CROSS BORDER BENEFITS ALLIANCE CBBA EUROPE

Brussels, the 15th of December 2020

CBBA-Europe reflection paper on a EU legal framework for a pan-European DC occupational pension

Preamble about the Cross-Border Benefits Alliance-Europe (CBBA-Europe)

The Cross-Border Benefits Alliance-Europe (CBBA-Europe), is a Brussels based advocacy organization (Belgian AISBL) promoting the creation of cross border and pan-European social benefits in the European Economic Area (EEA), including pensions (occupational and individual), healthcare insurance, unemployment benefits, long term care insurance, etc.

Indeed, CBBA-Europe considers the current excessive fragmentation of national social systems as detrimental to the creation of a European common market based on economies of scale and on the removal of costly and burdensome barriers in particular for citizens; but also detrimental to free movement of services, capitals and persons; and to the potential accumulation of huge capitals to be invested in the European economy, in accordance with the Capital Markets Union (CMU) to foster much needed growth and employment.

More generally, CBBA-Europe wishes the European Union to become a more interconnected economic and social area, where both economic competitiveness, with more efficiency in delivering benefits, and the protection of social rights assured to companies and citizens.

As for its structure, CBBA-Europe is a transversal Alliance made up of stakeholders with different backgrounds, including multinational companies, trade unions, asset managers, pension funds, insurance companies, consumers' organizations, national and international trade associations. Just created in October 2017, CBBA-Europe already has twenty members, and is still rapidly growing.

CBBA-Europe also relies on a Scientific Council made up of well-known experts and professors from the most prestigious Universities of Europe. The Scientific Council provides content for the half-yearly CBBA-Europe Review, which is available on the website of the Association.

Finally, in addition to its activities of monitoring and publication of position papers, CBBA-Europe organizes several public meetings throughout Europe with national and European decision makers and stakeholders.

For more information about CBBA-Europe, please visit our website: www.cbba-europe.eu

Cross Border Benefits Alliance - Europe
Square de Meeûs 38-40, B-1000 Brussels (Belgium), Tel: +32 2 401 87 92, Fax: +32 2 401 6868
Website: https://www.cbba-europe.eu

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Executive Summary

The aim of this paper is to imagine some possible features of a pan-European defined contribution (DC) occupational pension that might be created by the EU. Such an initiative would complement the EU initiatives on pan-European pensions started with the creation of a pan-European Personal Pension Product (PEPP).

According to CBBA-Europe, a pan-European DC occupational pension (that will be called PEOP, where the “O” stands for “occupational”) would be welcome insofar it will be able to represent a real added value for cross-border occupational pensions in Europe, and more specifically to overcome the existing barriers to cross-border activities of occupational pensions.

More in general, the present initiative might bring several advantages, such as enlarging the coverage of occupational pensions in Europe, especially in those Countries, sectors and categories of workers lacking occupational pensions; reducing the management costs by creating economies of scale and increasing the offer from different providers; promoting and facilitating the mobility of workers in the European Economic Area (EEA), assuring the accrual and preservation of their workplace pensions; strengthening the completion of the EU internal market; and favoring the accumulation and circulation of large amounts of capital in accordance with the EU Capital Markets Union (CMU) project.

CBBA-Europe believes that the new tool should be a real pension, and not just a financial saving vehicle; it should be “occupational”, by providing for a contribution from the employer; like the PEPP, it should be a 28th or 2nd EU regime, cohabiting with the existing pension systems but not undermining them. In addition to the features of a pan-European “super IORP”, it should also design the main rules of a pension “scheme”, or “plan”, in order to smoothly operate across the EU member states; and it should be transparent and flexible in order to satisfy the needs of its potential members and facilitate efficient operation by its organizers and administrators (sponsoring undertakings; pension providers; social partners, etc.).

Considering its twofold nature of pension provider and pension scheme, the new PEOP will have to face some questions regarding its coexistence with the national social and labor legislations and assess whether the creation of a pan-European scheme overriding national pension plan legislations, while not supplanting them for national plans, will be consistent with the EU legal framework.

Other complex questions will regard its taxation treatment: CBBA-Europe is very aware that different tax regimes represent one of biggest brakes to cross-border activities of pensions in Europe, so it deems it necessary that the new EU framework will face this issue, despite the well-known legal obstacles connected to tax regulations at the EU level.

Cross Border Benefits Alliance - Europe
Square de Meeûs 38-40, B-1000 Brussels (Belgium), Tel: +32 2 401 87 92, Fax: +32 2 401 6868
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In conclusion, CBBA-Europe, well aware of the several challenges to the real feasibility of this ambitious project, will try to suggest some possible solutions, while keeping in mind that if those challenges will be not courageously faced, a too watered-down compromise risks not adding value to the *status quo*, not fostering cross-border business development in the EU, and not adequately protecting workers in cross-border enterprises.

Cross Border Benefits Alliance - Europe
Square de Meeûs 38-40, B-1000 Brussels (Belgium), Tel: +32 2 401 87 92, Fax: +32 2 401 6868
Website: https://www.cbba-europe.eu

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Cross Border Benefits Alliance - Europe
Square de Meeûs 38-40, B-1000 Brussels (Belgium), Tel: +32 2 401 87 92, Fax: +32 2 401 6868
Website: https://www.cbba-europe.eu

Introduction: why the EU would need a Pan-European Occupational Pension (PEOP)

A. The current situation of cross border pensions in Europe

1. CBBA-Europe points out that workplace/occupational pensions play, and should continue, to play a major role in providing the bulk of the retirement income for workers in several EU member states.

2. At the same time, CBBA-Europe is also aware and quite concerned of the fact that in many EU Countries occupational pensions still lack enough coverage of the working population, and in some other Countries, like in the Central and Eastern Europe, they do not almost exist.

3. In addition, CBBA-Europe considers as granted that, due to the current economic and financial situation, occupational pensions are gradually but constantly shifting from a DB to a DC formula. The DC structure also facilitates compliance with local tax and social laws through the administration of national sub-accounts in a manner that DB does not.

4. At the moment occupational pensions are still offered at a national level in the Member States of the EU. CBBA-Europe acknowledges that such limited geographical scope did represent, and it will probably keep representing an obstacle to the exercise of the four European fundamental freedoms (free movement of persons, services, capitals and goods) on which the European Union was created. More in general, CBBA is aware that every time that a national social system represents a block or a limitation of the said EU freedoms, then a conflict arises, and many legal cases have been taken to the European Court of Justice. Moreover, the limited geographical scope of private pensions limits the potential of a healthy competition of pensions' provision in the European Economic Area: such competition might play a virtuous role for several employers and workers who could benefit of lower fees and better quality of pensions' products.

5. The new EU Regulation on a Pan-European Personal Pension Product (PEPP) [1] aims precisely to promote competition in the field of individual/personal pensions, and it also aims at extending the coverage of private pensions in those European states where occupational pensions barely exist or not exist at all.

6. Portability of occupational pensions across Europe represents another open, unsolved issue. With this regard, it should be reminded that nowadays the EU has not a real framework providing for portability of private pension rights, yet (with the important exception of the PEPP); and that even the cross border activities provided

[1] Regulation (EU) 2019/1238 of the European Parliament and of the Council of 20 June 2019 on a pan-European Personal Pension Product (PEPP)

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Square de Meeûs 38-40, B-1000 Brussels (Belgium), Tel: +32 2 401 87 92, Fax: +32 2 401 6868
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by the pension funds/IORP Directive[2] do not provide, as such, any portability. Therefore, mobile workers in Europe are still penalized with regards to the safeguard and accrual of their workplace pension rights.

7. CBBA-Europe is well aware that the cross-border activities for pension funds (IORPs) offered by the aforementioned IORP Directive are not satisfying the expectations of employers and pension providers; the authorization process between the National Competent Authorities (NCAs) is often complex and long; the compliance with the national social and labor legislations require IORPs to create as many national compartments -as to say national pension plans/schemes- as the Countries where they offer their cross border activities (host states); finally, as said above, portability among the states where those the IORP run cross border activities is not even provided. In conclusion, the paradigm on EU level cross-border pensions PEPP/IORP (where the PEPP would be the tool of reference for cross-border/pan-European personal pensions, and the IORP directive would be the corresponding tool for the occupational ones) is clearly insufficient.

8. With this regard, the European Insurance and Occupational Pensions Authority (EIOPA) launched a survey in March 2017[3], trying to assess the stakeholders' appetite on the creation of a EU legal framework for a pan-European DC occupational pension. The outcomes were quite poor: few answers were provided to EIOPA; several stakeholders feared that new rules and legal requirements would have been imposed on national IORPs; other stakeholders clearly opposing cross-border and pan-European solutions feared that those could have undermined protection of their local/national markets. At that time, the PEPP Regulation was still under discussion and the process of implementation of the new IORP 2 directive had not started yet. Nowadays, it seems quite clear that the new IORP directive did not significantly remove the obstacles or eased the cross-border activities encountered under the previous IORP 1 directive. On the contrary, the way in which some member states implemented the new IORP 2 directive created new obstacles to cross-border activities.

9. Moreover, granted that it is still to early to predict if PEPPs will really take off,[4] a strong curiosity -if not an explicit interest- for PEPP was shown by some large multinational companies (often not European) employing workers in Europe, because of its potential attractiveness due to its pan-European nature, in particular portability. This ascertainment should bring to two observations:

   A) the first is that the appetite for cross-border pension solutions from employers has

[2] Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs)
[3] 2017 Engagement Survey on the idea of a pan- European occupational DC framework
[4] At the moment, the main concerns about the PEPP are due to the costs of the first mandatory advice, which will be apparently included in thcap of 1% for the basic PEPP: such an inclusion seems to appear quite unbearable for several providers who clearly stated that the offer of PEPPs will become unprofitable for them, compared to the offer on national personal pension products.

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never disappeared. Interest for such solutions might be rather lacking towards the existing legal framework on cross-border activities of pension funds provided by the IORP Directive;

B) The second observation is that if one day employers will find a way to offer PEPPs to their employees because they will consider it more attractive, personal pensions (or "third pillar pensions" as defined by the EU terminology) might unseat, or at least undermine the occupational pensions ("second pillar" pensions) that have been traditionally more convenient for workers. Such an outcome was certainly not pursued by the EU, and also CBBA-Europe, which strongly supported the PEPP, would also consider it undesirable. But if the PEPPs will result one day more interesting than occupational pensions precisely because of their pan-European nature, the EU should provide a solution on the same ground in order to safeguard occupational pensions.

B. The possible advantages and goals of a pan-European DC Occupational Pension (PEOP)

10. In light of the aforementioned reasoning, according to CBBA-Europe, the sole real correspondent EU tool to the pan-European personal pension product (PEPP) would be the pan-European occupational pension product (PEOP), which might have similar features, including the fact that PEPP and PEOP would be both EU legal vehicles, governed by EU Regulations and voluntary ("2nd EU legal Regime), so as to say cohabiting with national pension tools but not conditioning their features or the functioning of the latter.

11. The PEOP could contribute to satisfy three EU goals:

    A) To enlarge the occupational pensions' coverage in Europe;
    B) To improve the quality of occupational pensions by reducing their costs and enhancing competition among them;
    C) To ease mobility of workers;
    D) And to boost the creation of the EU Capital Markets Union (CMU)

12. The goal of enlarging the **coverage of occupational pensions** came up since the late nineties: Europe is facing a dramatic demographic challenge, including the aging of its population and low fertility rates. Public social security pensions ("first pillar pensions") are still mainly working on a pay as you go mechanism (PAYG) and are becoming more and more unstainable, considering also the high public debts of the EU member states. The last pension reforms focused much more on the sustainability of those systems to the detriment of their adequacy.

13. At the same time, many Europeans still not have the culture of private pensions, and often rely on the wrong assumption that public/social security pensions will take care of their retirement income during their old age. Moreover, in several EU member states

workplace/occupational pensions are not mandatory for companies and workers; and, as said above, in other states, especially in Central and Eastern Europe, those pensions do not almost exist.

14. A new pan-European occupational pension (PEOP) operating across the EU would enlarge the offer of this kind of pensions in all the EU member states, even if those where local occupation are not developed enough; or where they are too expensive; or where they are absent.

15. PEOPs could be created not only individually by large employers (sponsor plans), but also as open multi-employer/master-trusts platforms created by pension providers (pension funds, asset managers, insurance companies). In such a way, not only large employers would have the advantage to cover their employees at once in all the EU member states where they employ workers; but also several SMEs could join those multi-employer/master-trusts platform PEOPs, also created in Countries other than theirs. Moreover, PEOPs would encourage the coverage of occupational pensions also for that growing number of workers who change jobs more and more frequently, as expounded on the following paragraphs about mobility.

16. Multi-employer/master-trusts PEOPs would have not only the potential of covering those EU member states where the offer of local occupational pensions is scarce of absent; but also, if well designed and based on an utmost transparency and simplicity for both beneficiaries and sponsoring companies, the PEOPs would have the **potential of competing with local national pension funds** where fees are too high, or returns on investments are disappointing; or, again, where the administrative and information standards are insufficient. In other words, competition between PEOPs (maybe created in other EU member states) and national occupational pensions will likely force to raise the quality of these latter as well, by breaking some local dominant positions disadvantageous to employers and workers[5]. Only an initiative taken at the EU level would be able to address this matter.

17. More in general, PEOPs covering thousand of workers and companies across the entire European Economic Area would be capable to generate those economies of scale leading to more efficient and cheaper solutions in the overall pension management. CBBA-Europe understands that once the PEOP will be created, the transition from the existing national arrangements to the European one will be gradual and will imply some costs. Therefore, it would be quite predictable that the achievement of PEOPs functioning at their full capacity will require some years.

18. Like the PEPPs, PEOPs would be fully portable tools not only among their national sub-accounts, but also between themselves, in case of a shift from a PEOP provider to another. Therefore, it goes without saying that such a feature would **ease the mobility of workers in Europe** with regards to the preservation and accrual of their

[5] A reasoning apart will be made with regards to those national occupational pensions -especially sector/industry wide- that are made mandatory by the local public authorities.

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Square de Meeûs 38-40, B-1000 Brussels (Belgium), Tel: +32 2 401 87 92, Fax: +32 2 401 6868
Website: https://www.cbba-europe.eu

occupational pension rights. In the absence of an EU legal framework on portability of occupational pension rights, missing also in the cross border activities of the IORP Directive, here again it should be reminded that the PEOP could be only taken at the EU level.

19. Moreover, an easy switch (including portability) from a PEOP to another, and/or from PEOPs to PEPPs would also **protect the mobility of jobs**, considering that nowadays people change jobs much more frequently, not only across the industries but also in their work status (from employee to self-employee to other hybrid employment forms and vice-versa). Sometimes, even the national pension systems have been not able to address these challenges and several workers still remain uncovered, or suffer from fragmented positions with their occupational pensions because of the frequent changes of their work sector and status.

20. Finally, PEOPs might fill the missing piece related to funded pensions in the **construction of a EU Capital Market Union (CMU)**: accumulation of great amounts of assets collected by pan-European Occupational Pensions would contribute to the completion of this EU initiative, and would also favor investments in the so called "real economy" (i.e. Infrastructures; PPPs, financing of companies; etc.) by reducing the predominant role of the banks, which still remain by far the main lenders in Europe.

21. Being the PEOP a 2nd EU voluntary legal regime, the cross-border activities provided by the IORP directive could still respond to some needs and be more suitable for some specific arrangements not covered by the PEOP. Therefore, the cross-border activities of pension funds provided by the IORP directive might well coexist with the PEOP, as much as the existing national occupational pensions.

C) *Final remarks to this introduction*

22. The present paper has not the ambition of being a feasibility project for a pan-European DC Occupational Pension (PEOP), but a starting point, or food for thought, for possible solutions or options to be taken into consideration. Therefore, CBBA will freely express its opinions on the possible characteristics of the new pan-European pension even if they will sound problematic in some respects from a political point of view. Indeed, according to CBBA-Europe, such a project would be legally possible on a EU legal level, but the main obstacles to its realization will be mainly political.

23. If well designed, based on an utmost transparency and simplicity for both beneficiaries and sponsoring companies, a pan-European DC Occupational Pension (PEOP) may be beneficial for several actors living and/or operating in Europe, and it would contribute to achieve other EU goals.

