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Occupational pension funds: Governance issues at the international and European levels

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Abstract
This article reviews the orientation of the European regulation on pension fund governance in the international context of the OECD's recommendations. It outlines the features judged to be essential for a sound private pension scheme's governance. It then describes the orientation of the European regulations in this area and sets out some criticisms. The focus is on private sector 'defined-contribution' occupational pension plans managed by a pension fund, in light of the shared perception that the 'governance' issue is particularly sensitive for these types of schemes.

Keywords
Governance, occupational pension plans, pension funds, european union, OECD, socially responsible investments

Introduction

The topic of pension fund governance has not received the same research attention as corporate governance. In this field, there are a limited number of publications both from a theoretical point of view and with an empirical dimension.[1] However, the subject matter is relevant in the context of reflections on the evolving 'public-private' mix in national pension policies. Indeed, for most Member States, ensuring the financial and social sustainability of the pensions is a crucial

1. In particular, the series of survey-based research projects on pension fund governance conducted by Ambachtsheer whose most recent contribution is Ambachtsheer and McLaughlin, J. (January 2015).

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challenge for the next few decades. The so-called ‘ageing process’, caused simultaneously by an increase in longevity, a decrease in fertility and the effects of the baby boom have important impacts on the long-term viability of retirement schemes. Factors other than demographic ones also play a role, for example the high level of unemployment, persistently low interest rates and small increases in GDP. In this context, various countries have encouraged the development of occupational pension plans, with a particular emphasis on plans for transferring risks on affiliates and giving them more responsibility for old age retirement. This is the well-known move from ‘defined benefit’ (DB) to ‘defined-contribution’ (DC) plans. However, as Gordon Clark and Roger Urwin pointed out in 2011, whereas DC plans were once regarded as a simple solution to burdensome DB liabilities, there is, in reality, nothing simple about a well-designed DC pension plan. Complexities associated with DB liabilities are exchanged for complexities in the design and management of DC institutions.[2] It follows that ‘governance’ is an essential feature of any sound DC occupational pension system. In a collective study on public-private pensions in Germany and the UK, Lutz Leisering demonstrated that the need for public regulation and control of private pension has increased as a result of privatisation and the State’s retreat from having sole responsibility for providing adequate legal pensions.[3]

On the international scene, the OECD has pinpointed the importance of the principles of healthy steering of occupational pension schemes, considering the multiple interests (employers, affiliates, funds) that are involved.[4] According to the OECD, in a changing socio-economic environment, with a shift away from pay-as-you go financed public system towards a multi-pillar approach, national differences in the regulation and organisation of occupational pensions might affect the pecuniary situation of retirees, their risk exposure and their participatory rights.

The European Union has also become aware of the importance of pension fund regulation and governance. Consequently, a European policy has been developed for Occupational Retirement Provision (hereafter IORP) frequently referred to as ‘pensions funds’[5] with the aim of fostering the single internal market for insurance and private pensions, an area of regulation where national prerogatives are not firmly established.

International normalisation of pension fund governance

The importance of the ‘governance factor’ for the financial and social sustainability of occupational pensions is now recognised by different transnational organisations and backed by the scientific literature[6]. The OECD, CAPSA[7], Stanford Institutional Investor Forum, CFA Institute,[8] among others, have highlighted the structural, procedural and relational dimensions of pension plan governance; they have drawn attention to the necessity of drafting internal and external mechanisms for improving investment performance without sacrificing beneficiaries’ security.

2. See Clark, and Urwin (2011).
3. See Leisering (2011) and Ebbinghaus (2011).
4. See OECD (2012) and OECD (2006).
5. The term ‘pension fund’ is used by convenience, although the exact European legal concept, at the heart of the 2003/41 Directive, is IORP.
6. See Clark and Urwin (2011) and Clark and Urwin (2008). See also Ambachtsheer and McLaughlin (2015).
7. Canadian Association of Pension Supervisory Authorities, see the various publications related to Pension plans.
8. See CFA Institute (2008), Code of Conduct for Members of a Pension Scheme Governing Body.

