



Council of the  
European Union

116770/EU XXVII. GP  
Eingelangt am 19/10/22

Brussels, 19 October 2022  
(OR. en)

13783/22

EF 309  
ECOFIN 1056  
DELECT 188

## COVER NOTE

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	18 October 2022
To:	General Secretariat of the Council
No. Cion doc.:	C(2022) 7413 final
Subject:	COMMISSION DELEGATED REGULATION (EU) .../... of 18.10.2022 amending the regulatory technical standards laid down in Delegated Regulation (EU) 149/2013 as regards the value of the clearing threshold for positions held in OTC commodity derivative contracts and other OTC derivative contracts

Delegations will find attached document C(2022) 7413 final.

---

Encl.: C(2022) 7413 final



EUROPEAN  
COMMISSION

Brussels, 18.10.2022  
C(2022) 7413 final

**COMMISSION DELEGATED REGULATION (EU) .../...**

**of 18.10.2022**

**amending the regulatory technical standards laid down in Delegated Regulation (EU)  
149/2013 as regards the value of the clearing threshold for positions held in OTC  
commodity derivative contracts and other OTC derivative contracts**

(Text with EEA relevance)

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE DELEGATED ACT

Regulation (EU) 2019/834 ('EMIR Refit') introduced a mandate in Regulation (EU) No 648/2012 ('EMIR') for ESMA to periodically review the clearing thresholds for over-the-counter (OTC) derivatives and propose to update them where necessary, in order to ensure that those thresholds remain appropriate. Following this review and where an amendment of the thresholds is identified as necessary, ESMA can then submit regulatory technical standards proposing new values for the thresholds.

Under Commission Delegated Regulation (EU) No 149/2013, there are currently five clearing thresholds for: (i) credit derivative contracts, (ii) equity derivative contracts, (iii) interest rate derivative contracts, (iv) foreign exchange derivative contracts and (v) 'commodity derivative contracts and other derivatives'. ESMA's methodology to determine the level of the clearing threshold is meant to provide a certain degree of stability for those thresholds. The clearing threshold for "*OTC commodity derivative contracts and other OTC derivative contracts*"<sup>1</sup> has been set by ESMA at EUR 3 billion in 2013 and has not been revised since.

In addition to the clearing thresholds, ESMA is mandated to determine which classes of OTC derivatives should be subject to a clearing obligation (i.e. the obligation to centrally clear a derivative at a central counterparty).<sup>2</sup> So far only some interest rate derivatives and some credit derivatives are subject to such an obligation, as they are standardised and traded in liquid markets. At present, there is no clearing obligation for OTC commodity derivatives, including energy derivatives.

All counterparties subject to EMIR requirements must compute their positions in OTC derivatives against the clearing threshold for all asset classes.

Financial counterparties crossing the clearing threshold in any asset class become subject to the clearing obligation in all asset classes. For uncleared OTC derivatives (i.e. those which are not centrally cleared at a CCP), all financial counterparties are subject to both variation and initial margin requirements (subject to the internationally agreed phase-in of initial margin requirements).

Non-Financial counterparties (NFCs) crossing the clearing threshold in a given asset class become subject to the clearing obligation in that asset class. For uncleared OTC derivatives, non-financial counterparties only become subject to margin requirements if and when they cross one of the clearing thresholds. They then become subject inter alia to variation and initial margin requirements on the entirety of their portfolio of uncleared derivatives (also subject to the internationally agreed phase-in for initial margin, variation margin kicks in immediately).

The methodology to calculate the position towards the clearing threshold is laid out in EMIR Article 10: "*the non-financial counterparty shall include all the OTC derivative contracts*

---

<sup>1</sup> i.e. other than interest rate derivatives, credit derivatives, FX derivatives and equity derivatives.

<sup>2</sup> Under Commission Delegated Regulation (EU) No 149/2013, ESMA has identified 5 asset classes (Credit, Equity, Interest rate, Foreign exchange and Commodity and other derivatives).

*entered into by the non-financial counterparty or by other non-financial entities within the group to which the non-financial counterparty belongs, 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 that group”.*

The clearing threshold for commodity derivatives which has not been revised since 2013 should be increased to cater for inflation and the fact that the price of some derivatives and commodity derivatives have risen sharply and became much more volatile, as a result of the Russian invasion of Ukraine and supply-chain issues triggered by the COVID-19 pandemic, many of which have not been fully resolved. An increase in the clearing threshold for commodity derivatives would also take into account the fact that some exchange-traded derivatives traded on third-country exchanges are counted as OTC derivatives when calculating the threshold even though they are cleared and their risk is therefore mitigated.

These factors lead non-financial counterparties to cross or to get closer to crossing the clearing threshold and subject them to margin requirements under EMIR, in particular variation margin requirements. When required to post variation margin, non-financial counterparties may face difficulties as they may lack liquidity to comply with the requirement (while not mandated by law, variation margin in practice needs to be provided in cash).

In order to take into account the impact of inflation on EU non-financial counterparties, ESMA has proposed that the clearing threshold for commodity derivatives should be increased by EUR 1 billion.<sup>3</sup> This relief will only benefit non-financial counterparties and should avoid that non-financial counterparties become subject to margin requirements for undue reasons, without creating risks to financial stability.

This increase in the clearing threshold should not have any impact for financial counterparties as they are subject, in all cases, to risk-mitigation techniques, including bilateral margining, whether they are above or below the clearing thresholds.

As part of the upcoming EMIR review, the Commission will further reflect on how to improve the methodology to compute the position towards the clearing threshold for NFCs, in particular looking how to better take into account amongst other things fluctuating prices, and OTC derivatives transactions that are already cleared, following which another review of the thresholds to cater for any changes is likely to be necessary.