 23.1. **Large employers (multinational companies) would finally be able to make material savings in managing their workplace pensions across Europe.**

Economies of scale, centralization of governance, common administration and investment policies, mergers and reduction of local/national occupational pensions schemes by overcoming the legal requirements provided by the current IORP Directive and valid solutions in case of corporate cross-border transfers of employees in Europe, would represent an important added value for multinationals employing workers in several EU member states;

23.2. **The occupational pensions' coverage might significantly increase for SME**, as several employers could be more motivated to offer a cost-efficient tool to their employees even in those EU Countries where occupational pensions almost do not exist,[6] or where they are particularly costly. Small and medium enterprises (SMEs), are often limited in offering occupational pensions to their employees because of the costs and/or lack of adequate offer of open pension funds. In particular, multi-employer pensions platforms (multi-employer IORPs) located in other EU member states and allowed to operate in several Countries might offer cheaper occupational pension solutions to several employers, including SMEs, by efficiently competing with local pension tools. Increasing the workplace pensions' coverage is in fact one of the main goals of the EU;

23.3. As for the **members/beneficiaries**, in addition to the said accrued chances of getting enrolled in a workplace pension that they would have otherwise never got, the creation of economies of scale, lower administration costs and a simple design of the tool would potentially increase their future retirement income, by granting a better pension adequacy, which is another main goal of the EU in the field of pensions. Moreover, they might take advantage of portability of their pension rights across the EU member states;

23.4. **Mobility of workers (both at infra-corporate or inter-corporate level) would be favored** at the advantage of both the sponsoring undertakings and the members, insofar as the same PEOP (fully portable) acting in several Member States of the EU would cover those mobile workers. Multinational companies employing people in European Countries would be finally free to transfer their employees over their national branches located in the European Economic Area, by keeping them enrolled in the same corporate pension (infra-corporate mobility). Industry sectors experiencing a huge mobility in the European Economic Area such as Research, Agriculture, Healthcare, or Construction might find specific solutions to keep those workers covered by occupational pensions even after changing their employer(s) (inter-corporate mobility). Moreover, a free portability between PEOPs and even between PEOPs and PEPPs would ease the mobility

[6] Such a situation might occur in those Countries where occupational pensions are not developed, or where the local pension offers are too expensive, or in cases where the local workers are not allowed to join their national-based occupational pensions because they do not satisfy the national requirements requested to join those pensions (ex. because their employment contracts are atypical). In all those cases, employers might find the chance to enroll their employees in an occupational pension established in another Country.

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Square de Meeûs 38-40, B-1000 Brussels (Belgium), Tel: +32 2 401 87 92, Fax: +32 2 401 6868
Website: https://www.cbba-europe.eu

of workers also at inter-sectoral level both in case of cross border and (in some cases) national mobility. The removal of the obstacles deriving from mobility of workers would contribute to a better pension income of the future beneficiaries – as opposed to a fragmentation of their pension positions in every Country or sector where they did work.

23.5. **Several actors of the pension industry** such as IORPs (including multi-employer IORPs), insurers, asset managers, auditors, advisors, pensions' administrators, etc., would finally get several advantages coming from the creation of a real European internal market of pensions deriving from the EU freedoms of provision of services and movement of capital. Europe could become the wealthiest and most competitive pension market of the World, by favoring in the future the capacity of the European pension industry to offer solutions throughout Europe and overseas.[7]

23.6. Accumulation of great amounts of assets collected by pan-European Occupational Pensions would contribute to the **completion of the EU Capital Market Union**.

24. On the basis of the listed benefits, there is a wider, overall advantage of the PEOP that should be underlined, which is its potential to finally combine the social and the economic goals of the European Union, too often perceived as contrasting and irreconcilable souls of the overall EU project.

25. In other words, this framework would somehow represent the realization of that "social market economy" provided in the article 3.3 of the Treaty on European Union (TEU). Social goals such as a wider coverage and better adequacy of pensions could walk hand in hand with the European economic fundamental freedoms (mobility of workers, capitals and services), and more in general, would lead to an accrued economic competitiveness of the Union.

[7] Note, for example, that the decision of the United States in 1974 to allow occupational pensions to operate and be regulated on a national level rather than at the level of 50 different sovereign states and their regulators, has led to large accumulations of investment capital in those pension funds and fostered the growth of many of the world's largest pension providers.

Cross Border Benefits Alliance - Europe
Square de Meeûs 38-40, B-1000 Brussels (Belgium), Tel: +32 2 401 87 92, Fax: +32 2 401 6868
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Chapter 1. The PEOP and the national IORPs: similarities and differences

A. A pan-European occupational pension vehicle vs IORP as a pure national pension provider

26. It is well known that the IORPs (institutions for occupational retirement provision) are pension funds, as to say pension providers managing pension schemes. More in particular, according to the IORP directive, the IORP is an "….*an institution, irrespective of its legal form, operating on a funded basis, established separately from any sponsoring undertaking or trade for the purpose of providing retirement benefits in the context of an occupational activity on the basis of an agreement or a contract agreed: (a) individually or collectively between the employer(s) and the employee(s) or their respective representatives, or (b) with self-employed persons, individually or collectively, in compliance with the law of the home and host Member States, and which carries out activities directly arising therefrom"*[8]*;*

27. IORPs, even if partially regulated at the EU level by the said directive, are still national entities. In other words, on the one hand, the IORP directive only provides for EU minimum standards for IORPs; on the other hand, pension schemes (or plans) run by IORPs remain purely and solely national arrangements, deprived of any regulation at the EU level, as will be discussed below in section B.

28. National IORPs are therefore still subject to their national legislations that might regulate aspects not covered by the EU legislation (ex: quantitative solvency requirements), or to other requirements going beyond the said EU minimum standards.

29. Importantly, the EU IORP directive is based on two main legal bases. The first is the achievement of the goals of the EU internal market (art 114 of the Treaty on the Functioning of the European Union: TFEU); the second is the principle of mutual recognition (53 and 62 of the said TFEU) with particular regard to the freedom of provision of services, according to which a given pension provider (IORP) based in a member state should be recognized by other member states as fit enough to operate in their own territories.

30. However, according to the same IORP directive (art.11), cross-border activities of IORPs cannot be carried out automatically. In particular, every time that a cross-border activity is going to be launched, an authorization should be granted by both the national competent authority (NCA) of the state where the IORP is based (home state); and by the NCA where the IORP will be operate (host state). So far, several IORPs willing to launch cross-border activities in EU member states have experienced problems with the said authorizations[9], which were (and sometimes still are) too slow

[8] Paragraph 1 of article 6 of the IORP directive

[9] Moreover, now some IORPs are also experiencing problems with the cross-border transfers of pension schemes provided for by article 12 of the IORP directive.

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Square de Meeûs 38-40, B-1000 Brussels (Belgium), Tel: +32 2 401 87 92, Fax: +32 2 401 6868
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and burdensome, discouraging, in some cases, pension providers and sponsoring companies from pursuing such cross-border activities[10]. Those obstacles can be fairly described as mainly due to resistance of the host states, which did not really welcome foreign IORPs operating in their territories. Therefore, protectionism and mistrust towards pension funds located in other EU member states still represents a big challenge.

31. In the light of the aforementioned obstacles, the principle of mutual recognition among IORPs located in other member states, on which the IORP directive itself is legally based, has been often disregarded. With this regard, CBBA-Europe publicly raised some concerns and has issued some position papers[11].

32. It was not disclosed by the aforementioned EIOPA's survey of 2017 if such a possible new pan-European DC occupational pension entailed the creation of a legal framework designing just a new pan-European provider (a kind of "Super EU IORP"), or rather a pan-European scheme/plan, or both. This question was also asked by that survey.

33. Against this background, and in the lack of efficient measures able to assure the observance of the principle of mutual recognition among the different national IORPs, CBBA-Europe deems that a European legal entity, as to say a pension vehicle (PEOP fund) directly designed and regulated by the EU legislation (a kind of EU level IORP, as opposed to the existing national IORPs), might significantly solve some of the aforementioned challenges. In particular, it would overcome the national resistance and mistrust towards the cross-border activities of the existing (national) IORPs and end some accusations of "regulatory arbitrage" in the choice of the home state of the IORP. In this perspective, and unlike national IORPs, the new PEOP fund would correspond as a pan-European occupational vehicle to the PEPP.

34. The European framework regulating the PEOP fund should take as reference both some provisions of the IORP directive, considering that this directive just regulates occupational pension providers; and some features of the PEPP Regulation, which is the first pan-European pension vehicle.

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[10] With this regard, please look at the CBBA-Europe Communication on the withdrawal of United Pensions from The Netherlands due to the Dutch provisions aimed at hampering the cross-border activities in its territory: https://www.cbba-europe.eu/wp-content/uploads/2019/12/CBBA-Europe-Communication-following-the-withdrawal-of-United-Pensions-from-The-Nertherlands-.pdf

[11] CBBA-Europe Position paper on possible legal inconsistency with EU provisions of the additional requirement of providing information on the coverage ratio of a foreigner pension fund operating in another member state (host state) according to the national parameters of the host state: https://www.cbba-europe.eu/wp-content/uploads/2019/04/CBBA-Europe-position-paper-about-requirements-of-information-on-coverage-ratio-to-foreigner-pension-funds-in-case-of-cross-border-def.-.pdf

Position paper on possible legal inconsistency with EU provisions on cross border transfers of pension schemes with regards to the establishment of excessive and unjustified majorities of members and beneficiaries left to national legislations: https://www.cbba-europe.eu/wp-content/uploads/2019/01/CBBA-Europe-position-paper-on-article-123-IORP-2-Directive-final.pdf

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35. In order to safeguard its nature of occupational pension, CBBA-Europe believes that such an EU level IORP (or PEOP fund) should satisfy the typical features of an occupational/workplace pension vehicle social tool that differentiates it from other products:

    - For example, unlike an investment vehicle, it should have a long-term perspective; early withdrawals of capitals should be limited, or penalized, or conditioned under particular circumstances.

    - Moreover, unlike personal pensions, the PEOP fund should manage schemes based on an employment arrangement, where contributions of the employer (sponsoring plan) should be definitely provided.

    - Finally, if and when this initiative will go further and reach the European Commission (EC) for a possible legislative proposal, CBBA-Europe strongly wishes that not only the DG FISMA[12] of the EC (which has been in charge of the PEPP Regulation and IORP directive) will be entrusted with this initiative; but also the DG Employment and Social Affairs of the EC should be deeply involved in the preparatory works.

36. Ideally, the new PEOP fund, powered by an EU label, would therefore (almost) automatically operate in all the states of the European Economic Area (EEA); and the previous authorization to operate in other EU member states should be strongly simplified and reduced to few requirements in the same way as a PEPP.

B. *The PEOP as a wider pension tool than a pure EU level pension fund*

37. Even if a new EU IORP (PEOP fund) might represent an important achievement for cross-border activities of occupational pensions in Europe, the sole creation of such a vehicle (or fund) might not suffice. Indeed, in addition to the aforementioned protectionist tendencies towards foreigner pension funds willing to operate in other EU member states, it is well known that the main obstacles for cross-border activities are represented by the different national social and labor legislations (and by the different national taxation systems: taxation of the PEOP and some possible solutions be treated on chapter 5 of this paper).

38. In other words, if the current provisions on cross-border activities of the IORP directive were kept as reference, even a new PEOP fund ("super EU IORP") easily authorized to operate across the European member states would have still to comply with the national jurisdictions regulating some features of their pension schemes (or pension plans).

39. According to the said directive, IORPs might act in other EU member states granted

[12] Directorate-General for Financial Stability, Financial Services and Capital Markets Union of the European Commission

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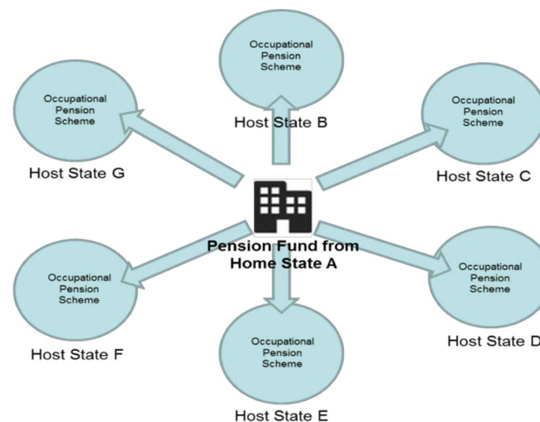
that they will not bring any *"…prejudice to national social and labour law on the organisation of pension systems, including compulsory membership and the outcomes of collective bargaining agreements…"*[13]: this means that pension schemes cannot be designed/structured at ultra-national level, because they all must be consistent with their own national social and labor legislations.

40. Hence, as things stand today, a "cross border activity" only implies that a given IORP based in a (home) state "A", can run (different) national pension schemes based in the (host) states B, C and D, where usually the employers and workers are based. It is not by chance that all those IORPs operating cross-border activities must set up as many national compartments as the Countries where they do operate in order to comply with national social and labor (and tax) legislations. In short, according to the IORP directive, "cross border" is the activity of the pension provider (IORP), but not the nature of the scheme[14].

Figure 1: Example of "cross-border activities" of pension funds according to the EU existing legislation (IORP directive)



41. In this perspective, it might even be argued that if member states (and their national competent authorities: NCAs) had correctly applied the principle of mutual recognition among national IORPs by readily granting the authorizations to foreigner IORPs to operate in their territories (which unfortunately does not happen to be the reality), the need to set up a new strengthened EU-level IORP (the PEOP fund) to solve the challenges of cross-border occupational pensions in Europe would not be such a priority.

[13] Paragraph 1 of article 11 of the directive 2016/2341 (new IORP directive)

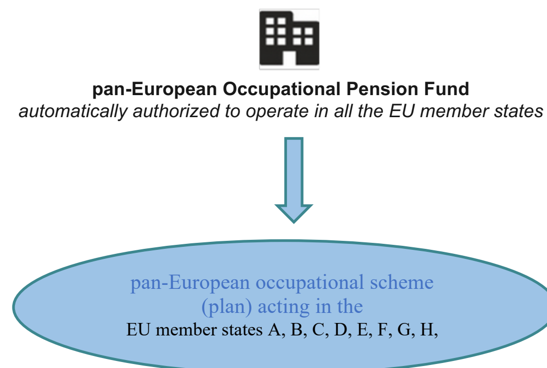
[14] As an example, the RESAVER project (the pan-European pension fund for researchers promoted and funded by the European Commission) is applying the said EU provisions on cross-border activities of IORPs: one IORP based in Belgium (and one insurance company) will be entrusted with the management of national pension schemes set up and regulated by the national social, labor and taxation laws in other EU member states. It is quite well known that such complications are currently causing several challenges to carry on this project, which has the noble ambition to offer an occupational pension to researchers, who are the most mobile workers of the European Union, and so the most vulnerable as well, in a pension perspective.

42. In light of that, CBBA-Europe suggests that in addition to the pension vehicle (PEOP fund), also a common EU pension scheme/plan operating smoothly and as much as possible homogenously across the different EU member states should be included in the new PEOP initiative.

43. After all, CBBA-Europe noticed that also EIOPA (rightly) acknowledged the need to act at the scheme level in its survey of 2017, where some questions (from n. 11 to n.19) explicitly focused on the possible features of the new "scheme", and not anymore on the features of the new (more generic) framework.

44. Unlike the current legal framework provided by the IORP directive and requesting to multiply the number of pension schemes for the number of the covered EU member states, a pan-European pension scheme (plan), would be capable to act properly throughout Europe: employers and providers should be not requested to adapt the pension arrangements to the different national jurisdictions by fragmenting the management of their pension plans. Once created, the same pension plan would operate under the same conditions in all the Countries covered by that plan/scheme.

Figure 2: example of how the new pan-European DC occupational pension should act throughout the European Union.



45. The new PEOP should therefore be made up of two main components: a new EU pension vehicle (PEOP fund); and a set of rules describing the possible options on how to design and forge the occupational pension scheme/plan (PEOP scheme). Therefore, rather than a pure pension provider, the PEOP should be a European wider pension tool.

C. *A legal framework for a 28th (or 2nd) voluntary EU regime provided by a new EU Regulation*

46. The EU legal framework regulating the PEOP, like the PEPP, would be an EU 28th (or 2nd EU) regime.

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Square de Meeûs 38-40, B-1000 Brussels (Belgium), Tel: +32 2 401 87 92, Fax: +32 2 401 6868
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47. The legal nature of 28th regime has important implications that deserve to be clarified:

    - First of all, it would be voluntary and alternative to the national workplace pension systems. In other words, unlike the IORP directive, which is addressed and binding to all the European pension funds, the new framework would not impose an adaptation of all the existing workplace pensions to its rules because these latter would keep working as they are, with their current rules;

    - Secondly, a 28th/2nd EU alternative and voluntary regime would just represent an additional option on the top of the national existing occupational pension, and so it would be usable for those sole actors (sponsor undertakings, pension providers, social partners, workers) seeking a wider offer of occupational pensions across Europe, or needing to handle transnational situations.

