8 April 2025
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Consultation Paper

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

Responding to this paper

ESMA invites comments on all matters in this 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 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 under the heading '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).

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Legislative references

Commission Delegated Regulation (EU) No 149/2013	Commission Delegated Regulation (EU) No 149/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council (OJ L 52, 23.2.2013, p. 11–24)
Commission Delegated Regulation 2017/592 (RTS 20)	Commission Delegated Regulation (EU) 2017/592 repealed by Commission Delegated Regulation (EU) 2021/1833.
Commission Implementing Regulation 2022/1860	Commission Implementing Regulation (EU) 2022/1860 of 10 June 2022 laying down implementing technical standards for the application of Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to the standards, formats, frequency and methods and arrangements for reporting (OJ L 262, 7.10.2022, p. 68–114)
EMIR	Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1–59)
EMIR 3	Regulation (EU) 2024/2987 of the European Parliament and of the Council of 27 November 2024 amending Regulations (EU) No 648/2012, (EU) No 575/2013 and (EU) 2017/1131 as regards measures to mitigate excessive exposures to third-country central counterparties and improve the efficiency of Union clearing markets (OJ L, 2024/2987, 4.12.2024)
ESMA Regulation	Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84–119)

Acronyms

AAR	Active account requirement
CCP	Central Counterparty
CO	Clearing Obligation
CP	Consultation Paper
CTs	Clearing Thresholds
CWG	Consultative Working Group

EC	The European Commission
ECB	European Central Bank
EEA	European Economic Area
ESG	Environmental, Social and corporate Governance
ESMA	European Securities and Markets Authority
ESRB	European Systemic Risk Board
ETD	Exchange Traded Derivative
FC	Financial Counterparty
FX	Foreign exchange
GLEIF	Global Legal Entity Identifier Foundation
IRD	Interest Rate Derivative
NFC	Non-financial Counterparty
OTC	Over-the-Counter
PPA	Power Purchase Agreement
RTS	Regulatory Technical Standard
TR	Trade Repository
TSR	Trade State Report

Executive Summary

Reasons for publication

This consultation paper (CP) presents draft regulatory technical standards (RTS) amending the RTS on the clearing thresholds (CTs).

The recent review of EMIR led to Regulation (EU) 2024/2987[1] (also referred to as 'EMIR 3'), amending EMIR and in particular modifying the CTs regime. In relation to this new CTs regime, EMIR 3 introduces a twofold mandate for ESMA, under Articles 4a(4) and 10(4)(b), to specify the values of the CTs for aggregate positions and uncleared positions, respectively. Additionally, Article 10(4) of EMIR requires ESMA to specify the criteria for establishing which over-the-counter (OTC) derivative contracts are objectively measurable as reducing risks as well as the mechanisms triggering a review of the values of the CTs.

The CP highlights the main changes brought in by EMIR 3 to the CTs framework, notably on the calculation methodology which moves away from the exchange traded derivatives (ETD) versus OTC distinction (where only OTC derivatives count towards the threshold) to a framework based on the level of OTC uncleared transactions. More precisely, under EMIR 3 financial counterparties are required to calculate their uncleared positions and, separately, their aggregate OTC exposure (cleared and uncleared) to assess whether they exceed the CTs, while non-financial counterparties (NFCs) should only count their uncleared positions towards the CTs.

Contents

This CP is divided into 4 different sections.

Section 1 sets the context and walks the reader through the different aspects covered in this CP.

Section 2 provides some background information on the broader clearing obligation (CO) and CTs regimes, and focusses on the mandate related to the calibration of the aggregate and uncleared thresholds. To respond to the EMIR 3 mandate, ESMA carried out a data analysis using EMIR TR data to assess the population of counterparties currently above the CTs for each asset class and, on that basis, proposes uncleared thresholds at a level that would allow capturing a similar population of counterparties. In addition, while FCs are subject to the uncleared thresholds, ESMA considers necessary to establish aggregate thresholds at least for interest rate and credit derivatives (i.e. the asset classes in scope of the clearing obligation) to ensure not leaving out of scope of the clearing obligation FCs that may have large cleared portfolios which may therefore not be captured by the uncleared CTs. Lastly, this section also includes some additional considerations on commodity derivatives in light of the EMIR 3 recital which invites ESMA to consider more granular thresholds for this asset class.

Section 3 deals with considerations with respect to the definition of hedging contracts. At this stage no amendment is proposed by ESMA, but input is sought from market stakeholders, in particular in respect of virtual power purchase agreements.

Section 4 covers the new trigger mechanism to launch a review of the CTs, which ESMA suggests should be based on qualitative assessment and could include the identification of significant evolutions of the markets through the monitoring of certain market indicators.

Lastly, four different annexes are included at the end of the CP. Annex I presents the draft RTS, Annex II includes some statistics on uncleared positions for the different commodity derivatives sub-asset classes based on EMIR TR data, Annex III provides an explanation of the various EMIR fields used for the purpose of the data analysis, while Annex IV includes a summary of questions.

Next steps

ESMA is inviting stakeholders to provide feedback on the topics presented in this CP by 16 June 2025. The feedback received will be carefully considered and ESMA will then take it into account when preparing the Final Report and the draft RTS for submission to the European Commission (EC).

[1] Regulation (EU) 2024/2987 of the European Parliament and of the Council of 27 November 2024 amending Regulations (EU) No 648/2012, (EU) No 575/2013 and (EU) 2017/1131

1 Introduction

1. EMIR sets out the CO framework regarding OTC derivatives, setting the criteria and conditions determining which counterparties are subject to the CO, at what point in time, for which classes and for which transactions of OTC derivatives.

2. On 27 November 2024, the European Parliament and the Council adopted EMIR 3, amending EMIR. EMIR 3 was published in the Official Journal on 4 December 2024 and the provisions started applying on 24 December 2024.

3. The objectives of EMIR 3 are: improving the attractiveness of EU cleared markets, enhancing the resiliency of the EU clearing system and reducing excessive reliance on third-country CCPs of substantial systemic importance. In this context, EMIR 3 brings in a number of changes to the clearing regulatory framework, including with regards to the CTs.

4. The pre-EMIR 3 version of EMIR defined the CTs as an amount set by class of OTC derivative contracts used by counterparties to compare their aggregate month-end average position in OTC derivatives over a period of 12 months for the purpose of assessing whether or not they should be subject to the CO. More precisely, under the pre-EMIR 3 text and until the entry into force of the new RTS, counterparties should calculate their position by including all OTC derivative contracts entered into by the counterparty itself or by any other entities within the group to which the counterparty belongs (for NFCs, this should not include hedging positions and it should only encompass NFCs within the same group). The levels of the CTs are set in Commission Delegated Regulation (EU) No 149/2013[2] for five different asset classes: credit derivatives, interest rate derivatives, equity derivatives, foreign exchange (FX)[3] derivatives and commodity and other derivatives.

5. EMIR 3 amends the CTs framework by moving away from the ETDs versus OTC distinction (where ETDs are not included in the calculation while OTC derivatives are) to a framework based on the level of OTC uncleared transactions. This shift in the calculation methodology, whereby only non-centrally cleared derivative contracts count for the purpose of calculating positions for the CTs, is consistent with ESMA's proposed amendment to EMIR, as highlighted in its high-level response to the EC consultation in April 2022. The rationale behind ESMA's proposed amendment was to further recognise the benefits of clearing and thus focusing the positions calculation on the non-cleared segment.

6. While a more in-depth assessment of the changes to the CTs framework introduced by EMIR 3 is provided in Section 2.1, it is already worth noting that the new regime introduces

[2] Commission Delegated Regulation (EU) No 149/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council.
[3] Those are referred to as 'CURR' or 'Currency' under EMIR Reporting.

some differences in the calculation methodology for FCs and NFCs. Both NFCs and FCs should now calculate their uncleared positions to assess whether they are above the threshold for mandatory clearing.

7. However, in addition to the above, under EMIR 3, FCs are also required to calculate, where necessary, their aggregate position including cleared and uncleared OTC derivatives (the ‘aggregate threshold’ calculation).

8. In summary, EMIR 3 creates a different calculation methodology for FCs and NFCs as the former are required to calculate their uncleared positions and, separately, their aggregate OTC exposure (cleared and uncleared) while NFCs should only count their uncleared positions towards the CTs.

9. In view of these changes, Articles 4a(4) and 10(4)(b) of EMIR 3 introduce a twofold mandate for ESMA to specify the values of the CTs for aggregate positions and uncleared positions, respectively.

10. Additionally, Article 10(4) of EMIR requires ESMA to specify the criteria for establishing which OTC derivative contracts are objectively measurable as reducing risks as well as the mechanisms triggering a review of the values of the clearing thresholds.

11. Against this background, the purpose of this CP is to seek views and input from stakeholders on the proposed measures as presented in Annex I below. Based on the responses and feedback received to this CP, ESMA will prepare a final report for submission to the EC. Respondents to this consultation are encouraged to provide relevant information, in particular quantitative data, to support their arguments or proposals.

2 Values of the thresholds

2.1 Background and mandate

12. EMIR sets out that counterparties should clear all OTC derivative contracts for a class of OTC derivatives that has been declared subject to the CO, when those contracts are concluded between certain counterparties and when those are entered into or novated on or after the date on which the CO took effect.

