

Explanatory memorandum to the form of the ISDA EMIR Classification Letter

International Swaps and Derivatives Association, Inc. (“ISDA”) has prepared this explanatory memorandum to assist in your consideration of the form of the ISDA EMIR Classification Letter published by ISDA on 13th July 2015 and as updated and further published on 13th April 2016 (the “**Classification Letter**”).

THIS EXPLANATORY MEMORANDUM DOES NOT PURPORT TO BE AND SHOULD NOT BE CONSIDERED A GUIDE TO OR AN EXPLANATION OF ALL RELEVANT ISSUES OR CONSIDERATIONS IN CONNECTION WITH THE CLASSIFICATION LETTER OR COMPLIANCE WITH THE EUROPEAN MARKET INFRASTRUCTURE REGULATION (“EMIR”). PARTIES SHOULD CONSULT WITH THEIR LEGAL ADVISERS AND ANY OTHER ADVISER THEY DEEM APPROPRIATE PRIOR TO USING THE CLASSIFICATION LETTER. ISDA ASSUMES NO RESPONSIBILITY FOR ANY USE TO WHICH ANY OF ITS DOCUMENTATION OR OTHER DOCUMENTATION MAY BE PUT.

INTRODUCTION TO THE CLASSIFICATION LETTER

The Classification Letter is a form of letter that market participants may find useful as part of the management of their regulatory obligations under EMIR, the European Union (“EU”) regulation that deals mainly with: clearing over-the-counter (“OTC”) derivatives; mitigation of risks associated with uncleared OTC derivatives; and reporting of derivatives transactions to trade repositories.

Under EMIR, financial and non-financial counterparties have to comply with certain regulatory obligations and the application of these obligations depends, in many circumstances, on the classification of *both* parties to a given transaction. The Classification Letter is a method of facilitating communication of classification status between counterparties to help ensure compliance with EMIR. By answering a series of questions in the Classification Letter, derivatives counterparties can classify themselves according to the EMIR taxonomy. The Classification Letter serves a similar purpose to that of the ISDA 2013 EMIR NFC Representation Protocol, the EMIR Counterparty Classification Tool and the EMIR Clearing Classification Tool (the latter two being the “**ISDA Amend Classification Tools**”), all of which provide ways for derivatives counterparties to classify themselves. In particular, the Classification Letter was developed as a bilateral version of the ISDA Amend Classification Tools, for use by parties which do not subscribe to ISDA Amend.

To help ensure conformity where a party receives classification information from both the Classification Letter and the ISDA Amend Classification Tools, the questions and answers in the Classification Letter duplicate those used in the ISDA Amend Classification Tools. Accordingly, this guidance follows very closely the guidance which is available for users of the ISDA Amend Classification Tools.

UPDATE TO THE CLASSIFICATION LETTER

ISDA published the original form of the Classification Letter on 13th July 2015 and then published the updated form of the Classification Letter on 13th April 2016. The updated version:

- aligns the definition of Category 1 Entity to that used in the final, published version of the Interest Rate Products RTS;
- adds two new questions (and supporting definitions), allowing the Named Entity to state its clearing Category in respect of each of the Second Rates RTS and the Index CDS RTS; and
- removes the forward looking statement about classification in respect of future classes of OTC derivatives contracts made subject to mandatory clearing, which used to appear in Question 1 of Appendix I, and the related “form of” notice which was attached at Appendix IV. These were no longer seen as necessary given the addition of the two new questions (noted above).

If the Named Entity has used or is using the original form of the Classification Letter, it should consider the effect of the forward looking statement and advise each Recipient accordingly.

GUIDANCE TO THE CLASSIFICATION LETTER

In the first section of the Classification Letter, an entity (the “**Named Entity**”) gives its full legal name and signature. This section states that the Named Entity makes the statements in Appendix I (EMIR Clearing Categorisation) and/or Appendix II (EMIR Counterparty Classification), as indicated in each appendix to provide its counterparty (the “**Recipient**”) with status information needed by the Recipient to determine the application of certain clearing requirements under EMIR and that the statements in the Classification Letter are solely for the purposes of such determinations. The Named Entity also commits to inform the Recipient if the classification information provided ceases to be true.