According to the OECD, an occupational DC pension plan deals with a complex nexus of agency relationships involving different entities and persons engaged in the functioning of the scheme. This configuration raises risk transfer problems, for instance between sponsor and beneficiaries, and surveillance and control problems that vary in severity according to the structure of the plan (defined benefit or defined contribution).[9] Thus, adequate pension fund governance implies providing a structure through which the objectives of the plan are set as well as the means for attaining those goals and monitoring performance.

Governance and good governance

Fiona Steward and Juan Yermo (2008) argue that the basic 'governance' feature is one of mitigating agency costs stemming from the agency relationships between plan members and beneficiaries, on the one hand, and the persons or entities involved in the administration or financing of the pension plan, on the other hand. Pension fund governance is supposedly the mirror image of corporate governance (the governance of public limited companies) comprising the nexus of relationships between the company's management, board, shareholders and other stakeholders.[10] Nevertheless, considering the differences between a pension fund and a traditional corporation, which is discussed below this argument must be handled cautiously.

'Good governance' goes a step further and aims to deliver high pension fund performance while keeping costs for all stakeholders low[11] Indeed, according to Clark and Urwin, good governance by institutional asset owners makes a significant incremental difference to value-creation as measured by their long-term risk-adjusted rate of return.[12] The threefold principles of good governance are summarised[13] in terms of: (i) organisational coherence including an institution's clarity of mission and its capacities; (ii) people referring to who is involved in the investment process, their skills and responsibilities; and (iii) process, i.e. how investment decision-making is managed and implemented.

Governance and good governance are influenced by two sets of norms: the legal structure of the pension fund, framed by statute, property rights and covenants, and the non-legally binding rules and procedures that sustain the functioning of the fund consistently with desired goals.

The OECD Guidelines[14] insist upon the following:

- The 'governance structure' should ensure an appropriate division of operational and oversight responsibilities as well as the accountability and suitability of those with such responsibilities.
- The 'governance mechanisms' require pension funds to have appropriate control, communication and incentives to encourage good decision making, proper and timely execution, transparency and regular review and assessment.

9. See Mignault (2016).
10. See OECD (2012).
11. See Steward and Yermo (2008).
12. See Clark and Urwin (2008).
13. *Ibid*.
14. See OECD (2012) and OECD (2006).

From the legal point of view, these requirements can be grouped around four categories of norms, which are essentially present in any sound pension fund regime[15]:

- The fiduciary duties of the fund managers: in situations characterised by agency conflicts, the law requires that the agent acts prudently, diligently, loyally, honestly and for the sole benefit of the principal (the employer and the affiliates).
- The composition of the fund's governing body: as an essential organ, the governing body of the fund must establish an appropriate and subtle equilibrium between expertise, representativeness and independence from the sponsor and must be composed of competent people designated by the sponsor and the affiliates as well as of independent experts.
- The general functioning of the fund: organisational rules and procedure must frame the decisional powers of the managing body, taking into account the type of risks and the level of complexity involved (notably a separation between operation and supervision).
- The transparency obligations: the governing body must render regular accounts to the affiliates and the sponsor.

The legal factor

The legal factor is particularly crucial in the domain of pension fund governance. Notwithstanding their variety, pension funds are less exposed to market forces than traditional firms: they do not act on the market in the same way as publicly-listed companies.[16] For instance, they do not issue stocks; they limit themselves to be asset buyers and sellers for the sole purpose of providing complementary pensions for their beneficiaries. Also, compared to the managers of publicly listed companies, pension fund managers are much less exposed to market sanctions, such as *ad nutum* revocation, takeover threats, shareholders' exit or direct shareholder control. Thus, market discipline does not operate fluently to reduce agency costs and the law is an essential adjunct for the promotion of good governance practices.