13. Currently, only certain interest rate derivatives (IRD) and certain credit derivatives are subject to the CO. With respect to IRDs, those are Basis swaps denominated in EUR, Fixed-to-Float swaps and Forward Rate Agreements denominated in EUR, NOK, PLN and SEK, as well as Overnight Index Swaps denominated in EUR, USD, GBP and JPY, with

certain characteristics[4]. On the credit derivatives front, those are certain index Credit Default Swaps (CDS) denominated in EUR[5].

14. With respect to the counterparties subject to the CO, the pre-EMIR 3 framework established a CO for FCs and NFCs (as well as entities established in third countries that would be subject to the CO if they were established in the Union), when their aggregated month-end average position for the last 12 months exceeds the CTs or when these counterparties do not calculate their positions. The value of the CTs, specified in Article 11 of Commission Delegated Regulation (EU) No 149/2013, are:

    - EUR 1 billion in gross notional value for OTC credit derivative contracts;
    - EUR 1 billion in gross notional value for OTC equity derivative contracts;
    - EUR 3 billion in gross notional value for OTC interest rate derivative contracts;
    - EUR 3 billion in gross notional value for OTC foreign exchange derivative contracts;
    - EUR 4 billion in gross notional value for OTC commodity derivative contracts and other OTC derivative contracts not provided for in the above four categories.

15. Lastly, it is also worth noting that when exceeding any of the CTs indicated in the previous paragraph, FCs become subject to the CO for any classes of OTC derivatives subject to the CO, while NFCs only for those classes for which the relevant CTs have been exceeded (unless the NFC decides not to calculate its positions[6]). By way of example, if an NFC exceeds the EUR 1 billion threshold for credit derivatives, it becomes subject to mandatory clearing with regards to credit derivatives but does not become subject to mandatory clearing with respect to IRDs (unless it also exceeds the clearing threshold for IRDs).

16. Looking now at the changes to the CTs regime introduced by EMIR 3, as mentioned in the introductory section, one of the main amendments concerns the calculation methodology of counterparties' positions which now takes into account whether OTC derivatives are centrally cleared or not. As a reminder, only uncleared trades count now towards the CTs for NFCs, while FCs are required to calculate their position in uncleared OTC derivatives

[4] The list of IRD subject to the CO is specified in Commission Delegated Regulation (EU) 2015/2205 and Commission Delegated Regulation (EU) 2016/1178.
[5] The list of credit derivatives subject to the CO is specified in Commission Delegated Regulation (EU) 2016/592.
[6] Both FCs and NFCs would in any case become subject to the CO for any classes of OTC derivatives when they decide not to calculate their uncleared positions (and the aggregate positions for FCs).

and, separately, their aggregate position including both cleared and uncleared OTC derivatives as further detailed below.

17. The revised Articles 4a and 10a of EMIR establish that FCs and NFCs, respectively, may calculate their uncleared positions and compare them with the CTs to assess whether they are subject to the CO. As already mentioned, EMIR 3 also includes an aggregate threshold for FCs who, beyond the uncleared positions, should also calculate their overall OTC positions (cleared and uncleared), becoming subject to the CO when any of the two values (uncleared only or overall OTC) exceed the relevant CTs.

18. It may also be useful to specify that Article 4a(5) of EMIR defines 'uncleared position' as "*the aggregate month-end average position for the previous 12 months in OTC derivative contracts that are not cleared by a CCP authorised under Article 14 or recognised under Article 25*".

19. EMIR 3 does not amend the functioning of the CTs regime with respect to the classes for which FCs and NFCs become subject to the CO when exceeding the thresholds. In other words, what is described in paragraph 15 remains applicable.

20. In contrast, the new framework re-designs how FCs and NFCs should calculate their positions also with respect to the distinction between groups and entities. More precisely, the positions calculation remains at group level for FCs (notwithstanding the case of funds who should calculate their positions at entity level in accordance with the third subparagraph of Article 4a(3) of EMIR 3) while it moves to the entity level for NFCs. It should be reminded that, under the pre-EMIR 3 regime, NFCs were calculating their positions by taking into account OTC derivatives entered into by the other NFCs belonging to the same group.

21. This means that FCs will now have to compute their positions based on the level of uncleared trades (and, separately, on the level of their cleared and uncleared OTC derivatives as per the aggregate threshold methodology) entered into by any entity within their group whereas NFCs only uncleared trades entered into at entity level.

22. It is also worth noting that NFCs will continue to benefit from an exemption for those contracts reducing risks directly relating to the commercial activity or treasury financing activity of the NFCs or of its group (the so-called hedging exemption). And in this case, the exemption covers transactions entered into by the NFC for its hedging needs or for the hedging needs of another group entity. Taking out hedging transactions from the calculation of positions towards the CTs does not mean netting between trades not for hedging and trades for hedging, it just means counting only trades not for hedging.

23. Considering that the calculation of positions for NFCs is now at entity level while the hedging exemption should also cover other NFCs within the NFC's group, a few practical examples (not intended to be exhaustive) might help illustrate further the new regime with

regard to how the hedging exemption would work based on ESMA's understanding of the new EMIR 3 provisions.

- Case A: an NFC (NFC A) has a 3 billion EUR position in IRDs not for hedging and a 2 billion EUR position in IRDs classified as hedging: total NFC position in IRDs for the purpose of the CT would be 3 billion EUR;

- Case B: an NFC (NFC A) has a 4 billion EUR position in IRDs not for hedging and a 2 billion EUR position in IRDs classified as hedging on behalf of another NFC (NFC B) within the same group (with an intragroup trade between A and B for example): total NFC A position in IRDs for the purpose of the CT would be 4 billion EUR, total NFC B position in IRDs for the purpose of the CT would be 0;

- Case B-bis: an NFC (NFC A) has a 4 billion EUR position in IRDs not for hedging and another NFC (NFC B) within the same group has a 2 billion EUR position in IRDs classified as hedging (with no link between A and B regarding that trade/position): total NFC A position in IRDs for the purpose of the CT would also be 4 billion EUR, total NFC B position in IRDs for the purpose of the CT would also be 0;

- Case C: an NFC (NFC A) has a 1 billion EUR position in IRDs not for hedging and two other NFCs (NFC B and NFC C) within the same group only have a 2 billion EUR position each in IRDs classified as hedging: total NFC A position in IRDs for the purpose of the CT would be 1 billion EUR, total NFC B and NFC C position for the purpose of the CT in IRDs would be 0 respectively;

- Case D: An NFC (NFC A) conducts some sort of portfolio management of its trading activity. For example, NFC A has a 2 billion EUR position in IRDs which are partly (1 billion EUR) not for hedging and partly (1 billion EUR) for hedging on behalf of another NFC (NFC B) within the same group: total NFC A position in IRDs for the purpose of the CT would be 1 billion EUR and total NFC B position in IRD for the purpose of the CT would be 0.

24. A tabular representation referring to the EMIR fields used for the calculation of the CTs for these examples[7] is presented in here below.

[7] For the purpose of these examples, NFCs should include in their calculation all OTC derivative contracts that are not cleared through a CCP authorised under Article 14 or recognised under Article 25 of EMIR. In this context, while Fields 2_41 (Venue of execution) and 2_33 (Central counterparty) are not included in Table 1, they should also be considered in the computation of the uncleared position.

	2_55 Notional amount of leg 1	2_56 Notional currency 1	1_5 Nature of the counterparty 1	2_11 Asset class	1_20 Directly linked to commercial activity or treasury financing
	NFC A				
Case A	3 billion	EUR	N	IR	FALSE
	2 billion	EUR	N	IR	TRUE
Conclusion Case A	Total NFC A position in IRDs for the purpose of the CT would be 3 billion EUR.				
Case B	NFC A[8]				
	4 billion	EUR	N	IR	FALSE
	NFC B				
	2 billion	EUR	N	IR	TRUE
Conclusion Case B	For NFC A the total position in IRDs for the purpose of the CT would be 4 billion EUR. For NFC B the position for the purpose of the CT would be 0.				
Case B-Bis	NFC A[9]				
	4 billion	EUR	N	IR	FALSE
	NFC B				
	2 billion	EUR	N	IR	TRUE
Conclusion Case B-bis	For NFC A the total position in IRDs for the purpose of the CT would be 4 billion EUR. For NFC B the position for the purpose of the CT would be 0.				
	NFC A[10]				

[8] NFC A and NFC B in this example belong to the same group.
[9] NFC A and NFC B in this example belong to the same group.
[10] NFC A, NFC B and NFC C in this example belong to the same group.

Case C	1 billion	EUR	N	IR	FALSE
	NFC B				
	2 billion	EUR	N	IR	TRUE
	NFC C				
	2 billion	EUR	N	IR	TRUE
Conclusion Case C	For NFC A the total position in IRDs for the purpose of the CT would be 1 billion EUR. For NFC B and NFC C the position for the purpose of the CT would be 0.				
Case D	NFC A[11]				
	1 billion	EUR	N	IR	FALSE
	NFC A on behalf of NFC B				
	1 billion	EUR	N	IR	TRUE
Conclusion Case D	For NFC A the total position in IRDs for the purpose of the CT would be 1 billion EUR. For NFC B the position for the purpose of the CT would be 0.				

