PensionsEurope Position Paper on the EC's Code of Conduct for relief-at-source from the withholding tax procedures

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About PensionsEurope

PensionsEurope represents national associations of pension funds and similar institutions for workplace pensions. Some members operate purely individual pension schemes. PensionsEurope Members are large institutional investors representing the buy-side on the financial markets.

PensionsEurope has **24 member associations** in 19 EU Member States and 3 other European countries with significant – in size and relevance – workplace pension systems.

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 **26 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.

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1. Introduction

In April 2016 PensionsEurope published a position paper on the withholding tax refund barriers to cross-border investment in the EU[1]. In the paper PensionsEurope provided several examples of the lack of reciprocal recognition of pension funds and problems with withholding tax (WHT) refund processes.

The obstacles with the WHT refund processes pose a major barrier to cross-border investments in the EU and to build the Capital Markets Union (CMU). In order to boost the economic growth in the EU, PensionsEurope calls on the EU Member States (MSs) and the European Commission (EC) to remove all the WHT barriers to cross-border investments and not to create new tax barriers[2].

PensionsEurope welcomes all the EC's upcoming work to remove barriers to cross-border investment that has been mentioned in the EC's Action Plan on Building a Capital Markets Union[3]:

- Code of Conduct to apply in principle the relief-at-source method and if relief-at-source is not possible to work with one standardized tax reclaim procedure for WHTs within the MSs. The EC aims to start working on it in early 2017;
- Study on discriminatory tax obstacles to cross-border investment by life insurance companies and pension funds. The study will be managed by DG TAXUD and the work should be launched in 2017;
- Where necessary, the EC aims to initiate infringement procedures.

Furthermore, MSs' expert group has made progress in mapping barriers and exchanging good practices. PensionsEurope welcomes that building on this work, the EC aims to adopt a report[4] by the end of 2016 that will list the barriers identified by the group, identify best practices, and set out a roadmap of proposed actions that MSs would be encouraged to take by 2019 at the latest.

PensionsEurope emphasizes that relief-at-source systems for the WHT are the most effective way to promote cross border investment and therefore calls upon the EC to study the possibilities for a Directive to facilitate this, for amongst others pension funds, in the internal market. Meanwhile, PensionsEurope welcomes the initiative of the EC to establish relief at

[1] See PensionsEurope position paper on the withholding tax refund barriers to cross-border investment in the EU.
[2] See PensionsEurope Position Paper on the negative effects of a Financial Transaction Tax on pension provision.
[3] See the EC's Action Plan on Building a Capital Markets Union, published on 30 September 2015.
[4] See the Communication from the Commission: 'Capital Markets Union - Accelerating Reform', published on 14 September 2016.

source, quick and standardized refund procedures through best practices and a code of conduct.

2. PensionsEurope cost assessment of the WHT refund procedures

The WHT refund processes are regularly complex, expensive, and long-lasting. Sometimes they can last even 10 years. As the legal outcomes are uncertain, given that the legal recourse involves several levels of jurisdiction, often pension funds do not assert their justified reclaims. Therefore, PensionsEurope has called on the EU MSs to ensure a standardized (preferably one process within the whole EU), simple, transparent, and inexpensive WHT refund process for pension funds.

In the paper that was published in April 2016 PensionsEurope provided a range of examples from pension funds in various MSs. Tax reclaim procedures create additional costs, extra administrative burden, and material opportunity losses for pension funds. PensionsEurope estimates that these total costs of refund procedures are substantial for pension funds.

The economies of scale are very important on the WHT procedures and costs tend to be relatively lower the larger the refund is. Especially smaller pension funds often make the decision not to apply for refunds, as the cost of the procedure is higher than the expected return.

3. The most significant barriers

A large number of practical problems with the WHT refund processes still exist in spite of the EFTA judgment "Fokus Bank" (2004) and the case law of the Court of Justice of the European Union (CJEU) i.e. "Denkavit" (2006), "Amurta" (2007), "Aberdeen" (2009), and "Santander" (2012). The above-mentioned cases have shown that the WHT practices in many MSs are discriminatory with respect to dividends earned by foreign pension funds, and therefore, contradicting the European law. PensionsEurope notes that the most significant obstacles in relation to WHT are:

- Not all MSs apply the relief at source method to realize the appropriate WHT rate for pension funds within the EU;
- Lack of one definition of recognized pension fund for (withholding) tax purposes within the EU (both relevant for relief at source and tax reclaim);
- Lack of single and simplified documental evidence for the recognized pension fund status within the EU (both relevant for relief at source and tax reclaim);

- In some MSs there is much more required than simplified documental evidence to substantiate tax reclaims by recognized pension funds;
- Lack of one similar approach/same requirements for tax reclaims in all the different MSs;
- In some MSs the process time of tax reclaims and payment of refunds by the tax authorities is unreasonably long;
- Absence of one single (IT) system within one MS or the EU that captures relevant data on WHT and which is accessible for tax authorities, intermediaries, pension funds, and other stakeholders. This data source could be used by relevant stakeholders for example in a tax reclaim process.

4. PensionsEurope's proposals on the Code of Conduct for relief-at-source from the WHT procedures

The obstacles with the WHT refund processes pose a major barrier to cross-border investments in the EU and to build the CMU. In order to boost the economic growth in the EU, PensionsEurope calls on the MSs and the EC to remove all the WHT barriers to cross-border investments. PensionsEurope's proposals on the Code of Conduct for WHT are to:

- Introduce relief at source as the method to levy the appropriate WHT from recognized pension funds within the EU;
- Introduce one definition of recognized pension fund within the EU and agree on a common recognition across the EU (e.g. pension fund definition in the IORP II Directive, the definition in the OECD initiative "Public Discussion Draft on the Treaty Residence of Pension Funds"[5], or the definition of pension scheme arrangement' in the EMIR[6]);
- Introduce in all MSs the same and simplified documental evidence or an EU register for recognized pension fund status;
- Introduce simplified documental evidence requirements to substantiate tax reclaims by recognized pension funds within the EU;
- Introduce one similar approach/same requirements for tax reclaims in all MSs that use this methodology to reduce WHT;
- Process submitted tax reclaims in a reasonable time frame (maximum 3 months);

[5] See OECD Public Discussion Draft - Treaty Residence of Pension Funds and an input of the Federation of the Dutch Pension Funds on pages 67-68 and APG AM, PGGM IM and other pension funds on pages 73-79 of Comments received on OECD Public Discussion Draft - Tax Treaty Residence of Pension Funds.

[6] See the Article 2(10) of the 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.

- Introduce a single IT system within the EU to capture the WHT data and which is accessible for the various relevant stakeholders to substantiate a tax reclaim.

Furthermore, PensionsEurope notes that there are also other drivers that could facilitate actions taken to address the WHT issue, including:

- Harmonisation of the market in the field of auditing and compliance → verification of the identity of final beneficial owners possible via consultation of publicly available documents;
- T2S (the European securities settlement engine which offers centralised delivery-versus-payment (DvP) settlement in central bank money across all European securities markets) can be of inspiration as a practical tool to exchange information.

PensionsEurope agrees that all above-mentioned drivers could be suitable solutions and encourages the EC to explore them further. In addition, PensionsEurope agrees with the EC that agreeing on a Code of Conduct in 2017 will require a strong commitment from MSs and PensionsEurope calls for it from them. As the EC has stated in its communication on 14 September 2016, the success of CMU can only be ensured if MSs are determined to work to dismantle the unjustified national barriers to the free movement of capital.