In meeting governance requirements, pension funds are legally structured in different ways in different countries.[17] All autonomous pension funds have a governing body or board, comprising the person(s) responsible for the operation and oversight of the fund, such as elaboration of strategy, setting the investment policy, choosing the managers and reviewing performance. This body may be internal or external to the pension fund which may have a single or dual board structure and may, or may not, have recourse to delegation. As far as its legal form is concerned, the institutional model is more frequent than the contractual one in OECD countries. The first appeals to an independent legal personality with full capacity and an internal governing board. The second implies a segregated pool of assets without legal capacity that is governed by an external institution such as a bank, an insurance company or an investment firm. The 'trust technique', which is used by pension funds in Anglo-Saxon countries, lies at the intersection of the two models: it is the trustee who legally owns the pension fund's assets and must administer them in the sole interest of participants who are the beneficiaries according to the trust deeds. While this

15. As proposed by Mignault (2013:286).
16. See Sitkoff (2003).
17. See Stewart and Yermo (2008).

feature is similar to that of foundations, the trustees are not legally part of the trust. Indeed, a trustee may be of the corporate type, which makes the pension fund resemble a contractual agreement.[18]

Vulnerable aspects in pension fund governance

According to the OECD literature, vulnerable aspects in pension fund governance are the following:

- Risky operations and transactions decided by the governing bodies, e.g. operations involving the sponsoring-company.
- Conflicting interests of fund managers affected by a separate personal interest or a duty owed to another person in spite of the traditional 'exclusive benefit rule' that imposes a fiduciary duty to manage the pension interests on behalf of the sole affiliates and other beneficiaries, e.g. trading the same share as the pension fund that employs them.
- Duality of role in the governing body whose members act also as directors in the sponsor-company.[19]
- Lack of skills and resources of the governing body for dealing with some plans in the context of high levels of complexity in the industry.
- Opacity and poor information disclosure to plan participants.
- Delegation of responsibilities to external actors, such as asset managers, banks or custodians.
- Remuneration policy of fund managers that encourages excessive risk taking.

In their empirical research surveys of 2006[20] and 2015[21], Ambachtsheer et al. pinpointed more problems such as flawed board selection and improvement processes, regulations encouraging short-termism, outsourcing misalignment and absence of clear investment models.

An efficient governance model should strive to overcome these weaknesses by adapting the normative framework in order to reduce the costs generated by these aspects of pension fund governance. The OECD's guidelines mentioned earlier can be thought of as responses to these preoccupations. In their 2015 survey, Ambachtsheer and McLaughlin made the following complementary recommendations:

- Pension contracts should be redesigned by the contracting parties to eliminate any incompleteness, over-complexity and/or unfairness.
- A board self-evaluation protocol should be implemented in order to address remaining weaknesses.

18. See Stewart and Yermo (2008: 6).
19. Cocco and Volpin (2007) have shown that DB plans of indebted companies with a majority of insiders (executive directors of the sponsor) on the trustee board invested more in equities, contributed less to the pension fund and had a higher dividend payout ratio. This evidence supports an agency view, whereby insider-trustees act in the interest of shareholders of the sponsoring company, and not necessarily pension plan members.
20. See Ambachtsheer, Capelle and Lum (2006)
21. See Ambachtsheer and McLaughlin (2015).

- Differences between board and management competences should be clarified.
- Board effectiveness should be made into a regulatory requirement: pension regulators should require pension funds annually to disclose the steps they have taken to ensure an effective governance of the pension scheme.

