

Efficient level 2 measures are needed to achieve EMIR 3.0 goals for resilient markets

Brussels, 14 October 2024 - JEAG welcomes the improvements endorsed by the EU legislators to **the clearing thresholds calculation, the transparency and predictability of margin calls, and the extension of eligible collateral to (uncollateralised) commercial bank guarantees under the European Market Infrastructure Regulation (EMIR 3.0).**

The European Securities and Markets Authority (ESMA) Level 2 measures need to give full effect to these EMIR 3.0 improvements. This is necessary to maintain liquid, competitive, independent and efficient EU energy markets which are key to ensure an affordable, secure and sustainable energy supply.

Key recommendations

- 1. A holistic approach to the clearing threshold calculation in Art. 10 EMIR 3.0 is required to facilitate the EU energy transition.** It is important to use all elements of the regulatory toolbox in the most appropriate manner to support the resilience, sustainability and competitiveness of the EU's energy markets. Together with the entity level calculation adopted in EMIR 3.0, the clearing thresholds should be increased to € 12 billion, and the calculation period reviewed to support a dynamic regulatory approach. At the same time, a review of the definition of risk reducing OTC derivative contracts is required to account for the energy market participant's ("EMPs") contribution to the financial viability of renewable energy projects which are key to a successful energy transition.
- 2. The current approach of an aggregated commodity clearing threshold should be kept.** More granular commodity clearing thresholds would hinder the proper risk warehousing activities of energy market participants and unnecessarily increase complexity including for national competent authorities.
- 3. More transparency of margin calls and availability of simulation tools will foster resilience of markets:** It is critical for energy market participants to have a thorough understanding of ongoing margin requirements and margin calls by Central Counterparties ("CCPs") and Clearing Members ("CMs"). Simulation tools should be promoted, to enable the anticipation of potential changes to margin requirements. These measures combined will improve the EMPs' preparedness for higher and more frequent margin calls in times of market stress.
- 4. Extending eligible collateral to (uncollateralised) commercial bank guarantees will increase market liquidity and EU competitiveness:** Allowing uncollateralised commercial bank guarantees as eligible collateral at CCPs adequately extends the pool of eligible collateral, contributes to the robustness of central clearing and increases EU competitiveness. We offer in the detailed comments below suggestions on how to design them for the best leverage of these tools.

Detailed comments

1. A holistic approach to the EMIR commodity clearing threshold methodology is required to facilitate the EU energy transition

The European Market Infrastructure Regulation (EMIR) plays a crucial role in ensuring the stability and transparency of the derivatives market within the EU. However, as we embark on an ambitious energy transition, it is imperative to adopt a holistic approach to the EMIR commodity clearing threshold methodology whereby every single element of the calculation (such as its scope, its level, its thresholds, etc....) is assessed regarding its effects, in combination with all the others. This approach is essential to ensure alignment with market realities but also to reach the broader objectives of the EU's energy policy.

We certainly welcome the improvements introduced by EMIR 3.0 for Non-Financial counterparties (NFCs), and particularly the entity scope approach to the clearing threshold calculation.

We believe, however, that the clearing threshold should be further increased, as explained in more detail in Section 1.2. Such an increase will create a more robust, liquid, and transparent energy market, which is crucial for supporting the energy transition and enhancing the competitiveness and resilience of European energy markets.

Finally, the existing criteria for defining risk-reducing derivatives, when coupled with a low clearing threshold (CCT), hinder EMPs from adequately meeting the hedging needs of third parties. This limitation restricts their ability to effectively manage and mitigate financial risks, thereby impacting market stability and efficiency. To support the energy sector's evolving requirements, it is essential to reassess and adjust these criteria, ensuring they align with the realities of market participants and facilitate robust risk management practices.

In conclusion, a holistic approach to the EMIR commodity clearing threshold methodology is not just beneficial but necessary to facilitate the EU energy transition. By addressing the unique needs of the energy market and aligning regulatory objectives, this approach can support the EU's goals of achieving a sustainable, secure, and competitive energy future.