A standard signatory box is included but, as stated in the footnotes, this should be amended in some cases, such as where an investment manager is acting on behalf of one or more funds.

GUIDANCE TO APPENDIX I (EMIR CLEARING CATEGORISATION)

General Introduction

WHY THE DATA IS NEEDED

The application of the clearing obligation – both in terms of whether the clearing obligation applies and, if so, the timeframe for implementation – depends on, among other things, how both entities to an OTC derivative contract are classified according to the taxonomy used in EMIR.

- As a preliminary matter, certain types of entity are not subject to the clearing obligation under EMIR. In general terms, these include (among other entities) non-financial counterparties below the clearing threshold (often referred to as “NFC-s”), non-undertakings, certain central banks, public authorities, multilateral development banks and other supranational bodies.
- For entity types that are subject to the clearing obligation (financial counterparties (“FCs”) and non-financial counterparties above the clearing threshold (“NFC+s”)), the regulatory technical standards which set out the detail of the application of the EMIR clearing obligation to interest rate and credit product OTC derivative contracts distinguish between:
 - Category 1 Entities (clearing members of certain clearing houses clearing certain products);
 - Category 2 Entities (FCs and NFC+ alternative investment funds which hold an aggregate gross notional amount of non-centrally cleared OTC derivative contracts above a given threshold by reference to a prescribed time period and which are not Category 1 Entities);
 - Category 3 Entities (FCs and NFC+ alternative investment funds which are not in Category 1 or 2); and
 - Category 4 Entities (NFC+s which are not in Categories 1 to 3).

The definition of each Category appears in Appendix III (Defined Terms).

The Classification Letter enables users to indicate their Category in respect of certain interest rate and credit products. It is intended that the Classification Letter be expanded in the future to cover other classes of products, should this be needed.

EMIR also provides a temporary exemption – originally until 16 August 2015 – from the clearing obligation for certain types of OTC derivative entered into by certain types of pension scheme arrangements. The European Commission (“EC”) has extended the temporary exemption to the clearing obligation for pension scheme arrangements by two years – it now runs until 16 August 2017 – and can extend it by one further year if it considers this necessary.

In respect of third country entities, the clearing obligation may apply (directly or indirectly) to such a third country entity depending on, among other things: (a) the classification of its counterparty; and (b) how the third country entity would be classified if it were established in the EU.

WHO SHOULD/SHOULD NOT COMPLETE THESE QUESTIONS?

These questions should not be completed by:

- central counterparties;
- trade repositories; or
- trading venues.

All other undertakings that enter into OTC derivatives that have been or may be declared subject to mandatory clearing **should** complete these questions (unless otherwise indicated in the letter), including those that are not established in the EU.

Care should be taken to ensure consistency in responses. For example, an entity which has indicated in Appendix II (EMIR Counterparty Classification) that it is not a Pension Scheme Arrangement should not answer the fifth or sixth questions in Appendix I (EMIR Clearing Categorisation) as these two questions relate solely to Pension Scheme Arrangements.

PURPOSE OF THE DATA

This Classification Letter is intended to provide a means by which entities can make known their classification and gain access to other entities' classifications, where applicable, according to the EMIR taxonomy by answering a series of questions.

GUIDANCE TO APPENDIX I (EMIR CLEARING CATEGORISATION)

Question Specific Guidance

Question 1 “What is your clearing category under the EMIR Interest Rate Products RTS?”

The question asks entities to specify their clearing category under the “**Interest Rate Products RTS**”: the Commission Delegated Regulation supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on the clearing obligation in respect of interest rate OTC derivatives denominated in Euro, British Pound, Japanese Yen or U.S. Dollar. Article 2 of the Interest Rate Products RTS sets out the categories of counterparty to which the clearing obligation in respect of interest rate OTC derivatives applies.

