CMCE response to ESMA's consultation paper on draft technical standards amending Regulation (EU) 149/2013 to further detail the new EMIR clearing thresholds regime

16 June 2025

Opening remarks

The Commodity Markets Council Europe (CMCE) welcomes the opportunity to respond to ESMA's consultation on the draft technical standards amending Commission Delegated Regulation (EU) No 149/2013 to reflect the revised EMIR clearing thresholds (CT) regime.

CMCE represents a wide range of firms active in European commodity derivatives markets, including commodity trading companies, energy firms, utilities, and trading venues. Our members play a critical role in the functioning of physical supply chains, energy security, and the transition to a low-carbon economy. Many of these firms are non-financial counterparties (NFCs) who use derivatives to hedge commercial risks linked to the production, transportation, and delivery of essential goods and energy.

We support the overarching objectives of EMIR 3 to enhance transparency and systemic risk oversight in derivatives markets, and we appreciate ESMA's efforts to update the CT regime in a way that is consistent with those goals. However, we strongly advocate for a proportionate, evidence-based, and context-sensitive calibration of thresholds, particularly for commodity derivatives, that takes into account the distinctive features of these markets and the real economy functions they serve.

CMCE supports a flexible approach to the timing of application of the new CT calculation methodology, recognising differing operational preferences between NFCs and FCs. In particular, we advocate for the inclusion of an option allowing, but not requiring, NFCs to apply the new methodology as soon as the RTS enters into force, while also providing for a harmonised application date aligned with the existing annual calculation cycle to support a smoother transition for other counterparties. This is with the understanding that previous calculations on which existing threshold positions have been established at the time of the change will not be affected, and that the new methodology would apply only to calculations to be made after the changes come into force. In addition, CMCE would welcome clarification in ESMA's Q&As (specifically OTC Q&A 4) that the entry into force of the new RTS does not trigger an automatic requirement for counterparties to re-confirm their EMIR status. For NFCs opting to adopt the new methodology immediately, the responsibility should rest with them to inform counterparties if their classification changes. We believe this approach would minimise operational burdens while preserving legal certainty

In this response, CMCE supports the continued exclusion of commodity derivatives from the aggregate threshold regime, opposes the proposed reduction of the uncleared threshold for commodity derivatives, and welcome the introduction an additional category for emission allowance derivatives. We also outline our position on the composition of the fifth bucket, the need to avoid unnecessary granularity at this stage, and the importance of ensuring stability and legal certainty for market participants adapting to wider regulatory changes under EMIR 3.

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.

CMCE answer

Yes, we strongly support ESMA's proposal to limit aggregate thresholds to asset classes currently subject to the clearing obligation, namely interest rate and credit derivatives. This approach is proportionate, consistent with the risk mitigation objectives of EMIR, and avoids unnecessary expansion of obligations into markets, such as commodity derivatives, where systemic risk is significantly lower and the clearing obligation does not apply. Commodity derivatives are fundamentally tied to physical supply chains and commercial hedging activity. They do not present the same systemic concentration risks that EMIR's clearing mandate was designed to address. Extending aggregate thresholds would increase compliance burdens without materially improving market stability.

We agree with ESMA that the introduction of an aggregate threshold serves a clear supervisory purpose for centrally cleared asset classes where significant notional volumes could otherwise be overlooked if only uncleared positions were considered. This logic does not translate to commodity derivatives, which are not covered by the clearing obligation and are predominantly used by non-financial counterparties to hedge and manage physical exposures. ESMA itself acknowledges in its analysis that only 0.2% of NFCs exceed the commodity derivative clearing threshold and that these NFCs represent just 13% of notional traded in that class. This reinforces that systemic risk is limited and does not warrant an expansion of the aggregate threshold regime to commodity markets. As such, the continued exclusion of commodity derivatives from the aggregate threshold regime is appropriate and justified.

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.

CMCE answer

Yes. The existing thresholds have been effective in targeting systemically important activity while avoiding undue regulatory pressure on market participants. They have proven effective in identifying counterparties engaged in systemically important activity, while avoiding unnecessary regulatory pressure on a broader range of market participants. Maintaining these thresholds provides legal certainty and regulatory continuity, which is especially important as market participants adapt to the broader EMIR 3 reforms. Furthermore, we note that these thresholds have remained unchanged since their introduction under the original EMIR framework. In the absence of evidence that they are insufficient, and given that they already capture over 90% of relevant notional traded in the asset classes concerned, there is no justification for recalibration at this time.