25. For completeness, the calculation methodology for FCs and NFCs as established by Article 4a and Article 10 of EMIR is presented in the tables below.

Article 4a - Financial counterparties that are subject to the clearing obligation   1. Every 12 months, a financial counterparty taking positions in OTC derivative contracts may calculate the following positions: (a) its uncleared positions in accordance with paragraph 3, first subparagraph;   (b) its aggregate month-end average positions in cleared and uncleared OTC derivative contracts for the previous 12 months ("aggregate positions") in accordance with paragraph 3, second subparagraph.   Where a financial counterparty:

[11] NFC A and NFC B in this example belong to the same group.

(a) does not calculate its uncleared positions, or where the result of the calculation of those uncleared positions under the first subparagraph, point (a), of this paragraph exceeds any of the clearing thresholds specified pursuant to Article 10(4), first subparagraph, point (b); or

(b) does not calculate its aggregate positions, or where the result of the calculation of those aggregate positions exceeds any of the clearing thresholds specified pursuant to paragraph 4 of this Article;

that financial counterparty shall:

(i) immediately notify ESMA and the relevant competent authority thereof;

(ii) establish clearing arrangements within four months of the notification referred to in point (i) of this subparagraph; and

(iii) become subject to the clearing obligation referred to in Article 4 for all OTC derivative contracts pertaining to any class of OTC derivatives which is subject to the clearing obligation entered into or novated more than four months following the notification referred to in point (i) of this subparagraph

The financial counterparty may delegate the task to notify ESMA under the second subparagraph, point (i), to any other entity within the group to which that financial counterparty belongs. The financial counterparty remains legally liable for ensuring such notification has been made to ESMA.

2. A financial counterparty that is subject to the clearing obligation referred to in Article 4 or that becomes subject to the clearing obligation in accordance with paragraph 1, second subparagraph, of this Article, shall remain subject to that clearing obligation and shall continue clearing until that financial counterparty demonstrates to the relevant competent authority that its aggregate positions or uncleared positions do not exceed the clearing thresholds specified pursuant to paragraph 4 of this Article or Article 10(4), first subparagraph, point (b).

The financial counterparty shall be able to demonstrate to the relevant competent authority that the calculation of the aggregate positions or uncleared positions, as applicable, do not lead to a systematic underestimation of those aggregate positions or uncleared positions.

3. In calculating the uncleared positions referred to in paragraph 1, first subparagraph, point (a), of this Article the financial counterparty shall include all OTC derivative contracts that are not cleared through a CCP authorised under Article 14 or recognised under Article 25, entered into by that financial counterparty or entered into by other entities within the group to which that financial counterparty belongs.

In calculating the aggregate positions, the financial counterparty shall include all OTC derivative contracts entered into by that financial counterparty or entered into by other entities within the group to which that financial counterparty belongs.

Notwithstanding the first and the second subparagraphs, for UCITS and AIFs, the uncleared positions and the aggregate positions shall be calculated at the level of the fund.

UCITS management companies which manage more than one UCITS and AIFMs which manage more than one AIF shall be able to demonstrate to the relevant competent authority that the calculation of positions at the fund level does not lead to:

(a) a systematic underestimation of the positions of any of the funds they manage or the positions of the manager; or

(b) a circumvention of the clearing obligation. The relevant competent authorities of the financial counterparty and of the other entities within the group shall establish cooperation procedures to ensure the effective calculation of the positions at the group level.

Article 10 – Non-financial counterparties

1. Every 12 months, a non-financial counterparty taking positions in OTC derivative contracts may calculate its uncleared positions in accordance with paragraph 3.

Where a non-financial counterparty does not calculate its uncleared positions, or where the result of the calculation of those uncleared positions in respect of one or more classes of OTC derivatives exceeds the clearing thresholds specified pursuant to paragraph 4, first subparagraph, point (b), that non-financial counterparty shall:

(a) immediately notify ESMA and the relevant competent authority thereof, and, where relevant, indicate the period used for the calculation;

(b) establish clearing arrangements within four months of the notification referred to in point (a) of this subparagraph;

(c) become subject to the clearing obligation referred to in Article 4 for the OTC derivative contracts entered into or novated more than four months following the notification referred to in point (a) of this subparagraph that pertain to those asset classes in respect of which the result of the calculation exceeds the clearing thresholds or, where the non-financial counterparty has not calculated its position, that pertain to any class of OTC derivatives which is subject to the clearing obligation.

2. A non-financial counterparty that is subject to the clearing obligation referred to in Article 4 or that becomes subject to the clearing obligation in accordance with paragraph 1, second subparagraph, of this Article, shall remain subject to that obligation and shall continue clearing until that non-financial counterparty demonstrates to the relevant competent authority that its uncleared position

does not exceed the clearing threshold specified pursuant to paragraph 4, first subparagraph, point (b), of this Article. The non-financial counterparty shall be able to demonstrate to the relevant competent authority that the calculation of the uncleared position does not lead to a systematic underestimation of that position. 3. In calculating the uncleared positions referred to in paragraph 1 of this Article, the non-financial counterparty shall include all OTC derivative contracts that are not cleared through a CCP authorised under Article 14 or recognised under Article 25 entered into by the non-financial counterparty which are not objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity of the non-financial counterparty or of the group to which that non-financial counterparty belongs.

26. In order to better understand what the main amendments to the CTs regime are, the table below provides a synthetic overview of the changes brought in by EMIR 3, both for FCs and NFCs.

	EMIR		EMIR 3	
	FCs	**NFCs**	**FCs**	**NFCs**
Scope of positions calculation methodology	All OTC derivative trades (both cleared and uncleared)	All OTC derivative trades (both cleared and uncleared)	**- Uncleared OTC derivative trades** **- Aggregate threshold calculation of all OTC derivative trades (both cleared and uncleared)**	**Uncleared OTC derivative trades**
Entities subject to CO	FCs above CTs	NFCs above CTs excluding hedging derivative transactions	No change	No change
Asset classes to clear	When above at least one of the CTs, all asset classes for which there is a CO (regardless of the asset class(es) for which the CT has been exceeded)	Only for asset class(es) for which the relevant CTs have been exceeded	No change	No change
Group vs entity	Group level (with funds at entity level)	Group level (positions of all NFCs within the same group)	No change	**Entity level**

Hedging exemption	No hedging exemption	Yes, exemption for hedging derivative trades	No change	No change (*nota bene*: it remains at group level despite the positions calculation methodology has moved to the entity level – more examples provided in Section 1.2. above)

27. Lastly, it is also worth noting that under the EMIR 3 transitional measures, the current positions calculation methodology and the current levels of the CTs outlined in Commission Delegated Regulation 149/2013 continue applying and should be used for the active account requirement (AAR) as from the entry into force of EMIR 3 as stipulated in Article 7a(1). For more details on the AAR regime and its entry of application, stakeholders are invited to refer to the ESMA CP on the AAR[12].

28. Under the new Article 4a(4) of EMIR 3, ESMA is mandated to develop a draft RTS to specify the value of the CTs applicable to aggregate OTC derivative positions.

29. In addition, Article 10(4) of EMIR empowers ESMA to develop a draft RTS to specify the values of the CTs for uncleared derivative positions, taking into account the relevant calculation methodology, the systemic relevance of the sum of net positions and the exposures per counterparty and class of OTC derivatives. It should also be noted that Article 10(5) of EMIR requires ESMA to review the CTs for uncleared and aggregate positions at least every two years and earlier where so required by the trigger mechanisms described in Article 10(4) of EMIR.

30. ESMA also notes that EMIR 3 includes a recital inviting ESMA to consider certain additional aspects, such as possibly more granular CTs for commodity derivatives. More precisely, the text states: "(..) *that granularity could be achieved by separating the clearing thresholds by sector and type, such as differentiating between agriculture, energy or metal related commodities or differentiating those commodities based on other features such as environmental, social and governance criteria, environmentally sustainable investments or crypto-related features*." Additional considerations on these elements are presented in section 2.2.4.

31. Furthermore, another recital gives further guidance with respect to the CT calibration. In particular, Recital 9 of EMIR 3 suggests that the review and recalibration of the CTs is not

[12] https://www.esma.europa.eu/sites/default/files/2024-11/ESMA91-1505572268-3856_Consultation_Paper_EMIR_3_Active_Account_Requirement.pdf

expected to lead to substantial changes in order to ensure that the current coverage of the CO is not affected by the new methodology.

32. In light of the changes introduced by EMIR 3 to the calculation methodology and to fulfil these mandates, ESMA has conducted an assessment of the population of counterparties above the CTs and of the notional subject to the CO (i.e. notional traded by counterparties above the CTs), and ran some simulations based on the new methodology to help further assess at what levels to set the CTs. In this context, it is important to keep in mind the already mentioned Recital 9 of EMIR 3 which invites ESMA to ensure that the current prudent coverage of the CO is not affected by the new methodology.

2.2 Analysis and proposals

2.2.1 Data source and methodology

33. In order to deliver on the policy mandates related to the calibration of the CTs for aggregated and for uncleared derivative positions, ESMA has carried out a data analysis using as a main source EMIR data reported to trade repositories (TR) (also referred to as EMIR data) registered in the EU. These TRs centrally collect and maintain the records of all derivative contracts reported under EMIR and which are then made available to authorities.