48. Such a cohabitation between national workplace pensions and the EU new tool would allow the same sponsor undertakings or pension providers to make use of both the national and European frameworks (traditional national IORPs and the PEOPs). As an example, several employers might consider it as more suitable to offer national pensions to non-mobile workers, and the PEOPs to the mobile ones. Moreover, in the case of cross-border activities, they might still choose the legal framework provided by the IORP directive; or the EU PEOP; or both, according to their special needs (this matter will be treated on the following section D).

49. Only the EU legislation might be able to smoothly regulate PEOPs. Non-binding instruments such as guidelines, codes of good practices, recommendations, etc. would result inappropriate for this purpose. Indeed, only the EU legislation would have the legal force to provide the PEOP with the power to override national legislations and work smoothly across the EU member states. At the same time, only the EU legislation has the legal power to derogate or get exemptions from other EU legislation, in case this latter resulted in contrast or incompatible with the aims of the new initiative.

50. At the same time, as all the EU member states would be required to transpose the new EU legislation in their jurisdictions, the PEOP will be an available option everywhere in the states of the European Economic Area.

51. CBBA-Europe thinks that the best legislative tool to attain those goals should be a EU Regulation, as was used for the PEPP. Unlike Directives, Regulations do not leave room of discretion to member states because their implementation into the national legal systems is direct and not filtered by protectionist local legislation.

D. The possible co-existence between the cross-border activities of the PEOP and the ones provided by the IORP Directive

52. It was stated that the PEOP would be an occupational pension tool acting on a DC basis, and with common scheme rules across the European member states.

53. It was also stated that the IORP directive provides for cross-border activities for pension funds, where the pension schemes remain national. Such approach, even if sometimes challenging for employers and pension funds willing to set up cross-border arrangements, has the peculiarity of safeguarding the specific and different features of the pension plans set up in the different EU member states.

54. According to CBBA-Europe, the cross cross-border activities of the PEOP and the ones provided by the IORP directive might co-exist, in the sense that sponsoring employers and pension funds might decide to offer one or the other solution according to their needs, and/or on request of their clients in case of cross-border multi-employer pension platforms.

55. After all, DB or quasi-DB schemes might be offered only through the cross-border activities of IORPs; also, some local governance bodies in charge of negotiating, monitoring and modifying the features of their specific scheme (including the policy on biometric risks; some local investment options; different conditions on the acquisition or safeguard pension rights, etc.), are created through cross-border activities of IORPs.

56. The PEOP solution, at least for some aspects, would likely be less sensitive to some local, specific needs because it would precisely be less prone to local adaptations due to its purpose of assuring a smooth functioning across the EU member states and avoiding national fragmentation, but at the cost of sacrificing local needs and peculiarities.

57. Even if some flexibility shall obviously be granted by the new PEOP framework to establish some features of the pension tool (for example, the offer of some protection of capital; coverage of biometric risks; participation of employees' representatives in the management), those features, once decided by the PEOP promoters, should then be applied under the same essential and substantial conditions in all the Countries where that PEOP will operate. In other words, and unlike the cross-border IORPs, real national compartments (reflecting the different national schemes and often equipped of local decision-making committees) will be not created within the plan.

58. Of course, some companies employing workers in several European Countries, might also decide to set up both the solutions (cross-border IORPs and a PEOP). As an example, if a given employer operating in 10 EU member states had the 70% of its employees based in 3 of them, it would decide to set up a cross-border IORP across the 3 states in order to better satisfy the local needs and expectations of the majority of its employees; and then a PEOP for the other 7 Countries, where the remaining 30% of its workforce is located.

59. Alternatively, considering that the cross-border activities of IORPs do not provide for portability (transferability of capitals across the member states are not provided by the IORP directive), the same employer might decide to use the PEOP as a portability

tool also in both the Countries where it will set-up a cross-border IORP and in the others.

60. A deeper specific reasoning about the possible relation between national IORPs and the PEOP, and about the possible use of the PEOP as a portability tool will be made respectively in the next section and in chapter 3.

E. The possible relationship between the PEOP and the national occupational pensions (scope of application of the PEOP in the different pension systems)

61. This section will just cover the possible leeway of PEOPs in the national pension systems, as to say when PEOPs might be offered in competition with local pensions, and when they should be prevented from doing so. However, this section will not cover the legal question of how PEOPs might be allowed to operate in markets regulated by their national social and labor laws. This matter will be faced in Chapter 5 of the present paper.

62. As a preliminary remark, CBBA-Europe reminds that the new initiative of a PEOP aims at strengthening the coverage and development of occupational pensions in Europe; and to ease the mobility of workers in the EU. The first goal would be particularly relevant for those Countries where occupational pensions are not really developed, or where they do not practically exist. Therefore, it would be granted, and even recommendable that PEOPs should be offered in those Countries (ex. in Central and Eastern Europe). Considering the extraordinary potential added value of such a new pan-European occupational pension tool, the EU should make sure that the EU legal framework on the PEOP will be properly implemented in those member states.

63. A different reasoning should be made, instead, for those EU member states where occupational pensions are well developed, and where the coverage is already very high.

64. It was stated that the new PEOP might serve just one-employer like a multinational company, which might likely set up its own PEOP; and that a PEOP might also cover several employers (related in the same sector or unrelated like master-trusts). Multi-employer PEOPs may arise new questions about their relationship, -and potential conflict- with the national existing sector/industry-wide or small-medium enterprises' pension plans.

65. In principle, a 28th or 2nd EU legal regime like the PEOP, alternative and voluntary to the existing national ones, and based on the concepts of alternativity and voluntariness, implies freedom of choice, and therefore a competitive environment. However, CBBA-Europe is also aware that in few member states, sector-wide occupational pensions do not always act in an open-market environment, as they are mandatory for all the employers and workers of the same sector, and they are managed by a sole monopolistic pension provider. Sector-wide compulsory

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Square de Meeûs 38-40, B-1000 Brussels (Belgium), Tel: +32 2 401 87 92, Fax: +32 2 401 6868
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occupational pensions normally arise from collective agreements concluded by the national social partners, and then extended to all the sector through the intervention of the public authorities. Such an extension has a very important meaning: the occupational pensions at stake deserve a public interest, and so they represent an integral part of the overall pension system of a given Country.

66. CBBA-Europe considers these national sector-wide mandatory occupational pensions as important as the ones subject to the EU Regulation 883/04 dedicated to the public social security systems[15], and already excluded from the scope of the IORP directive.[16]

67. In addition, several judgments of the EU Court of Justice had to face the compatibility between the EU competition law and those occupational pensions made compulsory and monopolistic by the public authorities. The sentences roughly gave the same answers: those pensions deserve to be protected. Mandatory membership to a given occupational pension plan (or other plans providing other social benefits) set up by collective agreement is totally in line with the EU antitrust provisions (art.101 TFEU) and is even exempted by the EU competition law. The monopolistic management, instead, even if it is in principle subject to the EU provisions forbidding abusive dominant position exercised by undertakings (art. 102 TFEU), is justified insofar as it accomplishes a mission of general economic interest such as the provision of solidarity (art. 106.2 TFEU), because in such a case the dominant position would be not “abusive”[17].

68. In the light of those explanations, CBBA-Europe considers that the new PEOP legislation should exclude from its scope of application both the mandatory sector-wide occupational pensions and (obviously) the social security pensions as well.

69. However, it should be added that monopolistic IORPs entrusted with the management of the said sector-wide mandatory occupational pensions should be not allowed to offer PEOPs by competing with other pension funds across the EEA. Otherwise, the reasoning on the exclusion of mandatory sector-wide pensions from the scope of PEOPs might appear incoherent. Indeed, granted that those monopolistic IORPs are protected by the EU competition rules, if they offered PEOPs in open competitive markets of other EU member states, they would generate a kind of upside-down distortion of the competition, by taking advantage of their special position in their home

[15] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems

[16] Paragraph 2 of article 2 of the IORP directive: […This directive shall not apply to… (a) institutions operating social security schemes which are covered by Regulations (EC) No 883/2004 and (EC) No 987/2009 of the European Parliament and of the Council;..]

[17] Judgment of the EU Court of Justice of 21 September 1999, on the joint cases: C-67/96 Albany [1999]; C-115;116;117/97 Brentjens; and C-219/97 Drijvende Bokken; Judgment of the EU Court of Justice of 21 September 2000, case C-222/98 Van der Woude; Case E-8/00; EFTA Judgment of 22 March 2002, Landsorganisasjonen i Norge v. Kommunenes Sentralforbu. But also, even with (slightly) different arguments: Judgment of the EU Court of Justice of 12 September 2000, joint cases C-180/98 a 184/98, Pavel Pavlov and others; Judgment of the EU Court of Justice of 3 March 2011, causa C-437/09, AG2R Prévoyance

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Country.

70. As a further legal argument supporting the aforementioned reasoning, it should be reminded that a judgment[18] questioned the legitimacy of the criteria used by the social partners to designate an insurer in charge of managing their social protection scheme (in this case it was a healthcare plan). This judgement neither challenged the right of social partners to set up sector-wide occupational schemes requiring a mandatory membership, nor their right to entrust a (pre-existent) provider with the monopolistic management of their scheme. However, the European Court of Justice, aware of the fact the such a situation would limit the free movement of services in the EU (article 56 of the TFEU), made it clear that social partners expecting to get an extension of the mandatory membership to their social scheme do not have an unconditioned *carte blanche* in choosing the monopolistic provider, but they should follow some specific criteria (here: transparency in their selection process). A reasonable, wider interpretation of this judgement might be read as following: even if justified, a monopolistic management of a social protection scheme (which implies a dominant position in a given market) does not only "sacrifice" the EU competition rules; but it also sacrifices the EU fundamental freedom of providing services in the Union. Therefore, such a "sacrifice", which just represents an exception to the general EU rules, should be subject and limited to very specific circumstances. Now, it would sound as paradoxical if some pension providers (IORPs) benefiting from such a dominant position in their Countries, carried out cross-border activities (through the IORP directive or through a PEOP) by taking precisely advantage of the same EU rules from which they were exempted at home. Such a situation of non-reciprocity with other competitors should be just unjustifiable.

71. Unlike the previous conclusions opting for a preclusion for PEOPs to manage national mandatory sector-wide occupational pensions, the question would lead to a different answer in the following two cases:

    A) in the case of Countries where occupational pensions are usually mandatory, but those pensions do not cover some sectors/categories of workers, which do not have a pension fund of reference[19] or some large companies are free to set up their own pension schemes according to their rules. (In this regard, if some multinationals based in those Countries are already permitted to set up cross-border activities according to the IORP directive, it will already be clear that the PEOP should represent an option for them as well).
    B) in the case Countries where occupational pensions do freely compete among each other, and there is no compulsion to join any specific workplace pension.

72. In both cases A) and B), even if the occupational pensions at stake are not mandatory,

[18] Judgement of the Eu Court of Justice of 17 December 2015 for the joint cases C-25/14 and C-26/14, known as the "UNIS" case.

[19] As an example, workers covered by atypical, precarious employment contracts; or some semi-autonomous workers; etc.

they act in mature markets, and probably subject to stringent and well-established national rules. Wouldn't it then be suitable to offer PEOPs, even if those will be structured under legal requirements slightly different than national pensions? According to CBBA-Europe, the answer should be affirmative, because PEOPs might still represent an additional means to increase the chances to extend the pension coverage to workers currently lacking an occupational pension. After all, here the hypothesis is precisely referred to those situations where the local market, even if open to competition among providers, has not been able to cover some (or many) workers, so the PEOP would represent the less of two evils (PEOP having different features than national pensions vs no coverage of those workers at all).

73. Quite connected to the aforementioned situation is also the case of potential activities of PEOPs in Countries where there are different forms of auto-enrollment into workplace pensions. As known, the system of auto-enrolment usually provides for an open competition among different pension providers, sometimes under the condition of satisfying some local requirements. CBBA-Europe considers that in principle PEOPs should be also allowed participating in the auto-enrolment markets.

74. As a DC pension, if some minimum or maximum pension contributions were already established by the local legislation on auto-enrolment, the PEOPs should not have any obstacles to adapt their offer to the local requirements. However, if other minimum local conditions were imposed on those national workplace pensions as a condition to compete in that auto-enrolment market (for example: compulsory forms of risk-sharing), PEOPs should be allowed entering those markets insofar as they will be obviously able to comply with those requirements[20].

75. CBBA-Europe also believes that a European framework for a pan-European DC Occupational Pension scheme and the PEOPs created on the basis of that, will be not necessarily less "social" than the national ones. After all, it will be up to the PEOP promoters (sponsor undertakings, pension providers, social partners) to design the scheme, and it might result that the conditions offered on the top of the minimum requirements provided by the EU legal framework will be even better than the national ones in certain Countries.

76. It would even be imaginable that one day sector-wide European social partners will create pan-European pension schemes deriving from European agreements under article 155 of the Treaty on the Functioning of the European Union (TFEU). In such a case, they could make use of PEOPs; or just use PEOPs as portability tools (the portability of PEOPs will be treated below).

77. Finally, even multinational corporations not obliged to join national mandatory sector-wide pensions plans might decide to join an industry-wide PEOP designed for their

[20] However, with the obvious exception on the level of the pension contributions, the PEOPs competing in an auto-enrolment market should be able to offer the same conditions also when acting abroad.

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sectoral needs, instead of setting up their own corporate workplace pension.

Chapter 2. The controversial ordering of provisions concerning the PEOP provider and PEOP scheme

78. It has been argued that the new pan-European Occupational DC Pension tool should (PEOP) be made up of a pension provider (almost) automatically authorized to act in all the EU member states, and a pension scheme working as much as possible homogenously across the Union.

79. However, in the world of occupational pensions, it is often quite difficult to clearly separate the rules referred to the provider (or pension fund, or institution for retirement provision: IORP), and the rules referred to the scheme (or plan).

80. The definition of a pension provider, or pension fund or, again, institution for retirement provision (IORP) was already given on Chapter 1 section A of this paper[21].

81. According to the same directive, an (occupational) pension scheme is instead "*a contract, an agreement, a trust deed or rules stipulating which retirement benefits are granted and under which conditions*"[22].

82. Legal rules regulating occupational pensions will therefore concern either the provider (pension fund/IORP, or insurance company or, in some Countries, asset managers), or the "scheme" (or "plan"). So far, and in accordance to the general setting of the IORP directive, the rules on the pension fund are provided by the EU legislation (in particular by the IORP directive), while the provisions on the scheme are determined at a national level (the so called "social and labor law").

83. In addition to the provisions on cross-border activities, the IORP directive provides for minimum requirements on governance, information and investment rules of the pension fund. Some cross-references to the insurance directives[23] are also made in case that a pension fund will provide for guarantees or cover biometric risks.

84. However, some requirements (especially those on governance, information and investment rules) might be still regulated also by national legislations on the top of the minimum ones settled at the EU level.

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[21] IORP: "….*an institution, irrespective of its legal form, operating on a funded basis, established separately from any sponsoring undertaking or trade for the purpose of providing retirement benefits in the context of an occupational activity on the basis of an agreement or a contract agreed: (a) individually or collectively between the employer(s) and the employee(s) or their respective representatives, or*
(b) with self-employed persons, individually or collectively, in compliance with the law of the home and host Member States, and which carries out activities directly arising therefrom".
Paragraph 1 of article 6 of the IORP directive

[22] Paragraph 2 of article 6 of the IORP directive

[23] In particular, to the directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)

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85. Finally, according to the approach of the IORP directive, rules concerning the determination of the pension contributions, conditions on the acquisition and preservation of pension rights (vesting periods, minimum age to accrue pension rights, portability, reimbursement of capital in case of early withdrawal of the worker from the pension fund before vesting pension rights, safeguard of pension rights in case of cessation of the membership into the pension fund), coverage (or not) of biometric risks, provision of guarantees on the capital (or on returns of investments), determination if the schemes should work on a DB or DC basis, additional information requirements, joint participation of employers and workers' representatives in the governing bodies of the pension fund, forms of solidarity/risk sharing among members, compulsory or elective participation to a given pension fund, early withdrawal of pension's accrued capital, forms of the payout phase, etc. are typically considered as rules of the scheme subject to the "national and labor laws" (or collective agreements) of the member states.

86. Unlike the IORP directive, other EU legislation such as the directive 2014/50/EU[24] (known as former "portability" directive), seems to cover typical aspects of the pension scheme -normally left to the competence of member states- such as the conditions on the acquisition and preservation of pension rights (vesting periods, minimum age to accrue pension rights, safeguard of pension rights in case of cessation of the membership into the pension fund, etc.), even if the provisions of this directive will be applicable only in case of cross-border mobility of workers across the European Union.

