



**PensionsEurope input on the last Spanish
compromise text related to the FASTER proposal.**

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We value access to quick refunds for indirect investments.

PensionsEurope would like to react to the 13 November Spanish compromise text related to the European Commission's proposal for a Faster and Safer Relief of Excess Withholding Taxes (FASTER). We would suggest the Belgium presidency build on the work done by the Spanish presidency and make targeted improvements to the latest Spanish compromise.

As mentioned in our position paper¹, we support the initiative as pension funds bear witness to investment barriers and costs within the single market which ultimately impact negatively pension fund members and beneficiaries. Refund requests or exemption requests are often an extensive and burdensome process, with different procedures and requirements among Member States.

Institutions for occupational retirement provisions (IORPs) often use transparent investment funds as vehicles for their investments including IORPs operating in Belgium and in the Netherlands. To ensure the applicability of FASTER's procedures for a wide range of IORPs, it should be available to such indirect investments. Considering that FASTER is introducing a relatively streamlined framework for withholding tax relief and refund procedures, it is likely that transparent investment funds could otherwise face additional delays and rejections in other procedures. Transparent investment funds would not get the FASTER's benefits, which could harm investors (including retail investors) in such funds. It would also put legal uncertainty on tax authorities, leading to discussion and possible litigation cases.

Indirect investments under certain conditions should be granted similar treatment under FASTER compared to direct investment, as indirect investments represent a major part of the total investment of financial entities. Thus, we appreciate the Council's work to expand FASTER procedures to indirect investments, securing a comparable treatment among investment funds, and between direct and indirect investments. This will, in our view, deepen the Capital Markets Union (CMU) agenda and is in line with the EU Court of Justice's case law.

We still have certain reservations, however:

- A. FASTER procedures should not just be available to fiscally transparent collective investment undertakings that are EU-regulated as Alternative Investment Funds (AIF) or Undertakings for Collective Investments in Transferable Securities (UCITS). Article 13a (a) (ii) should refer to both the 'prospectus' and 'terms of conditions' of transparent investment funds, to account for their heterogeneity.
- B. The Digital tax residence certificate (eTRC) should be the model for due diligence in all withholding tax procedures.
- C. Relevant Safeguards are needed to ensure Member States with comprehensive relief at source apply fast procedures in the case of indirect investments.

¹ [PensionsEurope position paper on the EC's proposal for a withholding tax directive - 2023](#)

How indirect investment through transparent investment vehicles works

Pension funds, life, non-life, health, and funeral insurers can invest indirectly. Indirect investments are common for IORPs operating in e.g. the Netherlands and Belgium. Institutional investors - such as IORPs - often outsource their asset management. Asset managers pool resources from different asset owners and invest them through a transparent investment vehicle. These investment vehicles are also widely used for collective investment by private individuals through distribution channels such as banks or other intermediaries.

Asset pooling creates economies of scale, which helps to decrease concentration risk, share costs and can also facilitate more impactful collective shareholder engagement on ESG-factors. Indirect investment through transparent investment vehicles thereby helps investors meet their obligations or cover certain risks.

A transparent investment vehicle is a contractual agreement between the manager, the depository (registered owner), and the participants (the investors/beneficial owners). The contract is commonly referred to as the 'terms and conditions' of management and custody.¹ On the basis of the terms and conditions, the depository registers the assets and assets are invested by the manager, for the participants' account and risk, so that the participants will be joint beneficial owners.

A significant number of transparent investment vehicles in Europe do not have legal personality and do not qualify as a legal entity. The legal ownership of the assets is held by a separate legal entity: the depository. The purpose of the depository is restricted to holding the legal title to the assets of the fund.

1) Transparent investment vehicles should have access to FASTER

We welcome the latest Spanish compromise expanding access to FASTER procedures to indirect investments via transparent investment vehicles. Because of differences in the establishment of transparent investment vehicles and differences in treatments of tax residency of transparent investment funds between Member States, it is relevant to distinguish between cases in which:

- (i) the depository holds assets for the account of participants that are entitled to tax relief; and
- (ii) the depository maintains internal records enabling the individual allocation of the assets to the transparent investment vehicles or to its participants, either of which are entitled to tax relief.

It is practical that each entity that is entitled to relief - either the depository of the transparent investment vehicle or its participant – declares that it is entitled to the relief, and according to which legal basis; it has been informed about the relief request; and that it waives its right to independently request relief if the relief is granted. Likewise, it is reasonable for the registered owner to declare an indication of the applicable withholding tax rates.

