CMC EUROPE

5 January 2026

CMCE response to the ESMA CP on EMIR 3 draft RTS on participation requirements

Q1. Do you agree with the suggested elements with regard to fair and open access and transparency? Should the CCP consider other elements? Please justify your response and provide evidence.

We support the overarching principles of fair, open and transparent access to CCPs, underpinned by clear, objective and risk-based participation criteria. These principles are essential to ensuring competitive, resilient and well-functioning clearing markets.

We strongly welcome ESMA's recognition of the structural differences between financial counterparties and non-financial counterparties (NFCs). NFCs in the commodity markets ecosystem perform a fundamentally different role from hedge funds or other financial intermediaries, and their cleared activity is directly linked to the real economy, physical production, and end-user supply chains.

For this reason, participation criteria must reflect the legal, operational and economic realities applicable to NFCs. For example, requirements such as access to central bank liquidity are not legally or operationally feasible for NFCs. Applying such criteria uniformly would undermine EMIR's intent by excluding entities that are otherwise creditworthy, operationally sound and integral to commodity market functioning.

We also emphasise that more NFCs clearing directly results in better visibility of positions, better risk monitoring and ultimately better CCP risk management. Direct clearing improves transparency for CCPs and supervisors relative to indirect clearing via intermediaries.

Accordingly, we recommend that ESMA ensure CCP participation criteria:

- Remain proportionate to the nature, size and risk profile of the participant;
- Reflect the distinct role and limitations of NFCs in commodity markets;
- Preserve open and non-discriminatory access consistent with EMIR.

Importantly, Level 1 EMIR text explicitly provides for NFC participation in CCPs. This legislative intent must be honoured: any interpretation of participation criteria that would effectively exclude NFCs is inconsistent with the primary law, would risk significant market disruption and would create a monopoly over clearing access in the hands of the financial institutions, potentially increasing clearing costs for the commodity market participants with consequences for the real economy. In certain markets, national legislation or market rules require trading participants, including NFCs, to be CCP members to meet trading or regulatory obligations. If excluded, they may be forced to withdraw from markets entirely, harming market integrity and liquidity.

- **Q2. Do you agree with the suggested elements with regard to the clearing member's financial resources? Should the CCP consider other elements? Please justify your response and provide quantitative evidence.**

We support ESMA's continued emphasis on ensuring that clearing members maintain sufficient financial resources to support the scope and scale of their clearing activities. This principle is fundamental to safeguarding the integrity and resilience of CCPs and the wider clearing ecosystem.

However, we consider it essential that the assessment of "sufficient financial resources" remains proportionate to the nature and extent of the activities undertaken by the clearing member. In particular, NFCs operate under a distinct regulatory framework and business model compared to financial institutions:

- NFCs are not permitted to provide clearing services to third parties; and
- NFC's cleared positions typically arise from hedging activities directly linked to commercial exposures or physical assets.

Given these characteristics, we agree that the financial resource requirements for NFCs should generally align with those applied to financial institutions or intermediaries, but CCP participation criteria must additionally take into account the CCP member's actual asset base. For NFCs, this asset base is typically tied to self-cleared hedging activity, which presents a significantly smaller CCP risk compared to the broader, generally speculative, client-clearing activities undertaken by financial firms. The framework should therefore ensure that capital and liquidity requirements are calibrated with due regard to these factors, so that obligations remain proportionate to the specific risk profile of NFC clearing activity.

- **Q3. Do you agree with the suggested elements with regard to the clearing member's operational capacity? Should the CCP consider other elements? Please justify your response and provide evidence.**

We agree that it is essential for all clearing members to demonstrate adequate operational capacity to manage their risks and to comply fully with the rules and requirements of the clearing house. Robust operational capability is key to ensuring the orderly functioning of CCPs and maintaining confidence in cleared markets.

However, the assessment of operational capacity should reflect the nature and scope of the clearing activities undertaken. There are significant differences between a bank or financial intermediary offering client clearing across multiple products and jurisdictions, and an NFC is only permitted to clear its own group positions.

An NFC that is restricted to clearing proprietary or group hedging activity does not require the same level of operational infrastructure, systems, or staffing as a clearing member providing third-party or client clearing services. Applying identical operational requirements across such diverse CCP self-participants would risk creating unnecessary barriers to access, contrary to EMIR's objectives of open and non-discriminatory participation.

We therefore encourage ESMA to ensure that CCPs apply proportionate and risk-based assessments of operational capacity, taking into account both the business model and the clearing permissions of the member. This would maintain high operational standards while

ensuring that participation remains fair and appropriately calibrated for all categories of clearing members.

