

OPINION

Exemption from the clearing obligation for pension schemes

Notification Reference: 24_Pension_Notification_Comisión Nacional del Mercado de Valores_ES-2

1 Legal Basis

1. According to Article 89(2) of Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories¹ (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)(d) 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 1095/2010² 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).

¹ OJ L 201, 27.7.2012, p. 1.

² 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, the Comisión Nacional del Mercado de Valores has notified ESMA on 19 December 2016 that the following Entity Type has requested to benefit from the exemption from the clearing obligation in application of Article 2(10)(d):

Personal Pension Funds (Fondos de Pensiones Personales), hereinafter “the Entity Type”.

9. The Entity Type is identified in the EIOPA database of pension plans and products in EEA³ under the code: ES-2 (subgroup identified in the database under code: ES-2).
10. EIOPA has replied to the consultation on the notification and has provided its response to ESMA on 23 December 2016.

3 ESMA Opinion

11. 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 Entity Type with Article 2(10)(d)

12. The national competent authority has confirmed that the Entity Type does not fall within the definition of Article 2(10)(a), (b) or (c) of EMIR and that it is authorised and supervised by Ministry of Economy.

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



13. The national competent authority has confirmed that the Entity Type operates on a national basis i.e. that services are provided on a national basis whereas investments may be performed on a cross border basis, is recognised under national law and has as its primary purpose to provide retirements benefits.ⁱ
14. The national competent authority is of the opinion that the Entity Type complies with Article 2(10)(d) of EMIR. EIOPA shares this view.
15. In view of the above and on the basis of the information provided, ESMA is of the opinion that the Entity Type complies with Article 2(10)(d).

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

16. The national competent authority is of the opinion that the Entity Type would encounter difficulties in meeting variation margin requirements for centrally cleared transactions due to limited holdings of cash within the Entity Type, 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.
17. 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 Entity Type are valid.

This Opinion is addressed to:

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ⁱ Royal Legislative Degree 1/2002, of November 29 on Pension Plans and Pension Funds (Real Decreto Legislativo 1/2002, de 29 de noviembre, por el que se aprueba el texto refundido de la Ley de Regulación de los Planes y Fondos de Pensiones). Article 11(7)(b) of Royal Legislative Degree 1/2002, foresees within the type of pensions funds, the personal pension funds. Chapters IV and V of that legislation include the general provisions on pension funds which apply both to occupational pension funds and personal pension funds which apply both to occupational pension funds and personal pension funds.