The answers given to Question 1 will help parties determine if the clearing obligation applies to interest rate OTC derivative contracts denominated in Euro, British Pound, Japanese Yen or U.S. Dollar between them and, if it does apply, the answers help the parties determine both the start date for the clearing obligation and whether trades entered into before such date will have to be cleared (such retrospective clearing is typically referred to as “frontloading”).

The period leading up to the start date for mandatory clearing is shortest for trades entered into between two Category 1 Entities and becomes progressively longer for trades entered into between entities in Categories 2, 3 and 4. Where the two parties to a trade belong to different Categories resulting in different start dates for their respective trades, the later start date will be used.

The meanings of each of the four Categories are set out in Appendix III (Defined Terms).

Frontloading applies to trades between financial counterparties in Categories 1 and 2.

Pension Scheme Arrangements (each, a “**PSA**”) should answer Question 1 irrespective of whether they are intending to use the Pension Scheme Arrangement Exemption (the “**PSA Exemption**”). By stating its category, the PSA is not considered to be stating whether or not it will be subject to mandatory clearing or if it has or will have the benefit of the PSA Exemption (and so not be subject to mandatory clearing in respect of one or more contracts). Question 6 provides the opportunity to make a statement in respect of the applicability and use of the PSA Exemption without undermining its ability to clear trades on a voluntary basis if it so chooses.

If the Named Entity is an entity other than an NFC- or an out of scope entity as indicated in Appendix II (EMIR Counterparty Classification) (including where it is a non-undertaking), then it should answer Question 1.

Third Country Entities should answer this question on the basis of what their categorisation would be if they were established in the EU. If the Named Entity is an entity out of scope for EMIR, it should not answer any of the questions in Appendix I (EMIR Clearing Categorisation).

Please note that, if the Named Entity indicates in Appendix II (EMIR Counterparty Classification) that it is an NFC+, it is unlikely, though not impossible, that it will be a Category 1 Entity. In addition, if the Named Entity indicates in Appendix II (EMIR Counterparty Classification) that it is an FC, it is unlikely that it will be a Category 4 Entity.

Question 2 “What is your clearing category under the Second Rates RTS?”

The question asks entities to specify their clearing category under the “**Second Rates RTS**”: the Commission Delegated Regulation supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on the clearing obligation in respect of interest rate OTC derivatives denominated in Norwegian Krone, Swedish Krona and Polish Zloty.

The same guidance as set out in Question 1 applies to Question 2, except that any reference to “interest rate OTC derivative contracts denominated in Euro, British Pound, Japanese Yen or U.S. Dollar” shall be to “interest rate OTC derivative contracts denominated in Norwegian Krone, Swedish Krona and Polish Zloty”.

The updated Classification Letter has been published before the Second Rates RTS is finalised. The parties should consider whether the Classification Letter requires amendment to conform to the finalised Second Rates RTS and, similarly, should use this guidance with care.

Question 3 “What is your clearing category under the Index CDS RTS?”

The question asks entities to specify their clearing category under the “**Index CDS RTS**”: the Commission Delegated Regulation supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on the clearing obligation in respect of index CDS OTC derivatives.

The same guidance as set out in Question 1 applies to Question 3, except that any reference to “interest rate OTC derivatives denominated in Euro, British Pound, Japanese Yen or U.S. Dollar” shall be to “index CDS OTC derivatives settled in Euro”.

The updated Classification Letter has been published before the Index CDS RTS is finalised. The parties should consider whether the Classification Letter requires amendment to conform to the finalised Index CDS RTS and, similarly, should use this guidance with care.

Question 4 “Are you an Alternative Investment Fund?”

The answer given to Question 4 adds further detail helpful to the parties to support the classification given in response to Questions 1, 2 and 3. A NFC+ which, in respect of the relevant regulatory technical standards, is not in Category 1 will be in Category 2 or 3 if it is an Alternative Investment Fund (“**AIF**”) or in Category 4 if it is not.

