# The PEPP: *A Pension Solution for the Future*

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Pensions are high on the agenda of all European Union member states. National pension systems are under a huge amount of pressure. We keep getting older and we are changing jobs more frequently. Economic circumstances, such as low interest rates, exacerbate the problems. It seems evident that we can no longer afford the traditional, guaranteed lifelong pensions.

The pension problem has been around for years, but due to several factors, reforms are not yet achieved. The EU is nevertheless trying to deal with the problem in several ways.

First of all, IORPD II—that is, the *pension directive*—has led to great commotion in the media, politics, and on social media. The European Directive relates to the "second pillar" of the pension system: the work-related pension that supplements the state pension. IORPD II intends to achieve a high degree of transparency and to clarify the terms under which a pension fund can operate in more than one member state. Thus, an IORP must make it clear when and how it may reduce pension payments to ensure that members no longer have to read in the paper that the pension fund, which he or she is a compulsory member of, has to reduce pension payments once again.

In addition, we are increasingly seeing Dutch pension schemes (IORPs) moving to Belgium (BP, Exxon). They usually cite costs and more flexible supervision by the Belgian regulator as reasons for doing so. IORPD II provides the necessary safeguards for this move, such as different veto rights for members and regulators.[1]

The directive does not, however, regulate the level of the work-related pension. It is partly for that reason that the EU is keen, second, to move toward personal pensions that you can save for in addition to your occupational pension (i.e., the third—individual—pillar).

This shift from a collective to a more individual approach is necessary due to the problems mentioned earlier. Often, the second pillar, together with the state pension, is no longer sufficient for old-age pensions.

The differences within the EU, however, are huge. For various reasons, it is almost impossible to harmonize these differences. A recent EU idea is therefore to shift to a "29 regime" (the EU has 28 member states). This regime means that a pension scheme will be put in place that is implemented by financial institutions in the EU that do not form part of the (second-pillar) systems of the member states. This would make it easy to accrue extra savings for your pension wherever you are in the EU in a European pension account, referred to as a personal European pension product (PEPP).

In the last couple of years, questions have arisen as to how the PEPP should ideally be regulated and the European Commission and various interest groups have yet to find a solution for all possible problems in developing a common regulatory framework. For that purpose, we wrote a report, "PEPP—Towards a Harmonized European Legislative Framework for Personal Pensions," that focused on how the PEPP could ideally be regulated.[2] It discussed 1) the PEPP and national personal pension products (PPP), 2) how PEPPs as a "wrapper product" should be defined, and 3) how a PEPP (product) passport under a future PEPP regulation could be established. Furthermore, the report focused on 4) the possible regulation for PEPP providers/distributors, 5) depositaries/custodians, 6) the position of consumers, 7) the standardization of PEPP/PPP product regulation and sales regulation. It concluded by 8) reviewing possible tax barriers related to the PEPP, migrating PEPP holders, and the lessons that can be learned from the existing (personal) pension frameworks in Sweden, the United Kingdom, and the United States.

In this article, we want to present our findings.[3]