1.1. EMIR clearing threshold calculation by EU based firms only

The updated wording of Article 10 (3) states that the *“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”*. As per Article 2(9), a “non-financial counterparty” is explicitly defined as *“an undertaking established in the Union”*. This amendment reflects the clear intention of the EU co-legislators to intentionally shift the clearing threshold calculation from a consolidated group level, including all “non-financial entities” belonging to a corporate group, to a separate calculation of only EU established “non-financial counterparties”. This is achieved by (i) adopting the defined term “non-financial counterparty” to describe the scope of the EMIR

CCT calculations and by (ii) deleting the reference to “*other non-financial entities within the group to which the non-financial counterparty belongs*”. At the same time and in line with the current EMIR, Article 10(3) fully recognizes the organisational needs of EU corporate groups by maintaining the ability of European NFCs to centrally hedge the risks relating to the commercial and treasury financing activities (in particular commodity, foreign exchange (FX) and interest rate (IR)) of their entire corporate group.

1.2. The Clearing threshold should be further increased to facilitate the energy transition and enhance European competitiveness

In 2022, Energy Traders Europe commissioned Frontier Economics to conduct a study (the “EMIR Study”) on the EMIR commodity clearing threshold (“EMIR CCT”). The study recommended an immediate, permanent and substantial increase of the EMIR CCT applicable to NFCs to address several shortcomings of EMIR¹. This increase is necessary to support the EU energy transition, offset historical energy price inflation, and create fair competition with entities from other non-EU G20 jurisdictions. ESMA, in its position paper on strengthening EU capital markets from June 2024, recommends as well to account for the EU’s global competitiveness in policy making (Recommendation 20)².

The EMIR Study explains in detail why **an increase of the EMIR CCT is one of the available tools to facilitate the energy transition and enhance European competitiveness. In fact, such an increase**

- **Will offer more effective hedging for renewable projects and promote the Green Deal** – Further enabling the development of open and competitive energy and commodity derivatives markets in the EU allows energy market participants to better support the energy transition³. OTC derivatives are required for the financing of renewable projects. Energy market participants play a key role in facilitating the energy transition by providing liquidity to OTC markets and offering necessary hedging opportunities to renewable energy producers and industrial consumers, helping them to reduce their commercial risks and promote needed investments in renewable assets⁴.
- **Will enhance European competitiveness** – EMIR is one of several regulatory regimes implementing the G20 commitments from the Pittsburgh Summit 2009, and consistently appears to be among the most restrictive ones. The Memorandum delivered by Luther Law (the “Cross Jurisdictional Analysis”), which compares the international treatment of commodity derivatives in different jurisdictions, confirms that the **EU EMIR regime applies the lowest clearing threshold to the largest set of entities, products and activities**⁵. Remarkably, another recent [Frontier Study](#) on the Markets in Financial Instruments Directive (MiFID) commodities review (the “MiFID Study”) explains that

¹ Frontier Economics, [Review of the EMIR Clearing Thresholds for Commodities \(CTT\)](#), May 2022 (pages 58 – 63).

² ESMA, [Building more effective and attractive capital markets in the EU](#), June 2024 (Recommendation 20)

³ Frontier Economics, [Review of the EMIR Clearing Thresholds for Commodities \(CTT\)](#), May 2022 (pages 24-35)

⁴ Frontier Economics, [Review of the EMIR Clearing Thresholds for Commodities \(CTT\)](#), May 2022 (pages 59-60)

⁵ Luther, [Memorandum on commodity derivative clearing under EMIR](#), Oct 2021

under the Commercial End-User Exemption of the US Dodd-Frank Act, a non-financial energy market participant can trade cash settled derivatives for hedging in an unlimited manner and for non-hedging purposes up to a *de minimis* threshold of 8 billion USD⁶. In the most recent review, the U.S. Commodity Futures Trading Commission (CFTC) decided to maintain the 8 billion USD threshold, which was initially planned to be reduced to 3 billion USD, for several reasons. **One of the main reasons cited was the availability of effective hedging opportunities for the real economy**⁷. At the same time the US threshold only **applies to activities within a 12-months period**, whereas EMIR requires to calculate the total outstanding notional of all OTC derivatives from the date of their execution to their maturity; this especially affects financial PPAs that are entered for longer terms and whose maturity usually reflects the amortization period of the renewable investment (usually beyond 10 years).

