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Introduction to the Special Issue on Complementary Pensions

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Abstract
This Special Issue is devoted to the impact of European Law on complementary pensions. It examines the main features of European policy shifts related to the ageing process in the field of occupational pensions. Normative trends exemplifying mutations in European pension policies and their consequences are studied in some detail with reference to the situation of specific Member States.

Keywords
Ageing, Occupational Pensions, Pension Funds, European Law

Nowadays, the financial and social sustainability of pension systems is a crucial challenge for most European countries. Indeed, the so-called 'ageing' process, caused simultaneously by the increase in longevity, the decrease in fertility and the effects of the baby boom, has an important impact on the long-term viability of retirement schemes. This is made even more acute by the high level of unemployment, the persistent low interest rates and the weak growth of GDP.

This Special Issue was produced in the wake of these challenges. It examines the main features of European policy shifts related to the ageing process in the field of occupational pensions[1]. In the six articles that appear in this Issue, normative trends exemplifying mutations in European pension policies and the situation in specific Member States are looked at in detail; internal and external tensions are explored.

The main conclusions of this Special Issue can be summarised in five points.

1. By occupational pensions schemes, we target the private supplementary plans linked to the employment relationship.

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1. The first conclusion comprises a transversal diagnostic referring to the so-called 'silent pension pillar implosion'. In his article, Yves Stevens points out that, when it comes to pensions, two phases of policy waves can be observed: individualisation 1.0 and individualisation 2.0. Individualisation 1.0, which took about 25 years to reach its peak, brought about a worldwide shift in risk, and resulted in an increase in defined-contribution plans at the expense of defined-benefits plans. The more recent phase, individualisation 2.0, can be characterised in terms of an orientation towards individual or personal pension plans. In the first dynamic, collective schemes – and hence employers – maintained their importance but, in the second dynamic, the third pillar is at the forefront. Occupational pensions are put under pressure by this third pillar surge, leading progressively to a two-pillar dichotomy, in which public and private (individual) pensions dominate. This phenomenon is global and is linked to a worldwide individualisation shift driven by economic and cultural globalisation. In one way or another, individualisation 2.0 is reflected at the European level and at the level of Member States. As far as the European Union is concerned, the most notorious example is the Personal European Pension Product (hereafter 'PEPP') called for by the European Insurance and Occupational Pensions Authority (EIOPA). Indeed, to increase multi-pillarisation, EIOPA states that 'in addition to public pay-as-you-go pensions schemes and occupational retirement savings, personal voluntary pension savings can help secure adequate replacement rates in the future.'[2] Individualisation is also country specific, proceeding at different speeds in the States that are involved, e.g. in Belgium, Denmark, Germany, Netherlands, Poland and UK. This process generates two side-effects described by Yves Stevens in his article. First, a problematic emphasis on personal empowerment in financial matters in a context of the well-known information asymmetry in pensions (which leads to the risk of mis-selling) and second, the possible creation of inequality at the expense of those with low incomes.

2. A second finding is the emergence of a conflicting situation in the field of workers' mobility, as shown in the article by Marion Del Sol and Marco Rocca. The European Union appears simultaneously to promote the cross-national mobility of workers and an increased role for occupational pensions. An inherent tension characterises these two objectives, as a mobile worker risks losing part of his pension rights under an occupational scheme precisely because of his mobility. The European Union has tried to tackle this problem in two ways. On the one hand, Directive 2014/50 on the minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights was adopted after a very long gestation period. On the other hand, the Court of Justice has elaborated its case law in the field of workers' freedom of movement. However, the Directive failed to create real portability and only established basic minimum requirements. Considering its limitations, the door is seemingly open for an intervention of the Court of Justice in areas left outside the scope of the Directive, such as the issue of waiting/vesting period of up to three years[3]. However, and more fundamentally, the new Directive could have a 'dampening' effect on the application of the Treaty's free movement provisions in the field of occupational pensions. In

2. EIOPA (2016) EIOPA's advice on the development of an EU Single Market for personal pension products (PPP), Frankfurt, 6 July, 108, available at: http://www.eiopa.europa.eu/publications/submissions-to-the-ec
3. A potential result of the application of the reasoning of the Court in the Casteels case (C-379/09).

other words, it could represent the benchmark against which compatibility with the primary European law is tested. In their article, Marion Del Sol and Marco Rocca point out that such a configuration has controversial implications for workers and pension providers. In fact, the Directive, together with case law, appears to favour a specific type of mobile worker, a highly mobile and highly skilled worker, preferably one employed by a multinational company. This may be at the expense of other types of worker whose ability to enjoy 'true' mobility in the field of occupational pensions remains limited.

