



PensionsEurope position paper on the European Commission's proposal for a withholding tax directive

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A step forward to an efficient EU withholding tax framework

PensionsEurope welcomes the European Commission's proposal for a Faster and Safer Relief of Excess Withholding Taxes (FASTER). As cross-border investors, with 2.4 trillion euros of assets for EEA institutions for occupational retirement provision (IORPs) ¹at the end of 2022, pension funds bear witness to investment barriers and costs within the single market which ultimately impact negatively pension fund members and beneficiaries. Indeed, refund requests or exemption requests are often an extensive and burdensome process, with different procedures and requirements among Member States.

We fully support the Commission's ambition to further deepen the Capital Markets Union through this proposal which would harmonise a fragmented EU landscape when it comes to withholding tax refunds and reliefs. Member States should swiftly progress on this initiative to deliver their conclusions² on the Commission's CMU Action Plan which mentioned the withholding tax proposal. This proposal could foster institutional investment among Member States by improving withholding tax relief procedures which would allow pension funds to reinvest excess withholding taxes. In 2022, the aggregate costs of withholding tax procedures are estimated to be EUR 6.62 billion³ due to foregone tax relief, opportunity costs, and incurred costs.

The introduction of two new fast-track procedures would therefore tackle existing administrative barriers that pension funds face. Current refund processes are often expensive, complex, and can last up to 10 years,⁴ which leads to high costs to pension funds and public administrations. The latter spend a great deal of time verifying applications for tax relief which could be better allocated by focusing on high-risk cases of tax abuses.

We also have reservations to express and suggestions to improve the proposal. FASTER procedures should be available to fiscally transparent investment entities, which are used for the majority of investments by institutions for occupational retirement provision. We indicate that liability over information that the investor must provide to the Certified Financial Intermediary (CFI) should be transferred from the CFI to the investor, to make FASTER work in practice. Possibilities to deviate from FASTER should be constrained. Specifically, Member States should only have specified limited options to exclude tax-exempt investors from FASTER procedures. Lastly, there is the need for a harmonized approach to the concept of beneficial owner.

We strongly support the establishment of two fast-track procedures

We consider the establishment of the relief at source procedure as a best practice for pension funds. Indeed, it would facilitate their correct tax treatment, avoiding the process to recover from the excess withholding tax. By matching double taxation treaty provisions, the relief at source procedure is greatly

¹ [EIOPA financial stability report – June 2023](#)

² [EU Council conclusions on the Commission's new action plan - December 2020](#)

³ [Commission SWD – Impact assessment report – June 2023](#)

⁴ [PensionsEurope position paper on WHT Code of Conduct - 2016](#)

streamlining withholding tax procedures. We are of the opinion that sufficient safeguards for this procedure are designed to avoid tax abuses as reporting by financial intermediaries provides a holistic view of the investment chain. Considering their business models, pension funds would be suitable low-risk actors to be eligible for relief at source in many countries.

Moreover, PensionsEurope also supports the introduction of the quick refund procedure which can be used as an alternative to the relief at source procedure or in combination with it. This is an important improvement compared to the current situation as repayment procedures can take several years or are not even initiated by smaller pension funds because of the complexity of the procedure. Moreover, the obligation of having the reimbursement of overpaid taxes within 25 days from the date of payment greatly speeds up the process. PensionsEurope is aligned with the need to ensure choice to Member States for the implementation of both procedures with the aim of fighting against tax abuses to avoid losses of tax resources by schemes highlighted in the Cum/Ex and Cum/Cum scandals.

Encouraging the creation of a common digital tax residence certificate

The Common digital tax residence (eTRC) is an important step forward to ensure an efficient and quick tax residency verification of EU taxpayers against a background of overreliance on paper-based processes among Member States. As there is currently no harmonisation among Member States regarding the documentation needed, the eTRC would also help to provide uniformity in the process. Furthermore, the delivery of an eTRC within one day would ensure certainty and predictability in the refund process. However, the possibility for Member States to have extra time to deliver these certificates must only be circumscribed in exceptional cases and must be limited in time. It may be considered to include the pension fund classification (as determined by the tax authorities of the home country or based on the IORP Directive) as additional information in the eTRC⁵.

FASTER should be accessible to transparent investment entities

We want to highlight the issue of the applicability of the directive to various investment entities. Institutional investors such as pension funds commonly use investment funds, which aim to pool assets from a number of investors to invest in accordance with a predefined investment policy to which they subscribe. These entities have an operational function, are highly regulated, and do not pose any risk of tax evasion.

Transparent investment funds are one way to pool assets. In fact, a majority of investments by EU IORPs are done through transparent investment funds. In such cases, the transparent investment fund is the registered owner and multiple pension funds are the beneficial owner and taxable subject. The transparent investment fund is an administrative entity with a strict mandate from which it has no agency to deviate. Because it is fiscally transparent, the relationship with its beneficial owners is paramount. We therefore foresee no problem with giving transparent investment funds access to FASTER procedures.