## **2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT**

The amendment to Delegated Regulation (EU) No 149/2013 has an urgent character in order to allow counterparties to continue to develop their business strategy and remain competitive despite the move in prices in commodity derivatives. ESMA conducted an open public consultation on the substance matter of the level of coverage of the clearing thresholds for the different asset classes and specifically on the coverage for commodity derivatives asset class, from November 2021 to January 2022. A total of 29 respondents provided feedback, out of which 19 non-financial counterparties. 16 out of the 19 non-financial counterparties' responses came from the energy industry and all of them have presented similar arguments: (i) they highlighted the impact of inflation and the rise of commodity prices on their ability to

---

<sup>3</sup> <https://www.esma.europa.eu/press-news/esma-news/esma-proposes-eur-1-billion-increase-commodity-derivatives-emir-clearing>

continue to operate without breaching the clearing threshold; (ii) the fact that some exchanges-traded derivatives on some third-country exchanges must be included in the calculation of the counterparties' positions against the clearing threshold, in the absence of an equivalence decision for those third-country exchanges under Article 2a of EMIR; (iii) while the transition towards a more decarbonised energy system and the development of renewable energy requires high demands for hedging via OTC derivatives, the hedging exemption for non-financial counterparties under EMIR would not cover all trading activities and part of the OTC derivative contracts used by non-financial counterparties would be included in the calculation of the clearing threshold. In its letter to the Commission of 22 September 2022 and after having updated its analysis with the most recent available price data, ESMA confirmed the appropriateness of the EUR 1 billion proposed increase.

Given the limited scope of the amendment and the urgency of the matter, it would have been disproportionate for ESMA to have conducted an additional open public consultation on the draft regulatory technical standards. ESMA consulted the ESRB and requested the advice of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council.

### **3. LEGAL ELEMENTS OF THE DELEGATED ACT**

The delegated act introduces a modification to Commission Delegated Regulation (EU) 149/2013.

Article 1 modifies Article 11 of Commission Delegated Regulation (EU) 149/2013 regarding the value of the clearing threshold for “*OTC commodity derivative contracts and other OTC derivative contracts*”, in the following way:

- Point (e) is amended so that the clearing threshold is increased to EUR 4 billion in gross notional value.

# COMMISSION DELEGATED REGULATION (EU) .../...

of 18.10.2022

## amending the regulatory technical standards laid down in Delegated Regulation (EU) 149/2013 as regards the value of the clearing threshold for positions held in OTC commodity derivative contracts and other OTC derivative contracts

(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<sup>4</sup>, and in particular Article 10(4), third subparagraph, thereof,

Whereas:

- (1) Commission Delegated Regulation (EU) 149/2013<sup>5</sup> specifies, among others, the values of the clearing thresholds for the purpose of the clearing obligation.
- (2) Pursuant to Article 10(4), fourth subparagraph, of Regulation (EU) No 648/2012, the European Securities and Markets Authority (ESMA) is to periodically review the values of those clearing thresholds and to propose regulatory technical standards to amend them. That review is to be preceded by a consultation of the European Systemic Risk Board (ESRB) and other relevant authorities and has to take into account, where necessary, the interconnectedness of financial counterparties.
- (3) For some third-country jurisdictions, no equivalence decision as referred to in Article 2a of Regulation (EU) No 648/2012 has yet been adopted. As a result, contracts executed on markets in those third-country jurisdictions are considered OTC and, although being cleared by recognised CCPs, count towards the clearing thresholds. In addition, commodity prices have recently increased, significantly exacerbated by Russia's unprovoked and unjustified military aggression against Ukraine. Those reasons call for a corresponding adjustment of the current threshold for commodity derivatives. The clearing threshold value for positions held in OTC commodity derivatives should therefore be increased from EUR 3 billion to EUR 4 billion.

<sup>4</sup> OJ L 201, 27.7.2012, p. 1.

<sup>5</sup> Commission Delegated Regulation (EU) 149/2013 of 19 December 2012 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 (OJ L 52, 23.2.2013, p. 11).

- (4) Delegated Regulation (EU) No 149/2013 should therefore be amended accordingly.
- (5) This Regulation is based on a report and the draft regulatory technical standards submitted to the Commission by ESMA.
- (6) ESMA conducted an open public consultation on the clearing thresholds for different asset classes and in particular on the clearing thresholds for commodity derivative asset classes. Given the limited scope of the amendment and its urgency in view of the rapidly increasing commodity prices, it would be highly disproportionate for ESMA to conduct an additional open public consultation on these draft regulatory technical standards. ESMA consulted the ESRB in accordance with Article 10(4), fourth subparagraph, of Regulation (EU) No 648/2012 and requested the advice of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council.<sup>6</sup>
- (7) Given the recent increase of in commodity prices and its effect on non-financial counterparties taking positions in OTC commodity derivative contracts, it is necessary to adjust the clearing threshold value for positions held by non-financial counterparties in OTC commodity derivatives as quickly as possible. In the light of the current energy crisis and inflation, ESMA shall assess the impact of the revised threshold and come forward with amendments if deemed necessary and appropriate. This Regulation should therefore enter into force as a matter of urgency,

HAS ADOPTED THIS REGULATION:

#### *Article 1*

#### **Amendment to Delegated Regulation (EU) No 149/2013**

In Article 11 of Delegated Regulation (EU) No 149/2013, point (e) is replaced by the following:

“(e) EUR 4 billion in gross notional value for OTC commodity derivative contracts and other OTC derivative contracts not provided for under points (a) to (d).”.

#### *Article 2*

#### **Entry into force**

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

---

<sup>6</sup> 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).

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

Done at Brussels, 18.10.2022

*For the Commission*  
*The President*  
*Ursula VON DER LEYEN*