Governance and socially responsible investments

Socially responsible investments (SRI) by pension funds constitute another set of preoccupations at the international level. SRI refer to the integration of social, environmental and/or ethical criteria into investment decisions alongside conventional financial considerations. The OECD has not published any specific guidelines on SRI: international approaches using self-regulation are enshrined in agreements like the United Nations' Global Compact[22] and the United Nations-supported Principles for Responsible Investment[23] that have pressed institutional investors to take a more stringent approach on SRI than the classical one promoted by national regulators relying on disclosure requirements.[24] Could or should pension funds take those SRI factors into consideration in their financial investments policy? Do they have to be more transparent about whether they do so? Is this consistent with the classical fiduciary duties of funds' governing bodies and their financial responsibility? These are important questions to consider.

A decade ago, an important report from the United Nations Environment Programme Finance Initiative (UNEPFI) the so-called 'Freshfields Report'[25] supported the SRI strategies referred to above as a viable alternative for institutional investors. This report distances itself from standard scholarship considering that, in most jurisdictions, SRI strategies are in conflict with the duties of institutional investors towards their beneficiaries. According to the Report, taking environmental, social and governance considerations (ESG) into account in institutional investment is not only legally acceptable in certain circumstances, but is actually legally binding in some cases. The aims of the Report have been acclaimed by the promoters of the SRI movement[26] and its legal recommendations have been widely debated.[27] The general approach surrounding the fiduciary duties of institutional investors' trustees refers to the classical opinion of the often quoted Chicago Law Professors Langbein and Posner (1980): 'the duty of prudent investing (. . .) reinforces the duty of loyalty in forbidding the trustee to invest for any other object that the highest return consistent with the preferred level of portfolio risk and were fiduciaries to take ESG considerations into account, both the duty of loyalty and the prudent man rule would be violated.'[28] The Freshfields Report adopted a different approach. First, although the institutional investors' goal is the provision of financial benefits for the beneficiaries, it does not preclude taking ESG considerations into account when purely financial considerations have been exhausted. Second, there are many occasions

22. Available at https://www.unglobalcompact.org
23. Available at https://www.unpri.org
24. See 'Recent trends and regulatory implications in socially responsible investment for pension funds', Working Paper prepared for the 2007 OECD Roundtable on corporate responsibility', available at: https://www.oecd.org/corporate/mne/38550550.pdf.
25. See UNEPFI (2005). The Report was distributed by the Freshfields Bruckhaus Deringer Law Firm on behalf of the UNEPFI. See also UNEPFI (2009).
26. See Aviva Investors (2008); Kierman (2011) and Krosinsky and Robins (2008); UNEPFI, (2009).
27. See the interesting analysis by Sandberg (2011). See also Richardson (2008).
28. See Langbein and Posner (1980).

where ESG considerations have a financial relevance: ESG will have a positive effect on financial performance. Third, ESG considerations may be taken into account when the beneficiaries are in agreement.

Despite the inputs of the Freshfields Report, institutional investors are not keen on SRI strategies. A paper by Joakim Sandberg (2011) presents the Freshfields Report in an interesting critical perspective. According to the author, the alleged compatibility between fiduciary duties and ESG considerations actually leaves very little room for promoting SRI. On the one hand, given the fact that trustees analyse their investment opportunities according to modern portfolio theory,[29] it is rarely conceivable that they will find a situation where the financial characteristics of two investments are exactly the same, so that they could choose the one integrating ESG considerations rather than the other disregarding such criteria. On the other hand, the possible financial relevance of SRI is debated[30] with the results of the empirical studies being inconclusive.

At best, the relationship between ESG considerations and financial performance seems contingent: there is no clear evidence for saying that ESG factors always, or even often, have financial relevance. Thus, it is overly optimistic to promote SRI on the basis of its sole alleged financial importance. Finally, the consensus argument is difficult to handle: considering that ethical matters often lead to conflicting views, agreement between beneficiaries is difficult to reach. Therefore, the optimism around the Freshfields Report needs to be mitigated. Moreover, practice shows a low involvement of institutional investors and pension funds into ESG investment strategy. As Joakim Sandberg (2011) points out, legal reform would be needed for SRI to become a real driving force in institutional investment.