87. Finally, the PEPP Regulation, even if designed in reference to a personal pension product (not occupational), covers wider aspects than the pure features of the pension provider[25]. As an example, the PEPP Regulation provides for a guaranteed-insured capital investment option that would be considered as a feature of the pension scheme (and hence a national competence) in the world of occupational pensions; it provides for portability of pension rights, which could be considered as a feature of the occupational pension scheme -and hence a national competence-, at least in some Countries (but this topic is controversial); finally, unlike the IORP directive, the PEPP Regulation clearly limits the number of investment options (six in total) for the pension product; it regulates the cases of early withdrawals from the product; and it also provides possible sanctions in cases of early changes of investment options.

88. In the light of the above, a clear division between the "pure rules" referred to pension provider, and the "pure rules" on the pension scheme is quite difficult to determine

[24] Directive 2014/50/EU on the minimum requirements for enhancing the worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights.
[25] Unlike the IORP directive, it should be reminded that the PEPP initiative also tried to face the big challenge of the possible different taxation treatments of PEPPs in the EU member states. As known, taxation is still a national competence of EU member states, and so the EU legislation could not easily regulate this matter. However, considering that different taxation treatments of pensions still represent a big challenge for the smooth functioning of pan-European pensions, this question will be treated on chapter 6 of the present paper.

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because of the different approaches of both the EU and national legislations. This paper will anyway divide the description of the main possible features of the PEOP into two parts: the first will cover the possible features of the PEOP provider (or fund); the second will cover the possible features of the PEOP scheme (or plan). This division, if not unanimously reflecting all the national approaches regulating the provider and the scheme, will follow a combined setting partially inspired by the IORP directive, and partially inspired by the PEPP Regulation.

89. The aforementioned division will be especially useful to handle the very sensitive legal question of how the specific features of the PEOP scheme might be allowed to be designed at the EU level, considering that these matters are normally regulated by national social and labor legislations, and still considered by some people as an exclusive national competence (and not a EU one). This matter will be faced in chapter 5 of this paper.

90. Here below the list of matters respectively treated in the first and second part:

1) The part concerning the mean features on the PEOP provider will cover:

- The possible pension providers entitled to set up PEOPs; (mainly inspired by the PEPP Regulation)
- The solvency rules and supervision of the PEOPs (inspired by both the IORP directive and the PEPP Regulation)
- The investment principles and investment options; (inspired by both the IORP directive and the PEPP Regulation)
- Governance; (mainly inspired by the IORP directive)
- Information; (inspired by both the IORP directive and the PEPP Regulation);
- Possible existence of a “basic PEOP” and related question about fee-caps
- Portability; (inspired by the PEPP Regulation)
- An additional possible use of PEOP as a portability tool of accrued pension capitals

2) The part concerning the mean features on the PEOP scheme will cover:

- The conditions on the acquisition and preservation of pension rights (mainly inspired by the directive 2014/50/EU);
- The determination of the level of pension contributions (mainly inspired by the approach of IORP directive);
- The possible guarantees on capital and on returns on investments; (mainly inspired by the PEPP Regulation);
- The coverage of biometric risks (inspired by both the IORP directive and the PEPP Regulation);
- The possible provision of solidarity/risk sharing mechanisms (mainly inspired by the approach of IORP directive);
- Early withdrawal of pension’s accrued capital (mainly inspired by the PEPP Regulation);
- Retirement age and the possible options of the pay-out phase (inspired by both the IORP directive and the PEPP Regulation);

Chapter 3. The possible features of the PEOP provider (PEOP fund) as a "super EU IORP"

A. The possible PEOP providers entitled to set up PEOPs

91. As with the PEPP, several national providers might be allowed to set up a PEOP pension fund: national IORPs and insurance companies, and possibly other entities like asset managers currently allowed to create occupational pension products in their respective Countries[26].

92. As the PEOP pension fund will have the ambition to operate also in those EU member states where occupational pensions are very scarce or do not even exist, the EU should make sure that local providers not currently involved in the management of occupational pensions will have the possibility to set up a PEOP pension fund in their Countries.

93. All the PEOPs (like the PEPPs) should be registered at the EIOPA[27]; in the PEPP Regulation, the registration is made towards the National Competent Authorities (NCAs), which then forward the registration to the EIOPA's central register. In the CBBA-Europe opinion, it would have made more sense that such pan-European products had been directly registered towards the EIOPA. However, considering the need of keeping consistency between the PEPP and the new PEOP provisions, the procedure of registration might remain the same for both the products.

94. Assuming that companies and sponsoring employers will set up their own PEOPs, in case of "open" PEOPs" created by other entities (that would be the case of multi-employer PEOPs offered to several unrelated employers), the provisions of the PEPP Regulation allowing the distribution of the PEOP by intermediaries and entities other than the PEOP promoter might be applicable to the PEOP pension fund as well. Of course, as the those PEOPs would be sold to employers (instead of individuals like in the PEPP case), some arrangements and adaptations should be made in order make the distribution more tailored to the negotiations between PEOP distributors and companies.

B. The solvency rules and supervision of the PEOPs

95. The Title II on quantitative requirements of the IORP directive[28] should represent a

[26] In Italy, for example, asset managers are entitled to set up pension funds regulated and supervised as IORPs. That being stated, asset managers and other financial operators willing to set up and manage PEOPs might always alternatively create their own separate IORPs or other pension entities entitled to run occupational pensions at cross border level: this happens for example in Spain or Portugal
[27] Articles 5 and 6 of the PEPP Regulation
[28] Title II of IORP directive (from article 13 to 19) covers, among other issues: technical provisions and their funding (articles 13 and 14); regulatory own funds (article 15); available solvency margin (article 16); and the required solvency margin (article 17 and 18).

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starting point in order to determining some solvency requirements of the new PEOP fund.

96. In its turn, the PEPP Regulation, when referring to the possible providers entitled to create a PEPP, makes a cross reference to the European sectoral legislation[29] applicable to them (ex. insurance directives or IORP directive, or again asset managers' legislation) for those aspects not directly covered by the PEPP Regulation (art.3 of the PEPP Regulation). A similar approach might be taken for the PEOP.

97. It was already stated that the new PEOP should work on a DC basis. However, and like the PEPP, it should be assumed that it could offer insured-based guarantees on the capital, or cover biometric risks (death, invalidity, longevity). Here again, like with the PEPP Regulation[30], those PEOP providers willing to cover such risks, but deprived in their sectoral legislation of a specific solvency framework dedicated to them, should cooperate with insurance companies.

98. Prudential supervision of the PEOP might also follow the same approach taken by the PEPP Regulation, as to say a coordinated supervision and distribution of powers between the NCAs and the EIOPA. Like with the PEPP Regulation, also the in the new PEOP framework the home state authority (where the PEOP provider is based), will interact with the host state NCAs. Article 66 of the PEPP Regulation[31] , together with the other provisions on the cooperation and consistency between the NCAs and EIOPA[32] might represent a good reference. Some rules on prudential supervision provided by the IORP directive should be also taken into consideration insofar as

[29] Article 6 of the PEPP Regulation refers to credit institutions regulated by Directive 2013/36/EU; insurance companies covered by Directive 2009/138/EC; IORPs covered by Directive (EU) 2016/2341; investment firms covered by Directive 2014/65/EU,; investment companies or management companies covered by Directive 2009/65/EC; EU alternative investment fund managers (EU AIFM) covered by Directive 2011/61/EU.

[30] Art. 49 of the PEPP Regulation.

[31] Article 66 of the PEPP Regulation: Cooperation and consistency

1. Each competent authority shall contribute to the consistent application of this Regulation throughout the Union.
2. The competent authorities shall cooperate with each other in accordance with Regulation (EU) No 575/2013 of the European Parliament and of the Council, Directives 2009/65/EC, 2009/138/EC, 2011/61/EU, 2014/65/EU, (EU) 2016/97 and (EU) 2016/2341.
3. The competent authorities and EIOPA shall cooperate with each other for the purpose of carrying out their respective duties under this Regulation in accordance with Regulation (EU) No 1094/2010.
4. The competent authorities and EIOPA shall exchange all information and documentation necessary to carry out their respective duties under this Regulation in accordance with Regulation (EU) No 1094/2010, in particular to identify and remedy infringements of this Regulation.
5. In order to ensure consistent application of this Article, EIOPA shall develop draft implementing technical standards specifying the details of cooperation and exchange of information, together with the requirements needed to present the information above in a standardised format allowing for comparison.

EIOPA shall submit those draft implementing technical standards to the Commission by 15 August 2020.
Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1094/2010.

[32] In particular, in addition to the aforementioned article 66, also articles 61, 63, 64,65,67 and 70 of the PEPP Regulation

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compatible with the pan-European nature of the new pension vehicle[33].

99. Unlike the IORP directive where host states' authorities (NCAs) are in charge of monitoring the compliance with their national social and labor laws, here those NCAs will mainly check the full compliance of the PEOPs operating in their territories with the provisions of the PEOP Regulation. This approach is the same as the PEPP Regulation[34]: the supervision of host states' NCAs will start when PEOPs will create (national) sub-accounts, and with regards to possible portability from a national sub-account to others. Host state NCAs shall be informed and will coordinate themselves, and they shall have powers of intervention in case of serious violations or risks of prejudice to PEOP members and in case of absence of actions taken by the home state NCA.

100. However, in the new PEOP framework, some aspects of the supervision will be not limited to the pension provider itself, but also to the overall functioning of the pension scheme. Since the new PEOP would be both a fund (provider) and a scheme, EIOPA would result again a natural supervisory body.

C. The investment principles and investment options

101. Both the IORP directive and the PEPP Regulation provide for investment rules[35] based on the "prudent person" principle. The PEOP fund might therefore take as reference those.

102. Unlike the IORP Directive, which confer some powers to member states to impose their national requirements on investments (article 19, paragraphs 6 and 7[36]), the PEOP Regulation should not provide for such powers. In other words, the PEOP fund should be not subject to any national rules but only subject to the common investment rules provided by the EU legislation regulating the PEOP.

103. If deemed it necessary, some more specific investment rules referred to the new European Occupational DC pension might be introduced in addition to those provided by the current IORP directive.

104. Like the PEPP[37], also the new EU framework regulating the PEOP should

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[33] Title V of the IORP directive on prudential supervision (from article 45 to article 59).
[34] Articles 16, 15 and 21 of the PEPP Regulation
[35] In particular, articles 19 and 32 of the IORP directive; articles 41 and 46 of the PEPP Regulation
[36] Article 19, paragraph 6 of the IORP directive: "In accordance with the provisions of paragraphs 1 to 5, Member States may, for the IORPs registered or authorised in their territories, lay down more detailed rules, including quantitative rules, provided they are prudentially justified, to reflect the total range of pension schemes operated by those IORPs".
7. Article 19, paragraph 6 of the IORP directive: "Paragraph 6 shall not preclude the right for Member States to require the application to IORPs registered or authorised in their territory of more stringent investment rules also on an individual basis provided they are prudentially justified, in particular in light of the liabilities entered into by the IORP".
[37] Article 42 of the PEPP Regulation

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provide for a limited number of investment options (five of six). The discussion about guaranteed or semi-guaranteed investment options will be held in chapter 4 (section C) and in chapter 5 (section B.2).

The PEPP Regulation[38] provides for a minimum time (five years) before switching investment option, which will be then out of charges. On the one hand, it is well known that too frequent changes of investment options are counterproductive; on the other hand, it also happens that several members of pension funds do not take care of monitoring the investments' outcomes of their funds for long periods and they often remain in the same investment line even when it is not performing well. That is the reason why a well-designed default investment option offered by the basic PEOP will likely play a key role for several members. Having said that, the minimum time for a switch of investment options might be left to the choice of the employers if those will be the PEOP promoters or, in case of open-multiemployer PEOP platforms created by external providers, to the open contractual negotiation between those providers and the sponsor plans (employers): for example, PEOP fund or sponsoring plan of the PEOP might be free to provide or negotiate shorter term investments' shifts without any costs for members.

D. Governance

105. Harmonized minimum requirements concerning the governance are already provided by the IORP directive[39]. Those requirements should represent the main source to regulate the PEOP fund. In the light of that, the governance requirements should be sufficiently well structured in order to make the management professional, skillful, efficient and more in general, proper.

106. If deemed it necessary to assure a credible recognition and a high-level EU label, the new EU Regulation on the PEOP fund might provide for some additional governance requirements to the existing minimum standards listed by the IORP directive.

107. Finally, CBBA-Europe reminds that nothing would prevent the PEOP promoters (sponsor undertaking(s) or social partners) from adopting rules in addition to those provided by the legal requirements, or from establishing a joint labor-management governance model (paritarian) through an involvement of both the workers' and sponsor undertaking(s)' representatives (ex. the social partners) in its governing bodies.

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[38] Article 44 of the PEPP Regulation

[39] The entire Title III of the IORP directive (from article 20 to article 35) are devoted to the governance requirements. The Title is divided into three chapters, respectively dedicated to the System of Governance (chapter 1, divided on its turn into a sections on general provisions, key functions, documents concerning governance); outsourcing and investment management (chapter 2); and depositary (chapter 3).

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E. Information

108. A PEOP should not disregard the harmonized minimum requirements in terms of information provided by the IORP directive[40], which should represent the natural starting point on the PEOP information requirements.

109. Some rules on information provided by the PEPP Regulation[41] might be adapted to the new PEOP fund as well, considering that the provisions on information provided by the PEPP Regulation aim at being exhaustive, as opposed to the minimum requirements provided by the IORP directive. Moreover, in case of commercial multi-employer PEOPs offered to companies, also some provisions about information on the distribution phase might be inspired by the PEPP Regulation. As for the advice, this task might be carried out by HR/compensation departments of sponsoring companies to their companies, or kept under the responsibility of the PEOP fund if this latter was not directly created by an employer, but chosen on the basis of a contract between the sponsoring employer and an external PEOP fund.

110. Additional information requirements might be necessary in order to make the new pan-European framework sufficiently clear, transparent and fitting the members' needs.

111. Here again, the new Regulation on the PEOP should make sure that the information requirements will be homogeneous across the EU member states. Therefore, additional information requirements provided by some national legal systems (allowed by the IORP directive[42]) should be not applicable to the new PEOP.

112. Finally, like with the PEPP and the lesser part with IORP directive, additional and harmonized specifications, mock-ups, and models could be provided by the EIOPA in order to ease a common and uniform use of the information tools across the EU.

F. Possible existence of a "basic PEOP" and related question about fee-caps

113. As known, the PEPP Regulation provides for two typologies of "basic PEPPs" as default investment options[43]. One basis PEPP guarantees the capital paid by the

[40] The entire Title IV of the IORP directive (from article 36 to article 44) is dedicated to the Information of prospective members, members and beneficiaries. The Title is divided into three chapters: chapter 1 on general provisions; chapter 2 on the pension benefit statement (and supplementary information); and chapter 3 on other information and documents to be provided.
[41] The entire chapter 4 of the PEPP Regulation (from article 22 to article 40) is dedicated to the distribution and information requirements. The Chapter is divided into 5 sections: general provisions (section 1); pre-contractual information (section 2); advice (section 3); information during the term of the contract (section 4); reporting to national authorities (section 5).
[42] Paragraph 6, art. 11 of the directive 2016/2341: "IORPs carrying out cross-border activity shall be subject to the information requirements referred to in Title IV imposed by the host Member State in respect of the prospective members, members and beneficiaries which that cross- border activity concerns".
[43] Article 45 of the PEPP Regulation (Basic PEPP):

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PEPP saver (insured based PEPP); the second just aims at recouping the said capital through risk mitigation techniques. Another important feature of the basic PEPP is that its costs and fees should not exceed 1% if the accumulated capital per year (fee-cap).

114. A basic version -here meant as a default option- would make sense for the new PEOP as well. Indeed, a well designed basic PEOP will likely play a key role for millions of workers in Europe. Like the PEPP, also the PEOP should have two typologies of default options, an insured based PEOP and capital recouping PEOP working on mitigation techniques.

115. However, a maximum fee-cap on the basic PEOP should be not requested by the EU Regulation on the PEOP. Here the different treatment between the PEPP and the future PEOP should be justified for two reasons:

- first of all, because considering its occupational nature, in several cases the sponsoring plans (employers) might be the only promoters -and managers- of a PEOP their its employees. In such a case, it would be reasonable to assume that an employer would make its best to keep costs as low as possible, considering also that part of those costs would be anyway borne by the employer itself.