34. EMIR data is provided at different levels of granularity to the authorities, with the highest level of granularity being trade activity (also referred to as flow data) providing information about all conclusions, modifications and terminations of the derivative contracts. TRs also provide a further level of data processing trade state data which provide information about the latest state of only outstanding derivatives at the time of aggregation by the respective TR at the end of a day. For the purpose of this CP and in line with regulatory requirements, ESMA used 12 trade state reports (TSR) each reflecting a different date[13] to compute the aggregate position for each group and counterparty.

35. As part of the analysis is performed at group level, it is essential to identify the groups within the data to meaningfully assess the counterparties and notional subject to the CO. The starting point for the identification of groups is the notification that ESMA (and NCAs) receive under Article 4a(1) and Article 10(1) of EMIR[14]. This information is valuable as it allows ESMA to identify entities that belong to the same group and provides additional information regarding the classification of counterparties by type (i.e., FC vs NFC), sector and country. The data included in the EMIR notification are cross-checked and

[13] The exact EMIR TSR dates used are: 2023-05-26, 2023-06-30, 2023-07-28, 2023-08-25, 2023-09-29, 2023-10-27, 2023-11-24, 2023-12-29, 2024-01-26, 2024-02-23, 2024-03-22, 2024-04-26

[14] For the purpose of the notification, counterparties should use the template provided on the ESMA website at the following webpage: https://www.esma.europa.eu/post-trading/clearing-thresholds

complemented with the information in the Global Legal Entity Identifier Foundation (GLEIF) Level 2 data on relationship data for legal entities.

36. For this analysis, OTC derivatives (bilateral derivatives trades and derivative trades executed on markets other than EU regulated markets or third country equivalent regulated markets) and uncleared derivatives (derivative trades not cleared at a recognised or authorised CCP) have been considered. It should be noted that EMIR operates in a double reporting regime for EEA entities, i.e. when both trading counterparties reside in the EEA, they are both mandated to report the information on their transactions to TRs. For this reason, and to prevent doubling figures, the notional is adjusted by halving when both counterparties are domiciled in the EEA if needed by the analysis. Analysing outstanding amounts at entity or group level, for the calibration of the thresholds, nominal amounts have not been halved as those amounts are relevant to establish whether entities may fall under the CO or not.

37. EMIR data includes further information also on the nature of the transaction, to identify when a transaction is for hedging purposes (i.e. field 15, "Directly linked to commercial activity or treasury financing"), and the nature of the entity (included in field 7, "Nature of the reporting counterparty") to distinguish FCs from NFCs among others. As a reminder, the hedging exemption is only available for NFCs for whom hedging transactions have not been counted in the calculation of the positions.

38. With respect to the treatment of hedge trades for NFCs, ESMA notes that for the purpose of the data analysis, the EMIR field "Directly linked to commercial activity or treasury financing" was used to exclude trades or positions when said field is equal to "Yes".

39. To sum up, this analysis utilizes the EMIR TSR, EMIR Notifications, and GLEIF level 1 and level 2 data. The EMIR TSR includes 12 dates[15], and the positions of entities are calculated by aggregating the 12 TSR notional amounts outstanding (converted to EUR using ECB rates) for each entity and dividing the total by the number of dates to produce a 12-month average. The metadata of reporting entities is enhanced by incorporating ultimate owner information from GLEIF level 2 data. Notifications are also used to complement GLEIF level 2 data ownership information.

40. Additionally, the EMIR intragroup flag is employed to further refine this information. The financial or non-financial nature and sector of the ultimate owner is determined using EMIR data. If an entity is an ultimate owner but does not report under EMIR, the statistical mode of the subsidiaries' nature and sector (which are the reporting entities) is used to determine the nature and sector of the ultimate owner. In the calculation performed as part of this exercise for the OTC amounts, NFCs and FCs are organized into groups, while funds are treated separately. For the uncleared notional calculations, only FCs are grouped, and

[15] See footnote 13

NFCs and funds are treated as individual entities. CCP reporting has been excluded from all calculations, and for NFC calculations, hedging was excluded using the EMIR field “Directly linked to commercial activity or treasury financing”.

41. A more schematic representation of the EMIR fields used for the purpose of this analysis is presented in Annex III below.

2.2.2 Scope of the data analysis

42. For the data analysis presented in this CP, the two following sections are built in the following manner.

43. Firstly, in section 2.2.3, ESMA assesses the population of FCs and NFCs (at group level) as well as the notional subject to the CO, per each asset class, based on the pre-EMIR 3 methodology i.e. by looking at both cleared and uncleared OTC derivatives.

44. Secondly, in section 2.2.4 ESMA presents the proposed way forward for the aggregate thresholds and some simulations of how the coverage of counterparties and notional would be impacted by the different levels of CTs for uncleared derivative positions. The statistics in this section are based on a 12-month average calculated over the 1 May 2023 – 30 April 2024 period. The rationale for choosing such a time window is connected with the implementation of EMIR Refit, and more precisely with the entry into application of Commission Delegated Regulation 2022/1855 and Commission Implementing Regulation 2022/1860, which amends the reporting regime starting from 1 May 2024. While one of the goals of the reform is to ensure overall consistency between the new and the old framework in terms of scope of entities and risk captured, the new EMIR Refit data structure may have an impact on the data analysis and therefore ESMA considered more prudent using data from May 2023 to April 2024 to allow for a higher degree of comparability over the reporting period.

45. Lastly, in light of the amended methodology whereby FCs and NFCs should calculate positions based on uncleared derivative trades, ESMA also presents in Annex II some data on the level of uncleared derivative positions, including cumulative exposures, overall number of active entities as well as other indicators based on EMIR TR data. However, in light of Recital 21 of EMIR 3 inviting ESMA to consider more granular thresholds for commodity derivatives, this analysis focussed on this asset class and provided granular statistics at sub-asset class level. In particular, ESMA considered useful to look at the categorisation included in the repealed Commission Delegated Regulation 2017/592 (RTS 20)[16] which divided commodity derivatives in the following sub-asset classes: agricultural products, coal, emission allowances and derivatives on emission allowance, gas, metals, oil and oil products, power, seafood and other commodities. However, it is noted that ESMA

[16] Commission Delegated Regulation (EU) 2017/592 repealed by Commission Delegated Regulation (EU) 2021/1833.

did not compute statistics on the current coverage of entities and notional for these sub-asset classes as the CTs are currently set at asset class level (i.e. the whole commodity derivatives category).

2.2.3 Data analysis by asset classes

46. This section presents data to illustrate how the CTs based on the pre-EMIR 3 methodology apply to the different derivative asset classes, with the purpose of understanding the coverage of entities and notional currently captured, in order to calibrate the thresholds based on the new methodology.

47. The statistics in this section are based on the average notional reported by EEA counterparties to TRs over a 12-months period from May 2023 to April 2024. The section presents data for the different derivatives asset classes as currently bucketed by the CTs (IRDs, credit derivatives, equity derivatives, FX derivatives as well as commodity derivatives).

48. ESMA has taken a macro approach to investigate how the current CTs apply at asset class level. In particular, the data look at FCs and NFCs (at group level) that are above the relevant CT as well as the percentage of notional traded by counterparties above the CTs.

49. In that respect, Table 1 below presents the coverage of entities and notional for FCs group. Generally, the ESMA calculations show that only a small portion of FCs are above the CTs (albeit some differences between asset classes exist) while it appears that the very large majority of notional traded is instead captured by the CO across all asset classes.

Table 1: Percentage of FCs above the CTs and notional traded by FCs above the CTs

Asset class	% FCs above CTs	% notional traded by FCs above the CTs
IRDs	5%	98%
Credit derivatives	4%	93%
Equity derivatives	3%	94%
FX derivatives	2%	94%
Commodity derivatives	3%	95%

50. In the NFC space, the situation appears more heterogenous as shown in Table 2 below. More precisely, both the share of NFCs groups above the CTs and the notional traded by those NFCs are significantly smaller when compared to those of FCs. In addition, the portion of notional traded by NFCs above the CTs varies from 52% (for IRDs) to 13% (for commodity derivatives). In this context, it is worth reminding that NFCs can benefit from the hedging exemption and therefore a large part of their activity may fall under this category which does not count for the purpose of the CTs.

Table 2: Percentage of NFCs above the CTs and notional traded by NFCs above the CTs

Asset class	**% NFCs above CT**	**% notional traded by NFCs above the CTs**
IRDs	0.1%	52%
Credit derivatives	1.5%	22%
Equity derivatives	0.1%	43%
FX derivatives	0.4%	39%
Commodity derivatives	0.2%	13%

2.2.4 Simulations and proposals

2.2.4.1 Aggregate positions (only for FCs)

51. Starting with the aggregate thresholds applicable to FCs only, it should firstly be noted that the empowerment in Article 4a(4) of EMIR as amended by EMIR 3 states that: "*ESMA (..) shall develop draft regulatory technical standards to specify the value of the clearing thresholds applicable to aggregate positions* ***where necessary*** *to ensure the prudent coverage of financial counterparties under the clearing obligation*."