One possible tack is a requirement for institutional owners to meet certain ESG benchmarks that would be fixed independently. Richardson, for instance, argues that 'financial institutions that fail to meet such standards could be subject to regulatory sanctions including future restrictions on their investment choices or financial penalties to reflect social costs. Thus, the fiduciary standard by this model would effectively emphasise the returns to society as a whole."[31] Other avenues could likewise be considered: this is the case for the extension of disclosure requirements concerning SRI, the allowance of tax incentives for considering ESG factors, the introduction of liability techniques (investors would be held responsible for poor ESG performance of the companies they have supported financially) as well as the compulsory appointment of beneficiaries' representatives to the governing body of the institutional investor.[32]

EU regulatory intervention in the field of pension fund governance

The regulatory impact of the European Union on pension fund governance has taken place in the wake of the international normalisation described above. It has been punctuated by two instruments: Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision designated by the acronym IORP I and its revision designated IORP II.

29. See Thornton (2008).
30. See the references quoted by Sandberg (2011: 150.)
31. See Richardson (2009: 566).
32. *Ibid*.

The context

The European population has become older, thus public pensions regimes are under a great deal of pressure have in terms of financial and social sustainability. Many Member States reformed, more or less radically, not only their public pensions but also their occupational pension systems. Indeed, the latter are an important adjustment variable in the context of public regimes becoming less generous. The EU's Social Protection Committee stressed the advantages of those schemes in 2008.[33] The 2015 Pension Adequacy Report jointly prepared by the Social Protection Committee and the European Commission pointed out that 'while a pay-as-you go pension system is the main provider of pensions everywhere in the EU, occupational pension schemes based on collective agreements or on employer sponsorship have increased their coverage in some Member States and are acquiring an increasing role in pension income as they mature.'[34] The assets detained by institutions for occupational pensions are notorious on the European financial market. According to a memo published by the European Commission alongside the proposal for the IORP II directive[35], pension funds hold assets worth 2,5 trillion on behalf of around 75 million Europeans, which represents 20 per cent of the EU's working age population.[36] Furthermore, the collective and non-profit nature of occupational pensions, as well as the involvement of the social partners (at least in some plans) may make them a good pension saving option, with opportunities to share risks amongst the stakeholders involved and to deliver lower costs per member from economies of scale.

The first regulatory step: IORP I

From the perspective of European law, pension funds belong to a particular disciplinary domain at the crossroad of national labour law and EU regulated financial markets.[37] The subject of pensions is closely linked to social security and welfare for which only Member States are competent.[38] However, occupational pensions are managed by pension funds operating as institutional investors in the single European market, in competition with insurers and other financial services providers. European authorities have, accordingly, developed a policy towards occupational pensions through the prism of regulating and supervising the Institutions of Occupational Retirement Provision (IORP) hereafter pension funds.

The emblematic instrument is the directive IORP I of 3 June 2003, whose threefold objective is as follows: to furnish conditions for the development of a single market for occupational pensions services, to offer pension funds the benefit of the free movement of capital as well as the freedom to provide services, and to foster Pan-European pension market.

'Governance' prescriptions are less detailed in IORP I than in the OECD guidelines, but the conditions in which pension funds operate are specified in the legal framework of the directive whose overall content is the following:

33. See the Social Protection Committee (2008).
34. See European Commission and Social Protection Committee (2015: 17).
35. Eatock (2016).
36. Quoted by Eatock (2016: 2).
37. See Stevens (2004).
38. As shown by Haverland, supranational integration has been restricted to labour market-related issues (i.e., health and safety at work and gender equality in pay); for areas more central to the redistributive welfare state such as health, poverty and old age pensions, the EU applies the 'government-controlled' open method of coordination. See Haverland, M. (2007 :887).