- Secondly, and more importantly, because even when the sponsoring employer, including SMEs, will outsource the management of its workplace pension to an external PEOP provider/platform (ex. a multi-employer PEOP fund), in an open competitive market covering the entire EAA, the sponsoring company would have the possibility to benefit from the interplay of the competition between different providers: the market will be the most efficient way to assure the optimization of those products

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"*1. The Basic PEPP shall be a safe product representing the default investment option. It shall be designed by PEPP providers on the basis of a guarantee on the capital which shall be due at the start of the decumulation phase and during the decumulation phase, where applicable, or a risk-mitigation technique consistent with the objective to allow the PEPP saver to recoup the capital.*
2. The costs and fees for the Basic PEPP shall not exceed 1 % of the accumulated capital per year.
3. In order to ensure a level playing field between different PEPP providers and different types of PEPPs, EIOPA shall develop draft regulatory technical standards specifying the types of costs and fees referred to in paragraph 2, having consulted the other ESAs where applicable.
When developing the draft regulatory technical standards, EIOPA shall take into account the various possible types of PEPPs, the long-term retirement nature of the PEPP and the various possible features of the PEPPs, in particular out-payments in the form of long-term annuities or annual drawdowns until at least the age corresponding with the average life expectancy of the PEPP saver. EIOPA shall also assess the peculiar nature of the capital protection with specific regard to the capital guarantee. EIOPA shall submit those draft regulatory technical standards to the Commission by 15 August 2020.
Power is delegated to the Commission to supplement this Regulation by adopting the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1094/2010.
4. Every two years from the date of application of this Regulation, the Commission shall, after having consulted EIOPA and, where applicable, the other ESAs, review the adequacy of the percentage value referred to in paragraph 2. The Commission shall, in particular take into account the actual level and changes in the actual level of costs and fees and the impact on the availability of PEPPs.
The Commission is empowered to adopt delegated acts in accordance with Article 72 to amend the percentage value referred to in paragraph 2 of this Article in the light of its reviews with a view to allowing appropriate market access for PEPP providers".

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and to reward the most attractive ones by generating a virtuous circle. Moreover, in case of large employers (multinational companies), it could be assumed that they those will have undoubtedly enough bargaining power to negotiate the best conditions for their corporate pension.

- In conclusion, granted that management fees of an occupational pension tool (PEOP) are notoriously cheaper than a personal pension product (PEPP), members and beneficiaries will be protected enough by their employer in the marketplace, as opposed to single consumers buying a personal pension product like a PEPP.[44]

116. Of course, in case of insured capital PEOP, information on costs and the potential impact of these costs should be assured in order to make the pension members aware of their choice with maximum transparency. Here the outcomes on the implementation of the PEPP Regulation might help.

G. Portability

117. Like the PEPP, one of the main added values of the new PEOP would be its portability. Moreover, it should be reminded that even within the cross-border activities currently provided by the IORP directive, portability is not possible.

118. Following the approach of the PEPP Regulation[45], also the PEOP should create national sub-accounts, and here again several provisions of the PEPP Regulation, including the ones on coordination between the home state NCA of the PEOP (as to say the authority where the PEOP is based) and the NCAs of the host states (where the PEOP's sub-accounts are established) should be normally applied to the PEOP Regulation as well.

119. Two options should be offered to workers and companies: either the transferability of accrued capitals when sub-accounts are created in the new member state of destination of the employee; or the possibility to continue contributing to the PEOP sub-account based in the last country of departure of the employee.

120. Of course, considering that the PEOP fund would be an occupational pension institution, some adaptations should be made in order to grant information and possible decision powers to the sponsoring employer in case that a worker will be transferred from a national branch of the (sponsoring) company to another national one of the same company (infra-corporate transfers).

121. That being said, the PEOP fund should also be portable in case of cross-border inter-corporate changes, as to say when a given worker will change *both the Country of residence and the previous employer*. In such a case, some provisions of the PEPP

[44] Concerns that this might not occur due to self-dealing by employers could be addressed by regulatory prohibitions, such as against kickbacks, as well as transparency on what expense charges are used for.

[45] Chapter III of the PEPP Regulation (from article 14 to article 21) is dedicated to the cross-border provision and portability of PEPP. In particular, the specific provisions on portability of the product are findable in the section II of the said Chapter, at the articles 17-21

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should be applicable to the PEOP fund like the full portability among different PEOPs.

122. Notably, CBBA-Europe also suggests that portability should be offered also between PEOPs and PEPPs, in order to give the chance to members of PEOP funds leaving their company, to transfer their accrued pension rights into individual pension products like PEPPs.

123. Moreover, some possible portability options should be provided between a PEOP fund and local (national) pension funds (IORPs), in order to assure the safeguard, preservation and accrual of occupational pension rights for those workers leaving from an employer offering a PEOP and joining a new employer sponsoring a national pension fund. At least, this option should be taken into consideration from the perspective that capitals from PEOPs will be transferable to national occupational pensions (and not vice-versa).

H. An additional possible use of PEOP as a portability tool of accrued pension capitals

124. An additional potential use of the PEOP might be of integrating the existing workplace national pensions in case of cross-border mobility of workers. In other words, national workplace pensions (of the same industry sector, or within the same company) might create or join a pre-existent PEOP (even a multi-employer PEOP) and use it as a tool to assure the transferability of the accumulated pension capitals of those workers who would move to other Countries.

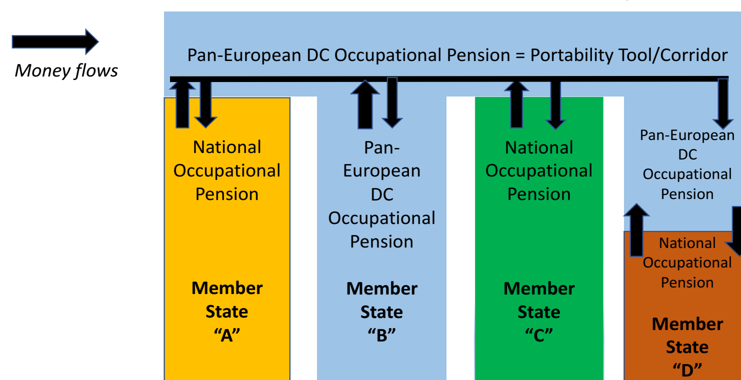
125. Assuming that PEOPs will always allow capital transfers to national pension funds, portability/transferability of pension capitals through PEOPs might work as following: once one worker moves to another EU Country, his/her national occupational pension fund (compulsory or not: it would not matter here) might decide to enroll him/her into a PEOP fund, and transfer all his/her accumulated capital into it, as if it "parked" the (dormant) pension position of the leaving worker into that PEOP.

126. In such a way, the mobile worker would have the possibility to take with him/her the accumulated capitals through the PEOP, which might be used as an intermediary vehicle, or a "corridor", or a "bridge" enabling mobile workers to take their pension capitals across the EU Countries. The advantage of national pensions facing the departure of their member is that they should only interact with one counterpart, as to say one PEOP, and not with dozens of pension funds throughout Europe.

127. Once the mobile worker will get settled in the new Country of destination, he/she will have two options: 1) to join a local workplace pension fund, by transferring his/her capitals from the PEOP to the new local pension fund; 2) or to keep paying his/her pension contributions to the PEOP with the approval and participation of his/her new employer, if the Country of destination does not have any corresponding occupational pension of the same sector (ex. In Central and Eastern European

member states), or in case that there is freedom to choose the workplace pension, and the worker considers more suitable to stay with his/her PEOP (either because that local occupational pension is not attractive; or because his/her company and worker are aware that he/she will move again to another Country in few years).

Figure 3: possible scenarios/options when the PEOP is used as a portability/corridor tool



Chapter 4. The possible features of the PEOP scheme (or PEOP plan)

A. Acquisition and preservation of pension rights

128. As for the acquisition of pension rights, ideally the new scheme might provide its own vesting periods and a minimum age (ex. a vesting period of one year or immediate; and a minimum age of 20 years). The new legal framework might also regulate the reimbursement of the contributions paid by the outgoing workers before the acquisition of their pension rights.

129. The PEPP Regulation leaves directly such decisions to member states, instead[46]. On a legal perspective, such a choice, if also embraced by the PEOP Regulation, would certainly avoid potential conflicts between the new Regulation and

[46] Article 47 of the PEPP Regulation: "Conditions related to the accumulation phase
1. The conditions related to the accumulation phase of the national sub-accounts shall be determined by Member States unless they are specified in this Regulation.
2. Such conditions may include in particular age limits for starting the accumulation phase, minimum duration of the accumulation phase, maximum and minimum amount of contributions and their continuity."

the national social and labor laws.

130. Granted that the PEOP should be always portable (ideally not only to other PEOPs, but also to PEPPs and national occupational pensions) in case of cross-border mobility of workers, when (and if) a one year or immediate vesting or a minimum age of 20 years will be not possible, the new Regulation might still make a direct reference to the article 4 of the Directive 2014/50/EU (3 years of vesting period; 21 years for the minimum age; reimbursement of the contributions paid by the outgoing worker before the acquisition of their pension rights).

131. However, it should be reminded that the directive 2014/50/EU is applicable only in case of cross-border mobility of workers: in case of internal mobility, national rules still apply. Considering its nature as a pan-European pension tool, this solution does not seem the most suitable: the new PEOP scheme should aim to provide the same treatment about the acquisition, reimbursement and safeguard of pension rights to both workers remaining in the same member state, and to those moving abroad.

132. The PEOP Regulation might therefore provide for the most convenient conditions on acquisition and preservation of pension rights, and add the possibility for member states to amend those conditions as far as their national PEOP sub-accounts are concerned;

133. The new EU framework for a PEOP should also provide for some solutions for the treatment and preservation of dormant rights. Article 5 of the Directive 2014/50/EU lists some options that should be taken into consideration for future discussion.

B. The determination of the level of pension contributions

134. A fundamental feature of a pension scheme is the determination of the level of the pension contributions. In some EU member states, the level of contributions due to occupational pensions (minimum or maximum) is predetermined by local legislations (either through social laws or especially through fiscal ones, determining some maximum thresholds on tax incentives). Moreover, in some EU member states, legislations establish the ratio of contributions that should be paid by the employer and the one to be paid by the employee as a percentage up to the one or another[47].

135. Moreover, it goes without saying that the level of contributions to occupational pensions differ across the EU member states because of the different wages and/or of the different levels of social security contributions that will inevitably condition the potential room left to employers and employees to fund an occupational/workplace pension: the higher will be the cost of social security contributions, the lower will be the margin left to fund private pensions' arrangements[48].

[47] As an example, the employer might be requested to pay the 2/3 of the contribution while the employee the remaining 1/3; or the payment is equally shared between the employer and the employee (50% each), etc.
[48] As an example, imagine a worker based in a Country "A" where the social security contribution for pensions represent the 20% of his/her salary; at a certain point of his career, this worker is transferred to another member

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136. Keeping in mind that the PEOP scheme will work on a DC basis, the EU legal framework should not cover this matter: such a decision on the level of contributions and on the share between the employer's and workers' part should be left to the sponsor undertaking(s), or to the internal company's negotiations.

137. Even an adaptation to the national normative requirements on the level of contributions –if existent- would be possible. As a matter of fact, such freedom of establishing different level of contributions would not undermine the smooth functioning of the PEOP across the EU member states.

138. In other words, the same PEOP scheme operating in several EU member states might easily collect different amounts of contributions at national level and being able to keep working smoothly. As an example, PEOPs' members moving across Europe might easily adapt their contributions to the local levels. In particular, if those mobile workers will have the chance to be covered by the same PEOP in other Countries (for example in case of intra-corporate transfers), they will have the chance to keep accruing their pension pots.

C. The possible guarantees on capital and on returns on investments

139. Another typical fundamental feature of a pension scheme is the provision (or not) of guarantees on capital and/or on returns on investments. Here again, such a provision might be predetermined by local legislations.

140. While an offer of a DC occupational pension scheme would have been quite challenging some years ago because several EU member states were still imposing DB arrangements or DC with some guaranteed returns, nowadays it seems that almost the EU member states (apart from Belgium and somehow Luxembourg) are providing their national pension funds with the possibility to offer DC occupational pensions without guarantees on returns. In the case of Belgium and Luxembourg, the final responsibility to cover such guarantees is imposed on the employers and not directly on the pension funds. The increased use of "target date" funds has done much to mitigate concerns about guaranteed returns by offering structural volatility protections rather than capital or return guarantees.

141. Granted that it was expounded above that the "basic PEOP" should also offer

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state "B" where the social security contributions represent the 15% of the wage. The pan-European occupational pension plan could provide for a contribution of 5% of the salary for the workers based in the Country "A", and a 10% for those based in the Country "B", so that the overall pension contributions in both Countries will not exceed 25% of the salary. In case of transfer of a worker from the Country "A" to the Country "B", his/her level of contribution to the company's pension scheme would shift from 5% to 10%. The final pension of such a worker will be made up of the national social security pensions of the Countries "A" and "B" calculated on a pro-quota basis according the EU Regulation 883/04, plus the pan-European workplace pension built up on the basis of the total money paid into the same scheme during his/her working time in both the Countries "A" and "B" (without any interruption of the contributions caused by the said transfer).

a guaranteed investment option on the capital (but not on the capital returns), such an option should therefore avoid conflicts with the great majority of the EU member states' legislations insofar as they will just impose the guaranteed option as one of the possible investment options (otherwise, the PEOP fund would be prevented from operating harmoniously across the EU member states, because in those Countries it could not offer investment options different than the guaranteed one).

142. That being said, none would prevent the PEOP scheme promoters from inserting also a guaranteed investment's returns option. However, and unlike the possible determination of different contributions levels, if such guarantee on returns was inserted in a given PEOP, the same option should be then also offered by the same PEOP across the other EU member states where it would operate, in order to avoid a discrimination or unequal treatment between the members of the same pension scheme.

D. The coverage of biometric risks

143. CBBA-Europe considers that the PEOP scheme should be not obliged by the EU legal framework to cover biometric risks of its members, but such a coverage should be only an option. However, here again such a provision might be required by some local legislations, though.

144. In a case, a PEOP will decide to cover biometric risks, a reference to the EU insurance directives would sound as natural, as stated above on the paragraphs on the features of the PEOP fund.

145. Finally, and similarly to the case of guarantees on investment's returns, if coverage of biometric risks was inserted as an option in a given PEOP, the same option should be then also offered by the same PEOP across the other EU member states where it would operate, in order to avoid a discrimination or unequal treatment between the members of the same scheme.

E. The possible provision of solidarity/risk sharing mechanisms

146. Similarly to the above, the decision to manage the scheme by practicing collective/risk sharing and some forms of solidarity among the members should be left to the freedom of the pension designers.

147. The EU legal framework should therefore remain neutral with this matter.

148. Here again, if the PEOP promoters will decide to shape the scheme in such a way, then the same feature should be offered by the same PEOP across the other EU member states where it would operate, in order to avoid a discrimination or unequal treatment between the members across the Countries.

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F. Early withdrawal of pension's accrued capital

149. In principle, early withdrawals of accumulated pension capitals from members should be strongly limited to extraordinary circumstances. The tool should indeed preserve its nature of a pension tool, and not be confusable with a pure saving financial vehicle.

150. The PEPP Regulation provides the possibility of sanctions and losses for users (but loss of other potential advantages) in case early withdrawals of capital[49]; it forbids, or sanctions users willing to switch PEPP[50] providers (and hence capital leaks from the current PEPP provided), or to change investment options[51] before reaching five years of stay with the first PEPP provider or with the current investment option. Such rules have the obvious (right) purpose to safeguard the very nature of a pension vehicle, which should operate on the long-term horizon.

151. That being said, the PEPP Regulation also permits to PEPP providers to allow more frequent changes of PEPP providers or investment options without any charges.

152. In some EU member states, occupational pension schemes' members have the possibility to request some parts (or even the whole) of the accrued pension capital in specific cases/circumstances provided by the social legislation. As an example, anticipations of the pension capital might be asked in case of job loss, or renovation of home, or home purchase, etc.

153. Considering that the PEOP scheme will work on a DC basis, anticipated withdrawals of pension capitals should not, as such, compromise the smooth functioning of the overall pension tool across the EU member states. Therefore, if any adaptation to some local jurisdictions will be made in order to not contradict local legislations, those adaptations should not represent a real obstacle.

154. Moreover, also the PEPP Regulation, even if not explicitly referring to early - whole or partial- withdrawals of capital, let member states determine the *"potential conditions for redemption before the minimum age for the start of the decumulation phase, in particular in case of particular hardship"*[52]

155. In the light of the aforementioned principle of non-discrimination or unequal treatment of members across the member states, it might be stated that if the PEOP promoters will allow early withdrawals of capitals in one state, they should then offer the same option also in the others. However, while in some EU member states early capital withdrawals are allowed, in other states they are forbidden.