Article 4(1)(a) of Directive 2011/61/EU provides the definition of Alternative Investment Fund:

- (a) Alternative investment fund means collective investment undertakings, including investment compartments thereof, which:
 - (i) raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and
 - (ii) do not require authorisation pursuant to Article 5 of Directive 2009/65/EC.

If the Named Entity is an entity other than an out of scope entity as indicated in Appendix II (EMIR Counterparty Classification), then it should answer Question 4.

If the Named Entity is a Third Country Entity, it should answer Question 4 on the basis of what its categorisation would be if the Named Entity were established in the EU.

If the Named Entity indicates in Appendix II (EMIR Counterparty Classification) that it is an NFC+ and has indicated that it is a Category 4 Entity, it is more likely not to be an AIF and should consider its categorisation here carefully. If it indicates in Appendix II (EMIR Counterparty Classification) that it is an NFC+ and has indicated that it is either a Category 2 Entity or a Category 3 Entity, it is more likely to be an AIF and should consider its categorisation here carefully.

Question 5 “What type of Pension Scheme Arrangement are you?”

The answers given to Question 5 add further helpful detail as to whether the PSA Exemption is available for use with or without action by the relevant national competent authority. The options shown in Question 5 correspond with the definition of Pension Scheme Arrangement in Article 2(10) of EMIR and are as defined in Appendix III (Defined Terms).

If the Named Entity is a PSA as indicated in Appendix II (EMIR Counterparty Classification), then it should answer Question 5. Third Country Entities should not complete this section.

Question 6 “Use of the Pension Scheme Arrangement Exemption”

The PSA Exemption exempts certain PSAs from having to clear contracts which meet set criteria.

Question 6 is intended to help PSAs inform their counterparties as to whether the PSA Exemption should be treated as applicable in respect of trades entered into by such PSA on an on-going basis. The aim is to remove, where possible, the need for the PSA to confirm the application of the PSA Exemption with each counterparty each time it enters into an uncleared trade. The statements made by the PSA are (only) in respect of trades to which the Recipient is party.

The first option, “All Contracts”, is broad, covering both trades which would otherwise have to be cleared and also trades which are, in any event, not subject to mandatory clearing. This is intended to allow the PSA:

- (i) to say (essentially) that the exemption applies to all trades the PSA enters into which, but for the exemption, would have to be cleared (so the PSA is not required to clear any trades but might choose to clear trades on a voluntary basis); and
- (ii) to give the parties it faces comfort relating to Articles 382(4)(c) and 482 of the Capital Requirements Regulation (Regulation (EU) No 575/2013).

The second option, “All Contracts To Which Mandatory Clearing Would Otherwise Apply”, is narrower than the first, applying only to trades which would otherwise have to be cleared. It says (essentially) that the exemption applies to all trades the PSA enters into which, but for the exemption, would have to be cleared (so the PSA is not required to clear any trades but might choose to clear trades on a voluntary basis).

The third option, “No General Statement Made”, is intended to allow the PSA to say (essentially) that:

- (i) while it is not making a general statement as to whether or not the PSA Exemption applies to all contracts (so the PSA may or may not be required to clear trades);
- (ii) if it does request to enter a trade on an uncleared basis where such trade would, but for the exemption, be subject to mandatory clearing, then it is requesting to trade uncleared because the PSA Exemption applies.

Third Country Entities should not complete this section.

If the Named Entity is a PSA as indicated in Appendix II (EMIR Counterparty Classification), then it should answer Question 6.

If the Named Entity indicates an intention to use the exemption in a particular way in the “Do you intend to utilise the Pension Scheme Arrangement Exemption” question in Appendix II (EMIR Counterparty Classification), it should take care that the answer it gives there is consistent with the election it makes under Question 6.