- **Will compensate for the historical increase of energy prices** – the EMIR CCT was set at €3 billion in 2012, in a non-empirical manner due to the absence of robust data on the OTC commodity derivatives market. Fundamental changes in the market and the war in Ukraine have led to prices for all commodities (electricity, gas and EUAs in particular) to increase to a multiple of their values in 2012.⁸. Increased energy prices have proportionally inflated the notional value of commodity derivatives transactions at constant volumes. Higher commodity prices severely reduce the tradable quantities within the limits of the CCT, despite an increase of the threshold to €4 billion in 2022. This decline in tradable quantities of energy further exacerbates the drop in liquidity of the European energy markets. A considerable increase of the EMIR CCT is necessary to enable NFCs to trade comparable quantities of derivatives as they did in 2012⁹, which is crucial for facilitating the energy transition and supporting liquid and independent energy markets in the EU¹⁰.

The above proposals do not contradict EMIR's goals to enhance the transparency, safety and resilience of the EU's derivatives markets. **The proposed increase of the CCT to €12 billion would compensate for market developments since 2012 and establish an international level playing field.** Two specific characteristics of the commodity derivatives market, namely its size and the non-systemic importance of NFCs participating in such market, also imply that allowing for unmargined (though still collateralized through credit lines and credit support) OTC trading may increase credit risk, but not to a level that would pose a systemic risk to the wider financial markets¹¹. In this context it is important to remember that the

⁶ Frontier Economics, Luther, [Principles of Energy Market Regulation - Securing Efficient & Resilient Energy Trading](#) (pages 193 – 195)

⁷ Federal register p. 56666-56693, [De Minimis Exception to the Swap Dealer Definition – A Rule by the Commodity Futures Trading Commission](#), November 2018

⁸ Frontier Economics, [Review of the EMIR Clearing Thresholds for Commodities \(CTT\)](#), May 2022 (pages 15-23)

⁹ In 2012, the CCT of € 3 billion EUR allowed to trade approx. 70 TWh in OTC derivatives, which shrank to 11 TWh in early 2022, due to historical (non energy crisis related) increases in energy prices

¹⁰ Frontier Economics, [Review of the EMIR Clearing Thresholds for Commodities \(CTT\)](#), May 2022 (pages 60 – 61)

¹¹ Frontier Economics, [Review of the EMIR Clearing Thresholds for Commodities \(CTT\)](#), May 2022 (pages 62 – 63)

counterparty risk (which is addressed by EMIR) remains contained by (i) continuous risk monitoring and controls by energy market participants and (ii) contractual clauses allowing termination, payment netting and close out netting upon material events of default.

1.3. Definition of risk-reducing derivative contracts

ESMA is tasked under Art. 10(4) (a) to define in a Regulatory Technical Standard (RTS) the criteria for establishing which Over-the-Counter (“OTC”) derivative contracts objectively reduce risks directly related to commercial activity or treasury financing activity (hedging). Recital 21 clarifies that the aim of this review is to ensure that the hedging definition set out in Commission Delegated Regulation 149/2013 (the “CDR”) “*continues to be appropriate in light of market developments*”¹².

The current criteria for defining risk reducing derivatives, combined with a low CCT, prevent energy market participants meeting the necessary hedging needs of third parties¹³. **The OTC derivatives executed by NFCs which are only a hedge for the respective counterparty fully contribute to the EMIR CCT of the NFCs. The overly strict set of hedging criteria in the CDR should be updated to reflect (i) the general changes in the EU’s energy and derivatives markets since 2013 and (ii) the required contribution to the financing of the energy transition and create a regulatory level playing field.**

Cash-settled Power Purchase Agreement known in the market as “virtual PPAs” (“vPPA”), e.g. a financial swap between an energy market participant and a renewable energy producer aiming to hedge the latter’s market risks, constitute an important pillar of renewable investments. These vPPAs are used as means of investment financing since they secure the renewable energy producer a fixed margin for its produced power quantities and are a material condition for a credit institution financing the project.