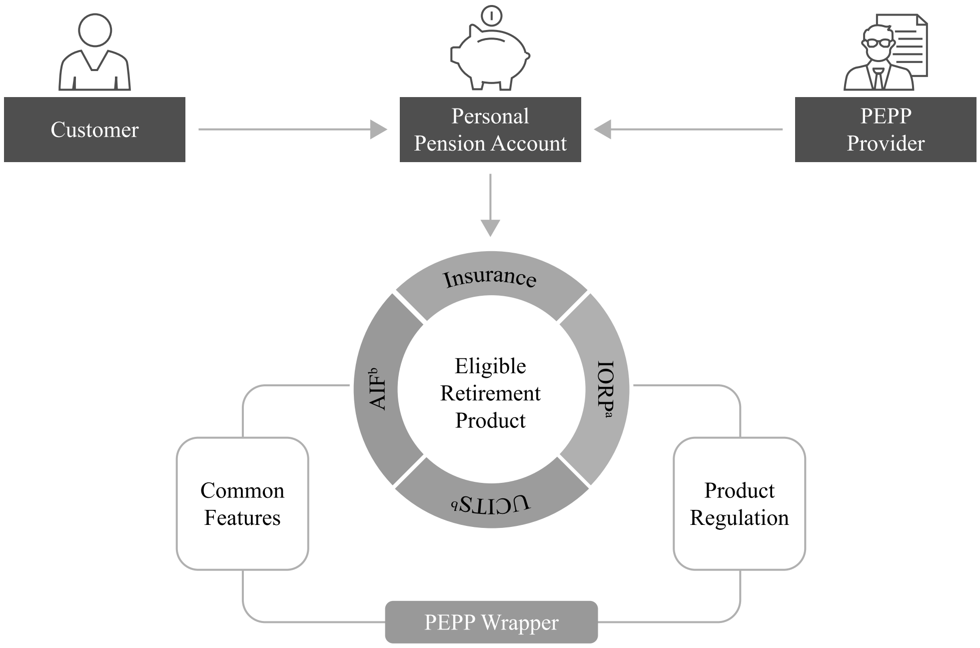
## PEPPs VERSUS PPPs

In the latest policy discussion, Personal Pension Products (PPPs) were not to be further considered as they were perceived by the industry and EIOPA (the EU supervisor on pension funds and insurance companies) to be too difficult to accomplish given the significant divergence in national legislative frameworks in the European personal pensions markets.[4] The report, thus, focused on the PEPP under an optional European regime.

## THE PEPP AS A WRAPPER PRODUCT—ESTABLISHING A DEFINITION

It was considered that the only viable way to establish a harmonized PEPP regime is by defining and regulating PEPPs as wrappers of existing (European Economic Area or EEA) third-pillar pension products. The product would be required to comply with "common features" of voluntary personal pension plans and fulfill additional mandatory elements, such as a default investment option, limited investment choices, and flexible elements that include guarantees, a cap of cost and charges, and switching between providers. Only allowing EEA-regulated third-pillar pension products would ensure that PEPP providers

## EXHIBIT 1




*Notes: Depositary/Custodian will be required for IORP. Depositary will be required for UCITS and AIF.*
*Source: Franklin Templeton.*

cannot enter into regulatory arbitrage by choosing a less well regulated underlying national product as part of a PEPP. The European legislator, however, could be of the opinion that the mandatory and flexible elements provide enough consumer protection as to allow every single type of underlying third-pillar product to be "wrapped" into the PEPP product passport. In addition, EIOPA could opt for a different "29 regime" or a "second" regime in which the PEPP as a standard EU pension plan may be optionally implemented by EEA member states into their national first pillar B and second pillar "occupational" pension laws (Van Meerten and Borsjé [2014, p. 20]). This would gradually lead to a standardization of pension products throughout the first, second and third pension pillars in Europe in a so-called "pensions union" (Van Meerten and Borsjé [2014, p. 21]). PEPP could even be part of extending the Undertakings for Collective Investment in Transferable Securities (UCITS) global brand success to other EEA (third-pillar) retirement products (Christian [2011]).

## THE PEPP (PRODUCT) PASSPORT UNDER PEPP REGULATION

EIOPA [2015] indicated in several policy documents that the internal market for PEPPs would be substantially enhanced if a PEPP product passport were to be introduced. To facilitate the "mutual recognition" approach and overcome "risk asymmetry," the European passport was proposed in the report to be based upon a common European substantive legislative and supervisory framework. In line with recent legal initiatives, including the ELTIFR,[5] EuSEFR,[6] EuVECAR,[7] and the proposed MMFR,[8] it would be logical that the PEPP initiative will also be established as a regulation. The regulation as legislative instrument prevents member states from "goldplating" the PEPP initiative that could result in the hindrance of an "internal market for PEPPs." The Level 1 harmonization of PEPP providers, distributors, products, and sales regulation may be further complemented by legislation implementing acts adopted by the European Commission (Level 2) or any technical measures/guidelines adopted by EU supervisory authorities (ESAs). Applying the European System of Financial Supervision introduced in 2011 to PEPPs would ensure that the PEPP initiative would also be adequately enforced by home/host member states and the supranational ESAs, such as EIOPA.

