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BDEW Bundesverband der Energie- und Wasserwirtschaft e.V.
(German Association of Energy and Water Industries)
BDEW Representation at the EU

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Position Paper

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

The German Association of Energy and Water Industries (BDEW), Berlin, represents over 1,900 companies. The range of members stretches from local and communal through regional and up to national and international businesses. It represents around 90 percent of the electricity production, over 60 percent of local and district heating supply, 90 percent of natural gas, over 90 percent of energy grid as well as 80 percent of drinking water extraction as well as around a third of wastewater disposal in Germany.

BDEW is registered in the German lobby register for the representation of interests vis-à-vis the German Bundestag and the Federal Government, as well as in the EU transparency register for the representation of interests vis-à-vis the EU institutions. When representing interests, it follows the recognised Code of Conduct pursuant to the first sentence of Section 5(3), of the German Lobby Register Act, the Code of Conduct attached to the Register of Interest Representatives (europa.eu) as well as the internal BDEW Compliance Guidelines to ensure its activities are professional and transparent at all times. National register entry: R000888. European register entry: 20457441380-38

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1 General information about respondent

Name of the company / organisation	BDEW – Bundesverband der Energie- und Wasserwirtschaft e.V. (German Association of Energy and Water Industries)
Activity	Other
Are you representing an association?	☒
Country / Region	Germany

2 Questions and answers

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.

A1: BDEW welcomes the ESMA's consultation paper "Draft for technical standards amending Regulation (EU) 149/2013 to further detail and the new EMIR clearing thresholds regime". **Yes, we agree that aggregate thresholds should only apply to the proposed asset classes** - i.e. interest rate differentials (IRD) and credit derivatives. In our view, the aggregate thresholds for financial counterparts (FC) have so far been well established and are working without problems.

Additionally, we would like to highlight the implementation of the new calculation methodology:

We appreciate that Article 5 of EMIR 3.0 clearly states that the changes to the clearing thresholds under Article 4(a) and Article 10 shall not apply until the entry into force of the regulatory technical standards (RTS) that are the subject of this consultation paper. We would like to take the opportunity to request that ESMA clarifies explicitly that market participants can apply without further delay the EMIR 3 changes to the calculation methodology (clearing vs. uncleared OTC derivatives) upon the publication of the RTS amending the RTS on the clearing thresholds (CTs). This clarification is needed to create legal certainty and because any further transitional implementation period would delay unnecessarily the application of the new threshold calculation method:

- At first, non-financial firms are aware of the new calculation method and can prepare and perform accordingly calculations already by today, so that any additional implementation period seems not necessary.
- Secondly, we understand that under the current pre-EMIR 3.0 position, and in line with OTC Answer 2 of ESMA's Questions and Answers on the Implementation of Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR), most market participants make calculations every 12 months on 17 June (the day EMIR Refit came into force) by reference to the 12 month period ending on that date ("calculation period") in order to determine their classification for the next following 12 month period. If the publication of the RTS on the amended clearing thresholds appears during such a calculation period, market participants should be able to apply the new calculation method already for the current calculation period. If market participants are forced to apply the new method only for the following calculation period, then the former calculation method pre-EMIR 3 (OTC derivatives vs. exchange traded derivatives) would continue to limit EU firms' ability to trade on 3rd country cleared exchange markets for an even longer period of time (as transactions entered over these markets are still deemed OTC derivatives). This would put EU non-financial firms at a competitive disadvantage vis-a-vis 3rd country firms.

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.

A2: As already mentioned, BDEW believes that the current threshold is functional and established. The chosen threshold of 3 billion EUR should therefore be maintained for the asset classes mentioned e.g. IRD and credit derivatives. **So, yes, we support ESMA's proposal for both thresholds for IRDs and credit derivatives**.

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.

A3: At first glance, it seems logical to lower the threshold when focusing on uncleared positions in order to trigger the clearing obligation earlier. In our view, however, the proposed calculation of thresholds is not entirely comprehensible. ESMA's simulation is based on the last 12-month clearing period between 1 May 2023 and 30 April 2024. We do not support the singular reference on just one clearing period. With the change of the clearing threshold methodology **we do not agree with the proposed reduction in uncleared thresholds for any of the asset classes**. At a minimum, the currently applicable thresholds should be maintained across all asset classes, including interest rate derivatives, credit derivatives, equity derivatives, and commodity derivatives. We believe the reduction of thresholds would have disproportionately negative effects on non-financial counterparties (NFCs), energy market functioning, and the EU's energy transition objectives.