Energy market participants are in a prime position to offer such vPPAs:

- Due to their experience of the physical power markets which is indispensable to manage the vPPA. The payments under such contracts depend not only on a price index, but also on the real physical production of a wind or solar farm by taking into account the metered data of produced renewable energy (“pay as produced”). Therefore, these contracts share some characteristics of commercial power production and physical delivery activities. **In fact, offering these PPAs has the same effect as investing in new power plants, which is part of the main business of energy market participants, solely without entering the investment risk as such.**
- Due to their ability to transform and warehouse risks in the markets (see Section 3.4 of the EMIR Study).

However, NFCs cannot offer these vPPAs to the operators of renewable facilities (e.g., wind- and solar parks) as this would quickly consume the current EMIR CCT. The EMIR Study identified that, due to the calculation methodology of the EMIR CCT, especially long term

¹² Commission Delegated Regulation (EU) No 149/2013, Current consolidated version: [29/11/2022](#).

¹³ Art. 10 of Commission Delegated Regulation (EU) No 149/2013, Current consolidated version: [29/11/2022](#).

vPPAs tend to consume huge portions of the available threshold because they need to be considered for their entire lifetime as opposed to a 12-months period from the date of their execution (as is the case under the Dodd Frank Act in the US). The EMIR Study calculates that a single large-scale offshore wind park with a contracted capacity over 12 years of more than 900 MW would lead to an EMIR CCT usage of € 3 billion and hence a further large-scale vPPA could not be accommodated by a single NFC- under the current CCT¹⁴.

JEAG recommends at the very least maintaining the current EMIR CCT of €4 billion. In fact, to comprehensively address the concerns on the EMIR CCT expressed in the EMIR Study and the Cross Jurisdictional Analysis, ESMA should consider further increases cumulatively with certain adjustments. This will complement the positive measures adopted in EMIR 3.0, specifically the exclusion of derivatives cleared by CCPs from the CCT calculation and the entity level calculation of the CCT.

Considering the points above, we ask ESMA:

- **To substantially increase the CCT to facilitate the EU Energy transition, compensate for historical energy price inflation and enhance the international competitiveness of EU market participants. JEAG suggests an increase to €12 billion, in line with the conclusions of the EMIR Study.**
- **To adjust the calculation period for the EMIR CCT to only take into consideration the OTC derivative contracts entered into within the 12-month calculation period.**
- **To review the definition of risk reducing derivatives to further support and contribute to the energy transition.**

¹⁴ Frontier Economics, [Review of the EMIR Clearing Thresholds for Commodities \(CTT\)](#), May 2022 (pages 38-39, 67 and Annex)

2. Clearing threshold granularity should not be introduced

When reviewing the clearing thresholds, Article 10 (4a) of EMIR 3.0 states that “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”.

JEAG generally welcomes a more dynamic approach to clearing thresholds to free them from their current staticity and enable continuous improvements to reflect the constant changes in the markets. We underline at this stage that a 12-month calculation period for the CCT would further contribute to an agile framework, allowing less disruptive downward corrections of the thresholds. **We stand ready to provide constructive information in this regard and contribute with our “specific knowledge on particular commodities” (Recital 21 EMIR 3.0).** Additionally, recital 21 encourages ESMA to “consider and provide more granularity for commodity derivatives” clearing thresholds¹⁵. This is written as an option rather than an obligation and, therefore, **we recommend maintaining the current approach of an aggregated commodity clearing threshold.** Setting more granular clearing thresholds, such as for “agriculture, energy, or metal-related commodities”, is not appropriate for the following reasons:

