

**European Commission proposal
for a Directive on corporate sustainability due diligence
ESIP position paper**

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The European Commission recently published a proposal for a Directive on corporate sustainability due diligence, with the objectives of ensuring companies are contributing to the green transition by mitigating adverse human rights and environmental impacts in their value chains and integrating sustainability into corporate governance. **The European Social Insurance Platform (ESIP), which represents statutory social security institutions from 17 Member States and Switzerland, would like to raise concerns with the scope of the proposal and its extension to statutory pension institutions which are operating social security schemes.**

The legal basis for this proposal is article 50 and article 114 of the Treaty on the Functioning of the European Union (TFEU), on the EU's competence to act in order to attain freedom of establishment as regards a particular activity and the necessary safeguards required by Member States of firms or companies, as defined in article 54 of the TFEU, which specifically excludes legal persons that are non-profitmaking. **The legal basis for this directive thus covers internal market matters only.**

Furthermore, ESIP would like to raise concerns regarding the definition of "company" in the proposal. Indeed, the definition of "company" according to article 3 (a)(IV) includes "pension institutions operating pension schemes which are considered to be social security schemes covered by Regulation (EC) No 883/2004 of the European Parliament and of the Council and Regulation (EC) No 987/2009 of the European Parliament and of the Council as well as any legal entity set up for the purpose of investment of such schemes".

Including statutory pension institutions within the definition of "company" in the context of this proposal would constitute a break away from the understanding of a company or undertaking in EU legislation as well as in the CJEU's jurisprudence.

Indeed, in 1993 with its judgment in case C-159/91 - Poucet and Pistre v AGF and Cancava, the Court of Justice of the EU clearly stated that "the concept of an undertaking within the meaning of Articles 85 and 86 of the [EEC] Treaty does not encompass organizations charged with the management of social security schemes." This ruling was further confirmed in subsequent case law, including cases C-238/94, and joined cases C-264/01, C-306/01, C-354/01 and C-355/01.

Recently, this principle was reaffirmed in the judgment of joined Cases C262/18 P and C271/18 further stating that "the Court has held that EU law does not, in principle, detract from the powers of the Member States to organise their social security systems. For the purposes of assessing whether an activity carried out in the context of a social security scheme is non-economic in nature, it makes an overall assessment of the scheme at issue and, to that end, takes the following into consideration: the pursuit, by the scheme, of a social objective, its application of the principle of solidarity, whether the activity carried out is non-profitmaking, and State supervision of that activity". It is apparent that the activities of pensions institutions operating pension schemes which are social security schemes under strict state supervision, match the listed criteria.

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In turn, this jurisprudence has also been reflected within EU legislation on reporting requirement for companies, including in the field of insurance. For instance, in the Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, the definition of public-interest entities is limited to listed companies, credit institutions and insurance undertakings but does not include pension institutions considered as social security schemes. Similarly, legislation on the activities of insurance and reinsurance undertakings set in the Solvency II Directive (Directive 2009/138/EC) in its subsection 1, article 3 clearly states that "(...) this Directive shall not apply to insurance forming part of a statutory system of social security."

Therefore, ESIP strongly recommends to EU legislators to delete the provision of article 3 (a)(IV) and exclude pension schemes considered as social security schemes under social security coordination rules from the scope of this directive.