3. A third important observation is the strain between the law of the EU internal market (the law promoting freedom to provide services and competition law) applied to occupational pensions and the willingness of some Member States to preserve some form of solidarity in the second pillar. The case of mandatory membership of a pension scheme and/or pension fund is particularly illustrative, as shown in the article by Hans Van Meerten and Elmar Schmidt. Indeed, the existence of compulsory (or quasi-compulsory) affiliation to some pension plans is an important aspect of occupational pension regulation in the Netherlands, Belgium, Denmark, Germany, France and Sweden. The classical rationales for this arrangement are the need to protect future retirees by forcing them to contribute, the willingness to restrain competition between pension arrangements and thus to smooth employment conditions, the necessity to ensure a minimum of equality between workers in a similar sector and the wish to add some solidarity concerns through the automatic protection of 'weak' workers. Incidentally, mandatory affiliation has the potential to generate economies of scale in pension schemes. The compatibility between mandatory participation and European law has been widely debated and tested through the framework of competition law. Mandatory participation has been justified as a breach of the general principles of competition law in light of the high degree of solidarity of pension schemes and because of the essential social function that mandatory schemes fulfil, provided that certain conditions are respected.[4] The situation is, however, different from the perspective of the freedom to provide services (article 56 TFUE), taking account the admissible arguments for either direct or indirect discrimination between national and foreign pension providers. Today, these case-law avenues seem to be forced back by the activities of some Member States in reforming their complementary pension systems. In the Netherlands, for example, proposed legislation could affect the possibility of maintaining the classical Dutch system of mandatory affiliation without infringing European Law and more particularly article 56 TFUE. Hans Van Meerten and Elmar Schmidt expose the ins and outs of these reforms; one of their axes being the creation of a new species of pension fund that can accommodate the emerging sectorial funds. In this respect, the tension between European primary law and the national commitment to solidarity in occupational pensions may have to be thought out afresh. Current proposals face the danger of weakening the solidarity factor when undertaken cumulatively, notably if one considers the possible abolition of the average contribution rate, the linking of the retirement rate to life expectancy and the increased shift towards defined contribution arrangements. The European Commission has warned about

4. Albany, Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen (Brentjens) (C-115/97-117/97) [1999] EU: C:1999:434; Maatschappij Drijvende Bokken BV v Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven (Drijvende Bokken) (C-219/97) [1999] EU: C:1999:437; AG2 R Prévoyance v Beaudout Père et Fils SARL (C-437/09) [2011] EU: C:2011:112.

the dangers of some of these possibilities for placing burdensome contribution rates on the shoulders of wage earners and for being unequal at the expense of younger age groups.[5]

4. A fourth finding drawn from interventions in the field of occupational pensions concerns the promotion of pension funds at the European level. European authorities have developed a policy of regulating and supervising the Institutions of Occupational Retirement Provision (IORP), frequently called pensions funds, since the IORP I Directive and its forthcoming revised version, the IORP II Directive. This normative framework aims to create an internal market for occupational retirement provision and to ease cross-border activity and to increase governance standards of pension funds in line with OECD's international requirements and other best-practices. The promotion of long-term investments for the European economy is also pursued. However, as shown in her article by Alexia Autenne, this still has a long way to go, in the context of a persisting diversity in pension plan options from Member State to Member State: single versus multi-sponsor funds, traditional versus dedicated pension vehicles, big plans versus small plans, plans that include some form of co-management by workers and plans that do not, etc. Also, the implementation of governance requirements according to international standards could raise the costs of pension fund schemes whose hallmark has always been flexibility, in comparison with insurance techniques. And, Member States attempt to defend their national specificities, from the labour law point of view – the Dutch mandatory system of affiliation, referred to previously, is one good example of such a tension. Regardless of these obstacles, there are genuine hopes that trans-national pension funds will develop progressively. The 'Retirement Savings Vehicle for European Research Institutions' (RESAVER), supported by the European Commission and analysed in her article by Maria-Cristina Degoli, constitutes an interesting example of a European type-model. This vehicle is an illustration that dissolving barriers to workers' mobility in the field of pension is feasible, at least for specific categories of workers such as European researchers. Considering the plan's feasibility, it clearly is conceivable that a minimum harmonisation of social protection could be achieved, at least in private pension funds. This experience may encourage the establishment of similar schemes for other sectors, through a 'spill over' effect that would alleviate the risk of discrimination among mobile workers in Europe, as mentioned under point 2 above.

5. The fifth and final conclusion arising out of the articles in this Special Issue is a normative one. Yves Stevens argues that scholars and policy makers should pursue a better understanding of the interaction between the three pension pillars since occupational pension should not be considered in isolation from state and private pension systems. According to Stevens, 'the common belief in three pillars has led to three distinct policies instead of the creation of an overall pension policy that takes the different forms of pension into account.' Indeed, from such a perspective, Yves Stevens pleads for a holistic vision of the development of pension schemes, arguing that 'in many countries, the various forms of pension operate completely separately so that there is no deeper knowledge of the societal or financial side effects of this arrangement.' This necessary focus on broader pension design requires an in-depth analysis of various pension forms and a sensitivity to the variety in

5. European Commission (2017) Country Report: The Netherlands 2017, available at: https://ec.europa.eu/info/sites/info/files/2017-european-semester-country-report-netherlands-en.pdf.

pension cultures and approaches to social protection. The final last collective article by Inne Nys, Yves Stevens and John Forman is an example of such an effort. The three authors compare the situation in Belgium, on the one hand and in United-States, on the other hand as far as early access to occupational pension plans is concerned. They analyse the differences and similarities between pension designs in these two countries in order to draw some conclusions. Early access is very limited in Belgium, except for acquiring real estate. Thus, workers cannot easily redeem the acquired reserves under a pension plan or obtain payment of benefits before reaching the legal retirement age. In United States, the major schemes – notably the 401(k)'s – provide several pre-retirement liquidity options, allowing pension savings to be used for consumption needs. Differences in pension philosophy explain this situation. In Belgium, the preservation of money saved for retirement is of paramount importance, and the real estate exception is justified in light of the role of housing in reducing poverty among the elderly. In the United States, the rationale of encouraging participation in occupational pension underpins the flexibility granted to contributors for early access to reserves.