

EACT's Response to the consultation on Clearing Thresholds under EMIR

Introductory comments

Representing the European economy, the European Associations of Corporate Treasurers (EACT) brings together 14,000 corporate treasury professionals active in 26 countries and working for around 6,750 individual non-financial companies. Corporate treasurers are the finance professionals of the real economy.

Derivatives are a key tool for corporates to manage and reduce commercial risks. EU authorities have long recognised the importance to preserve the ability of corporates to use those instruments – and to avoid forcing non-financial companies to divest cash to post as margin if they were mandated to centrally clear.

As corporate treasurers, we hedge our commercial risks- and this ability to hedge has been even more important to our businesses in the recent turbulent times we have faced. The ability for EU corporates to hedge appropriately is key to our competitiveness with global players. Our experience has shown that the current thresholds already reflect an appropriate balance between risk mitigation and flexibility for corporates (i.e. the real economy).

While the EMIR 3 reforms and ESMA's proposed technical standards aim to enhance the prudence and proportionality of the clearing obligation, the recalibration of thresholds and the shift in calculation methodology could have several unintended consequences for non-financial counterparties. These include a disproportionate regulatory burden, challenges in risk management, reduced flexibility for European businesses, and increased compliance risks. It is therefore crucial that the final regime carefully balances the objectives of systemic risk mitigation with the practical realities faced by NFCs, ensuring that regulation remains targeted, proportionate, and does not unduly hinder legitimate commercial activity.

In this context, we would like to express our support for the current definition of hedging. Economic uncertainty of the recent years on so many fronts (energy crisis, war, inflation, pandemic, supply chain disruption) is the perfect illustration of why EU businesses need to have efficient hedging strategies by using derivatives products. It is essential for the viability of our business operations. If a company can no longer have a proactive hedging strategy, the results would be dramatic in terms of economic volatility.

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.

We understand the rationale of the new calculation, which aims to consider only uncleared positions, as centrally cleared transactions no longer present systemic risk. Nevertheless, it is important to note that NFCs making limited use of voluntary or mandatory clearing, because of the cash impact it would have on them, are more significantly impacted by the lowering of the clearing thresholds. This development could therefore have a disproportionate effect on NFCs, which may become subject to the clearing obligation even though their risk profile has not fundamentally changed.

Lowering thresholds could end up imposing a disproportionate burden on corporates that, unlike some financial institutions, do not pose any systemic risk. Apart from these potential costs (operational, administrative, etc.), corporates could also end up having liquidity problems (or other unintended consequences) due to clearing, that would translate into less financial stability (opposite to what is presumably intended by lowering thresholds). We believe any reduction of the thresholds would unduly penalize non-systemic participants (corporates) which could translate (in case of clearing) into lower investment and job creation, offering limited or no value added.

We would also like to note that the current clearing thresholds have not yet been adjusted for inflation, with the exception of commodity derivatives which were adjusted in 2022. Therefore, we strongly encourage ESMA to adapt to the thresholds considering the high Eurozone inflation over the past years or at least to maintain the current level of the thresholds.

Regarding specific asset classes:

- We note that the clearing threshold for commodities is returning to its historical pre-2022 level. Although commodity prices have decreased since the peaks observed during the energy crisis, price regimes have not reverted to pre-2022 levels. Therefore, it would be preferable to maintain the current threshold.
- With respect to interest rate derivatives (IRDs), we note a very significant reduction in the proposed threshold. It is important to highlight that interest rate levels remain high and volatile, justifying active risk management, especially as monetary policies appear to be diverging across jurisdictions. This, combined with the fact that certain risk diversification strategies do not always benefit from hedge accounting treatment allowing for their easy exclusion from calculations, makes it preferable to maintain the existing thresholds

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.

Yes, we agree not to introduce separate thresholds for the various commodity derivatives sub-asset classes to avoid additional complexity and administrative burden for non-financial entities.

Q5: Do you agree with ESMA's proposal to have in the fifth bucket only commodity and emission allowance derivatives? Or do you consider that commodity derivatives should be singled out as a stand-alone category and another category for emission allowance derivatives introduced? Please elaborate.

We support the proposal to group commodity derivatives and emission allowance derivatives within a single bucket, in line with the EMIR Refit reporting structure. This approach simplifies classification and limits the operational burden for counterparties. Further distinction does not appear justified or beneficial at this stage, unless there is a significant evolution in the markets or associated risks.

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

Yes, it is appropriate not to introduce a sixth category for other derivatives at this stage. Creating a new category would further complicate the process of position calculation and compliance for non-financial entities. It would add complexity without clear benefit, given the limited maturity or volume

of the products concerned. This question could be revisited in the future if market developments so warrant.

Q7: Do you agree with ESMA's proposal not to introduce more granular thresholds for commodity derivatives based on ESG factors at this stage? If not, please elaborate.

We agree with the proposal not to introduce more granular thresholds for commodity derivatives based on ESG criteria at this stage. The lack of visibility and the diversity of market practices do not allow for the identification of specific needs for differentiation. However, it will be important to monitor market developments and to reassess this question in the future, particularly in light of new EMIR Refit reporting obligations.

Q8: Do you agree with ESMA's proposal not to introduce more granular thresholds for commodity derivatives based on crypto-related features at this stage? If not, please elaborate.

We agree with the proposal not to introduce more granular thresholds for commodity derivatives based on crypto-related features at this stage, given the lack of visibility and maturity of this market.

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.

We strongly welcome the proposal to clarify the status of Virtual Power Purchase Agreements (VPPA) or Power Purchase Agreements (PPA) as hedging instruments. For counterparty B (an energy producer or seller), this qualification is fully justified and reflects the economic reality of the sector.

We would also like to emphasise that, for counterparty A, where it is an end-user company purchasing energy for its own needs, the hedging qualification should also apply. We would welcome further clarification on this point. These companies use PPAs as a tool to reduce their risk related to energy purchase price fluctuations, by securing a fixed price over the contract term. Such recognition would encourage companies to make greater use of these contracts, which would support the energy transition and supply security (as also referenced in the Power Market Design analysis, where the use of PPAs is clearly indicated as a volatility management, and therefore hedging, instrument). It would therefore be appropriate to specify that PPAs or VPPAs entered into by end-users for their own consumption are eligible for hedging treatment, subject to appropriate documentation of the hedged risk.

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

The qualitative approach to triggering a review of the thresholds is welcome, as it enhances the competitiveness and responsiveness of the regulator for the benefit of European companies. However, it would be useful to better define the concept of "fluctuation" through objective and descriptive criteria (for example, a minimum price amplitude on a given period), in order to ensure transparency and predictability. Finally, the addition of indicators specific to certain markets (such as energy market volatility) and the involvement of stakeholders would further strengthen the relevance of the framework.