[49] Article 28, paragraph 3, letter c (VII) of the PEPP Regulation about the content of the PEPP KID
[50] Article 52 of the PEPP Regulation
[51] Article 44 of the PEPP Regulation
[52] Article 57 of the PEPP Regulation

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156. In conclusion, the new PEOP Regulation should remain quite flexible with this matter: sanctions or prohibitions of early withdrawals of capitals should be maintained only in those Countries where early withdrawals are not permitted, but sanctions or prohibitions should not apply in those member states where early whole or partial capital withdrawals are allowed by their social legislations under specific circumstances.

G. Retirement age and the possible options of the pay-out phase

157. Forms of pay-out and retirement age represent other typical features of a pension scheme, and they are always regulated by national jurisdictions.

158. Considering that the neither the retirement age nor the decumulation phase, would hamper the smooth functioning of the PEOP scheme, such aspects should remain flexible and subject to the national rules or, if permitted, to the choice of the PEOP members.

159. The PEPP Regulation has the same approach to the decumulation phase[53].

160. Like the PEPP, also the PEOP legal framework should offer different several forms of pay-out formulas such as annuities, lump sums, draw-down payments, and hybrid pay-out formulas. Moreover, possibilities for members to change their pay-out formulas should be allowed for the PEOP as well.

161. Interestingly enough, also an advice about the most suitable decumulation formula might be offered to the basic PEOP members, according to their needs and pension expectations.

Chapter 5. Some legal questions concerning the responsibility/competence of the EU in setting up a pan-European occupational pension scheme

A. The question about the consistency of such an initiative with the EU principles of subsidiarity and proportionality

162. Internal market (and social policies) are a shared competence between the EU and its member states. Therefore, before the Union takes an action in this kind of fields, the test on compatibility with the EU legal principles of subsidiarity and proportionality shall apply.

163. Considering that the PEPP Regulation was already finalized by obviously

[53] Articles 57-60 of the PEPP Regulation

passing these tests, some hints[54] from that legislation should be taken as reference. However, it should be reminded that, unlike the PEPP, the PEOP is not only a pan-European pension provider, but it will also contain some features of an occupational pension scheme. Therefore, the question on how such a tool would be consistent with the EU competences might result more challenging.

164. The principle of subsidiarity states that the Union[55], *"….shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level".* According to CBBA-Europe, it seems quite clear that a DC occupational pension acting at a transnational level, beyond the borders of the individual member states of the Union (i.e. a pan-European pension tool) would justify an action of the EU itself. Therefore, CBBA-Europe considers that such an initiative would not infringe the principle of subsidiarity.

165. According to the principle of the proportionality[56] *"…the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties".* At a first sight (which will surely need to be discussed more in depth in a later stage), CBBA-Europe does not consider that the new EU initiative, introduced as a 28th or second voluntary regime, would undermine the existing member states' legal systems regulating their national occupational pensions. Like the PEPP, the new pan-European occupational pension would not unsettle the existing national pensions' frameworks, but it would rather just cohabit with them: as an example, it should not affect the functioning and structure of mandatory occupational pensions created at the national level, as it will be expounded below in this paper. In the light of above, CBBA-Europe deems that the principle of proportionality would be respected.

166. As for the "form" of the Union action, it was stated that a EU Regulation would sound as the most appropriate tool because of the reasons expounded above.

167. An additional point that should be reminded in relation with the principles of subsidiarity and proportionality, is that the PEOP would not harmonize the level of the pension contributions in the different member states. Therefore, CBBA-Europe highlights that the overall national pension systems of the member states would not undergo any impact on their pension contributions levels because of the new framework.

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[54] Recital 90 of the PEPP Regulation: "Since the objectives of this Regulation, namely to enhance PEPP saver protection and improve PEPP saver confidence in PEPPs, including where those products are distributed cross-border, cannot be sufficiently achieved by the Member States but can rather, by reason of its effects, be better achieved at Union level the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives,"

[55] Article 5.3 of the Treaty on the European Union (TEU)

[56] Article 5.4 of the Treaty on the European Union (TEU)

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B. The relation between the EU law and the national social and labor legislations

168. Unlike personal pensions, which are commercial products mainly regulated by the insurance, financial, prudential and tax legislation[57], insofar as the features of occupational pension schemes are concerned, the IORP directive granted to determine those features to the national social and labor legislations (including national collective agreements). In particular, it was mentioned that the IORP directive, when regulation the cross-border activities of pension funds, does not allow interfering with such national frameworks; and it was also mentioned that is precisely the reason why the new PEOP should be partially exempted by the first paragraph of article 11 of the IORP directive, at least where it forbids any interference with the national social and labor legislations.

169. After all, that is also the reason why CBBA-Europe reaffirms that EU legislation (and not just guidelines or recommendations, or other forms of soft law) will be necessary to regulate the new pan-European DC pension (PEOP): only a new EU legislation would have the legal power to provide such an exemption to other EU legislation like the IORP directive.

170. The main question to face here is the following: according to the European Treaties, would a European legal framework for an occupational DC pension be legitimized to act as a pan-European pension hybrid tool, not only equipped with the features of a "pure" pension provider (PEOP Fund), but also with the ones of a retirement DC plan (PEOP scheme)?

B.1 The PEOP scheme and some important provisions of the EU Treaties

171. As this topic will deserve a deeper analysis, only few legal points will be given in this paper. Here, it should be made it immediately clear that the provisions on cross-border activities of the current IORP directive(s) safeguarding the national and social legislations were not conceived in such a way just to comply with obligations or limitations established by the EU Treaties. Much more simply, such provisions represented the result of political compromises during the negotiations among the EU political parties in the EU Parliament and, most of all, among the member states at Council of the EU. In other words, and contrarily to what it is often told by the opponents of any EU initiatives in the pension field, the IORP directive does not represent any proof of a lack of EU competences in the pension field. In fact, not only the EU does have such legal competences; but those ones have been constantly growing during the last years, as it will be briefly expounded here below.

172. According to the paragraph 2 of article 4 of the TFEU, Social Policy (lett. B) is a shared competence between the EU and its Member States, as much as the internal

[57] This assumption is only partially true: in some member states, individual pensions are also partially regulated by local social laws.

market (lett. A), but also as agriculture, environment or consumer protection, etc. This caveat is very important, because on the one hand, it reminds that the EU, in addition to the internal market/economic regulation, is also entitled to improve social policy, which is not an exclusive competence of the member states; on the other hand, it also clarifies that, according to the EU Treaties, the internal market and the social legislation have an equal hierarchical legal force. The current EU is not a mere economic project anymore, but it is also (and perhaps equally) social.

173. The question whether a European framework for an occupational DC pension would be legally allowed to cohabit with some national social/labor law requirements seems to deserve an affirmative answer. In particular, both the EU legislation and the case law of the European Court of Justice have already resized and limited the competence of the member states in drawing their social and labor legislations when the exercise of the EU fundamental economic freedoms resulted to be undermined or reduced by the former ones.

174. Starting with the EU provisions of the internal market, the aforementioned directive 2014/50/EU[58] (former "portability directive") provides harmonized requirements in terms of vesting periods, reimbursement of the contributions paid by the outgoing workers before they acquire supplementary pension rights, and rules about the preservation of the so called "dormant" rights. All those matters are normally regulated by the national social and labor legislations, but here they are subjugated by the EU law in the name of the free mobility of workers across the borders provided by article 45 TFEU[59], on which the said directive is based[60].

175. Even more interestingly, EU case law has also confirmed the superiority of the EU economic freedoms on the national social and labor legislations. As an example, the European Court of Justice gave a judgment stating as incompatible with the same article 45 TFEU the refusal of a German occupational pension fund to recognize pension rights to a worker who did not fulfill a local requirement of five years vesting period. After three years spent working in Germany, this worker was in fact transferred

[58] Articles 4 and 5 of the Directive 2014/50/EU, cited.
[59] Article 45 of the Treaty on the Functioning of the European Union (TFEU):
1. Freedom of movement for workers shall be secured within the Union.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
(a) to accept offers of employment actually made;
(b) to move freely within the territory of Member States for this purpose;
(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.
4. The provisions of this Article shall not apply to employment in the public service.
[60] More precisely, the Directive 2014/50/EU is based on article 46 TFEU, which regulates the EU legislation process aimed at the achievement of the goals of article 45 TFEU.

by his employer to another national branch of the same multinational company. The fact that the rules of that German pension scheme were just set up by a local collective agreement and in line with the national legislation on occupational pensions did not prevent the Court from stating that such a national legislation (and/or collective agreement) bringing an obstacle to the fundamental freedom of movement of workers in the EU was incompatible with the EU Treaties[61]. Some believe this judgement might be even interpreted as a recognition of immediate vesting pension rights –irrespective of the national provisions and even of the maximum three years period recognized by the directive 2014/50/EU[62]- for all those workers moving across the EU at infra-corporate level (as to say, within the branches of the same multinational company). Leaving apart further reasoning, the undoubtable conclusion of this judgement is that national social and labor laws, and collective agreements referred to occupational pensions succumb to the EU fundamental freedoms.

176. By analogy, it should not be omitted that even the healthcare provision, which is in great part still managed by public social security schemes of the EU member states, was clearly "absorbed" in the European (economic) freedoms of circulation of goods and services. That happened first through several EU Judgments[63]; and then it was definitely legitimized by the directive 2011/24/UE on the mobility of patients in Europe, which was founded on the findings of those Judgments. Important enough for this reasoning, the directive is just based on the same article of the PEPP Regulation and the IORP directive (article 114 of TFEU, on the completion of the EU internal market).

177. Given that there are many other examples proving that national pension systems are far from being exempted by the European competencies when they represent a barrier to the exercise of the EU fundamental freedoms (the removal of those barriers is commonly defined as the "negative integration"), it would be here also important to understand to what extent the EU legal framework on the PEOP might really undermine the national occupational pensions of member states.

[61] Judgment of the Court (Third Chamber) of 10 March 2011 on Case C-379/09, *Maurits Casteels* v. *British Airways plc*.
[62] Interesting enough, it should be noticed that while the article 4 of directive 2011/24/UE grants a maximum of three-year time for vesting periods, the present Judgment basically recognizes immediate vesting pension rights in case of cross-border infra-corporate mobility. It might be therefore assumed that a different treatment would be given to cross-border inter-corporate mobility (maximum three years vesting period in accordance to the directive 2011/24/UE), and cross-border infra-corporate mobility (immediate vesting period if the findings of the current EU judgment were applied to all similar infra-corporate mobility cases).
[63] Judgment of the EU Court of Justice of 28 April 1998, Case C-158/96 Kohll; Judgment of the EU Court of Justice of 28 April 1998, Case C-120/95, Decker; Judgment of the EU Court of Justice of 12 July 2001 Case C--157/99, Geraets-Smits e Peerbooms; Judgment of the EU Court of Justice of 12 July 2001, Case C-368/98, Vanbraekel; Judgment of the EU Court of Justice of 13 May 2003, Case C-385/99, Müller-Fauré and Van Riet; Judgment of the EU Court of Justice of 16 May 2006, Case C-372/04, Watts.

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B.2 Some examples on how typical features of national occupational pension schemes might be compatible with a PEOP scheme

178. First, as a 28th/2nd EU voluntary regime, existing national occupational pensions would be not undergone any changes or adaptation;

179. Secondly, the PEOP product might not compete with the mandatory sector-wide occupational pensions existing in some European Countries, but it should be allowed to compete with national occupational pensions active in open competitive markets (regardless of their competition takes place in Countries where also mandatory sector-wide exist or not);

180. With this regard, it should be also reminded that according to the aforementioned EU case law[64] in section E of Capital 1 of this paper, it is undisputed that pension funds (or IORPs) are economic entities always subject to the EU competition law[65]. In particular, pension funds are considered as "undertakings", regardless of their legal form or of their for-profit or not-for profit purposes, when they manage private (pension) workplace schemes not designed by the Government[66].

181. Thirdly, the main features concerning the regulation of pension schemes, typically falling the scope of national social and labor laws such as the acquisition and preservation of pension rights; the level of contributions; the provision (or not) of guarantees on accrued capitals; the coverage of biometric risks; some arrangements such as "risk sharing" or solidarity among the members; early withdrawal of pension's accrued capitals; and the retirement age and the different payout formulas, still seem to be compatible or reasonably adaptable to national arrangements, as expounded in Chapter 4. Several arrangements, insofar as restricted to the accumulation phase, would not really undermine the smooth functioning of a PEOP scheme across Europe.

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[64] Albany; Brentjens; Drijvende Bokken; Van der Woude; Landsorganisasjonen i Norge v. Kommunenes Sentralforbu, Pavel Pavlov and others; AG2R.

[65] Just for clarity, in chapter 1 it was expounded that some pension funds were then excluded by the EU competition law because, in those specific circumstances, they were running activities of general economic interest. However, those entities still had to pass the so called "competition test" precisely because they remain undertakings subject to the EU competition law. In other words, those judgments concluded that the exemption from the competition law was referred to the very specific features of the workplace schemes that those funds were managing, but not to the nature of those providers.

[66] In case of providers running mandatory and statutory social security schemes, the EU case law stated that those providers are not undertakings, and hence excluded by the EU competition law: Judgment of the EU Court of Justice of 17 February 1993, Joint Cases C-159/91 e C-160/91, Christian Poucet and Assurances Générales de France (AGF) and Caisse Mutuelle Régionale du Languedoc-Roussillon (Camulrcac) and between Daniel Pistre e Casse Autonome de Compensation de l'Assurance Vieillesse des Artisans (Cancava); Judgment of the EU Court of Justice of 16 March 2004, Joint cases C-264/01, C-306/01 and C-355/01, AOK Bundersverband and others. Judgment of the EU Court of Justice of 22 January 2002, Case C-218/00, Cisal di Battistella Venanzio & C. Sas against INAIL. Judgment of the EU Court of Justice of 5 March 2009, Case C-350/07, Kattner Stahlbau HmbH against Maschinenbau- und Metall- Berufsgenossenschaft

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182. Overall, it should be noticed that several conditions and features of national occupational pensions are already converging, and the huge, past differences do not exist anymore: shifts from DB to DC; gradual reduction of guarantees on capitals (or on returns); shortening of vesting periods' requirements; wider offer of pay-out solutions (as opposed to the past, where in some Countries, the sole lump-sums or the sole annuities were the only possible option).

183. As an example, a one-year vesting period, even if different from some national jurisdictions (which might require longer vesting periods) should not represent, as such, a problematic conflict with local social and labor laws. After all, the duration of vesting periods has been constantly shortening in all the EU member states. Moreover, the vesting periods were created to bind employees to employers and to incentivize the employees' loyalty[67] (and so in favor of employers), or also to *"…increase certainty of planning with regard to the occupational old-age pension scheme and can save the institution responsible for operating that scheme the costs which may be involved in administering and fulfilling particularly minor pension rights*"[68] (and so in favor of the pension provider). Therefore, if the PEOP Regulation introduced more favorable conditions for workers (one-year vesting period), and less favorable ones either for sponsoring employers deciding to join a PEOP, or for the PEOP provider, such a provision should not determine, in principle, an unacceptable degradation of the national social and labor systems.

184. <u>The same reasoning would apply to immediate portability among PEOPs, and to possible portability from PEOPs to national pensions</u> (but not the other way around: national pensions would be not requested to be portable to PEOPs). Improvements of conditions for members and beneficiaries should not represent, as such, a problematic conflict with local social and labor laws (for sure, portability might raise other questions from national governments about the taxation of the transferred pension capitals: this matter will be treated in the section C of this chapter).

185. As a DC pension tool, it was already stated that the PEOP might not compete with DB schemes, or act in markets where DB schemes are considered as the only legally possible option. However, as at the moment it seems that there is no national jurisdiction left in Europe still prohibiting the offer of DC pensions, here again, a potential conflict with national social and labor jurisdictions should not arise.

186. A couple of EU member states still provide minimum guarantees on returns from investments for their DC pensions, but even such obstacles might be overcome considering that such guarantees should be covered by employers in case of underperforming of investments, and not by the pension funds themselves. Therefore -at least in principle- a PEOP scheme might operate also in those Countries, granted that the local sponsoring employers will accept and agree to take care of those

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[67] Paragraph 32 of the Judgment Casteels (cited);
[68] Paragraph 63 of Opinion of Advocate General Kokott of 11 November 2010 in Case C-379/09 (Maurits Casteels v British Airways plc)

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(legally) guaranteed returns on investments. Of course, it might be assumed that employers will unlikely accept such a deal with a PEOP provider; but the main point of this reasoning is that even in those member states, a non-guaranteed PEOP scheme (or just guaranteeing the mere capital) would not technically infringe their local social and labor laws, and so it should be allowed to operate in those Countries as well.