52. ESMA acknowledges the benefits of the new calculation methodology based on the level of uncleared positions. At the same time, ESMA also notes that the sole application of the uncleared thresholds for the calculation of FCs' positions against the CTs may leave out of scope of the CO a number of counterparties that may have large, cleared portfolios, including cleared portfolios at third-country CCPs of substantial systemic importance, as long as they would remain under the uncleared thresholds. For example, there might be counterparties primarily executing trades in cleared derivatives on certain third-country

markets (to recall, derivatives executed on third-country markets not benefitting from an equivalence decision and cleared in authorised/recognised CCPs would be deemed as OTC under EMIR), and in large amounts, that would merit being in scope of the CO. To avoid any potential loophole, ESMA would deem the application of the aggregate thresholds (cleared and uncleared OTC derivatives) foreseen in EMIR 3 necessary to achieve the objectives of the CO, at least for those asset classes with classes in scope of the CO.

53. For the above-mentioned reasons, ESMA is of the view that it would be necessary to establish aggregate thresholds at least for those asset classes which are subject to the CO, i.e. IRDs and credit derivatives. ESMA would also like to note that any potential future amendment to the scope of the CO may need to be reflected in the scope of the aggregate CTs.

54. Based on the ESMA calculation, currently about 5% of FC groups active in OTC IRDs are above the CTs, representing 99% of the notional traded, while 4% of FC groups active in OTC credit derivatives are above the CTs, representing 93% of the notional traded. While the data suggest that the current thresholds only capture a small portion of FC groups, the figures also suggest that the CTs appear well calibrated to serve the purpose of preserving financial stability as the very large majority of notional in these two assets classes is traded by entities above the CTs and therefore subject to the CO.

55. On that basis, ESMA considers that the current thresholds of 3 billion EUR for IRDs and 1 billion EUR for credit derivatives should be maintained.

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.

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.

2.2.4.2 Uncleared positions (both for FCs and NFCs)

56. Moving to the uncleared space, in the absence of previous thresholds, ESMA carried out some simulations using as a starting point the levels of thresholds that would allow to capture a similar population of entities and notional, compared to the current scope of the CTs as presented in section 2.2.2.

57. ESMA acknowledges that the new methodology (on which the simulations are based) presents some intrinsic differences as it only considers OTC uncleared positions as

opposed to the old methodology which looks at all OTC derivative positions. However, ESMA is also of the view that the analysis of the current population of entities and notional captured should be used as a guide for the calibration of the CTs for uncleared positions in light of Recital 9 of EMIR 3 suggesting keeping a prudent coverage of counterparties.

58. On that basis, ESMA has considered what level of the CTs, for each of the five asset classes, would allow to capture a similar population of entities and notional (both for FCs and NFCs).

59. The simulations below are based on a 12-month average of positions reported by counterparties over the 1 May 2023 – 30 April 2024 period. To recall, the simulations are only run based on uncleared OTC positions reported by counterparties to TRs.

60. Starting with interest rate derivatives, including those subjects to the CO, the simulation shows that the level of the threshold that would allow to capture a similar population of counterparties would be 1.8 billion EUR.

61. On the credit derivatives front, including classes subject to the CO, the same simulation suggests that a comparable number of counterparties would be captured by a threshold of 700 million EUR.

62. Similarly, the simulations also lead to a very similar figure (700 million EUR) when it comes to equity derivatives.

63. With respect to FX derivatives, ESMA notes that the data analysis suggests that a similar coverage would be obtained by applying the quasi-identical threshold, and thus, once rounded, to the identical threshold of 3 billion EUR.

64. Lastly, for commodity derivatives, the simulations based on uncleared positions also suggest that the level of the CT that would allow to capture a similar population of counterparties would be 3 billion EUR.

65. These results seem consistent with the overall aim of the exercise whereby these CTs are set by looking at uncleared positions only and a reduction in the absolute level of the thresholds would indeed appear intuitive considering that for most asset classes the greater portion of OTC derivatives is cleared. In other words, considering that the simulations are now run based on a smaller dataset (uncleared OTC positions as opposed to cleared and uncleared OTC positions as per the aggregate thresholds), it would appear logical that in order to obtain a similar number of counterparties one would have to apply a lower threshold.

66. It might however be worth noting that in the case of FX derivatives, the thresholds would be the same as the previous one (considering both cleared and uncleared OTC derivatives)

as, based on the data available to ESMA, the great majority of notional is indeed uncleared and therefore the sample assessed remains highly comparable.

67. ESMA also notes that prudent coverage would be ensured as the proposed uncleared thresholds would not lead to significant changes in the portion of notional traded by counterparties above the CTs. Additionally, as far as FCs are concerned, another element worth considering is that ESMA would not expect significant changes in the coverage of entities/notional as the current aggregate thresholds remain in place for the asset classes subject to the CO, as explained in the previous section.

68. The table below summarizes the ESMA proposed thresholds based on the simulation ran with the use of EMIR data.

Asset class	**Proposed thresholds for uncleared OTC derivatives**
IRDs	1.8 billion EUR
Credit derivatives	0.7 billion EUR
Equity derivatives	0.7 billion EUR
FX derivatives	3 billion EUR
Commodity derivatives[17]	3 billion EUR

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.

[17] As explained in paragraph 79 of this CP, it is suggested that this bucket covers commodity derivatives and emission allowance derivatives to align with the EMIR reporting regime.

2.2.4.3 Additional considerations for commodity derivatives

69. When assessing the thresholds for commodity derivatives, it is worth recalling that EMIR 3 invites ESMA to consider more granular CTs for this asset class, with the text stating that such "(..) granularity could be achieved by separating the clearing thresholds by sector and type, such as differentiating between agriculture, energy or metal related commodities or differentiating those commodities based on other features such as environmental, social and governance criteria, environmentally sustainable investments or crypto-related features."

Commodity derivatives based on sector and type

70. With respect to the suggestion to differentiate clearing thresholds based on commodity derivatives sector and type, ESMA presented in Annex II an overview of uncleared positions at sub-asset class level. While the analysis only provides a high-level snapshot of the uncleared market, ESMA acknowledges that activity in most of the commodity derivatives sub-asset classes is already well developed. However, when considering whether more granular thresholds should be applied to commodity derivative sub-asset classes, ESMA notes that the amended calculation methodology introduced by EMIR 3 already entails a significant change for market participants. As a consequence, adding more complexity to the framework regarding the determination of the various sub-asset classes does not seem to be necessary at this stage.

71. Along the same lines, based on preliminary discussions with various market stakeholders, ESMA also understands that market participants trading in commodity derivatives have some reservations against having more granular CTs for sub-categories as this would lead to reduced flexibility in their management of exposure and risk. In addition, such an approach would entail additional burden for market participants who would have to conduct separate assessments for their different exposures.

72. Against this background and while this could be reassessed at a later stage also based on additional data gathering, ESMA would not recommend introducing in the RTS separate thresholds for the various commodity derivatives sub-asset classes.

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.

73. At the same time, given the importance of the commodity derivative asset class and the future importance of some derivatives that may not always be captured in the five traditional

asset classes, such as certain crypto-asset based derivatives, ESMA considers that the fifth bucket should no longer make reference to the residual category of "other" derivatives.

74. More precisely, with the aim of reducing burden on market participants, ESMA would recommend leveraging on the EMIR Refit reporting framework and therefore align the buckets with the asset classes provided for under Field 11 of Table 2 of the Annex to Commission Implementing Regulation 2022/1860. This would mean that the fifth bucket currently encompassing 'commodity and other derivatives' should now only capture 'commodity and emission allowances derivatives'. In their response to the consultation, stakeholders advocating for a different categorisation would be invited to take into account the potential impact on the existing reporting regime data structure.

75. At the same time, ESMA recognises that it is too early to define a sixth bucket for any other specific asset classes also in light of the data limitations linked to the pre-EMIR Refit reporting regime or the relatively early stage of development of some other derivative types. Furthermore, a sixth bucket would mean an additional bucket for entities to compute with no obvious benefits at this stage. This could however be reassessed at a later stage also considering relevant market developments.

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.

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

Commodity derivatives based on environmental, social and governance (ESG) factors

76. Recital 21 of EMIR 3 adds that such granularity could also be achieved by "(…) *differentiating those commodities based on other features such as environmental, social and governance criteria, environmentally sustainable investments*"[18]. ESMA understands this wording as a mandate to research how sustainability features could be accounted for in setting the CTs and the CO for commodities derivatives.

77. ESMA notes that practices in derivative markets are evolving in the context of the transition to a sustainable economy. The range of ESG-related derivatives offered has been

[18] It should be noted that the consideration of sectors and sustainability factors are interconnected: some sectors are more exposed to sustainability risks than others and the potential contribution to environmental sustainability of various activities very much depends on the sector they belong to.

expanding to cater for the needs of various market participants[19]. Although the current legislation does not provide a legal definition of ESG-related derivatives, the below assessment looks at several types of commodity derivatives products, which may be, for different reasons, deemed as ESG-related.