- **Q4. Do you agree with the suggested elements with regard to other considerations and risks? Should the CCP consider other elements? Please justify your response and provide evidence.**

We agree that it is important for CCPs to conduct comprehensive due diligence on potential clearing members. This should include assessing factors such as the jurisdictional framework, internal risk management controls, and the overall financial and operational soundness of the applicant. We agree such due diligence is essential to maintaining the safety and integrity of the clearing system. Consideration of any past or ongoing administrative, civil or criminal proceedings, sanctions or measures concerning a clearing member or a member of its group should be strictly limited to matters which may affect the clearing member's ability to fulfil its obligations to the CCP.

We welcome ESMAs recognition that whilst compliance with certain regulations such as DORA might form part of the assessment for FC, as they are related to providing financial services, and most likely not applicable to NFCs and therefore alternative elements should also be considered.

At the same time, we believe that any guidance issued by ESMA in this area should avoid being overly prescriptive. CCPs operate across diverse markets, and the relevant risk considerations for a commodities CCP can differ significantly from those for an equities or fixed income CCP. Overly uniform requirements could reduce flexibility and prevent CCPs from applying the most appropriate risk assessments for their specific products, participant base, and market dynamics.

We therefore recommend that ESMA's approach should focus on setting high-level principles, ensuring robust and consistent standards of due diligence, while allowing CCPs the discretion to tailor their assessments to the characteristics of their respective markets and the nature of their clearing members.

- **Q5. Do you agree with the suggested elements with regard to the specific risks of clearing members offering clearing services to clients? Should the CCP consider other elements? Please justify your response and provide quantitative evidence.**

N/A

- **Q6. Do you agree with the suggested elements with regard to sponsored models? Should the CCP consider other elements? Please justify your response and provide evidence.**

N/A

- **Q7. Do you agree with the suggested safeguards in relation to the access to reliable liquidity? Should ESMA consider other safeguards? Please justify your response and provide quantitative evidence.**

We welcome ESMA's recognition that different factors are relevant for NFCs compared to banks and other financial institutions. NFCs play a distinct and important role in cleared markets, using CCP participation primarily to hedge commercial exposures, rather than to provide client clearing or intermediation services.

We agree NFCs must demonstrate sound liquidity management, but requirements must be proportionate and avoid discouraging their continued participation. Punitive or overly rigid liquidity conditions could:

- Act as a de facto exclusion, contradicting Level 1 EMIR;
- Reduce the diversity of the clearing community;
- Increase the concentration of risk in a small number of financial institutions;
- Shift activity away from EU CCPs into bilateral markets or non-EU trading venues.

During the 2022 energy crisis, despite unprecedented price movements, no NFC clearing member defaulted. Both ESMA and the Financial Stability Board (FSB) have acknowledged that the clearing framework remained resilient throughout this period, which demonstrated the resilience of the current framework, including NFC participation. CCPs managed margins effectively and had full transparency over these members' exposures.

We therefore encourage ESMA to ensure that liquidity provisions for NFCs build on this proven resilience and remain grounded in proportionality, CCP discretion and creditworthiness-based assessment, and that they also take account of the broadening of the scope of eligible collateral available to be provided by NFCs.

- **Q8. Do you agree with the suggested alternative elements that a CCP could consider when an NFC is not subject authorisation or licencing requirements resulting in capital and prudential regulation and supervision?**

We agree with ESMA's view that the absence of a specific regulatory licence should not automatically disqualify an NFC from CCP participation. NFCs are subject to different legal, regulatory, and operational frameworks than financial institutions, and their participation in clearing typically relates to hedging commercial exposures rather than to offering financial services to third parties. We also note that the regulatory status of a clearing member does not dictate that CCP clearing members' risk to the CCP, nor its ability to meet margin calls or ability to meet its obligations towards the default fund.

We support the principle that CCPs should retain sufficient discretion to assess the eligibility and risk profile of potential members based on the characteristics of their markets and participants**.** In practice, CCPs are best placed to evaluate whether an entity has the appropriate financial soundness, risk management systems, and operational capacity to meet membership obligations. Prescriptive criteria, and over-standardisation of criteria, such as whether it holds a financial services licence will act as a de facto exclusion on CCP participation for all NFCs, whilst not addressing CCP member risk.

Accordingly, we encourage ESMA to maintain guidance that allows CCPs to exercise informed judgment in assessing NFC applicants, rather than imposing blanket licensing criteria that could inadvertently restrict the activities of financially stable participants.

We note that allowing NFCs to self-clear can reduce overall risk to the CCP. It broadens the clearing-member base used to mutualise losses, increases the amount of actual margin held at the CCP (as opposed to the net client margin posted by financial intermediaries), and materially reduces the concentration risk highlighted by ESMA and others arising from clearing activity being concentrated in a small number of large clearing members.

Finally, we would like to emphasise the importance of clear and phased implementation timelines. Introducing the proposed reforms through a single “big bang” transition would present significant operational and contractual challenges for CCPs and clearing members. Insufficient lead time could leave NFC clearing members in a position where they are compelled to seek alternative clearing arrangements on very short notice or unwind positions prematurely. Either outcome would create unnecessary disruption and could have broader adverse effects on market functioning and stability.