- **It does not align with the established practice of energy trading:** As explained in the MiFID Study, non-financial commodity trading firms are often active simultaneously in multiple commodity asset classes for various purposes: either to effectively manage their own risks, to generally warehouse market risks or to provide liquidity to the energy markets enabling risk management in the real economy¹⁶. For example, energy firms are active in various energy markets (e.g., power, gas, coal, oil) to manage their commercial energy production and mitigate (market) risks. They might also be active in other commodity markets (metals, raw materials) to mitigate commercial risks related to, for example, their renewable energy businesses. The current aggregated commodity threshold better aligns with this current and actual industry practice, rather than separate commodity clearing thresholds.
- **It is not feasible for market participants:** Setting separate commodity clearing thresholds would make it overly burdensome for NFCs to comply with the obligation to calculate clearing thresholds, such as in the case of cross commodity transactions, without providing obvious benefits for these firms and the EU domestic market. A disaggregation will also render the qualitative and quantitative controls on risk reducing transactions, as set out in Art. 7 of Commission Delegated Regulation 2021/1833, unnecessarily complex.
- **It would make supervision by National Competent Authorities (NCAs) impracticable:** We also question how NCAs can effectively monitor NFCs' compliance with different commodity clearing thresholds. In addition, an ESMA's report on the clearing system from July 2024

¹⁵ Recital 21 of EMIR 3.0 stipulates that “It is necessary to ensure that Commission Delegated Regulation (EU) No 149/201312, relating to the criteria for establishing which OTC derivative contracts are objectively measurable as reducing risk, continues to be appropriate in light of market developments”.

¹⁶ Frontier Economics, Luther, [Principles of Energy Market Regulation - Securing Efficient & Resilient Energy Trading](#) (chapter 3.1, pages 46 et seq)

confirms the resilience of such system, following recent stress tests¹⁷; hence, additional granularity would not serve any additional supervisory concerns.

- **It increases the risk of hampering market liquidity:** introducing disaggregated clearing thresholds will lead to market participants being obliged to actively administer their threshold consumption per commodity. Exceeding the EMIR CCT implies increased compliance requirements and costs, that NFCs cannot shoulder¹⁸. To avoid exceeding a disaggregated threshold the market participants will ultimately withhold their trading in a particular asset class, hence withdrawing liquidity with potential consequences on the EU's strategic energy autonomy and the resilience of its markets.

¹⁷ European Securities and Markets Authority (ESMA), [Fifth Stress Test Exercise for Central Counterparties \(CCPs\)](#), July 2024

¹⁸ Frontier Economics, [Review of the EMIR Clearing Thresholds for Commodities \(CTT\)](#), May 2022 (pages 45-47)

3. Increased transparency and simulation tools are needed to boost market participants' resilience

We welcome the new provisions under Article 38 (7) and (8) of EMIR 3.0 which will increase the transparency of margin models and practices. This will help market participants to better understand and forecast the potential impact of different market conditions on margin requirements. In this context, ESMA – in consultation with the European Banking Authority (EBA) and the European System of Central Banks (ESBC) – should ensure that energy market participants are provided with:

- user-friendly simulation tools offered by (Central Counterparties) CCPs; and
- the support of their Clearing Members (CMs) in running and comparing CCP simulations and their results to enable a certain level of predictability of magnitude of margin calls based on different market scenarios.

JEAG members, the majority of whom are clients of CMs when acting on centrally cleared commodity markets (and in rare exceptions act as CMs themselves) underline the need for a framework that better enables energy market participants' preparedness to handle margin calls, especially during exceptional market conditions. This framework requires robust support from both CCPs and CMs. CCPs should provide comprehensive disclosures about their margin models and related documentation, as well as easily accessible and user-friendly margin simulation tools to CMs and their clients. These tools should cover all types of margins, including unscheduled intraday margin calls and add-ons calculated by those CCPs.

Furthermore, CMs should provide comprehensive disclosures about any adjustments they make to CCP calculations, including unscheduled intraday margin calls and add-ons, and should support their clients in running and comparing simulations and their results. Clients should be able to include those adjustments in their replications and/or simulation of margin calculations.