GUIDANCE TO APPENDIX II (EMIR COUNTERPARTY CLASSIFICATION)

General Introduction

WHY THE DATA IS NEEDED

The application of the EMIR obligations mentioned above to a given entity – both in terms of whether the obligations apply and, if so, the extent to which they apply – depends on, among other things, how that entity is classified according to the taxonomy used in EMIR:

- As a preliminary matter, certain specified types of entity are wholly exempt from the obligations in EMIR; certain other specified types of entity are exempt in part. In general terms, these include (among other entities) certain central banks, public authorities, multilateral development banks and other supranational bodies.
- For entities that are not expressly exempted, EMIR distinguishes between:
 - “financial counterparties” – in general terms, entities authorised under one of a number of pieces of EU financial services legislation;
 - “non-financial counterparties” (NFCs) – all undertakings established in the EU other than financial counterparties and central counterparties; and
 - “third country entities” – all undertakings other than financial counterparties, non-financial counterparties and central counterparties.
- A further distinction is made among NFCs between those whose OTC derivatives activity (excluding hedging activity) exceeds a specified level (NFC+) and those whose OTC derivatives activity (excluding hedging activity) does not (NFC-).
- In respect of third country entities, certain EMIR obligations apply directly to such persons in specified circumstances. Other obligations may indirectly affect such persons where their counterparty to a derivative contract is an EU-established entity that is itself directly subject to those obligations. The application of such obligations to a given third country entity depends, among other things, on how that entity would be classified if it were established in the EU (i.e. whether it would be a financial counterparty, an NFC+ or an NFC-).
- EMIR also provides a temporary exemption – originally until 16 August 2015 – from the obligation to clear OTC derivatives for certain types of OTC derivative entered into by certain types of pension scheme arrangements. Commission Delegated Regulation (EU) 2015/1515 of 5 June 2015 has extended this exemption to 16 August 2017.

WHO SHOULD/SHOULD NOT COMPLETE THESE QUESTIONS?

These questions should not be completed by:

- central counterparties;
- trade repositories;
- trading venues.

All other undertakings that enter into derivatives **should** complete these questions, including those that are not established in the EU.

Natural or legal persons who/which are not “undertakings” for the purposes of EMIR – “non-undertakings” – and who/which therefore consider themselves to be outside the scope of EMIR should answer the “Third Country

Entity” question, answer “yes” to the “Are you an entity out of scope for EMIR?” question and then indicate that they are a non-undertaking.

In addition to the terms defined in Appendix III (Defined Terms), please note:

- A trade repository is defined in Article 2(2) of EMIR as: “A legal person that centrally collects and maintains the records of derivatives”.
- A trading venue is defined in Article 2(4) of EMIR as: “A system operated by an investment firm or a market operator within the meaning of Article 4(1)(1) and 4(1)(13) of Directive 2004/39/EC (MiFID) other than a systematic internaliser within the meaning of Article 4(1)(7) thereof, which brings together buying or selling interests in financial instruments in the system, in a way that results in a contract in accordance with Title II or III of that Directive”.
- Neither “undertaking” nor “non-undertaking” is defined in EMIR. Please refer to the accompanying guidance on “undertakings and non-undertakings” for the EC’s position on how a person should assess whether it is an “undertaking” for the purposes of EMIR.

PURPOSE OF THE DATA

This is intended to provide a means by which entities can make known their classification and gain access to other entities’ classifications, where applicable, according to the EMIR taxonomy by answering a series of questions.

GUIDANCE TO APPENDIX II (EMIR COUNTERPARTY CLASSIFICATION)

Question Specific Guidance

Question 1 “Third Country Entity”

The term “third country entity” is not defined in EMIR. However, in the context of the application of certain obligations, EMIR distinguishes between entities that are established in the EU and entities that are not established in the EU. For the purposes of Question 1 therefore, a “third country entity” means an entity that is not established in the EU (subject to the points below).