Several CMCE members point out that, if anything, the thresholds might warrant upward revision in future to reflect the growth of financial markets and the impact of inflation over the past decade. Furthermore, a stable and proportionate threshold framework is essential to ensuring the competitiveness of European financial and commodity markets, particularly at a time when commodity trading plays a key role in securing crucial liquidity and financing. Any reconsideration of the thresholds must therefore take into account not only financial stability but also the broader economic and policy environment in which these markets operate.

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.

CMCE answer

We do not agree with the proposed reduction of the uncleared threshold for commodity derivatives from €4 billion to €3 billion.

This change would materially increase the compliance burden on non-financial counterparties that rely on OTC commodity derivatives for the management of commercial businesses. It risks capturing a wider range of firms whose activities do not pose systemic risk, contrary to the intended scope of EMIR.

ESMA has not provided a sufficiently clear rationale for reducing the threshold or for reversing the relatively recent decision to increase the threshold from 3bn to 4bn in September 2022, following a period of sustained inflation in commodity prices. The proposed adjustment appears to be a mechanical outcome of the new methodology, rather than a policy-based decision grounded in new evidence of risk. Although, EMIR 3 explicitly invites a recalibration that maintains prudent coverage, this should not equate to tightening the regime without strong justification.

The current €4 billion threshold is well-understood and already captures relevant risk. In fact, at the time the threshold was increased to 4bn, the commodity sector indicated that this was not nearly a sufficient increase, given the historic price inflation since EMIR was first introduced, to maintain the economic position first set by EMIR.

It should also be noted that non-financial groups in the commodity sector often centralise their derivative trading activities through a single legal entity. This single entity trades with the external market in uncleared OTC derivatives trading activity on behalf of the group. Due to this set-up, the practical effect of the amended requirements of EMIR 3 for NFCs (i.e. taking into account only uncleared OTC transactions on a single entity basis) may be negligible. As a result, the proposed amendment of the commodity derivatives CT to €3 billion (down from €4 billion) would represent a significant reduction in the amount of trading activity that a group with an EU-established single trading entity could undertake without risking becoming an NFC+ (which would impose significant additional costs and administrative burdens). The risk of becoming an NFC+ is particularly problematic because going over the CT in the commodity derivative asset class brings all uncleared OTC derivatives of all asset classes into scope of uncleared margin requirements, even where transactions are for hedging purposes.

A reduction now would:

- Overreach: It could unintentionally capture legitimate NFCs, such as commodity traders and industrial hedgers, whose activities are essential for price stability and physical market functioning.
- Volatility effects: Firms could be pushed over the threshold due to temporary market price spikes, rather than any increase in trading volume or counterparty risk.
- Reduced liquidity: Lowering the threshold may disincentivise use of the OTC market, leading to reduced liquidity and increased costs, with knock-on effects on pricing and hedging efficiency. Increased costs would ultimately filter down to the end-consumer.
- Misalignment with policy objectives: Many firms use commodity and emissions derivatives to manage exposures linked to the energy transition. A lower threshold could create barriers to effective risk management in sectors critical to delivering EU climate and energy goals and potentially constrain participation in emissions trading schemes.
- Competitiveness concerns: European commodity markets must remain globally competitive. Imposing additional regulatory burdens without compelling justification could undermine EU commodity traders' ability to serve global supply chains and mobilise capital for transition finance. The effect of the NFC+ classification is magnified for those non-financial entities with large hedging requirements (such as commodity firms) which would put EU entities at a significant competitive

disadvantage to non-financials from other jurisdictions and could disincentivise hedging for those over the CT.

CMCE members are unanimous in their opposition to this reduction. While we understand ESMA's aim of preserving the status quo in terms of market coverage, this outcome is best achieved by maintaining the €4 billion threshold, which provides necessary headroom and supports market stability at a time of major structural change. If anything, an upward revision could be more justified, given inflation and market growth since EMIR's adoption.