Transparent and accessible margin model, calculation-related documentation and margin simulation tools will help energy market participants be better prepared to assess potentially large changes in margin requirements, especially under stressed market conditions. It is important to build on the experiences from the extraordinary market conditions that have emerged in recent years, particularly due to the COVID crisis and Russia's invasion of Ukraine, as learning opportunities. EMIR 3.0 has drawn the right conclusions aligning with the recommendations of other institutions and governance bodies. These include, for instance, a recent paper by the Basel Committee on Banking Supervision, the Committee on Payments and Market Infrastructures (CPMI) and the International Organization of Securities Commissions (IOSCO) that foresees improvements to the transparency and responsiveness of initial margin in cleared markets¹⁹.

¹⁹ Consultative report by the Basel Committee on Banking Supervision (BCBS), the BIS Committee on Payments and Market Infrastructures (CPMI) and the International Organization of Securities Commissions (IOSCO), [Transparency and responsiveness of initial margin in centrally cleared markets: review and policy proposals](#), January 2024.

JEAG has consistently emphasised the need to strengthen existing processes as well as the importance of transparency and simulation instruments in margining practices, this based on an end-to-end disclosure of information and cooperation between CCP, CMs and their clients. We are, therefore, pleased to see a broader recognition of these important issues. **We call on ESMA to make information sharing mandatory, more efficient and feasible and to ensure the highest level of transparency across the entire process. This is especially important given that margin requirements communicated by CMs to clients may differ from those set by CCPs for CMs. Any obstacles preventing information sharing from CCPs to CMs and their clients should be removed. This will allow energy market participants to continuously improve the replication and simulation of margin requirements.**

4. Accepting uncollateralised commercial bank guarantees as collateral at CCPs will promote the clearing of commodity derivatives and support the goals of EMIR for resilient markets

Within the mandate given to ESMA by Art. 46 (1) in conjunction of Art. 46 (3) of EMIR 3.0, we support the introduction of the following measures which we believe contribute to extending adequately the pool of eligible collateral while maintaining strict and robust risk-based criteria:

- CCPs should implement transparent collateral valuation policies and procedures.
- CCPs should develop a standard framework providing a clear overview of minimum requirements covering amongst other to legal documentation and technical implementation for the proposed eligible commercial bank guarantees.
- CCPs should extend their stress test framework to test the resilience and appropriateness of the set-up including commercial bank guarantees.
- CCPs should clearly define the conditions for the withdrawal of eligibility of the commercial bank guarantees, including in time of market stress and CCPs shall include an appropriate notice period in line with market standard already in place for bank guarantees i.e. for market participants to source alternative collateral within a reasonable timeframe.

Energy market participants are active in the exchange traded commodity markets in the EU. They access those markets either directly, or through CMs. In both cases, they are subject to collateral requirements and related frequent margin calls. Energy market participants' cash is tied in the real economy where it is required to operate and maintain cost intensive power generation assets. This factor, combined with the scarcity of collateral transformation services available to them, underlines the need for non-cash collateral alternatives, that will ensure market liquidity. Note these commercial bank guarantees are already used on a large scale in competing capital markets like in the US²⁰.

This type of collateral has the advantage of:

- Contributing to risk diversification as the bank issuing the guarantee may not be a clearing bank at the relevant CCP.
- Contributing to more effective cash management for energy market participants and potentially freeing resources for investments in sustainable energy projects
- Increasing the capacity of cash reserves to respond to higher margin and collateral demands at times of stressed market conditions.
- Being recognised by credit rating agencies as instruments that contribute to energy market participants' credit ratings²¹.

JEAG hence welcomes the recognition in Article 46 (1), sub-para. 3 of EMIR 3.0 of uncollateralised commercial bank guarantees as eligible collateral for CCPs. ESMA shall ensure that uncollateralised commercial bank guarantees can be accepted by CCPs for both non-financial clearing members and for financial clearing members (CMs) providing services to energy market participants to access the CCP. As mentioned in Art. 46 (1) it is key

²⁰ European Economic and Social Committee, [Opinion on EMIR 3.0 review](#), Rapporteur Florian MARIN, March 2023

²¹ Moody's, [Guarantees, Letters of Credit and Other Forms](#), July 2022



that a CCP may accept uncollateralised bank guarantees to cover its exposures both to its clearing members that are NFCs or to clients of financial clearing members, provided that those clients are NFCs.