We caution against relying solely on the idea that the new thresholds should result in a comparable population of clearing-obligated counterparties as under the previous methodology. While ESMA notes that this continuity aligns with Recital 9 of EMIR 3, this must not be the only consideration for threshold calibration.

Other regulatory objectives under EMIR, including credit risk mitigation, market liquidity, and macroeconomic context (notably inflation), must also be taken into account:

There is no evidence that a reduction of 1 billion EUR in the threshold would materially improve the resilience of the financial system. On the contrary, overly low thresholds may undermine the availability of bilateral hedging, restrict corporate risk management strategies, and reduce minimum liquidity in crucial parts of the real economy derivatives markets. Furthermore, thresholds originally calibrated in 2012/2013 do not reflect current inflationary conditions or the increased notional sizes required to hedge economically equivalent exposures.

We recommend maintaining the current thresholds at a minimum for all asset classes, including:

Commodity derivatives:

We do not agree with ESMA's proposed reduction of the uncleared threshold for commodity derivatives from EUR 4 billion to EUR 3 billion. We strongly recommend **maintaining** at least the current **EUR 4 billion threshold** and ideally increasing it in line with market realities. Our concerns are grounded in several key areas:

- Absence of systemic risk in the commodity derivatives market:
    - EMIR's objective is to mitigate systemic financial risk. There is no evidence that commodity derivatives activity by non-financial counterparties poses such a risk.
    - The Financial Stability Board (FSB) and ESMA's own data confirm that NFCs operating in this space are not systemically significant.
- Inflation and market volatility:
    - Since 2012, inflation and volatility in energy markets have drastically reduced the effective tradable volume permitted under the threshold. For example, the 3 billion EUR threshold enabled trading of approximately 70 TWh in 2012, but only 11 TWh by 2022.
    - These figures are drawn from the Frontier Economics study, commissioned by Energy Traders Europe, which analyzed the effect of price inflation on the usability of the clearing threshold in commodity markets.
    - The study recommends increasing the threshold to at least 12 billion EUR to reflect these changes and ensure meaningful trading capacity.
- Impact on energy transition and private investment:
    - Commodity derivatives, including virtual power purchase agreements (vPPAs), are critical to financing renewable energy projects.
    - Lower thresholds may constrain energy market participants' ability to support these investments, limiting the effectiveness of the EU's broader climate and industrial policy agenda.
    - The current criteria for defining risk reducing derivatives (hedging), combined with the proposed low clearing threshold, prevent energy market participants to offer cash-settled Power Purchase Agreements (known as virtual PPAs), e.g. a financial swap between an energy market participant and a renewable energy producer aiming to hedge the latter's market risks. These virtual PPAs are used as means of investment financing since they secure the renewable energy

producer a fixed margin for its produced power quantities which is a material condition for a credit institution financing the project. Energy firms cannot offer virtual PPAs as this would quickly consume the energy firms’ EMIR clearing threshold as these often are not a hedge for these firms. (for more details please refer to our answer to question 9)

- International competitiveness:
  - The U.S. allows non-financial entities to engage in unlimited hedging and up to 8 billion USD in non-hedging OTC activity, measured over a 12-month rolling period.
  - In contrast, under EMIR, exposures count against the threshold for the full duration of the contract, creating a significant competitive disadvantage for EU firms.
  - Exchange rate effects: The euro has depreciated significantly against the U.S. dollar since 2013 (from 1.39 to 1.04), which further erodes the real value of the threshold and should be factored into any recalibration.
- Risk management practices:
  - OTC commodity derivatives, while unmargined under EMIR, are typically collateralized via credit lines and managed under strict internal risk frameworks.
  - The commodity derivatives market represents less than 1% of overall derivatives notional exposure in the EU, making systemic disruption highly unlikely.

Interest rate derivatives:

- Higher interest rate environment requires more hedging
  - Since 2011, the general level of interest rates has increased significantly. This has led to a rise in nominal cash flows and thus a greater need for corporates to hedge interest rate risk, even when the underlying real exposure remains constant.
  - For example, swaps are typically used to hedge real (inflation-adjusted) cash flows. If a company wants to buy 1 tonne of steel today, it must now pay significantly more due to inflation. The hedging notional has increased, not because of speculation, but because the real cost exposure has risen.
- Critical for corporates with supply chain risk and long investment horizons:
  - Companies, particularly in the energy sector investing in renewable infrastructure, face significant long-term planning and construction risks—especially during the multi-year development phase of projects like wind parks.