## GOVERNANCE OF THE PEPP INITIATIVE—INTERMEDIARY, PRODUCT, AND SALES REGULATION

Van Meerten and Hooghiemstra [2017] addressed the full governance of the PEPP involving intermediaries (PEPP provider and distributor), the depositary, the position of consumers, the PEPP product, and sales/disclosure regulation.[9]

EIOPA has, throughout the PEPP consultations, considered two approaches to regulate PEPP providers (see EFAMA [2013, p. 33]). EIOPA originally considered a stand-alone authorization regime with specific conduct of business and prudential requirements for PEPP providers to ensure a level-playing field (EIOPA [2015, pp. 11–12]). The stand-alone regime was intended to allow not only "EEA PEPP providers" but also PEPP providers not authorized under any EEA legislation to provide PEPPs. This policy would ensure that such providers would not fall in an authorization gap and that a level playing field would be ensured that would lead to higher consumer protection provided that those providers would fulfill an "equivalence assessment" ascertaining the comparability with providers under EEA sectoral legislation (EIOPA [2015, p. 12]). The large majority of the stakeholders, however, responded that regulatory arbitrage should be prevented and only providers authorized under existing EEA legislation should be allowed to enter the PEPP market (EIOPA [2016b, p. 11]). Moreover, a separate authorization regime would lead to additional regulatory burden that would discourage EEA financial intermediaries from becoming PEPP providers because of the cost implications (EFAMA [2013, p. 33]). For this reason, EIOPA [2016b, p. 11] changed its view and came to the conclusion that current sectoral authorization regimes should be used and that the provision of PEPP should be limited to those providers authorized under relevant European legislation. The sectoral approach, however, has as a consequence that only those PEPPs may be offered for which the provider is authorized according to the current legislation for the respective sector.

The proposed PEPP provider regime allows EEA-regulated intermediaries that already offer third-pillar retirement products to be eligible as PEPP providers. The authorization includes a European (intermediary) passport under which the PEPP initiative would allow EEA intermediaries to be active on a cross-border basis.

PEPP providers may only offer those PEPPs that contain an underlying third-pillar retirement product for which they are authorized under EEA sectoral legislation (EIOPA [2016b, p. 11]). Consequently, the authorization of a PEPP provider limits the range of PEPPs that may be offered to consumers in the accumulation phase as well as the payout solution in the decumulation phase.

Distributors under the proposal in the report can be part of the PEPP provider, an agent of a PEPP provider, or a third party.[10] Within the context of the Packaged Retail and Insurance-Based Investment Products Regulation (PRIIPR), a distributor could be defined under the PEPP initiative as "a person advising on, or selling, PEPPs."[11,12] This definition would capture alternative investment fund managers (AIFMs) and UCITS management companies as PEPP providers that are authorized under the Alternative Investment Fund Managers Directive (AIFMD) and UCITS Directive V (UCITSD V) to market AIF/UCITS units to consumers. In addition, this definition would also include investment firms/credit institutions under Markets for Financial Instruments Directive II (MiFID II) and insurance companies/undertakings under the Insurance Distribution Directive (IDD). The advantage of the proposed definition is that both PEPP providers and distributors would in their capacity of distributor have a European passport under the respective European legislative acts.[13]

If a sector-specific approach for the use of depositaries would be pursued then no considerations would have to be made whether or not a depositary should be required to be appointed for PEPPs as this issue is already solved at the level of the sector-specific legislations. The sectoral approach also prevents a "double depositary requirement" as this approach, for instance, would not require insurance undertakings acting as PEPP providers to appoint a depositary for life insurances offered. Underlying investment options that would include UCITS or (retail) AIFs, however, would require the appointment of a depositary.

