PensionsEurope's position paper on the proposal for a Corporate Sustainability Due Diligence Directive.

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The transition to an economy which allows a safe climate for all is one of the most important tasks for our generation. A wide range of policy initiatives is needed to pave the way for this transition. Moreover, the need for social investments to achieve the sustainable development goals (SDGs) in the 2030 Agenda concerning human rights is widely recognized. Concerning sustainable corporate governance, pension funds can play their role in fostering the transition based on sustainable ESG criteria. However, PensionsEurope believes that there is a need for clarifications and amendments in the proposed CSDD directive as part of the ordinary legislative process to make it appropriate for institutional investors and financial services providers. Therefore, we would like to express the following points:

Scope-Article 2

The proposal brings into the scope the entire financial sector irrespective of legal personality, including pension funds. PensionsEurope believes that the element of proportionality is crucial. Therefore, we believe that the threshold (500 employees on average and a net worldwide turnover of more than EUR 150 million) of the original proposal should not be lowered. Any decrease in this threshold will be particularly cumbersome for smaller IORPs that lack the necessary resources to align themselves with this complicated framework. Placing an undue burden on pension funds will endanger the returns and the benefits of members and beneficiaries. In all circumstances, the primary fiduciary duty to pay pensions must be considered and should not be compromised in any way.

Amendments have been tabled in ECON to bring the financial sector, including pension funds, in scope as a high-risk sector. PensionsEurope opposes the notion that pension funds' activities entail a high risk of violations, certainly when it comes to contributing to or causing violations. Moreover, some amendments distinguish between thresholds in terms of balance sheet and assets under management. PensionsEurope opposes these amendments and urges to maintain the original scope of the European Commission, in order to maintain consistency. However, should balance sheet and AUM thresholds be considered, it is important to point out that pension funds keep their assets on their balance sheets and not in separate ring-fenced entities. The balance sheet threshold proposed in amendments 30 and 31 would therefore bring virtually any pension fund in Europe in scope. As such, PensionsEurope urges to use the employee-based criterion for the financial services sector, as foreseen in the Commission proposal.

Value Chain -Article 3

The definition of 'value chain' as regards regulated financial undertakings companies is a key issue of the proposal. The main activity of a pension fund concerning the proposal is investing contributions in a diversified portfolio of assets such as shares, corporate and government bonds, credits, real estate, infrastructure, and private equity. In most cases, pension funds will be minority shareholders with only a fraction of the shares. In some Member States, pension funds usually do not even invest directly in the aforementioned assets, but rather via AIF und UCITS. In Europe, pension funds have expressed different opinions on whether investments without any contractual relationship should be put under the scope of the CSDDD.

Some members of PensionsEurope believe that the proposal is inappropriate for institutional investors and pension funds. Therefore, they believe that the directive should not extend the due diligence requirements to investments in which there is no direct contractual relationship with investee companies. They argue that extending the due diligence requirements on investments will be

extremely costly and burdensome. Moreover, due to the lack of data, the exercise will be extremely difficult and highly unreliable. Therefore, institutional investors and pension funds can be highly exposed to potential legal consequences and uncertainties. This will then have a direct impact on members' and beneficiaries' returns.

Other members of PensionsEurope are in favour of including investments through the secondary market under the scope of the directive. However, they believe that several amendments to the original proposal should be introduced to make the directive appropriate and workable for institutional investors. The current proposal already contains specific provisions for financial services providers. For pension funds, there is usually no direct contractual relationship with investee companies. This means they do not conduct due diligence at a single point in time before entering a contract with a client, but on an ongoing basis across a portfolio of up to thousands of companies. Due diligence for institutional investors and asset managers should therefore be ongoing and risk based. This enables pension funds to target the worst adverse impacts while making sure that the administrative burden remains manageable to maintain the costs borne by pension fund participants at reasonable levels.

The proposal diverges from the OECD guidelines Responsible business conduct (RBC) for institutional investors in several meaningful ways, particularly considering the guidance the OECD has published on how the guidelines should apply to institutional investors. This divergence from the OECD framework is not in line with the practice of institutional investment. The OECD guidelines RBC for institutional investors establish different levels of involvement in an adverse impact ("linked to", "contribute to" and "cause"), which seems to be missing from the CSDDD proposal. Moreover, the OECD recommendations for institutional investors acknowledge the different roles an institutional investor can play compared to a company. PensionsEurope believes that the directive should integrate the nuances and limitations comprised in the OECD guidelines RBC for institutional investors due to the fact that "the relationship between an investor and an investee company is qualitatively different from the relationship between purchaser and supplier companies", which should work as a basis, and predictable and proportionate to pension funds' role in the value chain.