    - These projects often involve fixed-price PPAs where the financial exposure in the construction phase includes interest rate and inflation risk.
    - Hedging this exposure via IRDs is economically necessary. Lowering the threshold would discourage prudent hedging, raise transaction costs, and potentially undermine investment certainty—thereby conflicting with the EU Green Deal goals.
- ESMA’s new methodology doesn’t reduce the practical impact for corporates:
    - While ESMA has introduced a new methodology for the calibration of uncleared thresholds (focusing only on OTC uncleared positions, not all OTC derivatives), this does not reduce the regulatory exposure of corporates in practice.
    - The transactions that corporates enter into - typically bilateral OTC under ISDA master agreements and backed by CSAs - have always been and continue to be uncleared. Therefore, these positions still count fully toward the threshold under the new methodology.
    - For this reason, the change in methodology is not relevant for corporates, and the burden of a lowered threshold remains unchanged or may even increase under the new rules.

Credit and equity derivatives: These instruments remain essential for managing counterparty exposure, portfolio risk, and equity-linked obligations. Lowering thresholds may impose disproportionate burdens without improving systemic risk oversight.

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.

A4: We recommend maintaining the current approach of an aggregated commodity clearing threshold and agree with ESMA’s proposal. Setting more granular clearing thresholds is not appropriate for the following reasons:

Maintaining a single, aggregated threshold for all commodity derivatives is the most practical, proportionate, and operationally sound approach, particularly in the context of how commodity markets function and how energy firms manage risk. Fragmenting the commodity derivatives threshold into sub-asset classes would be operationally burdensome, economically distortive, and difficult to supervise. The current aggregated approach better aligns with market practices, enables more effective risk management, and supports the resilience and competitiveness of EU energy and commodity markets. We therefore support ESMA's proposal and recommend maintaining a single, aggregated threshold for commodity derivatives.

Key reasons for supporting ESMA's current proposal in detail:

Real-world trading and risk management practices:

- Market participants active in commodity trading, particularly in energy, typically engage across multiple commodity sub-classes (e.g. power, gas, coal, oil, emissions).
- Risk management is conducted on a portfolio basis, not in isolated asset class silos. Fragmenting the threshold into separate sub-asset classes would undermine these integrated hedging strategies and reduce risk mitigation efficiency.

Increased compliance burden without proportional benefit:

- Introducing multiple thresholds would significantly increase the operational and compliance complexity for non-financial counterparties, especially where transactions span multiple sub-asset classes or are difficult to classify.

Negative impact on market liquidity and resilience:

- Market participants would need to monitor consumption of each sub-threshold separately and may reduce or withhold trading in certain commodities to avoid breaching thresholds, potentially leading to withdrawal of liquidity and impairing market functioning.
- This could have systemic implications for EU commodity markets, particularly in the energy sector, which is central to the EU's decarbonisation and affordability goals.

No clear systemic risk justification:

- The current aggregated threshold already captures overall exposure effectively.
- There is no evidence that separating commodity classes would better serve EMIR's objective of identifying and containing systemic risk.

Supervisory and regulatory challenges:

- National competent authorities would be required to monitor compliance across multiple sub-asset classes, significantly increasing supervisory complexity without clear risk mitigation benefits.
- The lack of consistent and granular transaction data further complicates this task.

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.

A5: In our view, the chosen approach of having the fifth bucket only for commodity derivatives and emission allowances is correct. As mentioned a more granular approach would unnecessarily increase complexity. Maintaining a combined bucket for commodity and emission allowance derivatives is practical, proportionate, and aligned with existing market and regulatory structures. **We therefore fully support ESMA's proposal**.

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

A6: As an association whose members are primarily from the energy industry, we have not yet been active in the crypto-assets sector. **However, we currently agree with ESMA that this asset class does not require a sixth bucket**. Furthermore, the derivatives markets potentially falling under such a bucket such as those linked to hydrogen or other emerging asset classes remain in an early phase of development. Trading volumes are currently limited, data is insufficiently robust, and classification standards are not yet established. As such, there is no clear evidence of systemic relevance that would justify a separate threshold.

Introducing a catch-all threshold prematurely would create uncertainty for market participants, impose new compliance burdens, and risk discouraging innovation. Emerging markets often rely on early-stage trading activity to build liquidity and investor confidence. Subjecting these markets to a separate threshold before they mature could have a chilling effect on their development, running counter to the EU’s goals of financial innovation, energy transition, and capital market growth.

Moreover, from a risk management and supervisory standpoint, a sixth bucket would increase complexity for market participants and national competent authorities alike. Without a clear and widely accepted definition of what constitutes an “other derivative,” market participants would face ambiguity in classification, while regulators would face challenges in monitoring compliance and interpreting threshold breaches.