Emissions allowance derivatives:

78. Emissions allowances markets are key for the transition to a climate-neutral economy. Derivatives markets play an essential function in the EU Emissions Trading System by facilitating the acquisition of emission allowances by entities in scope of the compliance requirements from financial intermediaries. Ensuring the proper functioning of emission allowance derivative markets, including proper price discovery and liquidity services, is therefore critical. Based on available data under the pre-EMIR Refit reporting framework, ESMA conducted an assessment of the concentration and trades for emissions derivatives. Annex II looks into uncleared positions for emission derivatives to analyse the level of concentration and the distribution of counterparties and notional. The ESMA report on EU carbon markets 2024[20] highlighted that the vast majority of transactions in EU emission allowance derivatives takes place on exchange (and are therefore cleared). According to the report, total OTC trading in emission allowances (including derivatives and spot contracts) amounted to EUR 72.5 bn in 2023, highlighting the limited direct implications of this market segment for financial stability and the absence of a rationale for introducing more granular CTs.

Sustainably produced commodities derivatives:

79. The extraction, production, trade, use and disposal of commodities can lead to a wide range of negative impacts on environmental and social factors[21]. In that context and to cater for user demand, new derivative contracts have been developed providing more transparency regarding how sustainably certain commodities are produced[22]. ESMA acknowledges that trading of commodity derivatives with such features may have increased, compared to the moment when the different categories of CTs were established. However, there appear to be limitations in terms of historical data available to ESMA to allow for the potential design of new CTs taking into consideration the exposure of the underlying commodities to sustainability impacts. Indeed, the pre-EMIR Refit reporting

[19] This includes sustainability-linked derivatives, derivatives where the underlying assets are selected based on sustainability features (e.g., exposure to sustainability risks or sustainability impacts), emissions trading derivatives, or renewable energy and fuels derivatives. For more on the topic, see https://www.isda.org/a/qRpTE/Overview-of-ESG-related-Derivatives-Products-and-Transactions.pdf.
[20] https://www.esma.europa.eu/sites/default/files/2024-10/ESMA50-43599798-10379_Carbon_markets_report_2024.pdf
[21] Including (1) significant greenhouse gases emissions at the extraction and processing stages, (2) environmental impacts and social disruption related to land use change, water depletion and pollution at the extraction stage, and (3) social impacts stemming from corruption, human rights abuses, including child labour, and injuries or fatalities to workers. See in particular the chapter on the sustainable and responsible development of minerals in IEA (May 2021).
[22] For instance, by introducing 'sustainable' versions of already existing contracts to provide users with the ability to invest in commodities derivatives where the commodities are produced in a more sustainable way, based on the criteria set by the exchange. For more on the topic, see FIA Climate Change Policy Paper_0.pdf.

scheme did not allow for the detailed identification of the commodity underlyings. It would therefore be difficult, if not impossible, to propose any separate CTs for such a category without the adequate visibility on the data.

80. However, ESMA notes that EMIR reporting, as amended by EMIR Refit, now includes a field to identify renewable energy related trades. This means that for the purpose of future analysis based on EMIR Refit data, renewable energy may be looked at and assessed as a separate category.

81. It is worth noting that with regard to the risk of putting barriers to the transition to a green and sustainable economy, ESMA does not have evidence that the current CO and CTs methodology pose any specific problems. However, ESMA will continue monitoring the market, in particular for any potential barriers to sustainable investments, and consider evolutions of the CO where needed.

ESG-resilient commodity derivatives:

82. Market participants are increasingly considering the impact of the sustainability transition on the supply, demand and prices of various commodities. Similar to the rest of the economy, commodities are exposed to transition and physical climate risks. The energy transition will put upward pressure on the demand of commodities needed for a climate neutral economy (e.g. renewable energy, critical minerals essential for clean energy technologies)[23]. At the same time, it is also clear that the transition will put downward pressure on the demand for other commodities associated with high greenhouse gases (GHG) emissions (e.g. fossil fuels and energy powered based on fossil fuels)[24]. With regard to physical risks, certain commodities are also expected to come under increased climate stress[25].

83. With regard to the commodities most exposed to transition risks – oil, natural gas, coal – ESMA looked into uncleared positions for various fossil commodity derivatives to better understand the level of concentration and the distribution of counterparties and notional (see Annex II). Beyond this focus on fossil fuels, there appears to be limitations in terms of historical data available to ESMA to allow for the design of new CTs taking into consideration the exposure of the underlying commodities to sustainability risks which makes it difficult to propose any separate CTs for such category without the adequate data visibility.

[23] IEA. The Role of Critical Minerals in Clean Energy Transitions. May 2021. https://www.iea.org/reports/the-role-of-critical-minerals-in-clean-energy-transitions.

[24] Under EMIR REFIT, from 29 April 2024 counterparties will start reporting information that will allow for the specific identification of commodity derivative transaction where the underlying asset is renewable energy, which is not currently possible.

[25] PwC analysis on Physical risks to key commodities. April 30, 2024.

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.**

Commodity derivatives based on crypto-features

84. Lastly, Recital 21 also invites ESMA to consider more granularity for commodity derivatives based on crypto-related features. In this context, it is worth recalling that any other derivatives, not belonging to the interest rate, credit, equity, FX or commodity categories, is currently captured by the fifth 'catch-all' category i.e. commodity and other derivatives.

85. While ESMA acknowledges that trading in crypto derivatives may have increased compared to the moment when the different categories of CTs were established, where the fifth category was mainly designed for commodity derivatives, there appear to be some limitations in terms of historic data currently available to ESMA as the pre-EMIR Refit reporting scheme did not allow for the identification of crypto-related trades. It therefore appears premature, if not impossible, to propose any separate CTs for the crypto-asset category in this CP without the adequate visibility on the data.

86. However, ESMA notes that EMIR reporting, as amended by EMIR Refit, now includes a field to identify crypto-assets related trades. This means that for the purpose of future analysis based on EMIR Refit data, crypto-assets may be looked at and assessed as a separate category.

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.

3 Criteria to establish OTC contracts reducing risks relating to the commercial activity

3.1 Background and mandate

87. Article 10(4)(a) of EMIR requires ESMA to develop draft RTS to specify "*the criteria for establishing which OTC derivative contracts are objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity*".

88. These criteria have been already defined in Article 10 of Commission Delegated Regulation (EU) No 149/2013, as follows:

“*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:*

(a) it covers the risks arising from the potential change in the value of assets, services, inputs, products, commodities 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;

(b) it covers the risks arising from the potential indirect impact on the value of assets, services, inputs, products, commodities or liabilities referred to in point (a), resulting from fluctuation of interest rates, inflation rates, foreign exchange rates or credit risk;

(c) it qualifies as a hedging contract pursuant to International Financial Reporting Standards (IFRS) adopted in accordance with Article 3 of Regulation (EC) No 1606/2002 of the European Parliament and of the Council.”.

89. They have also been further clarified through questions and answers published by ESMA[26].

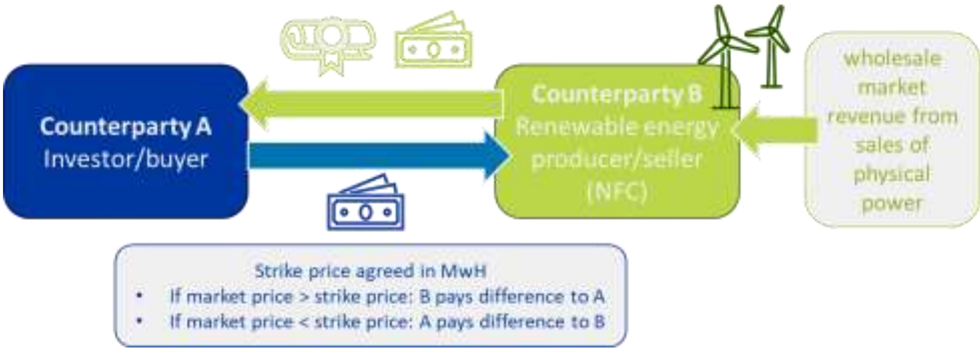
3.2 Analysis and proposals

90. ESMA considers that this framework already provides for a clear view of which contracts can be considered “risk reducing transactions” under EMIR. However, certain parts of the industry have raised concerns over the qualification as a hedge of a certain type of contractual arrangements, namely, renewable financial or virtual power purchase agreements (PPAs). Furthermore, as the EC has identified the use of PPAs as pivotal to achieving greater price stability in energy costs it appears that barriers for their use should be reduced, including, where possible, regulatory barriers[27].

[26] EMIR Q&As are available via the Q&A webpage on ESMA’s website: Questions and Answers

[27] Cf. Action Plan for Affordable Energy, Action 2 a), p. 10 (COM/2025/79 of 26.2.2025, 7e2e6198-b6b8-46fe-b263-984b437da3ab_en) and The Clean Industrial Deal: A joint roadmap for competitiveness and decarbonisation, 2.1 p. 3-4, (COM/2025/85, 9db1c5c8-9e82-467b-ab6a-905feeb4b6b0_en), see in particular: “*A fast increase of Power-Purchase*

91. Such arrangements are financially settled long-term contracts concluded between two counterparties, usually with the objective of providing long-term stable income to one of them (a renewable energy producer, an NFC) while the other counterparty might get the guarantees of origin of the renewable energy (certificates). These contracts take the form of a financial contract (generally analysed as a fix-for-floating swap or a contract for difference, as per MiFID II categories).



