Reply Form

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

Responding to this Consultation Paper

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

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

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

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

Instructions

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

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

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

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

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

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

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

**Publication of responses**

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

**Data protection**

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

**Who should read this paper?**

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

# General information about respondent

|  |  |
| --- | --- |
| Name of the company / organisation | ISDA |
| Activity | Trade Association |
| Are you representing an association? |  |
| Country / Region | International |

# 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 agree that it is unnecessary to set aggregate thresholds for asset classes not subject to the CO.

*On the proposal to set aggregate thresholds for IRDs and credit derivatives*

As set out under EMIR 3 Recital 9, ESMA is empowered to “set an aggregate clearing threshold, if needed”, the objective being defined “in order to ensure that the current prudent coverage of the clearing obligation is not affected by the new methodology”. However, we note that the clearing thresholds set under the new methodology, i.e. based on uncleared transactions, have been set by ESMA with the intention to “capture a similar population of entities and notional, compared to the current scope of the CTs”, as set out under paragraph 56 of the consultation paper. In particular, ESMA explains how the proposed levels of the CTs “would allow to capture a similar population of entities and notional” (paragraph 58), with €1.8 billion as the new CT achieving that objective for IRDs (paragraph 60), and €700 million as the new CT achieving that objective for credit derivatives (paragraph 61).

We understand this to mean that the proposed levels of the CTs for IRD and credit derivatives, based on the revised methodology, would ensure the same “prudent coverage” (Recital 9 of EMIR). Therefore, based on the objective set by EMIR 3 for the aggregate clearing thresholds, this would suggest that aggregate clearing thresholds are not necessary – because the same current coverage is achieved through the revised CT based on uncleared transactions, following ESMA’s own analysis that led to the calibration of the uncleared CTs.

Given that adding a second set of thresholds adds complexity for firms, who will now have to compute positions against two sets of thresholds, the uncleared and aggregate thresholds, we recommend minimising the burden on firms by only setting an aggregate threshold where strictly necessary. We understand that one of the raison d’être of the aggregate clearing threshold, even if not explicitly noted in EMIR 3 text or recitals, is intended to ensure that counterparties do not fall out of the scope of the AAR, as suggested by ESMA under paragraph 52. With this in mind, an aggregate threshold only appears necessary for IRD products, given that credit derivatives are not part of the clearing services relevant to the AAR.

*On the interplay with the AAR*

We also draw ESMA’s attention to Article 7a(1), which refers to counterparties “*that exceed the clearing threshold in any of the categories of derivative contracts referred to in paragraph 6 of this Article”,* setting out the second cumulative condition (“condition 2”) that must be met for counterparties to be subject to the AAR. In paragraph 27 of the consultation on the revised clearing thresholds, ESMA notes that stakeholders should refer to the ESMA CP on the AAR, without further assessing how the current revisions would affect the population captured under the AAR. However, through the scope of application of the AAR as set out under Article 7a(1), clearing thresholds – and whatever value needs to be used for the purposes of condition 2, which is a point that we discuss further – become an integral part of not just the scoping of clearing obligation, but also of the AAR. Because of this, any revision of the clearing thresholds, as consulted on as part of the current consultation paper, should consider, at least in a cost-benefit analysis, and ideally in the main impact analysis, how the revision of the CTs affects the population captured under the AAR.

Then, as regards the actual threshold to be used for the purposes of condition 2, we flag that if NFCs were to use the revised CT for OTC interest rate derivatives based on uncleared transactions for the purposes of condition 2, many NFCs may inadvertently become scoped in the AAR, while they would not have otherwise been subject to it absent a revision of the CT methodology, which led to a significant reduction of the IRD CT. We would suggest that ESMA clarifies that the aggregate CT on IRDs for FCs – the continuation of the current CT on IRDs of €3bn – be the value that NFCs also refer to when looking at condition 2 for the purposes of Article 7a(1), based on activity at the individual level (i.e. in accordance with the revised CT calculation methodology for NFCs which does not capture group activity), and also excluding hedging activity.

<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>

The purpose of the aggregate thresholds, which is to serve as a backstop to ensure that a similar population is captured, suggests that they should be much higher than the current level.

ESMA’s proposed approach consists in calibrating a new set of uncleared thresholds, as discussed in our response to Q1, to capture the same population as under the current CTs, in isolation from the aggregate thresholds. On top of this, the proposed aggregate threshold, which would remain at the current level, would also by default capture the same population in isolation from the uncleared threshold. This means that the new set of thresholds can logically only capture more entities. As such, this approach most likely does not meet the goal of capturing roughly the same number of entities, which is set out under Recital 9 of EMIR 3. We note that ESMA is empowered to set an aggregate threshold “if needed”, to ensure the same prudent coverage. As a result, if the uncleared CTs do indeed capture a similar population, the backstop nature of the aggregate threshold suggests that they should be much higher than the proposed level.

Otherwise, the aggregate thresholds would not fulfil the purpose set in Recital 9 and Article 4a(4) of EMIR.

<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 note that as a result of the revised methodology, looking at uncleared trades, ESMA has significantly lowered the value of the thresholds applicable to FCs and NFCs: the CT for credit and equity derivatives would be lowered by 30%, the CT for commodity derivatives by 25% and the CT for interest rate derivatives by 40%.