Given the dynamic nature of financial markets and the EU’s broader strategic objectives, we support a flexible, forward-looking approach that allows for the future introduction of new thresholds once sufficient data, market maturity, and regulatory clarity exist. For now, the current structure is both proportionate and appropriate.

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.

A7: A more granular commodity clearing threshold based on ESG factors would undoubtedly unnecessarily increase complexity, including for authorities. While supporting sustainability is a shared objective, introducing granular ESG thresholds under EMIR at this point would be premature and could generate unintended negative consequences for developing markets. We encourage continued monitoring of this space and support the idea of revisiting this issue in future reviews, once more mature ESG standards and classifications have emerged. **We support ESMA’s proposal not to introduce more granular clearing thresholds commodity derivatives based on ESG factors.**

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.

A8: **We fully support ESMA's proposal not to introduce specific clearing thresholds for crypto-related commodity derivatives at this stage**. The crypto-derivatives market remains immature, highly volatile, and lacks consistent regulation and classification standards. Introducing separate thresholds now would add complexity without clear systemic risk justification and could create uncertainty around scope and compliance.

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.

A9: Yes, we believe important clarifications should be introduced in Article 10 to reflect current market realities and ensure a harmonized interpretation across Member States—particularly in relation to the treatment of virtual power purchase agreements (vPPAs) and energy market participants' hedging activities. The following clarifications will enhance regulatory consistency, reduce legal uncertainty, and ensure EMIR remains supportive of the EU's energy transition and climate finance objectives.

We propose the following clarifications:

Recognition of trading as a commercial activity:

- Derivative transactions executed by energy firms as part of their risk management activities should be recognized as commercial in nature and eligible for the hedging exemption if they reduce risk for the firm or the counterparty.

Inclusion of virtual power purchase agreements (vPPAs) as risk-reducing instruments:

- Cash-settled Power Purchase Agreements (known as virtual PPAs, vPPAs), e.g. a financial swap between an energy market participant and a renewable energy producer aiming to hedge the latter's market risks, are used as means of investment financing since they secure the renewable energy producer a fixed margin for its produced power quantities which is a material condition for a credit institution financing the project.
- Hence, vPPAs are long-term financial contracts that play a critical role in enabling renewable energy investments.

- Consequently, vPPAs should be treated as commercial risk reduction instruments when structured to mitigate price risk for counterparties.
- Their contribution to the clearing threshold calculation should reflect their actual risk profile rather than their notional value alone.
- Under current interpretations, vPPAs - despite being structured to reduce price and volume risks for the renewable investor - may not qualify as risk-reducing for the executing energy firm, resulting in a disproportionate consumption of clearing threshold capacity.
- The Frontier Economics EMIR Study underscores the importance of vPPAs in meeting EU Green Deal and energy transition objectives and highlights that the current hedging exemption is not fit-for-purpose in the context of such arrangements. As vPPAs are often high in notional value and long-dated (10–15 years), they significantly inflate clearing threshold calculations - despite posing no systemic risk - if not treated as risk-reducing 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 CCT.
- Additionally, these contracts often serve as a substitute for physical infrastructure investments by energy market participants. Structurally, they mirror the risk profile of direct energy procurement or physical power purchase agreements, without involving grid access or ownership. In this way, they enable competition, flexibility, and cost-effective participation in the energy transition.

We therefore propose that Article 10 be amended to reflect the following key principles:

- A broader definition of commercial activity to include trading and risk provisioning services to support counterparties.
- Recognition of structured hedging arrangements, such as vPPAs, as risk-reducing when they directly relate to commercial activity or energy production risks.

Suggested drafting addition to Article 10:

Suggested minor drafting addition to Article 10 (1) of the CDR 149/213.:

“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, commodity derivatives 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.”

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

A10: In our view, the proposed triggers are not particularly practicable, as the terms themselves leave too much room for interpretation. In BDEW's view, fixed triggers with specified criteria should apply, which are comprehensible for everyone and, above all, ensure predictability, transparency and traceability. **Therefore, we partly agree with the ESMA proposal**. The use of macroeconomic and market-based indicators to guide future threshold reviews could improve the trigger mechanism.

However, we do not support dynamic thresholds and recommend that ESMA avoids reducing thresholds as part of future reviews. Due to the long-term nature of many commodity derivatives (e.g. vPPAs), lowering thresholds would create “cliff-edge” effects that could force non-financial counterparties into NFC+ status mid-contract or lead to early contract exits and counterparty uncertainty.

Furthermore, ESMA should incorporate competitive impacts into Article 11b. When reviewing thresholds, ESMA should consider the impact on market functioning, liquidity, private investment in energy infrastructure, and the EU’s global competitiveness.

In general, there should be clear legal concepts in Article 11b.

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