- The directive does not apply to social security pension schemes (whether pay as you go or funded) and direct insurance schemes. Pension schemes operating on a pay as you go (PAYG) basis and book reserve schemes are also excluded, as well as very small pensions funds with less than 100 members.
- The pensions fund must be separated from the business of the sponsoring firm and must be registered alongside the competent national authorities; cross-borders operating institutions are priory authorized by their home Member State.
- The pensions fund must meet certain requirements for annual reports and accounts.
- Transparency (information) to members and beneficiaries as well as to the national supervision authorities must be ensured.
- An expert must establish appropriate technical provisions based on prudent assumptions; the pensions fund is required to have sufficient fund to cover the technical provisions or to have a recovery plan to do so.[39]
- An investment principles' statement must be prepared every three years (investment risks, risk management and assets allocation).
- The pensions fund must be managed according to the 'prudent person' and the 'exclusive benefit' rules.
- Member States may not restrict pensions funds wanting to use management or custody services established in another Member State.
- Cross-border rules based on the 'home-country control' principle must be implemented by Member States.

IORP I is a directive '*à l'ancienne*' characterised by a minimal harmonization and using the technique of mutual recognition, notably from the point of view of national market authorities' supervision. Most Member States have gone beyond the minimal requirements and this has produced a complex administrative-legal environment, singularly for occupational pension plans with a transnational aim. Thus, as shown by I. Guardiancich and D. Natali (2009) the first step towards harmonization of supplementary pension institutions was a partial success[40]: it has left room to a large national autonomy, with return effect in terms of disparities and technicalities. There is indeed a large diversity of approaches in the member states in terms of occupational pensions setting up, of distribution of rights and liabilities and of incorporation of solidarity elements. Also, this may have impaired the possibility of pension funds to adjust rapidly to the financial markets evolution.

As far as governance is concerned, the IOPR I legal framework is characterized by the reinforcement of investment professionalism, better internal controls and adequate transparency at the benefit of risk bearers, along with the Commission's approach towards liberalization of the market for occupational pension. This professionalization proceeds together with the shift towards a greater freedom to invest according to the Anglo-Saxon standard of 'prudent person'. Indeed, Article 18 of the directive stipulates that 'Member States shall require institutions located in their territories to invest in accordance with the "prudent person" rule and in particular in accordance with the following rules: (a) the assets shall be invested in the best interests of members and beneficiaries. In the case of a potential conflict of interest, the institution, or the entity which

39. Full funding at all time is required for funds having cross-border activity.
40. See Guardiancich and Natali (2009: 13).

manages its portfolio, shall ensure that the investment is made in the sole interest of members and beneficiaries; b) the assets shall be invested in such a manner as to ensure the security, quality, liquidity and profitability of the portfolio as a whole.'

Nevertheless, despite the Commission's idea that quantitative investment restrictions make pension products costlier[41], Member States favouring a more restrictive vision of investments partly succeeded in protecting their domestic system. According to the directive, each Member State may retain the possibility to subject IORPs established within its jurisdiction to more detailed investment rule, without being able to prevent them from investing up to 70% of their portfolio in shares and corporate bonds and up to 30% in currencies other than those of the future pension liabilities.[42]

The second regulatory step: IORP II

In 2010, the European Commission launched a consultation on the revision of the IORP I directive that took the form of a so-called IORP II directive proposal. IORP II went through a long gestation period punctuated by various discussions and institutional steps. The final phase of the legislative procedure dates back to June 2016 when the EU Council reached an agreement with the European Parliament on a proposal for a revised IORP II Directive.[43] The Council's agreement with the European Parliament was also approved by the Permanent Representatives Committee, the final stage of decision-making on the Council of Ministers side. The final text of the Directive 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) was published in the Official Journal of the European Union on 23 December 2016. The new rules enter into force on 12 January 2017.

IORP II aims to go a step further in the creation of an internal market for occupational retirement provision: facilitation of cross-border activity and increasing governance standards of pension funds are the two key objectives of the proposal. The promotion of long-term investments for the European economy is also pursued.