The significant reduction of the CTs in asset classes where clearing is not prevalent, such as for equity derivatives and commodity derivatives, may lead many FCs to become subject to the CO because of their uncleared activity in those classes, while under the current methodology, they would have remained under the clearing threshold. Because ESMA’s calibration of the clearing thresholds for uncleared positions looks at the impact on the population captured by aggregating FCs and NFCs, the analysis might indeed show an unchanged population at the level of aggregation, obviating that more FCs might be subject to the CO under the new methodology than under the current approach.

We would welcome further economic justification for the revised level of the CTs. While we acknowledge that ESMA has sought to keep the population captured by the new set of CTs unchanged compared to current CTs, further information would be necessary to assess the appropriateness of the revised thresholds in light of the new methodology:

* ESMA does not provide data on the number of entities (breaking down between FCs and NFCs) and notional captured by the new CTs. Such data would be useful to understand the precise impact of the revised CTs. We note that in previous reports on the CTs, ESMA provided detailed data to assess the impact of changes to the CT levels (such as for example in Annex I of the Report on the review of the clearing thresholds under EMIR Refit, September 2022)[[1]](#footnote-2). In this consultation, ESMA does not provide the same level of granularity, hindering the understanding of the impact of the revised CTs;
* while ESMA explains that the great majority of notional in FX products is uncleared, such that it is intuitive that the CT would remain the same, for other categories, further economic justification underpinning the revised level of the threshold would be welcome. For example, ESMA proposes a substantial reduction of the CT level for equity derivatives and commodity derivatives. Further economic justification would be useful, especially as substantial volumes within those categories are not cleared. This would allow to better understand the impact of the revised CTs;
* the analysis on the impact of the uncleared CTs seems to be looking at the impact on the captured population in isolation from the separate aggregate CTs, which also results in capturing FCs based on their cleared and uncleared IRS and credit derivatives activity. The analysis provided by ESMA does not allow to understand which set of threshold would be binding; assuming that the aggregate CT would be the test which brings the majority of FCs within the clearing obligation, attempting to capture the same number of entities and notional through the uncleared CT either means that the aggregate CT appears unnecessary, or is likely to overestimate the magnitude of the reduction in the CT necessary to capture the same population under the revised CTs.

We note that the reduction in the CT might have unintended consequences on the liquidity of commodity derivatives markets, as NFCs might have to self-limit their activity in those markets to avoid breaching the CT. The proposal for a €3bn threshold for commodity derivatives also does not account for the fact that commodity prices have increased since 2012, when the €3bn value was originally defined. It is also a substantial reduction from the €4bn value that was applicable since 2022.

In addition, many non-financial groups manage all their derivative trading activities through a single centralised legal entity, which faces the external market for non-centrally cleared OTC derivatives trading activity. This centralised trading entity may not draw any benefit from the amended requirements of EMIR 3 because there is no aggregation of NFC group activities in this scenario. As a result, the proposed amendment of the commodity derivatives CT to €3 billion (down from €4 billion) would represent a significant reduction in the amount of trading activity that a group with an EU-established centralised NFC trading entity could undertake without becoming an NFC+, with all the additional costs and burden that this would bring. This cliff edge effect is particularly problematic as going over the CT in the commodity derivative asset class brings all uncleared OTC derivatives of all asset classes into scope of uncleared margin requirements, even where these are for hedging purposes. The effect of this NFC+ classification is therefore magnified for those NFCs with large hedging requirements, which would put EU entities at a competitive disadvantage to non-financials from other jurisdictions, and could disincentivise hedging for those over the CT.

The report does not include evidence suggesting that a lower threshold is warranted under the new methodology for the CT. Given the objective of EMIR to mitigate systemic financial risk and the FSB’s finding in its report on financial stability aspects of commodity markets[[2]](#footnote-3), a reduced threshold may not contribute to addressing counterparty credit risk concerns, but instead exacerbate liquidity challenges of NFCs acting in commodity markets in the event of unexpected price spikes and associated margin demands.

<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 with ESMA’s proposal not to introduce separate thresholds for the various commodity sub-asset classes in the RTS, and would recommend that ESMA does not do so in the future, in the spirit of simplicity and predictability of regulatory outcomes.

<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 have in the fifth bucket only commodity and emission allowance derivatives. However, for the reasons set out above, we believe that this threshold should be higher than proposed.

We do not support a separate threshold for emission allowances as it would be operationally challenging and costly to implement.

<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 proposal not to include a sixth bucket for other derivatives.

<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.

<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.

<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 do not consider that further clarifications are necessary.

<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 do not consider that other indicators should be monitored and assessed.

<ESMA\_QUESTION\_CPCT\_10>

1. [ESMA70-451-502 Report on the Review of clearing threshold under EMIR](https://www.esma.europa.eu/sites/default/files/library/esma70-451-502_report_on_the_review_of_the_clearing_thresholds_under_emir.pdf) [↑](#footnote-ref-2)
2. [The Financial Stability Aspects of Commodities Markets: The Financial Stability Aspects of Commodities Markets](https://www.fsb.org/uploads/P200223-2.pdf) [↑](#footnote-ref-3)