

5 January 2026

Consultation Paper: EMIR 3 draft RTS on Participation Requirements

Cboe Clear Europe appreciates the opportunity to respond to ESMA's consultation on the EMIR 3 draft RTS on Participation Requirements.

Participation criteria are intended to assess that clearing members are, in principle, parties that can meet the obligations arising from being a clearing member. **Participation criteria differ from ongoing risk management and should not be used as a tool to transfer risk and responsibilities to CCPs from oversight authorities and market participants.** A CCP must ensure that its participation criteria protects the CCP and its participants from risk that could be deemed unacceptable. Apart from guaranteeing the contracts accepted for clearing, it is not a CCP's role or responsibility, however, to ensure that its participants meet obligations to other parties. A CCP is neither an auditor nor an oversight authority, nor does it apply (collect) fees for these activities.

This proposal has several areas where it appears to confuse participation criteria with ongoing risk management. Participation criteria must be sufficiently high-level, while being transparent to ensure certainty. A clearing member that no longer satisfies one or more participation criteria of a CCP should in principle no longer be eligible to clear trades through that CCP. Once an entity becomes a clearing member of a CCP, the risk that the entity brings to such CCP is managed by the CCP's ongoing risk management framework, which considers elements such as many of those included in the draft RTS. For example, Article 2(4) of the draft RTS requires the CCP to consider the reliability and availability of financial support from the group and to consider the financial and operational dependence of the group to the clearing member, where it could negatively impact the clearing member's obligations towards the CCP. Articles 2(2)(a) and (b) require the CCP to consider a clearing member's access to reliable credit, liquidity and foreign exchange facilities, as well as a clearing member's creditworthiness. These topics touch on counterparty credit risk and should be considered by a CCP in connection with its ongoing credit risk management. To require CCPs to consider these rather granular elements when establishing admission criteria is in our view counterintuitive to the requirement that CCPs allow fair and open access to its services. Likewise, the elements required to be considered under Articles 4(2), 4(3), 4(4) and 5(b) of the draft RTS are more appropriate as guidelines rather than being encoded in legislation.

Articles 3(1)(e), 3(2), 3(6) and Article 4(3) of the draft RTS exemplify areas where both risk and responsibilities appear to be proposed to be transferred to CCPs. While it is appropriate for CCPs to gain sufficient comfort that a clearing member has the operational capacity, risk management framework and internal control systems to participate in the CCP, **CCPs are not oversight authorities and should not be expected to assess clearing member operational resilience and compliance with DORA and other regulatory obligations** to the extent suggested by Articles 3 and 4 of the draft RTS. Likewise, Article 5(c) of the draft RTS appears to transfer risk and responsibility to CCPs away from clearing members that clear on behalf of their clients. While CCPs may want to obtain information from clearing members on the exposures that underlying clients bring to the CCP, ultimately, clearing members are responsible for meeting the obligations towards CCPs.

It appears that the approach proposed by the draft RTS requires CCPs to assess each clearing member on several criteria to then set or adjust admission criteria that addresses the risks arising from the participation of existing or prospective clearing members. This bottom-up approach is not only burdensome, it seems to suggest that CCPs should continuously adapt their admission criteria based on the risks presented by existing or prospective clearing members. **We have concerns with the proposed approach and believe that CCPs should set admission criteria on the basis of the risks that CCPs are willing and able to accept**, and in accordance with those criteria, continue relationships with or accept new clearing members that meet such criteria. Article 7(a) of the draft RTS requires CCPs wishing to clear for non-financial counterparties to consider alternative collateralisation

arrangements in order to allow such parties to join the CCP membership, whereas CCPs may not wish to soften their standards at all.

Furthermore, **the proposed RTS as drafted has in our view the perhaps unintended effect of unduly restricting access to the CCP which we believe contravenes Article 37(1) of EMIR and substantially increases the burden of CCPs to achieve compliance with Article 37(2) of EMIR.** We respectfully request and urge special attention be paid to proportionality, for instance by disapplying most elements of the proposed draft RTS for financial counterparties, while maintaining those where the type of counterparty justifies it. The existing participation criteria framework for EU CCPs has not been identified, as far as we are aware, as a source of risk; therefore, the one-size-fits-all approach as set out by the draft RTS appears to be excessive and disproportionate to the risks we understand it is intended to address. In addition, the “shall consider” language used throughout the draft RTS suggests that CCPs must obtain for each clearing member the information called for in the various elements set out in the draft RTS, assess that information and when not addressing a specific element in its admission criteria, to justify for each such clearing member assessment, why that element has not been taken into account. As mentioned above, CCPs should set participation criteria on the basis of the risks CCPs are willing and able to accept. The approach proposed by the draft RTS could be seen as forcing CCPs to accept risks that they should not accept as well as being overly burdensome.