The text includes about eighty complex provisions agreed after a disputed legislative prelude.[44] Especially controversial, was the primary intention of the European Commission to apply an adapted version of Solvency II to pension funds. This would have meant, on the one hand, imposing pension funds solvency and capital requirements applicable to insurers and, on the other hand, recognising sponsor support as assets on the fund' 'holistic balance sheet.' This initial approach was abandoned by the Commission after the massive opposition of various actors: trade unions, employers, the fund industry and some governments (UK, Netherlands, Germany, Ireland and Belgium) who considered 'Solvency II – type' requirements unbearable for those pension funds and their sponsors that are financially responsible as a last resort in some jurisdictions.

The finalised proposal[45] to be voted on by the European Parliament contains a series of norms among which 'governance' is an important element. This proposal, however, considers the specificities of small or very small pensions funds for which, as listed below, the requirements are lighter[46]:

41. Haverland (2007: 888).
42. Also, according to the directive, the Member State of the sponsoring company may ask the Member State of the IORP to apply quantitative rules to assets held by cross-border pension schemes.
43. See http://data.consilium.europa.eu/doc/document/ST-10557-2016-ADD-1/en/pdf
44. See Eatock (2016). See also, http://ec.europa.eu/finance/pensions/iorp/index_en.htm
45. Available at: http://data.consilium.europa.eu/doc/document/ST-10557-2016-ADD-1/en/pdf.
46. This description is based on the content of the European Commission Press Release of 30 June 2016.

- Cross-border rules are enhanced: the proposal introduces a new procedure for cross-border transfer of pension scheme portfolios with a role given to the concerned countries' supervisory authorities.[47]
- According to the general principle, cross-border pension funds should be fully funded at all times. Nevertheless, the directive recognises some possibilities of underfunded cross-border IORPs, in which case the supervisor must promptly intervene and require the fund to implement protective measures for members and beneficiaries.
- Fund governance is improved: the key governance functions (risk management, internal audit, an actuary for DB schemes) must be exercised by experienced persons who carry out their duties in an objective, independent and fair manner. Also, funds must identify the risks they are or could be exposed to, in the short and the long term, which may have an impact on their ability to meet their obligations; they must draw up a risk assessment accordingly.
- Transparency is improved: the fund must provide better and comprehensible information to funds' beneficiaries and members through a 'Pension Benefit Statement' that includes various pieces of information: guarantees under the pension plan, benefit projections, accrued entitlements, contributions paid, costs deducted and the funding level of the plan. Member States retain the possibility to tailor the exact content and design of the benefit statement.
- SRI investments are promoted: pension funds will have to consider the risk of ESG considerations in their investment decisions and document this in a three-yearly statement of investment policy principles. ESG factors are, therefore, considered as part of prudence considerations.

Conclusions

Concerns about governance have recently been incorporated into pension regulation at the international level, especially by the OECD which has issued recommendations to improve the design of private pensions. Further, greater recourse to occupational pensions requires the development of institutional principles for: (i) regulating the risks associated with the management of pension schemes; (ii) reducing agency costs induced by the conflicting interests of the stakeholders involved (workers, retirees, firms, state, plans themselves, etc.); and (iii) achieving transparency. The major doctrine recognises that 'governance' is an essential determinant of fund performance.[48]

In the European Union, there has been an increase in pension fund assets and in the number of people involved in occupational pension schemes. A path towards an integrated European pension fund market and a single pension fund governance model has been taken, especially since the IORP I directive and its forthcoming revised version, the IORP II directive: governance is considered to be an inescapable element. Nevertheless, this path is still steep and strewn with pitfalls.