92. As such, they are derivative contracts covered by EMIR. Therefore, if not considered a "hedge", the position resulting from a financial PPA would count towards the CTs of an NFC.

93. In December 2023, the EC provided the following answer to the question "*Can virtual power purchase agreements be considered as "risk reducing transactions" under EMIR?*":

"*In general, a transaction through which a counterparty A takes on market risk to allow counterparty B to hedge risk related to counterparty's B commercial activity cannot be considered as "risk reducing" under EMIR for counterparty A.*

Assuming counterparty A ('the buyer') buys the environmental attributes and benefits associated with the renewable energy generated by counterparty B ('the seller') through a virtual power purchase agreement (PPA), counterparty B may claim that the virtual PPA is objectively measurable as reducing risks directly relating to its commercial activity, assuming its main commercial activity is to produce renewable energy and the virtual PPA provides a stable long-term financial income to compensate from the variable output of renewable energy production.

With regard to counterparty A, and subject to compliance with other legislative texts such as Directive 2014/65/EU of the European Parliament and of the Council (MiFID), and in

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Agreements (PPAs), including cross-border PPAs, and Contracts for Difference (CfDs) is key to making clean energy production more attractive for industrial users and final energy bills less dependent on volatile fossil fuels in short term markets."

particular with the ancillary activity exemption therein, the provision of a hedge through a virtual PPA may be considered as directly related to the commercial activity of counterparty A.

In accordance with Article 10 of Commission Delegated Regulation (EU) No 149/2013, a derivatives contract concluded by counterparty A to offset risks resulting from the virtual PPA concluded with counterparty B could be considered as "risk reducing" under EMIR and therefore the resulting position in those derivatives does not have to be included in the calculation of counterparty A's position towards the clearing thresholds.

Hedging strategies have to be well documented and need to be supplemented by evidence of the actual risk directly related to the commercial or treasury financing activity that the contract is covering."

94. ESMA understands from discussions with its consultative working group (CWG) that these virtual PPAs can add up quickly in terms of contribution to the overall OTC position towards the CTs. Notably, energy producers who are interested in entering into such virtual PPAs (as an investment in green energy production, in other markets, etc. and who would be acting as Counterparty A in the above graph) thus have to take into account the CT calculation when considering whether to enter into these virtual PPAs.

95. As the Q&A from the EC clarifies the situation of virtual PPAs with the current framework, ESMA would like to hear from stakeholders if the definition of hedging should also take into account, from the perspective of NFCs (in particular energy producers) that are acting as Counterparty A in the above graph, the cases of virtual PPAs and of the derivative contracts concluded to offset risks resulting from such virtual PPAs. If so, it would be useful to receive suggestions as to how the provisions of Article 10 of Commission Delegated Regulation (EU) No 149/2013 could be modified, in line with Level 1.

96. Besides virtual PPAs, ESMA would also like to understand from stakeholders whether the hedging provisions should also consider other aspects or cases.

97. As a result, for the purpose of this public consultation, input is requested from stakeholders, and no amendment is proposed to Article 10 of Commission Delegated Regulation (EU) No 149/2013 at this stage.

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.

4 Mechanisms triggering the review of the CTs

4.1 Background and mandate

98. Article 10(4)(c) of EMIR requires ESMA to develop draft RTS to specify "*the mechanisms triggering a review of the values of the clearing thresholds, following significant price fluctuations in the underlying class of OTC derivatives or a significant increase of financial stability risks*".

99. Such mechanism would trigger a review of the CTs as foreseen in new Article 10(4a) of EMIR: "*ESMA, in consultation with the ESRB, shall review the clearing thresholds referred to in paragraph 4, first subparagraph, point (b), of this Article and in Article 4a(4), taking into account, in particular, the interconnectedness of financial counterparties and the need to ensure the prudent coverage of financial counterparties under the clearing obligation. That review shall be conducted at least every two years, or earlier where necessary or where required under the mechanisms established under paragraph 4, first subparagraph, point (c). As a result of that review, ESMA may, in the regulatory technical standards adopted pursuant to paragraph 4, propose changes to the thresholds specified in the first subparagraph, point (b), of that paragraph. When reviewing the clearing thresholds, ESMA shall consider whether the classes of OTC derivatives, for which a clearing threshold has been set, are still the relevant classes of OTC derivatives or if new classes should be introduced. That periodic review shall be accompanied by a report by ESMA on the subject*."

100. ESMA understands that the introduction of such mechanisms follows from the recent experience during the 2022 energy crisis which was characterised by a spike in prices and led to the modification of the value of the CT for commodity derivatives.

101. It is however noted that CTs are not a very dynamic type of tool (as they are computed on the basis of the activity over the past 12 months), and thus not a way to manage a sudden crisis. Furthermore, some members from the CWG have indicated that stability in the level of the CTs is also an important aspect to maintain. In addition, should the CTs be reviewed further to the trigger mechanism, it would be necessary to make sure that counterparties have sufficient time to adapt. At the same time, any review of the CTs would go via the RTS amendment procedure and thus would already give a strong indication of what could be the new levels of the CTs ahead of full legal certainty when the Commission Delegated Regulation is adopted and published in the Official Journal. It is therefore clear that such trigger mechanism should not be considered as an emergency mechanism, but rather as a more organised way to envisage a review of the CTs.

4.2 Analysis and proposals

102. ESMA is of the view that any mechanism defined here should be of a more qualitative nature and leave a certain degree of judgement for ESMA to determine whether there should be a revision of the CTs, based on a careful assessment of the situation. Such trigger mechanism would therefore not be based on strict quantitative thresholds in terms of price fluctuations in the derivatives underlying or increase of financial stability risks, to avoid a mechanistic approach, and implement instead a risk-based trigger approach.

103. ESMA's proposal is to monitor and assess, together with the national authorities and with the European Systemic Risk Board (ESRB), the evolution of the prices of underlying assets of each class of OTC derivatives that is concerned by clearing thresholds (interest rates derivatives, credit derivatives, equity derivatives, foreign exchange derivatives, commodity derivatives). In addition, the assessment of financial stability risks could be based on the indicators developed for the purpose of ESMA's Report on Trends, Risks and Vulnerabilities, which is published twice per year under Article 32 of ESMA Regulation[28]. These indicators notably include the inflation rate, the global financial conditions, and the geopolitical and economic policy uncertainties.

104. In that respect, please see in Annex I the proposed new Article 11b.

105. The trigger to launch a review process would be the identification by ESMA, in coordination with the NCAs, and after having consulted the ESRB and other relevant authorities, of a significant change in the evolution of the indicators.

Q10: Do you have any comment on proposed new Article 11b? Do you consider other indicators should be monitored and assessed? If yes, please specify and if possible provide drafting suggestion.

[28] Article 32 'Assessment of market developments, including stress tests', '1. *The Authority shall monitor and assess market developments in the area of its competence and, where necessary, inform the European Supervisory Authority (European Banking Authority), and the European Supervisory Authority (European Insurance and Occupational Pensions Authority), the European Systemic Risk Board, and the European Parliament, the Council and the Commission about the relevant microprudential trends, potential risks and vulnerabilities. The Authority shall include in its assessments an analysis of the markets in which financial market participants operate and an assessment of the impact of potential market developments on such financial market participants.' The information contained in this publication, including text, charts, and data, exclusively serves analytical purposes. It does not provide forecasts or investment advice, nor does it prejudice, preclude or influence in any way past, existing, or future regulatory or supervisory obligations by market participants.*

5 Annex

5.1 Annex I – Amendments to Commission Delegated Regulation (EU) No 149/2013

COMMISSION DELEGATED REGULATION (EU) …/…

of XXX

amending Commission Delegated Regulation (EU) No 149/2013 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivatives contracts not cleared by a CCP

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (1), and in particular Article 4a(4), fourth sub-paragraph, and Article 10(4), third sub-paragraph, thereof

Whereas:

(1) Commission Delegated Regulation (EU) No 149/2013 specifies, among others, the values of the clearing thresholds for the purpose of the clearing obligation as well as some criteria for establishing which OTC derivative contracts are objectively reducing risks.

(2) To assess whether they exceeed the clearing thresholds, under Regulation (EU) No 648/2012, as amended by Regulation (EU) 2024/2987, financial counterparties and non-financial counterparties calculate their positions in uncleared OTC derivatives contracts and compare it with the uncleared clearing thresholds. In addition, financial counterparties also calculate their aggregate positions in cleared and uncleared OTC derivatives position and compare it against the aggregate thresholds.

(3) The aggregate thresholds are only relevant for financial counterparties. While these counterparties are still subject to the thresholds applicable to OTC uncleared positions,

it would be necessary to set aggregate thresholds in order to ensure a prudent coverage of counterparties subject to the clearing obligation. More precisely, in order not to leave out of scope of the clearing obligation counterparties having large cleared portfolios as long as they would remain under the uncleared thresholds, the aggregate thresholds should only apply to the asset classes which are subect to the clearing obligation in accordance with Article 4 of Regulation (EU) No 648/2012 and outlined in Commission Delegated Regulation (EU) 2015/2205, Commission Delegated Regulation (EU) 2016/1178 and Commission Delegated Regulation (EU) 2016/592. As a consequence, the aggregate clearing thresholds should therefore only apply to positions held in OTC interest rate derivatives and to positions held in OTC credit derivatives. The aggregate clearing thresholds for OTC equity derivatives, OTC foreign exchange derivatives and OTC commodity derivatives should therefore no longer appy.