Including a sector-specific requirement based on the underlying third-pillar pension product on the use of depositaries reflects, indeed, the business model of PEPPs the best. Extending the IDD and MiFID II to PEPPs would imply that product oversight and governance requirements under these acts would apply to PEPPs (Joint Committee [2013]).[14]

In this regard, IORPs pose a problem. IORPs have a diverging nature throughout the IORPD member state implementations. Some member states, such as the Netherlands and Luxembourg, have investment fund–like IORPs, whereas other member states offer defined-benefit (DB) pension funds and insurance company types of IORPs (France, for instance). IORPs, such as the Dutch PPI and the Luxembourg SEPCAV, are suitable for the PEPP. Therefore, a clear desire in Europe exists to include them in the PEPP initiative. Due to the occupational mandatory nature in some member states, it seems impossible to include all IORPs in the current EU law distribution landscape. Only pure defined-contribution (DC) IORPs, such as the Dutch Premium Pension Institution (PPI) and Luxembourg Société d'Epargne-Pension à Capital Variable (SEPCAV), are suitable for the PEPP. Any hybrid and DB schemes seem to attract no investor interest as these funds are not attractive because of, for example, the huge deficits in DB IORPs. Considering this, only "investment fund–like" IORPs are attractive and suitable, and therefore, it seems logical to include them in the "funds MiFID II distribution domain." Under this approach, both product manufacturers that manufacture and distribute PEPPs and distributors that merely distribute products that are manufactured by other providers would be targeted by the MiFID II or IDD distribution regimes, according to their role.[15]

The PEPP initiative departs from the point of view that consumers regard financial products as too complex and that disclosure does not, on its own, allow consumers to make better investment decisions due to cognitive and behavioral biases.[16] Extending the IDD and MiFID II product governance requirements to PEPPs would require PEPP providers and distributors to take measures to monitor the correct target market for the product prior to a PEPP launch on the market and during the lifecycle of the PEPP.[17] Upon concluding a PEPP contract, consumers are limited by picking among a limited number of investment options that are manufactured by the PEPP provider and regulated by intermediary (PEPP provider, distributor), product, and sales regulations. The retirement objective prevents consumers from exiting all PEPP investments prior to the due retirement date. This restriction is, however, mitigated by consumers' rights to switch to another provider and transfer their funds during the life of the PEPP.

In Van Meerten and Hooghiemstra [2017], a cap on charges is not proposed. The cap is discussed as a matter of policy as EIOPA and the Commission considered it. Therefore, it must be considered as a "flexible option."

For "political" reasons, this option is open for the individual member states to decide. A simple random check of UCITS Key Investor Information Documents (KIIDs) in Europe, however, show that quite some UCITS are to be found with ongoing costs that are higher than 1.5% annually. Considering the huge impact of ongoing costs on the eventual retirement payout, experience with 401(k) plans in the United States show that such expensive UCITS are not appropriate for the default option for PEPPs.[18] In any case, the costs for the default product should be lower than the alternative options.

To summarize, the Van Meerten and Hooghiemstra [2017] report does not propose a "one-size-fits-all" solution. Indeed, full DC PEPPs based upon a underlying UCITS/AIF will have a depositary. In some Eastern European countries, full DC mandatory pension funds exist (pillar 1b). These funds work as follows: A registrar will conclude a contract with a provider and depositary. The registration together with the account administrator is responsible for "booking" the corresponding units in the pension accounts belonging to the individual investors. Indeed, the cooperation of the depositary for this purpose is needed.

The Van Meerten and Hooghiemstra [2017] report also does not propose a regulatory mandatory solution for the "UCITS/AIF" practice. Providers offering a UCITS with an investment guarantee will operate as currently under UCITSD V and AIFMD.

For insurance products, such as life insurance contracts with an underlying UCITS/AIF, providers (insurance companies) can also use the solution they currently use. However, a personalized electronic domain should be accessible for the investor to see the current value of the contractual claim toward the insurance company as PEPP provider.