187. Certainly, and unlike the IORP directive[69], the new PEOP vehicle should not allow different national specific requirements on investments activities: but such provision is not part of national social and labor law, and so this matter would not even fall under the current discussion on EU legal competences vs national competences in the sphere of social and labor regulation; moreover, also the PEPP Regulation provides for centralized investment strategies.

188. Unlike article 12 of the IORP directive on cross-border transfers of pension schemes, a prior approval from the majority of both scheme's members and beneficiaries should be not requested. Such a provision was not included in the former IORP directive[70] and so it would be hard to justify that such a provision represents a recognition of national social and labor laws, all the more so since in several member states a majority has just been never required for national schemes' transfers. If it had assumed that a majority of such the EU provision requiring a majority of both scheme's members and beneficiaries to approve cross-border transfers were a social/labor provision, then it should have been concluded that paradoxically the new IORP directive itself did create social and labor law[71].

B.3 The question of the compulsory involvement of an equal number of workers' and employers' representatives in the governing bodies: the centralized solution vs national/local solution

189. An important issue very often falling under the national requirements of social and labor law is the compulsory involvement of an equal number of workers' and employers' representatives in the governing bodies of occupational pension schemes. As mentioned in section D of Chapter 3 of this paper, nothing should prevent the PEOP promoters (sponsor undertaking(s) or social partners) from establishing such a joint labor-management governance model (paritarian). However, some clarifications

[69] Article 19, paragraphs 6 and 7 of the IORP directive
[70] Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision
[71] Article 12 paragraph 3 of IORP directive:
"The transfer shall be subject to prior approval by:
(a) a majority of members and a majority of the beneficiaries concerned or, where applicable, by a majority of their representatives. The majority shall be defined in accordance with national law. The information on the conditions of the transfer shall be made available to the members and beneficiaries concerned and, where applicable, to their representatives, in a timely manner by the transferring IORP before the application referred to in paragraph 4 is submitted; and
(b) the sponsoring undertaking, where applicable."

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should be made.

190. A labor-management governance might either work on a central level or at national level:

- A joint labor-management body at the central level might be made up of employees' and employer's representatives coming from the Countries where the PEOP scheme will operate. Such a body would have the task of negotiating, monitoring and governing the overall PEOP scheme;
- Joint labor-management bodies at the national level made up of employees' and employer's representatives based in that Country. Such bodies would have, in principle, the task of negotiating, monitoring and governing the part of the PEOP scheme acting in their specific Country.

191. <u>In principle, no particular problems should arise in case of a centralized joint body, as the PEOP scheme might keep working smoothly across the EU member states</u> and the decisions made by the governance body would affect the pension tool as a whole. On case by case level, it should be understood if national requirements (if and when existing) providing for a joint labor-management representation in the governing bodies, would be satisfied if such a representation was only present in a centralized body.

192. <u>More problematic might appear the creation of national labor-management bodies, instead.</u> More predictably, some national social and labor laws will just provide for these solutions. After all, several IORPs carrying out cross-border activities did set up national compartments made up of social partners' (or working committees') representatives in charge of negotiating, monitoring and governing their respective national schemes. The risk with national labor-management governing bodies of the PEOP would be a fragmentation of its functioning across the EU member states due to different requests and expectations from the local representatives.

193. <u>Granted that national labor-management bodies might be created for the PEOP as well, it should be made clear that only some aspects -even if very relevant in a national/local perspective- might be negotiated at local level</u>. More in general, only those features that would not undermine the smooth functioning of the scheme across the EU might be established locally. As an example, local labor-management bodies might negotiate:

- *The levels and the share of the contributions between the employers and the employees;*
- *The conditions on the acquisition of the pension rights, but for local workers only (in case of cross-border transfers or move to other Countries, the maximum protection should be offered to workers quitting the PEOP) and insofar such conditions will not require burdensome or costly adaptations to the local situation;*
- *The coverage of biometric risks (but in such a case, as stated above, for fairness and equal treatment, the same PEOP scheme should offer the same opportunity also to members located in other EU states);*

- *The possible provision of solidarity/risk sharing mechanisms (but in such a case, as stated above, for fairness and equal treatment, the same PEOP scheme should offer the same opportunity also to members located in other EU states);*
- *Possible options of the pay-out phase (which would not undermine or hamper the smooth functioning of the scheme during the accumulation phase);*
- *Consistently with the above, unlike the IORP directive, national investment requirements of the PEOP should be not left to national legislation; and hence any decision on national investment policies should be not left to those local bodies either.*

194. Of course, it would also be imaginable the creation of both local labor-management bodies and a centralized committee for the overall PEOP in order to better coordinate and assure consistency on the functioning of the pension tool across Europe.

C. The possible legal basis of the PEOP legal framework

195. In the light of above, especially with regards to flexibilities still left to member states in determining some features of the scheme operating in their respective territories new PEOP Regulation might be based, like the PEPP, on the aforementioned article 114 TFEU on the completion of the EU internal market.

196. On a practical perspective, an EU Regulation just based on article 114 TFEU would also represent the best option, considering such a proposal would require a majority voting in the Council of the EU (where member states participate at the EU law making process) for its approval.

Legal basis of the PEOP legal framework: the possible (ideal but difficult) alternative option to use both the internal market and social policies provisions of the EU Treaty

197. Another possible option, surely more sophisticated, might be a combination of an EU Regulation dedicated to the PEOP fund and based on article 114 TFEU (internal market); and an EU directive dedicated to the main features the PEOP scheme based on article 153 TFEU (social goals of the EU).

198. Indeed, an initiative like the PEOP, based on both the European provisions on the internal market and those on social policy would be in principle the ideal solution, because it would combine the two main objectives of the new pan-European occupational pension tool: to encourage competition, increase the offer of occupation pensions in the EU, easing the mobility of workers, services and capitals and generating more efficient economies of scales (typical internal market goals); and to increase social protection of European workers in times when public social security pensions are declining (social goals).

199. The Title X of the third part of the Treaty on the Functioning of the European Union is completely dedicated to Social Policy. This Title is made up of 11 articles, and it indicates also the matters and procedures on how the EU can develop social

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Square de Meeûs 38-40, B-1000 Brussels (Belgium), Tel: +32 2 401 87 92, Fax: +32 2 401 6868
Website: https://www.cbba-europe.eu

policies, including legislation on these matters (particularly relevant are here articles 151 and 153 TFEU).

200. In particular, article 153 TFEU allows member states to adopt directives (not Regulations) aimed at setting minimum requirements[72], including in the field of social security and social protection of workers (lett.c, of paragraph 1 of the article 153 TFEU).

201. The big challenge of this provision is that legislative measures in the field of "social security and social protection of workers" still require the unanimity of the member states in the Council[73].

202. Despite the awareness that this provision dates back to 1991[74], it is a pity to still have to cope with such an outdated article, which still mingles "social security" and "social protection of workers". Indeed, assuming that social security is referred to the public-statutory schemes and the social protection of workers might be referred to the private/workplace ones, it seems quite evident that nowadays the two typologies should require a different legal treatment. While at the beginning of the nineties, in Europe public social security was by far the predominant, if not the exclusive form of social protection means, over the last thirty years private/workplace schemes are becoming (and will further become) a fundamental layer of the new social protection framework of the European citizens.

203. Moreover, considering the overall new approach of the EU towards private pensions (including all the initiatives aimed at strengthening their role, the initial attempts to create an internal market for pension funds[75], their classification as "undertakings" subject to competition rules by the EU Court of Justice, their common EU supervisory framework after the creation of the EIOPA etc.), all the caution exercised towards the public-statutory schemes aimed at keeping them under a quite relevant control of their respective governments[76] should be not needed towards

[72] Paragraph 2 of article 153 TFEU:*" […] To this end, the European Parliament and the Council:*
[…] B. may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings."

[73] Paragraph 2 of article 153 TFEU:*" […] The In the fields referred to in paragraph 1(c), (d), (f) and (g), the Council shall act unanimously, in accordance with a special legislative procedure, after consulting the European Parliament and the said Committees."*

[74] Agreement on social policy then joint to the Treaty of Maastricht, and then definitely included in the new provisions of the Treaty of Amsterdam in 1999.

[75] Just as an example, it should be reminded here preliminary initiatives of the Commission that then led to the drawing of the first IORP directive of 2003: the Commission Communication of 11 May 1999 - towards a single market for supplementary pensions (results of the consultations on the Green Paper on supplementary pensions in the single market) COM (99) 134; Commission Communication of 17 December 1994 on the Freedom of management and investment of funds held by institutions for retirement provision: Communication on an Internal Market for Pension Funds (94/C 360/08)

[76] Several other provisions of the TFEU clearly defend the role of EU member states in managing and designing their respective social security systems.

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Square de Meeûs 38-40, B-1000 Brussels (Belgium), Tel: +32 2 401 87 92, Fax: +32 2 401 6868
Website: https://www.cbba-europe.eu

private/workplace social protection schemes. In short, “social security” and “social protection of workers” should not stay in the same norm (letter c) of article 153 TFEU) anymore.

204. Of course, the burdensome impediment of the unanimity voting requirement might be partially mitigated by resorting to an enhanced cooperation[77] of a lesser number of EU member states (at least nine) willing to set up a pan-European occupational pension scheme based on the social policy provisions of the EU Treaties. Such a solution launched by a hard-core of member states might still represent a starting point.

205. In addition, knowing that in many EU member states sector-wide occupational pensions are set up and managed by social partners, it should be reminded that article 155 of the same social chapter of TFEU confers to the European Social Partners at cross-industry and sector-wide level the power to conclude collective agreements. Therefore, in a future it might be even imaginable that some open or sector-wide pan-European occupational pension schemes managed by a PEOP, could be directly designed by the European social partners, on the model of a widespread tradition in Europe.

206. The hypothesis of using also the social provisions of the TFEU as a legal basis of the PEOP (including the provisions on European collective agreements), was just an ideological cue on how and where a EU legal framework for a new pan-European occupational pension should ideally find its foundations in the European Treaties. However, as things stand, a pure internal market legal basis (article 114 TFEU) for the PEOP will appear as the best and most realistic option.

207. After all, in many cases the EU had to opt, or even change the legal basis of its legislative proposals -even when those were not necessarily the very ideal or optimal option- for practical reasons, and in particular in order to avoid (legal provisions requiring) the majority voting requirement. As an example, the European Commission tried to obtain the so called portability directive (that was then deprived of capital transfers across pension funds: today directive 2014/50/EU) through the aforementioned social provisions of the Treaty, and more in particular through an European collective agreement[78]; after taking note of the political and legal difficulties to rely on that legal basis, it then used the internal market (more precisely the provisions on free movement of workers in the EU) as legal basis.

[77] The procedure on the legislative Enhanced Cooperation is provided by articles 326-334 of the Treaty on the Functioning of the European Union (TFEU).

[78] In Paragraph 7 (page 16) of the Communication of 12 September 2003 “Second Stage of consultation of social partners on measures to improve the portability of pension rights”, SEC (2003), 916, the European Commission stated the following” ”*In the light of the above and taking into account the provisions of Article 137(1)* (Today: article 153.1 TFEU) *of the EC Treaty, according to which the Community shall support and complement the activities of Member States in the area of social security and social protection of workers, the Commission considers that there is scope for legislative action fixing minimum requirements to improve the portability of occupational pension rights within the European Union. However, the Commission believes that the most appropriate instrument would be a collective agreement at European level.”*

Chapter 6. The possible tax treatment of the PEOP considering the fragmentation of national taxation laws in the EU

208. The question of the possible tax treatment of the PEOP is probably the most problematic issue, considering that taxation remains a national competence of member states, and legislative initiatives on this matter should be not taken by the EU unless through the unanimity of the EU member states.

A. The approach taken by the PEPP initiative

209. Here again, the approach taken by PEPP initiative in this matter will deserve a look and some comments. The European legislator, aware of the aforementioned limited EU competences on taxation, decided to face this issue through a Recommendation[79] of the European Commission to the member states (therefore, a non-binding instrument) urging them to grant PEPPs the same tax relief as the one granted to their national Personal Pension Products (PPPs), *"…even when the PEPPs features do not match all the national criteria required by the Member State to grant tax relief to PPPs".*

210. The Recommendation also adds that where member states have more than one type of PPP, they are encouraged to give PEPPs the most favourable tax treatment available to their PPPs. Finally, the Commission's document encourages member states to exchange good practices and to coordinate themselves in order to align their national criteria as much as possible and facilitating the portability of such products.

211. The approach taken by the PEPP seems to be somehow reasonable, especially because of its realism and pragmatism: PEPPs should be allowed to compete with local PPPs and considering that fiscal incentives represent one of the biggest drivers for personal pension products, the same tax treatment between national pensions and PEPPs will be fundamental.

212. At the same time, the final decision whether implementing or not the Recommendation remains at the discretion of member states. Nothing excludes that some case law (in part also mentioned in the Recommendation itself[80]) will make it clear that such equal tax treatment between savers of national pension products and PEPPs should be granted in a future. However, at the moment the tax treatment of PEPPs is still uncertain across the EU member states.

213. Moreover, the burden of coordinating and adapting the different taxation

[79] Commission Recommendation of 29 June 2017 on the tax treatment of personal pension products, including the pan-European Personal Pension Product C(2017) 4393 final
[80] In particular the Judgement of the EU Court of Justice of 26 June 2003 Case C-422/01, Skandia Ramstedt

treatments will remain with the PEPP providers operating in different Countries; the way how the cross-border transferred capital (the PEPP is portable) will also remain uncertain and, most of all, it will be not sure if such transition of pension savings across the member states will generate some fiscal disadvantages for the PEPP users.

214. In conclusion, the question of taxation of the PEPP has not been solved, yet. According to several providers and stakeholders, this issue, if not well managed, will represent a serious risk compromising the success of the overall PEPP initiative.

B. The different taxation formulas as the main challenge for cross-border pensions in Europe

215. First of all, it should be made it clear that the main obstacle for a smooth functioning of pan-European pensions (whether personal like the PEPP or occupational like the PEOP) is not the level of taxation applied to them by different jurisdictions. In other words, the main problem is not "how much" is asked by each member state, but "when" and "what" it is asked.

216. In the pension field, the question of the "when" and "what" is commonly summarized in a taxation formula made up of three potentially taxable elements of the pension arrangement: contributions (E if exempted; T if taxed); returns on investments (E if exempted; T if taxed) and pension benefits (E if exempted; T if taxed). Different taxation formulas represent therefore the main obstacle to the smooth working of cross-border pensions in Europe.

217. As an example, harmonized TEE formulas (taxation on the pension contributions and exemption on returns and benefits) or EET formulas (taxation only during the pay-out phase, and exemption on contributions and returns) in the different EU member states would both appear ideal for a smooth functioning of a PEOP across the EU.

218. Taxation on returns of investments (namely the second letter, out of the three-letter taxation formula: ETT) would be quite challenging, instead. Indeed, the pension provider should be obliged to annually track, calculate and take out of the common investment pot the payable tax amounts of the sole members residing and working in Countries adopting such a taxation formula.

C. Possible options for the PEOP

C.1 Adopting the same approach as for the IORPs (operating cross-border activities) and the PEPPs

219. Considering that the PEPP initiative could not find solutions other than expecting (not even requiring) the same tax treatment granted to national (personal)

pensions as PEPPs, the same approach might be taken for the PEOP initiative as well. In such a case, the Commission would recommend member states to fiscally treat their national occupational pensions as they would treat PEOPs operating in their territories.

220. Moreover, it should be added that a DC structure also facilitates compliance with local tax and social laws through the administration of national sub-accounts in a manner that DB does not. And as mentioned above, sub-accounts might still need to be created by PEOPs for portability issues.

221. However, the ambition of the new PEOP initiative is to make occupational cross-border pensions easier in Europe, and therefore to overcome, or at least partially reduce, the current taxation problems. For this reason, CBBA-Europe thinks that the solution adopted by the PEPP would not represent a real added value for the new PEOP. After all, if that solution were adopted for the PEOP, and even assuming that member states would equal the same tax treatment granted to their national occupational pensions to the PEOPs, the same current situation of cross-border activities of IORPs would be repeated.

222. As a matter of fact, the experience from cross-border activities of IORPs confirms that different taxation formulas represent one the main challenges to those activities: basically, such IORPs must set up as many national taxation compartments as the EU member states where they do operate.