The meaning of “established” has also not been defined in this context – existing commentary from European authorities suggests that it refers to the jurisdiction in which an entity is incorporated or otherwise constituted (rather than any physical presence from which it does business, to the extent that this differs from its jurisdiction of incorporation or constitution); for example, an entity which is incorporated outside the EU but has a physical presence in the EU by way of a branch would still be a third country entity. *Each entity must determine for itself where it is “established” for these purposes.*

It is important to note that Question 1 should be answered subject to the following:

- it should still be answered by an entity which is wholly or partially exempt from EMIR (which is addressed in subsequent questions); and
- an entity which would be a “third country entity” on the basis of its establishment alone should still answer that it is not a third country entity if that entity is in fact a “financial counterparty” under EMIR. This is of particular relevance to a non-EU AIF managed by a manager authorised or recognised in accordance with the Alternative Investment Fund Managers Directive, which would be a “third country entity” on an establishment-only test but is a financial counterparty for EMIR purposes.

Where an entity elects here that it is a “third country entity”, the remainder of the elections made by the entity should be read in that context.

Natural or legal persons who/which are not “undertakings” for the purposes of EMIR – “non-undertakings” – and who/which therefore consider themselves to be outside the scope of EMIR should answer Question 1.

Question 2(a) “Are you an entity out of scope for EMIR?”

Question 2(a) intends to identify those entities which are expressly exempt from EMIR, either in whole or in part and those natural or legal persons who consider themselves to be outside the scope of EMIR by reason of not being an “undertaking” for the purposes of EMIR (“non-undertakings”).

Exempt entities

Certain specified types of entity are wholly exempt from the EMIR obligations; certain other specified types of entity are exempt in part.

An entity will be wholly exempt – i.e. none of the EMIR obligations will apply to it – if it falls within one of the types of entity listed in Article 1(4) of EMIR. An entity will be partially exempt – i.e. none of the EMIR obligations will apply to it *other than the reporting obligations* – if it falls within one of the types of entity listed in Article 1(5) of EMIR.

Subject to the next paragraph, and the adoption of EMIR by Iceland, Liechtenstein and Norway as members of the European Economic Area, the lists of wholly and partially exempt entities are static – in this context there is no concept of “equivalence” for entities that: (a) are not specifically named; or (b) in the case of a defined group of exempt entities, do not fall within that definition.

The EC has the power to extend the list of entities that are wholly exempt from EMIR (but not the list of entities that are partially exempt). It may therefore be the case that an entity not currently exempt from EMIR could become exempt in future, *at which point it should amend its response to Question 2(a).*

Each entity must determine for itself whether it falls within one of the types of entity listed as being wholly or partially exempt.

These exemptions are distinct from the time-limited exemption from clearing for certain types of OTC derivative entered into by PSAs. *A PSA not falling within Article 1(4) or Article 1(5) of EMIR should answer “no” to Question 2(a).*

Non-undertakings

Natural or legal persons who/which are not “undertakings” for the purposes of EMIR – “non-undertakings” – and who/which therefore consider themselves to be outside the scope of EMIR should answer “yes” to Question 2(a) “Are you an entity out of scope for EMIR?” and then indicate that they are a non-undertaking in Question 2(b).

Please refer to the accompanying guidance on “undertakings and non-undertakings” for the EC’s position on how a person should assess whether it is an “undertaking” for the purposes of EMIR.

Each natural or legal person must determine for itself whether it is or is not an undertaking for the purposes of EMIR.

Question 2(b) “Select the entity type that is out of scope”

Each entity which has indicated that it falls outside the scope of EMIR by selecting “yes” in response to Question 2(a) must specify the basis for that indication to confirm its entity type. These exemptions are distinct from the time-limited exemption from clearing for certain types of OTC derivative entered into by PSAs. If a PSA answers “no” to Question 2(a) then such PSA should not answer Question 2(b).