## TAXES

Various types of tax hurdles/obstacles have been identified to the cross-border provision of PEPPs, including tax discrimination, system diversity, and the "pensionista problem."[19] These three problems are not necessarily a hurdle/problem alone, but they are strongly interconnected. The European Commission and various interest groups have expressed their concern that tax obstacles could prevent the creation of an effective single market for PEPPs.[20] Over the past decades, the Court of Justice of the European Union (CJEU) has mostly eradicated tax discrimination in its case law.[21] Nevertheless, problems related to system diversity and the pensionista problem continue to exist. In these areas, differences between the taxation systems of member states related to the deductibility of contributions and the taxation of benefits could possibly pose a problem for PEPP holders.[22] Currently, some member states do not or hardly facilitate third-pillar private pensions by means of taxation, whereas other member states allow deductions with the maximum deduction of contributions that apply to contributions of all three pillars.[23] There are even member states that only allow deductions of contributions if there is a "pension gap."[24] The member states that do provide tax incentives mostly apply the EET (*exempt* contributions, *exempt* investment income and capital gains of the pension institution, *taxed* benefits) system.[25] Broad acceptance of the EET system and extending existing systems to PEPPs would encourage pension savings. Tax deferral has proven to be an effective incentive for taxpayers to save for retirement. To encourage PEPP investments, member states could also consider applying the principle of "compensating layers," or substitute tax relief, by a matching contributions system. Extending the EET system to all member states would eradicate most, but not all, problems. EET systems are complicated and may lead to double (non) taxation in migration cases. Politically, it is hardly feasible to harmonize the direct taxation field to address the pensionista problem related to the EET system. For this reason, the sole realistic remedy seems to be a renegotiating of tax treaties between the member states concerned.

PEPP providers may deal with taxation issues by creating sub-accounts linked to main accounts. This solution is, however, limited to their PEPP product passport. If a PEPP provider does not offer PEPPs in the member state that a PEPP holder is migrating to, the provider is forced to "lock in" the account. Even if tax obstacles are not remedied on the European level, the introduction of the PEPP would still lead to a single market for PEPPs as it facilitates the cross-border supply of PEPPs and enhances consumer choice and reduces costs.[26]

## COMPARATIVE RESEARCH: SWEDEN, UNITED KINGDOM, UNITED STATES, AND THE NETHERLANDS

A review of current PPP regimes in Sweden, the United Kingdom, and the United States indicates that the regulatory and tax regime of PPP regimes, on the one hand, and second- and third-pillar PPP regimes, on the other hand, are more closely aligned than has been assumed so far. In Sweden, for example, the successful third-pillar independent pension saving (IPS) regime had been introduced in the 1990s, but its tax advantages were recently abolished. The abolishment was made upon the assumption that most Swedes are covered by the overhauled Swedish second-pillar personal pension accounts regime, which is deemed to be providing sufficient retirement income. For this reason, Sweden only maintains tax advantages for Swedes investing in IPS third-pillar accounts that are not covered by its second-pillar regime.

In the United Kingdom and the United States, the close alignment is more evident. The United Kingdom has different types of personal pensions including (Group) stakeholder pension schemes, (Group) SIPP, and (Group) Personal Pension. For regulatory and tax purposes, the differences between the personal and occupational pensions in the United Kingdom are not clear cut. Personal pension schemes may be invested in by employed, unemployed, or self-employed people. In this regard, personal pensions that are "Group" pensions are being provided by employers for their employees. Nevertheless, employers may agree with their employees to contribute to their stakeholder pension schemes or SIPPs. This nature is also reflected by the tax relief applying to contributions to all types of personal pension schemes.

Similarly, the employer-sponsored 401(k) and (third-pillar) individual retirement account (IRA) plans in the United States are largely comparable and similarly regulated for tax purposes. An overview of the regulatory framework of PPPs in Sweden, the United Kingdom, and the United States, thus, indicates that the PEPP might inspire the European regulators and individual member states to extend the PEPP to the second-pillar domain and that more member states might introduce a "compensating layer" for tax purposes that takes into account pension savings made in both the second and the third pillars. Although it is a second-pillar product, the Dutch PPI could also serve as an inspiration for the PEPP.

## CONCLUSION

The PEPP initiative is an instrument that aims to address the pension issues currently faced by EEA member states. To that end, the PEPP initiative introduced a PEPP (product) passport that is built upon the current EEA financial law framework. The PEPP (product) passport is a financial third-pillar retirement product that may be marketed throughout the EEA with an authorization in a single member state. It incorporates the "mutual recognition principle" and is based upon harmonized substantive and supervisory provisions to avoid a "race to the bottom" throughout the EEA.