(4) The amendement in the calculation methodology calls for a calibration of thresholds for uncleared OTC derivatives applying to both financial and non-financial counterparties. Notably, based on elements such as the systemic relevance of the sum of net positions and exposures per counterparty and per class of OTC derivatives, the uncleared thresholds are set separately for interest rate, credit, equity, foreign exchange as well as commodity and emission allowance derivatives with the intention to ensure a prudent coverage of financial and non-financial counterparties subject to the clearing obligation. The bucket including commodity derivatives should no longer encompass other derivatives but should only refer to commodity derivative and emission allowance derivatives contracts in order to align with the relevant reporting requirements.

(5) The trigger to launch a review of the clearing thresholds should result from the identification by the European Securities and Markets Authority (ESMA) of a significant change in the evolution of the prices of the underlying class of OTC derivatives or of financial stability risks. These significant changes would be identified by ESMA when periodically assessing the market prices of the relevant underlyings and indicators such as those used to monitor market developments under Article 32 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council[29].

(6) Commission Delegated Regulation (EU) No 149/2013 should therefore be amended accordingly.

(7) This Regulation is based on the draft regulatory technical standards submitted to the European Commission by ESMA.

(8) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010,

[29] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84–119).
.

HAS ADOPTED THIS REGULATION:

Article 1

Delegated Regulation (EU) No 149/2013 is amended as follows:

(1) Article 11 is replaced by the following:

'*Article 11*

(Article 4a(4) of Regulation (EU) No 648/2012)

Clearing thresholds for aggregate positions

The clearing thresholds values applicable to aggregate positions for the purpose of the clearing obligation shall be:

(a) EUR 1 billion in gross notional value for OTC credit derivative contracts;

(b) EUR 3 billion in gross notional value for OTC interest rate derivative contracts';

(2) the following articles are inserted:

'*Article 11a*

(Article 10(4)(b) of Regulation (EU) No 648/2012)

Clearing thresholds for uncleared positions

The clearing thresholds values applicable to uncleared positions for the purpose of the clearing obligation shall be:

(a) EUR 0.7 billion in gross notional value for uncleared OTC credit derivative contracts;

(b) EUR 0.7 billion in gross notional value for uncleared OTC equity derivative contracts;

(c) EUR 1.8 billion in gross notional value for uncleared OTC interest rate derivative contracts;

(d) EUR 3 billion in gross notional value for uncleared OTC foreign exchange derivative contracts;

(e) EUR 3 billion in gross notional value for uncleared OTC commodity derivative and emission allowance derivative contracts;

Article 11b

(Article 10(4)(c) of Regulation (EU) No 648/2012)

Mechanisms triggering a review of the values of the clearing thresholds

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.'

Article 2

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

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President

5.2 Annex II – Statistics on uncleared OTC derivatives

In addition to the statistics on the coverage based on the methodology which considers the level of overall OTC derivative activity (both cleared and uncleared positions) presented in section 2.2.3, ESMA also looked, for the commodity derivatives sub-asset classes, at some statistics based on the level of uncleared trades only, in order to have an overview of the uncleared derivatives market at a more granular level. The statistics in that section are based on the 12-month average notional reported by EEA counterparties to TRs over the 1 May 2023 – 30 April 2024 period.

In light of Recital 21 of EMIR 3 inviting ESMA to consider more granular thresholds for commodity derivatives, the analysis looks at the commodity derivatives sub-asset classes individually. The analysis is carried out at group level for FCs (with the caveat of funds being computed at the level of the fund) and at entity level for NFCs.

In the spirit of not overloading the CP with too many graphs and charts not strictly related to the calibration of the thresholds, this is included in the Annex and not in the main body of the CP.

CO Agricultural products

The data reported to TR show that there are 197 FCs and 213 NFCs reporting positions in agricultural products commodity derivatives. The overall average notional reported over the 12-months period in scope of the observation for this sub-asset class is equal to 57,3 billion EUR with the great majority of the notional is held by FCs (95%).

In terms of concentration, the data suggest that the top 10 entities (9 FCs and 1 NFCs) hold 95% of the notional in uncleared OTC commodity agricultural derivatives.

CO Coal

The data reported to TR show that there are 23 FCs and 55 NFCs reporting positions in coal commodity derivatives. The overall average notional reported over the 12-months period in scope of the observation for this sub-asset class is equal to 35,7 billion with the great majority of the notional is held by FCs (97%)

In terms of concentration, the data suggest that the top 10 entities (8 FCs and 2 NFCs) hold 97% of the notional in uncleared OTC coal commodity derivatives.

CO Emission allowances and derivatives on emission allowance

The data reported to TR show that there are 66 FCs and 247 NFCs reporting positions in emission allowances and derivatives on emission allowance. The overall average notional reported over the 12-months period in scope of the observation for this sub-asset class is equal to 65,7 billion EUR with the great majority of the notional is held by FCs (80%)

In terms of concentration, the data suggest that the top 10 entities (9 FCs and 1 NFCs) hold 74% of the notional in uncleared OTC emission allowances and derivatives on emission allowance.

CO Gas

The data reported to TR show that there are 189 FCs and 259 NFCs reporting positions in gas commodity derivatives. The overall average notional reported over the 12-months period in scope of the observation for this sub-asset class is equal to 163,2 billion EUR with the great majority of the notional is held by FCs (68%).

In terms of concentration, the data suggest that the top 10 entities (6 FCs and 4 NFCs) hold 83% of the notional in uncleared OTC gas commodity derivatives.

CO Metals

The data reported to TR show that there are 412 FCs and 788 NFCs reporting positions in metals commodity derivatives. The overall average notional reported over the 12-months period in scope of the observation for this sub-asset class is equal to 465,3 billion EUR with the great majority of the notional being held by FCs (98%).

In terms of concentration, the data suggest that the top 10 entities (all FCs) hold 90% of the notional in uncleared OTC metals commodity derivatives.

CO Oil and oil products

The data reported to TR show that there are 316 FCs and 627 NFCs reporting positions in oil and oil products commodity derivatives. The overall average notional reported over the 12-months period in scope of the observation for this sub-asset class is equal to 245,8 billion EUR with the great majority of notional being held by FCs (93%).

In terms of concentration, the data suggest that the top 10 entities (all FCs) hold 79% of the notional in uncleared OTC oil and oil products commodity derivatives.

CO Other commodities

The data reported to TR show that there are 708 FCs and 417 NFCs reporting positions in other commodity derivatives. The overall average notional reported over the 12-months period in scope of the observation for this sub-asset class is equal to 196,3 billion EUR with the great majority of the notional being held by FCs (94%).

In terms of concentration, the data suggest that the top 10 entities (all FCs) hold 70% of the notional in uncleared OTC

CO Power

The data reported to TR show that there are 40 FCs and 556 NFCs reporting positions in power commodity derivatives. The overall average notional reported over the 12-months period in scope of the observation for this sub-asset class is equal to 77 billion EUR with the great majority of the notional being held by NFCs (54%).

In terms of concentration, the data suggest that the top 10 entities (4 FCs and 6 NFCs) hold 62% of the notional in uncleared OTC power commodity derivatives.

CO Seafood

The data reported to TR show that there is only one FC reporting positions in seafood commodity derivatives and that the overall average notional reported over the 12-months period in scope of the observation for this sub-asset class is equal to 388,3 million EUR.

5.3 Annex III – Representation of the EMIR reporting fields

Use of EMIR reporting fields for the ESMA data analysis in Section 2.2

For the purpose of the data analysis presented in the CP, and for the calculation of the positions assessed against the CTs, ESMA based its observations on the use of the following fields:

- **Reporting Counterparty ID (Table 1 Field 2):** This field is used to identify and exclude LEIs that should be exempted from the analysis, such as central banks and ministries of finance/treasury.

- **Nature of the reporting counterparty (Table 1 Field 4):** This field is used to determine whether the counterparty is Financial or Non-Financial.

- **Directly linked to commercial activity or treasury financing (Table 1 Field 15):** This field is used to identify hedging by NFCs.

- **Asset class (Table 2 Field 2):** This field is used to identify the asset class of the underlying security.

- **Trading venue (Table 2 Field 8):** This field is used to identify if the transaction is OTC or ETD.

- **Notional currency 1 (Table 2 Field 9):** This is used to identify the currency of the notional amount.

- **Notional (Table 2 Field 20):** The notional amount of the transaction.

- **Cleared (Table 2 Field 35):** This field is used to identify cleared and uncleared transactions.

- **Intragroup (Table 2 Field 38):** This field is used to enhance group information in conjunction with GLEIF Level 2 information.

- **Commodity base (Table 2 Field 65):** This field is used to further categorize commodity derivatives using the RTS 20 commodity categories.

- **Commodity details (Table 2 Field 66):** This field is used to further categorize commodity derivatives using the RTS 20 commodity categories.

5.4 Annex IV – Summary of Questions

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.

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.

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.

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.

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.

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

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.

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.

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.

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