproductive to ensuring price stability in energy costs.

It is vital, however, that any such extension of the hedging exemption should be clear that this extension is **in addition to** the current scope of the hedging exemption and should not be construed as interpretative (i.e. limiting) the existing scope and market understanding of the hedging exemption as applicable to virtual PPAs (or otherwise).

Based on the above, we would propose the following drafting amendment as a new Article 10(1)(d) of Commission Delegated Regulation (EU) No. 149/2013:

"(d) *insofar as not otherwise covered by any of the paragraphs above, it is entered into by a non-financial counterparty with another non-financial counterparty and it relates to the virtual supply or purchase of electricity produced from renewable energy sources and relevant environmental attributes.*"

**Footnotes:**

1. Frontier Economics, [Review of the EMIR Clearing Thresholds for Commodities (CTT)](https://cms.energytraderseurope.org/storage/uploads/media/220531-msc-rep-frontier-emir-cct-review.pdf), May 2022 (pages 6; 36-42)

<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>

We generally agree with the indicators set out in ESMA's proposal. We also note ESMA's position at paragraph 102 of the consultation paper that it should be able to exercise a certain degree of judgement to determine if there should be any future revision of the clearing thresholds. In exercising its judgement, we would strongly recommend that ESMA takes into consideration the impact of amending the clearing thresholds on market participants and the market more widely.

We would anticipate that ESMA monitor the thresholds with a view to increasing these in future as the markets for each of the asset classes continue to grow. We would strongly advise against a reduction in any of the clearing thresholds based on the inevitable and continuing inflationary pressures across markets and in consideration of the EU's global competitiveness. Our responses to Questions 3 and 5 provide significant supporting data and rationale in this respect.

We reiterate the significant implications, from an operational and costs perspective, on market participants of breaching these thresholds and bring ESMA's attention to our responses to Questions 1 and 3 which emphasise this.

We also note that there is precedent within EMIR itself to consider the impact of regulation on the market and its participants including at Article 89(3c) where ESMA is able extend the adaptation period for compliance following the classification of a CCP as a Tier 2 CCP based on the impact on clearing members.

We would therefore recommend amending the drafting of the proposed Article 11b to include the below language in bold:

*The mechanisms triggering a review of the value of the clearing thresholds shall include the identification of a significant change in the following indicators:*

*(a) the fluctuations of prices in the underlying of OTC credit derivatives, OTC equity derivatives, OTC interest rate derivatives, OTC foreign exchange derivatives or OTC commodity derivatives and OTC emission allowance derivatives; and*

*(b) the evolution of the inflation rate, of the global financial conditions, or of the geopolitical and economic policy uncertainties.*

***Where, following a review of the mechanisms pursuant to the first subparagraph of this paragraph, ESMA determines that a review of the value of the clearing thresholds is required, as part of such review and any revision to the clearing thresholds, ESMA shall consider the impact to the affected markets in the Union of revising the clearing thresholds for either or both aggregate and uncleared positions.***

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