223. Of course, the option for the PEOPs of adopting the same approach as for the IORPs (operating cross-border activities) and the PEPPs is still a possibility. In particular, it will even represent the most likely and natural "default" option if other solutions will be not found.

C.2 Harmonized EET or TEE formula for PEOPs as the best possible solutions, unlikely to realize due to the unanimity requirement, but reachable through enhanced cooperation or multilateral tax agreements

224. An EET system is adopted by several member states and is often recommended by international institutions and pension experts. The main argument in favor of a tax exemption on pension contributions (the first "E") is that such an exemption would represent an incentive for people to enroll in private pension plans.

225. Under a harmonized EET taxation formula, the duty of complying with national tax systems would fall on PEOP providers only during the pay-out phase, but such a duty would be easily manageable. However, the question on how to tax transfers of pension capitals in case of portability across the EU member states would remain a potential issue.

226. A TEE formula might represent a more interesting option for the PEOP.

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Square de Meeûs 38-40, B-1000 Brussels (Belgium), Tel: +32 2 401 87 92, Fax: +32 2 401 6868
Website: https://www.cbba-europe.eu

Indeed, it would be practically easier for such a pension tool to get rid of the taxation duties from the very beginning, through an automatic withholding tax paid at source. Unlike the EET formula, even the payout phase would result much easier for the pension provider and would not require any identification of the taxation amounts to be calculated according to the Country of residence of the future pensioners.

227. In addition to the practical advantages for the pension provider, CBBA-Europe notices that a TEE formula would probably result fairer (and therefore also more politically acceptable) for the member states: taxation would be paid in the Countries where the employment takes place and the labor related wealth is produced, as opposed to the place where the pensioners reside. In such a case, unlike an EET formula, governments would have not to worry about possible losses of pension tax revenues in case of mobility of workers/pensioners; on the contrary, member states would benefit from such a European occupational pension, because they would withdraw immediately their taxation income.

228. Under a TEE formula, issues in case of portability would not arise either, because member states would immediately get their taxation ratio before the worker moves abroad.

229. Finally, with regards to the arguments used in favor of EET formulas, according to which an exemption would represent an incentive for people to enroll in private pension plans, it should be stated that a pan-European framework for occupational DC pensions would be addressed in great part to sponsoring employers willing to offer workplace pensions to their employees. If so, tax incentives for employees to enroll in such pensions would not really have the same impact as with personal pensions, or purely national based (and not portable) occupational pensions.

230. This argument might not be presented in cases when the choice of joining a workplace pension is totally left to workers. In other words, assuming that in a given market occupational pensions operate in a full regime of competition, why should workers choose an open (or sector wide) PEOP, subject to a TEE taxation formula, when the national occupational pensions' competitors offer EET taxation formulas? Here workers might get simply convinced to enroll into a PEOP on a case by case level: for example, when they are likely mobile, and so they might prefer to get covered by the same occupational pension after moving to other Countries; or because the said pan-European occupational pension proves to have lower administrative costs and better performances than the local; or again, because in some Countries the local offer of occupational pensions is very poor or quasi inexistent (such as in the several Central and Eastern European Countries)[81].

[81] It may be noted that the United States since 2006 allows an employer to offer a TEE structure of DC plan (known as a "Roth") as an alternative to the EET structure of the traditional U.S. "401(k)" plan. They have become increasingly popular, particularly with younger workers who have lower effective tax rates at the time of contribution.

231. As said before, looking on the bright side of this perspective, an harmonization of taxation formula would not concern the level of taxation (the "how much"), freely settable by the member states (the "how much"), EU member states could quite easily maintain their tax income expectations (levels) by shifting a previous taxable part to another, and increasing the level of the latter: for example, in case of change from a national ETT formula to a EU harmonized TEE one, the new "T" will be more expensive in order to compensate the losses deriving from the deletion of the previous "T".

232. However, the unanimity requirement for such an EU harmonization remains.

233. On a legal point of view, the potential limitations deriving from the unanimity requirement might be softened through the use of the aforementioned "enhanced cooperation procedure"[82] among a fewer number of EU member states (used, for example, for controversial Financial Transaction Tax or FTT[83]). In such a case, a harmonized taxation formula for PEOPs might be applicable to those EU member states that participated to this initiative.

234. Also multilateral tax agreements among EU member states similar to the ones on double taxation –maybe with the support of the European Commission or the OECD- could potentially solve such a question[84].

C.3 The possible creation of a EU centralized labelled tax entity as a hub to coordinate the taxation duties towards national tax authorities so that PEOPs act "as if" there were harmonized taxation formulas

235. Alternatively, the new EU PEOP Regulation may include the creation of a centralized pan-European taxation entity, like an agency acting as a "tax hub". With this solution, member states would be not required to change their national taxation formulas. Such an entity may have mere tax information purposes for PEOP providers, or even functional/operating purposes, such as fulfilling the tax obligations of PEOP providers during the accumulation phase. There are already some examples of tools created at EU level aimed at the smoother implementation of European legislation in other policy matters[85].

[82] This procedure provided by articles 326-334 of the Treaty on the Functioning of the European Union (TFEU) was mentioned in section C of Chapter 5 of this paper.
[83] Initially the European Commission launched a legislative proposal in September 2011; considering several disagreements among the EU member states, an enhanced cooperation procedure was then taken by 11 Eurozone Countries in October 2012. After a long stagnation, it seems that a new boost to negotiations started again in June 2019. In the meantime (June 2016) Estonia withdrew from the enhanced cooperation, by leaving ten EU member states involved in the initiative.
[84] This consideration can also take into account the effect of multilateral tax agreements with non-EU countries, which may be relevant both for investment on countries outside the EU or in the event a pension recipient retires outside the EU.
[85] In the field of the coordination of the social security systems, the EESSI - Electronic Exchange of Social Security Information was set up in order to facilitate the exchange of social security information on migrant workers between competent national institutions in the field of social security in the application of Regulations

236. In the first case (proposal A: a centralized EU taxation agency with information purposes), all the PEOP providers would outsource to the EU taxation tool the calculation of the tax amounts, calculated on the basis of the specific features of the pension tool (number of members; Countries where it operates; collected contributions, assets under management, returns of its the investments, etc.). Exchange of information with the national tax authorities would be up to the EU tax agency, which would relieve the individual PEOPs providers from these tasks. On their turn, PEOP providers would only interact with the European tax agency, which would therefore represent the sole interlocutor for PEOPs with regards to tax information. Once that the information on the amounts to be paid will be sent by EU taxation agency to the different PEOP providers, those latter will just make the payments to the different tax authorities.

237. In the second case (proposal A: EU centralized taxation agency with operational purposes), such a centralized European tax tool would act as the sole point of reference for both the national tax authorities and the PEOPs. Here the EU tax agency would be entrusted with collecting directly the tax amounts due from PEOP providers on an annual basis; and with refunding the respective national tax authorities. In addition, member states would exclusively negotiate with the European tax agency the conditions and the timing of the payments (including possible tax compensations; etc.). In other words, the European tax agency may act as a buffer allowing the PEOPs to operate throughout the EU *as if* a common tax formula was in place for them.

238. Such alternatives would make politically easier for the PEOP Regulation to overcome the tax diversities over the EU member states, as national peculiarities would be not changed, and no unanimities would be required at the Council of the EU.

239. The taxation tools described above (either the information tax tool, or the operational one), might be set up as part of the EU bodies (a sub-department of the DG Taxaud of the European Commission; or a new separate EU body); or alternatively they might be chosen among external private service providers after a public tender launched by the EU.

240. Equipped with an EU label, all the responsibilities/burdens deriving from any possible controversies or misunderstanding with national taxation authorities should be borne by the centralized EU tax tool, and never on the individual PEOP providers. PEOP providers would not respond to the individual national taxation authorities, at least insofar as the providers totally rely on the information/instructions provided by the European taxation hub (in case of sole EU tax information tool) and/or comply with its requests (in case the EU tax tool is also in charge of collecting tax payments and

883/2004 and 987/2009 on social security coordination).

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Cross Border Benefits Alliance - Europe
Square de Meeûs 38-40, B-1000 Brussels (Belgium), Tel: +32 2 401 87 92, Fax: +32 2 401 6868
Website: https://www.cbba-europe.eu

refunding the national taxation authorities).

241. The new EU taxation tool might be co-financed by the EU budget, and/or member states authorities, and/or by the pension providers. After all, even if the new centralized tool was co-financed by the pension providers, it would result much cheaper because costs would be shared, as opposed to the costs of dozens tax departments created by all the individual PEOP providers.

242. The solution of a EU centralized tax agency for pan-European pensions might be also used by the PEPPs, which would then benefit from it and share the management costs with PEOPs.

Figure 4: Possible functioning of a Centralized EU Taxation Agency with information purposes:

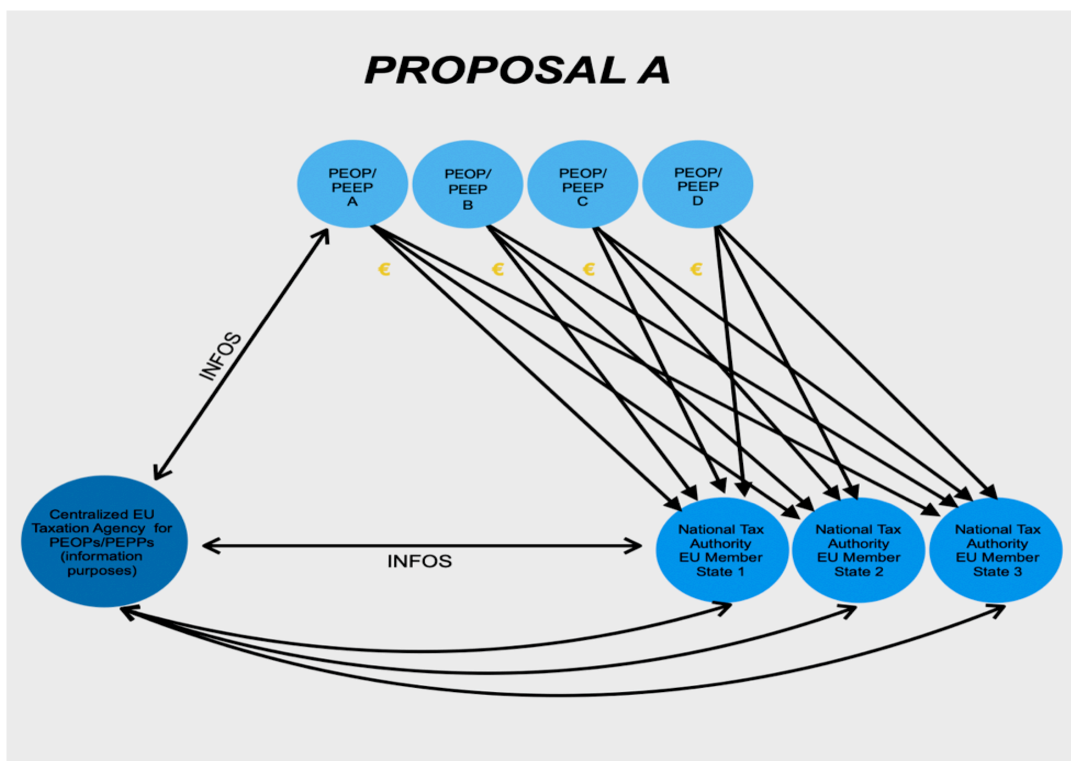
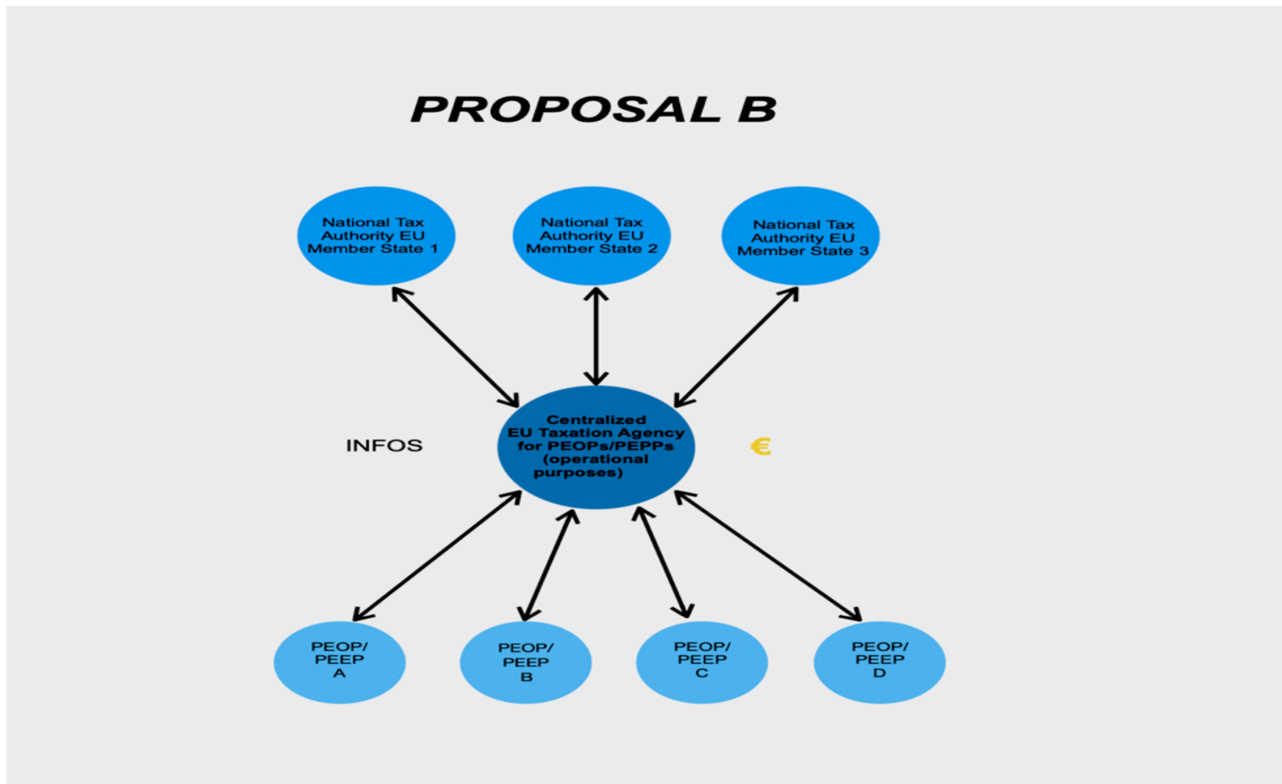


Figure 5: Possible functioning of a Centralized EU Taxation Agency with operational purposes:



Conclusions

CBBA-Europe is strongly convinced that more than ever the PEOP is necessary for European companies and workers.

A wider discussion on the PEOP should be promoted by the EU with stakeholders, decision makers and experts. Even if this paper does not have the ambition to cover in detail all the specific possible features of such a pension tool, it could represent a good starting point -or food for thoughts- for the said future discussions on how the PEOP could look like.

In its proposals, the paper clearly makes reference to the existing EU legislation on pensions such as the IORP Directive, the PEPP Regulation, or the Directive 2014/50/EU on the acquisition and preservation of supplementary pension rights, since a legal framework for a Pan-European Occupational Pension (PEOP) might be drawn on the basis of those sources also in order to keep legal consistency with them. Of course, some legal provisions should be added, amended or adapted to the PEOP.

Moreover, the paper paid a special attention to the possible relation -and cohabitation- between the PEOP, the existing national occupational pensions and their local regulation. After all, it is intuitable that the legal obstacles -and the consequent poor outcomes- of the cross-border activities provided by the IORP Directive(s) derived in great part from the member states' concerns to protect their national occupational pensions.
A PEOP acting as a 2nd EU legal regime, voluntary and alternative to national pensions but not invasive towards their existing national legal frameworks -given that those would be not required to adapt their rules to the PEOP legislation- could represent the best compromise to assure a fair cohabitation between the national and the European entities.
Having said that, competition between national IORPs and PEOPs should be allowed and even promoted in all those markets where competition between national pension funds already exists.

A different question would be a competition between occupational and personal pensions: as stated at the beginning of this paper, if the PEPP will really succeed in offering those solutions to employers that the cross-border activities of IORPs are not able to provide, then some companies might be tempted to replace their existing occupational pensions with PEPPs. That is why only competitive answer to a real pan-European pension tool like the PEPP would be a corresponding pan-European occupational vehicle -equally efficient- for employers: the PEOP.

Contacts:

Francesco Briganti, *Secretary General of CBBA-Europe*
Francesco.briganti@cbba-europe.eu

CBBA-Europe Offices:
Tel +32 2 401 87 92
info@cbba-europe.eu