POSITION PAPER

Adopt the changes to the clearing threshold calculation without delay

JEAG recommendations for EMIR 3 trilogues

15 January 2024

On behalf of the Joint Energy Associations Group (JEAG) composed of BDEW, EFET, Eurelectric, Eurogas and IOGP Europe, we are supportive of the changes proposed by all three EU co-legislators with regard to the EMIR 3 proposal. These are an appropriate response to the challenges faced by energy market participants during the energy crisis in 2022 to guarantee a secure, affordable and sustainable energy supply and will contribute to fostering transparent and safe European financial markets. We would like to highlight the following points with relevance for energy market participants:

Key points:

- **We are fully supportive of the proposals of all three EU co-legislators to install a new calculation methodology for the clearing threshold for non-financial counterparties (NFCs). We urge its immediate application without any delay as this is essential to develop competitive and liquid energy markets and support the energy transition.**
- **We are fully supportive of the further changes proposed by all three EU co-legislators with relevance for NFCs, in particular to guarantee the transparency of margin calls, the use of uncollateralised bank guarantees as eligible collateral and the direct access of NFCS to central clearing.**
- **We welcome the retention of the exemption for NFCs from intra-group reporting as proposed by the European Parliament and the Council.**

In detail:

Most importantly, we **endorse the changes agreed by all three EU institutions to the clearing threshold calculations under Article 10 paragraph 3 of EMIR 3**, which will help EU energy market participants to maintain and develop liquid, competitive and well-functioning EU energy markets, while securing energy supply. The proposals adequately amend the methodology of the clearing threshold calculation by:

(i) excluding cleared derivative transactions, which pose no systemic risk and
(ii) focusing the calculations on EU non-financial entities, while
(iii) maintaining the necessary provision from the current EMIR 2 enabling centralised risk management.

Moreover, **we further support additional amendments endorsed by all three EU institutions** that help energy markets participants in achieving the above-mentioned aims and to maintaining robust, proportionate and transparent operational processes:

- facilitating the **direct access of non-financial counterparties to central clearing** (Art. 37 EMIR 3);
- increasing **predictability and transparency of margin calls** (Art. 38 EMIR 3); and
- allowing **uncollateralised commercial bank guarantees as eligible collateral** (Art. 46 EMIR 3).

We very much welcome that the **EU Parliament and the Council maintain the intragroup transaction reporting exemption for NFCs** (Art. 9 EMIR 3). The relief first introduced by the Regulatory Fitness and Performance Programme (EMIR REFIT, Regulation (EU) No. 2019/834) in May 2019 with the intended benefit of reducing bureaucracy and lowering costs has proven its worth.

However, **we are concerned by the prospect of an application delay of changes to the clearing threshold calculation for NFCs (Article 10 paragraph 3 of EMIR 3) as suggested by the Council**:

The Council proposes that the amended Article 10 paragraph 3 of EMIR 3 shall only apply once ESMA has reviewed the clearing threshold and submitted an accordingly amended RTS 149/2013. This will delay for a longer period the intended positive effects of the changes to the clearing threshold calculation already agreed between all of the three EU co-legislators. However, we believe this cornerstone of the EMIR 3 proposal should not be delayed, since it addresses certain lessons learned from the energy crisis and supports energy market participants to guarantee secure, affordable and sustainable energy supply. We explain our concerns in more detail in Annex I.

Please find our detailed assessment of the final compromise texts of the Council and European Parliament with relevance for NFCS in the attached 4-column table (Annex II).

About BDEW

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.
For more information: www.bdew.de

About EFET

The European Federation of Energy Traders (EFET) promotes and facilitates European energy trading in open, transparent and liquid wholesale markets, unhindered by national borders or other undue obstacles. We build trust in power and gas markets across Europe, so that they may underpin a sustainable and secure energy supply and enable the transition to a carbon neutral economy. EFET currently represents more than 150 energy trading companies, active in over 27 European countries.
For more information: www.efet.org

About Eurelectric

Eurelectric is the federation of European electric industry. We speak for more than 3,500 European utilities covering the entire industry from electricity generation and markets to distribution networks and customer issues.
For more information: www.eurelectric.org

About Eurogas

Eurogas is the association representing the European gas sector. Our 78 members and associate members are active throughout the energy gas value chain, covering production, trading, distributor, and supply of natural gas, biomethane and hydrogen.
For more information: www.eurogas.org

About IOGP Europe

The International Association of Oil & Gas Producers (IOGP) Europe is the Brussels-based advocacy arm of IOGP. Its 30+ Members account for 90% of Europe's oil and gas production. IOGP Europe supports the EU's objective to reach climate neutrality in Europe and calls for an inclusive policy framework to help reach it.
For more information: www.iogp.org

Annex I

We strongly recommend to apply the changes to clearing threshold calculation for NFCs under EMIR 3 without any delay or phase-in.

The continued application of the current clearing threshold calculation under EMIR 2 would bear the following unintended adverse consequences:

- *Increases legislative complexity:* It is not justified, as the current Level 2 legislation (RTS 149/2013) is already fully aligned with the EMIR 3 proposal and will be applicable without need for additional amendments.
- *Would not reduce credit risks:* The amended calculation of the clearing threshold does not increase the credit risks in the financial markets, as the same population of non-centrally cleared OTC derivatives trades remains relevant from the perspective of mitigating credit risk (i.e., the amended calculation excludes only the OTC derivatives centrally cleared by an authorised or recognised CCP).
- *Discourage central clearing:* It is counterproductive when considering the intention of the EMIR 3 proposal, as it will not encourage central clearing (the current EMIR 2 method does not consider whether a derivative is cleared or not). Furthermore, it will restrict the access for EU energy firms operating to 3rd country commodity exchange markets which are cleared through a recognised CCP (the current EMIR 2 method treats transactions traded on non-recognised 3rd country exchanges as relevant OTC derivatives, even if they are cleared through a recognised CCP).
- *Decrease competitiveness of EU energy companies:* It has negative effects on the competitiveness of EU energy companies, as NFCs would have to continue to include in their clearing threshold calculations the OTC derivatives transactions that are entered into by non-EU entities of their group, even if there is no EU product, EU venue or EU entity involved. The effect would diminish the competitiveness of EU companies in the global marketplace and create incentives to reduce the volume of trade in the EU.
- *Force EU energy companies into an undesired status:* Furthermore, this worldwide EMIR calculation would force the entire worldwide corporate group into a so-called NFC+ status and consequently to comply with numerous additional obligations (such as mandatory central clearing and collateralisation), even if only one group entity will breach the clearing threshold(s). This disproportionate outcome is avoided by the new calculation methodology under which only the concerned entity breaching the clearing threshold(s) needs to comply with NFC+ requirements.
- *Impede energy transition and increase market costs:* Overall, at a time when we are aiming at energy transition and trying to improve the way the European energy market works through changes to the electricity market design, this represents an opportunity to accelerate improvements already identified that will be helpful in maintaining the contribution of markets towards achieving the energy transition economically.
- *Unnecessarily extend the above-mentioned disadvantages of the current EMIR 2 clearing threshold methodology:* These adverse unintended consequences will remain for a longer period than anticipated and hence unnecessarily extend the application of the current Article 10 (3) of EMIR 2, as the application of the new calculation methodology under EMIR 3 will potentially be delayed for several yearly calculation periods (June-May of each year). This repercussion is due to a likely postponement of the legislative timetable (i.e., pursuing the conclusions of the ESMA review) during a period including Parliamentary elections and the appointment of a new Commission.