The entity types are as defined in Appendix III (Defined Terms). In addition, for ease of reference:

- (i) in respect of the definition of an Article 1(4)(c) Entity, Article 1(4)(c) of EMIR was added by delegated act in accordance with Article 1(6) of EMIR, which required the EC to prepare a report assessing the international treatment of public bodies charged with or intervening in the management of the public debt and central banks (the report is available at <http://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=CELEX:52013DC0158>) and empowered the EC to adopt delegated acts (in accordance with Article 82 of EMIR) to amend the list set out in Article 1(4);
- (ii) in respect of the definition of an Article 1(5)(a) Entity, the multilateral development banks listed under Section 4.2 of Part 1 of Annex VI to Directive 2006/48/EC are:
 - the International Bank for Reconstruction and Development;
 - the International Finance Corporation;
 - the Inter-American Development Bank;
 - the Asian Development Bank;
 - the African Development Bank;
 - the Council of Europe Development Bank;
 - the Nordic Investment Bank;
 - the Caribbean Development Bank;
 - the European Bank for Reconstruction and Development;
 - the European Investment Bank;
 - the European Investment Fund;

- the Multilateral Investment Guarantee Agency;
- the International Finance Facility for Immunisation; and
- the Islamic Development Bank, and

(iii) in respect of the definition of Article 1(5)(b) Entity, “public sector entities” means non-commercial administrative bodies responsible to central governments, regional governments or local authorities, or authorities that in the view of the competent authorities exercise the same responsibilities as regional and local authorities, or non-commercial undertakings owned by central governments that have explicit guarantee arrangements, and may include self-administered bodies governed by law that are under public supervision.

Each entity must determine for itself to which category it belongs.

A non-undertaking

The concept of an “undertaking” is not defined in EMIR. The EC, in its EMIR FAQs, has given its interpretation of what constitutes an “undertaking” for EMIR purposes. In this regard, the EC notes the following:

- Undertaking could mean an “entity operating in one or more economic sectors”.
- The qualification of an entity as an “undertaking” for EMIR purposes would also appear to depend on the nature of the activities carried out by that entity, rather than on the nature of the entity itself.
- The Court of Justice has also consistently held that, in the context of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed. Therefore, the qualification of a specific entity as an undertaking depends entirely on the nature of its activities. As regards the concept of “economic activity”, the Court has considered that any activity consisting in offering goods and services on a market is an economic activity, regardless of the entity's legal status and the way in which it is financed.
- Non-profit entities are also considered “undertakings” if they offer goods and services in the market.
- Individuals carrying out an economic activity are also considered to be undertakings, provided they offer goods and services in the market.

The EC also notes, however, that the exercise of public authority or powers would not be considered an economic activity. In this respect, where authorities emanating from the relevant State act in their capacity as public authorities, they would not be considered undertakings.

Accordingly, the EC asserts that the term “undertaking” would be addressed to activities instead of entities and that, against this background, the term “undertaking” would include entities, regardless of their legal status, performing economic activities in the market.

Question 3 “EMIR Entity Type”

Each entity which has indicated that it falls outside the scope of EMIR under Questions 1 and 2 should not answer Question 3.

“FC” and “NFC” are as defined in Appendix III (Defined Terms).

If the Named Entity is a Third Country Entity, it should answer Question 3 on the basis of what its categorisation would be if the Named Entity were established in the EU but it should not answer Question 5(b).

Question 4 “Clearing Threshold”

“NFC+” and “NFC-” are as defined in Appendix III (Defined Terms). For ease of reference, Article 10 of EMIR states:

1. Where a non-financial counterparty takes positions in OTC derivative contracts and those positions exceed the clearing threshold as specified under paragraph 3, that NFC shall:
 - a) immediately notify ESMA and the competent authority referred to in paragraph 5 thereof;
 - b) become subject to the clearing obligation for future contracts in accordance with Article 4 if the rolling average position over 30 working days exceeds the threshold; and
 - c) clear all relevant future contracts within four months of becoming subject to the clearing obligation.
2. A non-financial counterparty that has become subject to the clearing obligation in accordance with paragraph 1(b) and that subsequently demonstrates to the authority designated in accordance with paragraph 5 that its rolling average position over 30 working days does not exceed the clearing threshold, shall no longer be subject to the clearing obligation set out in Article 4.
3. In calculating the positions referred to in paragraph 1, the non-financial counterparty shall include all the OTC derivative contracts entered into by the non-financial counterparty or by other non-financial entities within the group to which the non-financial counterparty belongs, which are not objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity of the non-financial counterparty or of that group.

