

OPINION

Exemption from the clearing obligation for pension schemes

Notification Reference: 20_Pension_Notification_Finanstilsynet_DK-2-2

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 Finanstilsynet has notified ESMA on 24 May 2016 that the following Entity Type has requested to benefit from the exemption from the clearing obligation in application of Article 2(10)(d):

Life insurer personal schemes (Livsforsikringssselskab private pensioner), hereinafter "the Entity Type".
9. The Entity Type is identified in the EIOPA database of pension plans and products in EEA³ under the code: DK-2 (subgroup identified in the database under code: DK-2.2).
10. EIOPA has replied to the consultation on the notification and has provided its response to ESMA on 03 June 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 Finanstilsynet.
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

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



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) and 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:

Finanstilsynet
Aarhusgade 110
2100 Copenhagen
Denmark

ⁱ All relevant undertakings are subject to the Financial Business Act.

According to Financial Business Act art. 11 section 1 undertakings are licensed to offer specific classes of insurances covering the following life insurance products (Act on Financial Business annex 8): general life assurance, marriage assurance and birth insurance, insurance attached to collective investment funds, permanent health insurance, tontine and capitalisation.

The general rule is, that Insurance companies may only carry out the activities mentioned in Annexes 7(non-life) and 8 (life). There are only a few opportunities to deviate from this general rule.

Relevant provisions from Act on Financial Business:

11.-(1) Undertakings, which carry out insurance activities, including reinsurance activities, shall be licensed as insurance companies, or captive reinsurance companies cf. however, sections 30 and 31. The licence shall state the classes of insurance in Annexes 7 and 8 it covers. Insurance companies may only carry out the activities mentioned in Annexes 7 and 8 as well as activities under sections 24-26 and section 29. The same shall apply to foreign insurance companies, which are covered by section 1(3) and fulfil the conditions in sections 30 or 31.

24. Banks, mortgage-credit institutions and insurance companies may carry out activities ancillary to the activities licensed. The Danish FSA may decide that the ancillary activities are to be carried on by another company.

(2) Banks, mortgage-credit institutions and insurance companies may, through subsidiary under-takings, carry out other financial activities.

25. Banks, mortgage-credit institutions and insurance companies may, temporarily, carry out other activities to secure or settle exposures already entered into, or with regard to restructuring enterprises. The financial undertaking must inform the Danish FSA regarding this matter.

26.-(1) Banks, mortgage-credit institutions, investment firms and insurance companies may, notwithstanding sections 7-9, 11, 24 and 25, carry out other activities in cooperation with others if

1) the financial undertaking does not have direct or indirect controlling influence on the undertaking,

2) the financial undertaking does not carry out the activities in cooperation with other financial undertakings which are part of a group with said financial undertaking, or with regard to insurance companies, in management cooperation with said insurance company, and

3) the activities are carried out in another company than the financial undertaking.

(2) If a financial undertaking or group begins to carry out other activities contrary to section 7(1), 8(1), 9(1), 11(1) or subsection 26(1) due to an acquisition, a merger, etc., the Danish FSA may determine a time-limit for disposal of the other activities, if an immediate disposal would result in a financial loss.

29.-(1) In addition to the activities included in sections 24-26, insurance companies may carry out the following activities:

1) Agency activities for insurance companies and other companies under the supervision of the Danish FSA.

2) Establishment, ownership and operation of real property as a long-term placing of funds.

(2) Life-assurance companies may erect residential housing for purposes of resale when said companies have been granted a pledge for a share of the appropriation framework under section 1c or under regulations laid down in pursuance of section 1(4) of the Promotion of Private Rental Housing Act (lov om fremme af privat udlejningsbyggeri) and at least half of the residential flats are rented for year-round residence.

(3) With regard to investments under subsection (2), the value of the share of residential flats erected for purposes of resale may not exceed 1 percent of the insurance provisions.

(4) Life assurance companies and multi-employer occupational pension funds may establish and manage separate SP (Special Pension Savings Scheme) accounts.

The Danish regulation of life insurance companies does not contain rules that entail any significant distinction between occupational pension schemes and personal pension schemes. Life insurance companies offer the same products for occupational schemes as they do for personal schemes. Investments connected to the pension savings are invested in the same way, and investments representing personal schemes are in most cases indistinguishable from investments representing occupational schemes. And the ability to purchase risk reducing derivatives is equally important for personal schemes as for occupational ones.