

## OPINION

# Exemption from the clearing obligation for pension schemes

Notification Reference: 21\_Pension\_Notification\_Finansinspektionen\_SE-1

## 1 Legal Basis

1. According to Article 89(2) of Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories<sup>1</sup> (EMIR), before taking its decision related to the pension scheme exemption from the clearing obligation, the relevant competent authority needs to obtain the opinion of the European Securities and Markets Authority (ESMA) that needs to consult the European Insurance and Occupational Pensions Authority (EIOPA).
2. ESMA is adopting the following opinion on (1) the compliance of the type of entities or the type of arrangements with Article 2(10)(c) and (2) the reason why an exemption is justified due to difficulties in meeting the variation margin requirements in accordance with Article 89(2) of EMIR.
3. Pursuant to Article 44(1) of Regulation (EU) No 1095/2010<sup>2</sup> this opinion has been adopted by the Board of Supervisors.

## 2 Background and Procedure

4. EMIR provides for the obligation of counterparties to clear certain classes of OTC derivative contracts. Some pension scheme arrangements or entities benefit automatically from a temporary exemption from that obligation for their OTC derivative contracts that reduce investment risks directly related to their solvency whereas other pension scheme arrangements or entities need to obtain a prior authorisation before benefiting from the exemption (in accordance with Article 89(2) of EMIR).

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

<sup>2</sup> OJ L 331, 24.11.2010, p. 84.



5. The pension scheme arrangements which can apply for an exemption under Article 89(2) of EMIR are (1) occupational retirement provision businesses of life insurance undertakings covered by Directive 2002/83/EC, and (2) other authorised and supervised entities, or arrangements, operating on a national basis, recognised under national law and whose primary purpose is to provide retirement benefits. The opinion of ESMA is required before the relevant competent authority decides on an exemption for these two categories of pension scheme arrangements.
6. After receiving the request for exemption, the relevant competent authority has to notify ESMA and EIOPA thereof and ESMA has to provide its opinion within 30 calendar days of receipt of the notification.
7. Upon receipt of ESMA's opinion, the competent authority has 10 working days to adopt and communicate its decision to the pension scheme arrangement and to ESMA.
8. In the present case, Finansinspektionen has notified ESMA on 06 June 2016, that the following Arrangement Type has requested to benefit from the exemption from the clearing obligation in application of Article 2(10)(c):  
  
*A participating life insurance company (limited by shares) (Livförsäkringsaktiefbolag), hereinafter "the Arrangement Type".*
9. The Arrangement Type is identified in the EIOPA database of pension plans and products in EEA<sup>3</sup> under the code: SE-1 (subgroup identified in the database under code: SE-1.2).
10. EIOPA has replied to the consultation on the notification and has provided its response to ESMA on 20 June 2016.
11. A first Opinion was adopted by ESMA on 4 July 2016<sup>4</sup>. However, Finansinspektionen has sent a corrigendum of their notification on 06 December 2016 and EIOPA has replied to the consultation on the corrected notification and has provided its response to ESMA on 20 December 2016. The present opinion replaces the Opinion initially adopted on 4 July 2016.

### 3 ESMA Opinion

12. In order to prepare this opinion, ESMA has relied on information provided by the national competent authority in its notification and provided by EIOPA in its consultation.

#### ***On the compliance of the Arrangement Type with Article 2(10)(c)***

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<sup>3</sup> <https://eiopa.europa.eu/regulation-supervision/pensions/database-of-pension-plans-and-products-in-the-eea>

<sup>4</sup> ESMA-2016-1073 of 4 July 2016



13. The national competent authority has confirmed that the Arrangement Type is an occupational retirement provision businesses of life insurance undertaking covered by Directive 2002/83/EC or, from 1 January 2016, by Directive 2009/138/EC (Solvency II)
14. The national competent authority has confirmed that the Arrangement Type has an explicit retirement objective in accordance with national law.<sup>i</sup>
15. The national competent authority is of the opinion that the Arrangement Type complies with Article 2(10)(c) of EMIR. EIOPA shares this view.
16. In view of the above and on the basis of the information provided, ESMA is of the opinion that the Arrangement Type complies with Article 2(10)(c).

***On the reason why an exemption is justified due to difficulties in meeting the variation margin requirements***

17. The national competent authority is of the opinion that the Arrangement Type would encounter difficulties in meeting variation margin requirements for centrally cleared transactions due to high cost (e.g. lower investment returns or transaction costs), risk of inefficiencies as a result of converting assets into cash. EIOPA shares this view.
18. In view of the above and on the basis of the information provided, ESMA is of the opinion that the reasons why an exemption is justified due to difficulties in meeting variation margin requirements for centrally cleared transactions for the Arrangement Type are valid.

This Opinion is addressed to:

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<sup>i</sup> In particular, the competent authority indicated in the notification that Ch. 1 S. 8 and Ch. 4 S. 8 of the Insurance Business Act (2010:2043)