Each entity which has indicated that it falls outside the scope of EMIR under Questions 1 and 2 should not answer Question 4.

If the Named Entity is a Third Country Entity, it should answer Question 4 on the basis of what its categorisation would be if the Named Entity were established in the EU but it should not answer Question 5(b).

Question 5(a) “Are you a Pension Scheme Arrangement?”

“Pension Scheme Arrangement” is as defined in Appendix III (Defined Terms).

Each entity which has indicated that it falls outside the scope of EMIR under Questions 1 and 2 should not answer Question 5(a).

Question 5(b) “Do you intend to utilize the Pension Scheme Arrangement Exemption?”

Each entity which has indicated that it falls outside the scope of EMIR under Questions 1 and 2 should not answer Question 5(b).

For ease of reference, please note the following provisions of EMIR.

EMIR Article 89 – temporary exemption for pension scheme arrangements

1. For three years after the entry into force of EMIR, the clearing obligation set out in Article 4 shall not apply to OTC derivative contracts that are objectively measurable as reducing investment risks directly relating to the financial solvency of pension scheme arrangements as defined in Article 2(10). The transitional period shall also apply to entities established for the purpose of providing compensation to members of pension scheme arrangements in case of a default.

The OTC derivative contracts, which would otherwise be subject to the clearing obligation under Article 4, entered into by those entities during this period shall be subject to the requirements laid down in Article 11.

2. In relation to pension scheme arrangements referred to in Article 2(10)(c) and (d), the exemption referred to in paragraph 1 of this Article shall be granted by the relevant competent authority for types of entities or types of arrangements. After receiving the request, the competent authority shall notify

ESMA and EIOPA. Within 30 calendar days of receipt of the notification ESMA, after consulting EIOPA, shall issue an opinion assessing compliance of the type of entities or the type of arrangements with Article 2(10)(c) or (d) as well as the reasons why an exemption is justified due to difficulties in meeting the variation margin requirements. The competent authority shall only grant an exemption where it is fully satisfied that the type of entities or the type of arrangements complies with Article 2(10)(c) or (d) and that they encounter difficulties in meeting the variation margin requirements. The competent authority shall adopt a decision within ten working days of receipt of ESMA's opinion, taking due account of that opinion. If the competent authority does not agree with ESMA's opinion, it shall give full reasons in its decision and shall explain any significant deviation therefrom.

EMIR Article 85 – EC ability to extend the temporary exemption

2. By 17 August 2014, the Commission shall prepare a report, after consulting ESMA and EIOPA, assessing the progress and effort made by CCPs in developing technical solutions for the transfer by pension scheme arrangements of non-cash collateral as variation margins, as well as the need for any measures to facilitate such solution. If the Commission considers that the necessary effort to develop appropriate technical solutions has not been made and that the adverse effect of centrally clearing derivative contracts on the retirement benefits of future pensioners remain unchanged, it shall be empowered to adopt delegated acts in accordance with Article 82 to extend the three-year period referred to in Article 89(1) once by two years and once by one year.

Article 1 of Commission Delegated Regulation (EU) 2015/1515 of 5 June 2015 amending Regulation (EU) No 648/2012 of the European Parliament and of the Council as regards the extension of the transitional periods related to pension scheme arrangements

The first subparagraph of Article 89(1) of Regulation (EU) No 648/2012 is replaced by the following:

“Until 16 August 2017, the clearing obligation set out in Article 4 shall not apply to OTC derivative contracts that are objectively measurable as reducing investment risks directly relating to the financial solvency of pension scheme arrangements as defined in Article 2(10). The transitional period shall also apply to entities established for the purpose of providing compensation to members of pension scheme arrangements in case of a default.”