⁵ [PensionsEurope position paper on EU tax register of recognised pension institutions – March 2018](#)

The Directive should make clear that when investors use investment entities, specifically transparent entities, the digital tax residence certificate of the former, like a pension fund, should be tapped in the fast-track procedures. If these entities are unable to obtain an eTRC, they do not benefit from the refund procedures set out by the directive, which creates a different treatment of direct investment and intermediated investment.

Avoiding inefficient Certified Financial Intermediaries' requirements

PensionsEurope welcomes provisions for investors to use certified financial intermediaries (CFIs) in withholding tax relief procedures. Pension funds are accustomed to dealing with CFIs such as custodian banks for their withholding tax procedures, which should also be foreseen by FASTER. The standardisation of reporting requirements applicable to CFIs and the obligation of registration for CFIs within national registers are good steps to ensure trust within the withholding tax ecosystem.

Due diligence requirements on CFIs could also help Member States better differentiate between the different investors requesting withholding tax relief. However, implementing the FASTER framework should be done in a proportionate way when it comes to requirements on CFIs as CFIs are likely to charge these compliance costs to clients such as pension funds.

Article 16 of the FASTER proposal also implies that the financial intermediary's civil liability is engaged in case of non-compliance with the requirements of the directive. According to the proposal, Member States should develop their own civil liability regime for non-compliant CFIs. We believe that this will very likely lead to fragmentation, which will be challenging for CFIs and might jeopardize the proper functioning of the system. Therefore, we propose to investigate whether certain EU-harmonized minimum requirements for the civil liability regimes can be defined. Nevertheless, in cases where Member States apply both fast-track procedures, this potential harmonisation must not provide incentives for CFIs to only apply the procedure with the lower risk of their own civil liability. This especially applies to registered owners that are tax-exempt.

Furthermore, while financial intermediaries partly rely on information provided by the investor, the current proposal holds CFIs solely liable for complying with their reporting obligation. An amendment is needed to transfer liability to the investor for the reporting of this information. CFIs should not be liable for actions that are outside of their control. If they would be, they could refrain from offering withholding tax reclaim services using FASTER procedures altogether.

Thus, we suggest making an amendment, adding the following text to Article 16 on Civil Liability to efficiently shift liability: *"Member States shall take appropriate measures to ensure the registered owner is liable, unless the certified financial intermediary has actual knowledge or reason to know that the information or representation is incorrect, in case the registered owner provides insufficient or wrongful information to the certified financial intermediary that is necessary for the certified financial intermediary to comply with its reporting obligation"*.

This new provision should avoid complicated scenarios in some Member States such as France where CFIs would require tax opinions from a law firm on the beneficial owner status to reduce their liability risk, which would put extra burdens and costs on institutional investors. This may also mean that smaller institutional investors would have effectively no access to FASTER procedures at all.

Furthermore, it could be considered to also create an EU standardized form for the declarations by the registered owner under Article 11, paragraphs 1(a) and (b), and paragraph 2(c)⁶. Besides creating uniformity this also ties in with the liability topic as described above.

Possibilities to deviate from FASTER should be limited

To really contribute to the Capital Markets Union agenda and to work effectively, the FASTER initiative should have a large application. There should be limited possibilities for deviating from FASTER procedures to ensure a level playing field among Member States.

Thus, we are concerned that Member States get the possibility to not apply the relief at source or quick refund systems for taxpayers who are exempt from withholding taxes. Member States could use the exclusion in Article 10, paragraph 3b to not apply FASTER procedures to institutional investors, such as pension funds.

Not applying FASTER procedures to tax-exempt investors could carve out a major volume of withholding taxes and therefore significantly decrease FASTER's impact, which should be prevented as much as possible while keeping a high degree of protection against tax abuses. Vigilance is also required to monitor that domestic pension funds do not get preferential access to FASTER procedures over for instance foreign pension funds. In the future, it would be good to expand harmonization, by scrapping the above-mentioned Member State option, at least for collective investment undertakings, including pension funds.

The notion of the beneficial owner must be defined

Lastly, we are troubled that the proposal does not provide a definition regarding the beneficial owner, while FASTER's procedures are based on this notion. CFIs requesting relief under one of the fast-track procedures on behalf of a registered owner must obtain from such registered owner a declaration that the latter is the beneficial owner. As the registered owner is not always the beneficial owner and to ensure legal certainty, we suggest the Council include in the proposal an EU harmonised definition of the beneficial owner, to be consistent with the aim of harmonising procedures of the proposed directive.

⁶ Based on current market practices, we believe that it is the responsibility of the registered owner to indicate to the CFI what the withholding tax (treaty) rate should be.

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 **24 member associations** in 17 EU Member States and 4 other European countries⁷.

PensionsEurope member organisations cover different types of workplace pensions for over **110 million people**. Through its Member Associations PensionsEurope represents more than **€ 4 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 **22 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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⁷ EU Member States: Austria, Belgium, Bulgaria, Croatia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Netherlands, Portugal, Romania, Spain, Sweden. Non-EU Member States: Iceland, Norway, Switzerland, UK.