Prevention of adverse impacts- Article 7

The current article and its actions are not workable for investors. An investor cannot impose its code of conduct or prevention plans on its investee companies. They can only use their tools as investors, which are engagement and voting at shareholder meetings. Furthermore, some institutional investors may hold shares of thousands of companies, so it is necessary to focus engagement efforts on the most severe adverse impacts. It should be borne in mind that while shareholders may wield influence in a company, they cannot assume the role and responsibilities of the board of a company. The wording of obligations on investors should respect this distinction. Moreover, institutional investors in most cases lack the possibilities of other economic agents to mitigate risks by including adequate clauses in contractual relations, since in a vast majority of cases there are no appropriate contractual relations with investee companies for this purpose. For this reason, **we believe that this article should not apply to institutional investors and should be amended to recognise the different levels of responsibility depending on the level of involvement.**

Directors' duties and civil liability- Article 22

The proposal imposes serious consequences when companies fail to fulfil their due diligence obligations. This failure may lead to civil liability, as well as a breach of the director's duty of care.
As a general principle under company law in most legal systems in Europe and around the world, shareholders have a separate legal personality from the company they invest in and only have 'limited liability' for their debts. Consequently, it is only under special circumstances that shareholders can be held directly liable towards an investee company's creditors or other third parties.

These general principles are also reflected within the framework of the OECD guidelines, under which institutional investors and asset managers are only considered responsible for remediation where they are found "to contribute" to or "cause" an adverse impact. Under the current proposed framework, making shareholders liable for the actions of the company would therefore be a very significant departure from this tenet of company law.

The current approach would undermine the principle of limited liability and the potential damages paid by investee companies would lead to reduced returns, so pension funds would have a strong motivation to avoid adverse impacts on the portfolio even without direct liability. Therefore, **PensionsEurope believes that pension funds and institutional investors under the status of minority shareholders should not be civilly liable within the context of the CSDDD given their limited level of involvement.**

Reporting-article 11

In recent years, the European Commission has adopted comprehensive new regulations in the field of sustainability, including the sustainability taxonomy (EU 2020/852 with subsequent delegated acts), the Sustainable Finance Disclosure Regulation and the CSRD. PensionsEurope believes that the proposal for the due diligence directive has not been sufficiently harmonized with already existing regulations in the area and planned regulations. Companies will have to operate according to different definitions of human rights and environmental protection, depending on whether in a specific situation they focus on the due diligence directive or the Taxonomy regulation. Moreover, the reporting that companies must provide following article 11 of the Due Diligence Directive will be based on other KPIs than the reporting that companies have to provide according to Article 8 of the Taxonomy Regulation, which will make it difficult to compare.

Plan for transition- Article 15

According to article 15, companies, under the relevant thresholds and sectors, must adopt a plan for transition to meeting the objectives of the Paris Agreement. PensionsEurope believes that more clarity is needed on the plan's form.

Framework for monitoring compliance-Articles 17 to 21

Finally, the proposed directive provides a framework for monitoring compliance with the provisions of the directive. In this connection, PensionsEurope notes that the EU's other sustainability regulations (CSRD, Taxonomy Regulation and SFDR) also contain rules and frameworks for supervision by the National Competent Authorities. At the European level, the supervision of sustainability regulation is coordinated by the pan-European supervisory authorities, respectively EBA, ESMA and EIOPA. PensionsEurope strongly encourages the supervision of compliance with sustainability regulation within the already established framework - both at the national and EU level and thus, new supervisory

authorities or structures should not be created as this could create unclear boundaries between different supervision authorities and contribute to uncertainty regarding how specific matters are regulated and supervised.

About PensionsEurope

PensionsEurope represents national associations of pension funds and similar institutions for workplace and other funded pensions. Some members operate purely individual pension schemes. PensionsEurope has **25 member associations** in 18 EU Member States and 4 other European countries[1].

PensionsEurope member organisations cover different types of workplace pensions for over **110 million people.** Through its Member Associations PensionsEurope represents **€ 7 trillion of assets** managed for future pension payments. In addition, many members of PensionsEurope also cover personal pensions, which are connected with an employment relation.

PensionsEurope also has **20 Corporate and Supporter Members** which are various service providers and stakeholders that work with IORPs.

PensionsEurope has established a **Central & Eastern European Countries Forum (CEEC Forum)** to discuss issues common to pension systems in that region.

PensionsEurope has established a **Multinational Advisory Group (MAG)** which delivers advice on pension issues to PensionsEurope. It provides a collective voice and information sharing for the expertise and opinions of multinationals.

What PensionsEurope stands for

- A regulatory environment encouraging workplace pension membership;
- Ensure that more and more Europeans can benefit from an adequate income in retirement;
- Policies which will enable sufficient contributions and good returns.

Our members offer

- Economies of scale in governance, administration and asset management;
- Risk pooling and often intergenerational risk-sharing;
- Often "not-for-profit" and some/all of the costs are borne by the employer;
- Members of workplace pension schemes often benefit from a contribution paid by the employer;
- Wide-scale coverage due to mandatory participation, sector-wide participation based on collective agreements and soft-compulsion elements such as auto-enrolment;
- Good governance and alignment of interest due to participation of the main stakeholders.

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[1] EU Member States: Austria, Belgium, Bulgaria, Croatia, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Netherlands, Portugal, Romania, Spain, Sweden. Non-EU Member States: Iceland, Norway, Switzerland, UK.

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