We therefore recommend that the threshold for uncleared commodity derivatives be increased, if this bucket is to carry emissions too, or at the very least, maintained at €4 billion. This level continues to strike an appropriate balance between risk sensitivity and market functionality, in line with EMIR 3's objectives.

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.

CMCE answer

Yes. We agree with ESMA's proposal to avoid introducing sub-thresholds by commodity type. Such granularity would add operational complexity and reduce flexibility for firms managing exposures across commodity classes. A single threshold enables holistic and efficient risk management and aligns with commercial realities of cross-commodity trading.

Commodity trading firms and industrial end-users often manage integrated portfolios across multiple commodity types. Applying distinct thresholds would fragment risk management, reduce netting efficiency, and significantly increase operational burdens. This would undermine effective hedging practices and introduce artificial constraints on cross-commodity strategies that reflect commercial and physical market realities. Moreover, ESMA's own data analysis confirms that the current single threshold structure already ensures prudent coverage.

Imposing sub-thresholds would send the wrong signal at a time when the EU is seeking to bolster its open strategic autonomy and ensure the availability of robust, flexible risk management tools to support supply chain resilience and the green transition. Any move towards further granularity should be deferred.

We therefore agree with ESMA's position that a single threshold is more proportionate, operationally sound, and fully aligned with the objectives of EMIR 3 and wider EU policy priorities.

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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.
CMCE answer
We support the proposed approach to add another stand-alone category for emission allowance derivatives. As emissions markets grow and diversify, we believe there is a strong case for establishing a threshold equivalent to the commodities threshold for this new category. If this new category is not established then we would strongly advocate increasing the threshold for the commodity bucket above the €4bn level, rather than simply maintaining it. This would better reflect the evolving scale and complexity of activity in these markets and help ensure the categorisation remains fit for purpose without masking differentiated risks. We would also support periodic reassessment to ensure the calibration continues to align with market developments.

Q6: Do you agree with ESMA's proposal not to introduce a sixth bucket for other derivatives at this stage? If not, please elaborate.
CMCE answer
Yes. Introducing an additional bucket for other derivatives at this stage would be premature and potentially counterproductive. It could dilute the clarity and integrity of the current asset class structure and impose administrative burdens without clear justification. If new derivative markets mature, such as for ESG or novel asset classes, any future changes should be carefully considered and remain distinct from the commodity derivatives category.

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.
CMCE answer

Yes. ESG factors are important, but the current regulatory and data frameworks are not yet sufficiently developed to support reliable differentiation of commodity derivatives by sustainability characteristics. Prematurely introducing ESG-based thresholds would increase complexity and create uncertainty without meaningful supervisory benefit. This issue could be revisited once EMIR Refit data offers clearer visibility into ESG-linked contracts.

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.

CMCE answer

Yes. The crypto-derivatives market is still evolving, and current EMIR data is insufficient to justify separate thresholds. We support ESMA's cautious and evidence-based approach. Any future changes should be deferred until the EMIR Refit reporting regime provides adequate visibility into market size, participant behaviour, and systemic relevance.

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.

CMCE answer

We understand the current drafting of Article 10 and believe it remains workable in practice. The existing language, supported by ESMA Q&A and guidance from the European Commission, offers sufficient clarity on what constitutes a risk-reducing transaction. We see no need for amendments at this time .

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

CMCE answer

Yes, we recommend that ESMA incorporate additional flexibility in the threshold review mechanism to account for short-term market stresses, such as those experienced during the energy crisis. In particular:

- Temporary price spikes could cause non-financial counterparties to breach thresholds unintentionally, triggering NFC+ classification and associated clearing and margining obligations.
- Such outcomes are not reflective of underlying risk, and can impose disproportionate compliance burdens.

We propose that ESMA consider:

- A grace period or temporary exemption where breaches are clearly linked to extraordinary but transitory market conditions;
- A mechanism to evaluate volatility and price shocks in threshold reviews, not just notional exposures;
- Inclusion of an implementation period for counterparties newly classified as NFC+, to allow for operational adjustment.

Stability and predictability in the thresholds framework are essential to allow market participants to plan, manage risk, and allocate capital effectively.