PensionsEurope Feedback to the European Commission Proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU

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As the European umbrella organisation representing pensions in Europe, we would like to comment on the European Commission Proposal for a Council Directive laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU (COM(2021) 565 final - hereinafter "the Proposal").

PensionsEurope supports the aim of preventing the use of legal entities and arrangements without minimal substance for tax avoidance or tax evasion purposes. However, we believe that certain adjustments to the European Commission's proposal are necessary to ensure that pension funds and the investment structures they use do not incorrectly fall within the scope and be impacted unintendedly.

First, although in practice pension funds would not pass the envisaged gateway criterion as they do not present any risk of lacking substance for tax purposes, we believe they should anyway be excluded from the scope for purposes of legal certainty. In our opinion, all pension funds should be included in the exemption from the scope of application of this Directive provided by Article 6.2, which excludes from the envisaged rules some entities that do not present tax avoidance risks, including "regulated financial undertakings". In this sense, recital 6 of the Proposal states that "*It would be fair to exclude from the envisaged rules undertakings whose activities are subject to an adequate level of transparency and therefore do not present a risk of lacking substance for tax purposes. Companies having a transferable security admitted to trading or listed on a regulated market or multilateral trading facility as well as certain financial undertakings which are heavily regulated in the Union, directly or indirectly, and subject to increased transparency requirements and supervision, should equally be excluded from the scope of this Directive."*

Article 6.2 further specifies the "regulated financial entities" by listing them. The Proposal rightly includes occupational pension funds as defined in the Directive (EU) 2016/2341 on the activities and supervision of institutions for occupational retirement provision (IORPs). However, it does not list entities providing personal pension products. Considering the reasons for excluding IORPs and, in general, all regulated financial undertakings, we believe **that entities providing personal pension products regulated at national level should also be listed**.

The current wording of the exemption does not cover all possible regulated pension schemes arrangements existing at the national level. We note that other EU legislation such as EMIR[1] or PRIPPs[2] recognise the specificities of all pension schemes.

Therefore, we would suggest the inclusion of a new letter in article 6.2 of the Proposal within the definition of "regulated financial undertakings" with a wording similar to that foreseen in the EMIR:

[new letter]

[1] See article 2 par. 1-10) of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories

[2] See article 2 letter e) of Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs)

Any other authorised and supervised entities, or arrangements, operating on a national basis, provided that:

(i) they are recognised under national law; and

(ii) their primary purpose is to provide retirement benefits;

Second, we believe that certain investment structures/entities used by alternative investment funds, such as private equity funds, should also not fall under the scope of the proposed directive.
These structures are used by pension funds (and other institutional investors) to ensure tax neutrality, to have more flexibility in choosing the preferred risk and structure of the investment, to facilitate easier exit and create greater returns for their members and beneficiaries, and to have more certainty regarding insulation from legal liabilities. Including these entities within the scope would negatively impact on the ability of pension funds to invest in the EU economy and reduce the various benefits currently provided by these structures, ultimately resulting in less investment opportunities and less returns for pension funds and their members and beneficiaries.

We thank you in advance for taking into consideration our suggestions and we remain at your disposal should you have any questions or need any further information.

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[3].

PensionsEurope member organisations cover different types of workplace pensions for over **110 million people.** Through its Member Associations PensionsEurope represents **€ 5 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 **19 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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[3] 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.