One of the distinctive features of transparent investment vehicles is that they are often not EU-regulated under the [AIFMD](#) or the [UCITS](#) framework. It is unnecessary when a vehicle only pools resources and has limited changes of participants. Transparent vehicles such as those mentioned above (i.e. non-AIF and UCTIS funds) pose lower risks of tax abuses. The depository can only act according to contractual terms and the parties to the contract are all regulated entities. In our view,

the definition of ‘collective investment undertaking’ in Article 3 (4b) should be expanded to include categories of entities governed under the law of the Member States as well as transparent investment vehicles recognized in double tax treaties.

Irrespective of this proposal, we would like to emphasize that regulated investment funds (AIF / UCITS) are very important for pension funds in many Member States and that the discussion on the extension of the scope of Article 3 (4b) must not jeopardize the consideration of regulated vehicles.

First, the [AML/CFT directive](#) requires Member States to notify to the Commission of categories of trusts and similar legal arrangements governed under their law. The Commission published its [last list](#) of such ‘trusts and similar legal arrangements’ that are obliged to provide beneficial ownership information in April 2020. As these entities are governed by law, they can and should be included in FASTER’s definition of collective investment undertaking.²

Investment vehicles can also be recognized as transparent in double tax treaties between EU Member States. This form of recognition could also be included in FASTER.

We propose the following amendments:

Article 3 (4b): *‘Collective investment undertaking’ means an undertaking for collective investment in transferable securities as defined in Article 1(2) of Directive 2009/65/EC11, an alternative investment fund as defined in Article 4(1)(a) of Directive 2011/61/EU12, an entity that adheres to a category as listed in [C 136/5](#), a fiscally transparent collective investment entity listed in a double tax treaty between two EU Member States or a third country collective investment vehicle under comparable legislation.’*

Furthermore, we note that the compromise text refers to the ‘prospectus’ of a transparent investment vehicles which refers to the document to be published when securities are accessible to the public or traded on a regulated market. In many cases, a transparent investment vehicle is not in that situation and therefore, the depository is designated in the ‘terms and conditions’. Article 13a (a) (ii) should refer to “the prospectus or the terms and conditions” to make up for this inconsistency.

2) The eTRC should be the standard for due diligence in all withholding tax procedures

The common and digital tax residence certificate (eTRC) streamlining proof of residence documentation is a major improvement brought by FASTER. In our view, it should be used in the due diligence process of all withholding tax procedures in all Member States, regardless of whether they apply FASTER procedures or comprehensive relief at source.

² If deemed necessary, it can also be pursued to create a similar list for FASTER, whereby Member States notify types of fiscally transparent collective investment entities governed under their law. For instance, in the Netherlands, two pieces of Dutch legislation, ([Wet fiscaal kwalificatiebeleid rechtsvormen](#) en [Wet aanpassing Fonds voor gemene rekening en Fiscale beleggingsinstelling](#)), harmonized the national fiscal interpretation in line with interpretations throughout the EU.

The Commission proposal captures broadly that idea by setting out that Member States have to recognize an eTRC issued by another Member State as adequate proof of residence (Article 4.5) and by introducing the eTRC in the due diligence process for FASTER procedures (Article 11.2).

In the Spanish compromise text, member states with a comprehensive relief of source system do not necessarily have to apply due diligence processes under Article 11. Following the changes in scope, Article 4.5b has been added, to ensure that eTRCs are used in all withholding tax procedures. The position of this paragraph in Article 4 seems to be at odds with Article 2 however. Article 2 specifies that Chapter II, which consists of Article 4, applies to all Member States concerning tax residents in their jurisdiction. Article 4 therefore does not seem to apply to the use of the eTRC for individuals or entities that are tax residents in another jurisdiction.

Amendments would be desirable to set out that the eTRC should be used in the due diligence procedures of all Member States for all withholding tax procedures.

3) Relief at source should be accessible to transparent investment vehicles

The possibility for Member States to opt out of FASTER could lead to counterproductive results where indirect investments have access to neither relief at source nor quick refund procedures. The latest Spanish compromise text does not explicitly secure the position of indirect investments for Member States with comprehensive relief at source systems. Article 2a or 9a should include safeguards to prevent such Member States from excluding certain tax-exempt entities from relief at source, and from lengthy relief at source procedures. The Commission should play a role in, at least, the investigation and disclosure of potential reversals in withholding tax relief speed.

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 3 other European countries³.

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 **18 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.

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.