For the sake of simplicity, the PEPP as a product contains underlying EEA insurance and investment products that share common features and comply with PEPP product regulation consisting of mandatory and flexible elements. Such a product definition ensures that non-EEA retirement products cannot make use of the PEPP (product) passport. The PEPP definition allows the initiative to be based on unique product and sales regulation, whereas PEPP providers, distributors, and depositaries remain to be regulated under EEA-sectoral legislation.

Extending the EET tax system to all member states would eradicate most, but not all, problems related to the introduction of a PEPP (product) passport. EET systems are complicated and may lead to double (non) taxation in migration cases. The renegotiation of double taxation agreements in relevant member states may resolve these issues.

The PEPP initiative thus provides a cost-efficient third-pillar framework in which consumers can save for retirement, in addition to, their first- and second-pillar retirement income. Moreover, member states are free to unilaterally extend the PEPP to their first- and second-pillar legal frameworks. Given the cost advantages, it is not unlikely that individual member states will replace their expensive second-pillar pension funds with (occupational) PEPPs. History seems to repeat itself as in the United States, expensive pension funds have already, to a large extent, been replaced by 401(k) accounts. The PEPP initiative seems thus to be the first step toward a "European Pension Union."

## ENDNOTES

[1]See van Slagmaat and van Meerten [2017].

[2]Van Meerten and Hooghiemstra [2017]; funded by Franklin Templeton Investments and First Pensions.

[3]The full report can be downloaded at https://ssrn.com/abstract=2425478.

[4]See the response of Arbeitsgemeinschaft für betriebliche Altersvorsorge to Consultation Paper 16-001 (EIOPA [2016d]).

[5]Regulation (EU) 2015/760 of the European Parliament and of the Council of April 29, 2015, on European long-Term Investment Funds.

[6]Regulation (EU) No. 346/2013 of the European Parliament and of the Council of April 17, 2013, on European Social Entrepreneurship Funds.

[7]Regulation (EU) No. 345/2013 of the European Parliament and of the Council of April 17, 2013, on European Venture Capital Funds.

[8]Proposal for a Regulation of the European Parliament and of the Council on Money Market Funds, 2016/0306 (COD).

[9]For the regulation financial intermediaries, in particular depositaries, see the following: Van Meerten and Hooghiemstra [2017]; Byrne, Harrison, and Blake [2007]; EIOPA [2016b, pp. 9-10]; OECD [2009]; IOPS [2012].

[10]See IOSCO [2003]; EIOPA [2016a, p. 40].

[11]Selling could be defined as "a person offering or concluding a PEPP contract to a customer." See a similar definition under Art. 4(5) PRIIPR: "'person selling a PRIIP' means a person offering or concluding a PRIIP contract with a retail investor."

[12]Recital 38 Art. 2(1) PRIIPR; see also, "distributors" under Recital 15 MiFID II are investment firms that offer or sell financial instruments and services to clients. Under the IDD, "distributors" are those involved in insurance distribution activities, including tied agents, brokers, direct channels (including online sales), full and ancillary insurance intermediaries. See Recital 28 IDD.

[13]Compare with Art. 4(5) PRIIPR: "'person selling a PRIIP' means a person offering or concluding a PRIIP contract with a retail investor."

[14]Joint Committee, *Joint Position of the European Supervisory Authorities on Manufacturers' Product Oversight & Governance Processes*, JC-2013-77, https://eiopa.europa.eu/Publications/Administrative/JC-2013-77__POG_-_Joint_Position_.pdf (accessed 28 May 2017).

[15]EIOPA [2016a, p. 48; 2016c, p. 48].

[16]Tapia and Yermo [2007]; EIOPA [2016a, p. 47; 2016c, p. 46].

[17]EIOPA [2016a, p. 47; 2016c, p. 46].

[18]AARP Public Policy Institute [2008]; see also Ebeling [2015].

[19]See also Van Meerten and Starink [2011] and Van Meerten and Borsjé [2014].

[20]EFAMA [2013, p. 37].

[21]Schonewille [2004, 2005].

[22]Commission of the European Communities [2001, p. 18].

[23]Dietvorst [2007].

[24]Dietvorst [2007].

[25]EIOPA [2016c, p. 59].

[26]EFAMA [2013, p. 38].

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