First, and this diagnosis was made for the doctrine in the wake of the implementation of the IORP I directive, the integration is difficult in the context of a persisting diversity in pension plan options from country to country: single versus multi-sponsor funds, traditional versus dedicated pension vehicles, big plans versus small plans, plans including some form of co-management by

47. This mechanism conforms to a procedure, with possible non-binding IEOPA mediation in case of disagreement between authorities.
48. See Clark and Urwin (2008: 3).

workers, etc.[49] Also, the implementation of good governance requirements according to international standards described earlier is not cheap. The imposition of governance rules might increase the costs of complementary pension fund schemes whose hallmark has always been flexibility, in comparison with insurance techniques.

Second, the development of trans-national pension funds remains limited despite the legal incentives provided by the IORP I directive and the context around its revision (e.g., IORP II). Sponsors and providers continue to face important technical and regulatory obstacles in the aftermath of the 2007-2009 financial crisis. A consolidation of small schemes, as recommended by the OECD,[50] is expected but this implies that the grouping or clustering is adequately profiled and piloted at low cost. Further, there is nothing simple about a well-designed pension plan, considering the governance principles that must be implemented. From this point of view, the pan-European pension fund Resaver, which is supported by the European Commission and analysed in Maria Cristina Degoli's (2017) contribution to the Special Issue, constitutes an interesting experiment for a European type-model.[51]

Third, Member States struggle to defend their prerogatives and their national specificities, especially from a labour law point of view. For instance, in the context of the proposed IORP II directive, some Member States expressed their explicit concern about respect for the principle of subsidiarity: the IORP II proposal should be sufficiently flexible to accommodate different national situations, particularly in terms of capital requirements and of the social partners' involvement in the governance of pension funds. However, despite its advantages, a uniform governance regime creates the risk of increasing the role of professional technocratic decision makers from the finance industry. This could come at the expense of the social partners and other stakeholders[52] in a context where there is a tendency to shift the risks from corporate sponsors and the State towards affiliates. As Davies (2008) points out, democratic decision making is important because pension fund managers and their agents are always subject to counter-incentives to disregard their fiduciary duty to act in the best interests of beneficiaries with respect to corporate governance.[53] It is also essential in the international context of the promotion of an SRI investment strategy that distances itself from the artificially constructed requirement to take account of sole financial considerations. After all, there is a need not only for secure retirement earnings but also for a decent social environment in which to enjoy them.

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49. See Guardiancich and Natali (2009: 25).
50. See Stewart and Yermo (2008: 33).
51. See Degoli (2017).
52. See De Deken (2011).
53. See Davies (2008: 176).

References

Ambachtsheer K., Capelle R. and Lum H. (2006) 'Pension Fund Governance Today: Strengths, Weaknesses, and Opportunities for Improvement', *Financial Analysts Journal Working Paper*, 1–28, available at: https://pdfs.semanticscholar.org/5cb7/d7c2cc41fba66b5513908fa4d7af32e73593.pdf

Ambachtsheer K. and McLaughlin J. (2015) 'How effective is pension fund governance today? and Do pension funds invest for the long-term? Findings from a new survey', *KPA Advisory Services*, 1–15, available at: http://www.top1000funds.com/wp-content/uploads/2015/02/Pension-Governance-and-LT-Investing.pdf

Antolin P. and Stewart F. (2009) 'Private Pensions and policy responses to the financial and economic crisis', *OECD Working Papers on Insurance and Private Pensions*, 6, 1–37, available at: http://www.oecd.org/finance/private-pensions/42601323.pdf

CFA Institute (2008) *Code of Conduct for Members of a Pension Scheme Governing Body*, 1–24, available at: http://www.cfapubs.org/doi/pdf/10.2469/ccb.v2008.n3.1

Clark G.L. and Urwin R. (2008) 'Best-practice pension fund governance', *Journal of Asset Management*, 9, 12–21.

Clark G.L. and Urwin R. (2011) 'DC pension fund best-practice design and governance', *Benefits Quarterly*, 4, 36–49.

Cocco J.F. and Volpin P. (2007) 'The Corporate Governance of Defined Benefit Pension Plans: Evidence from the United Kingdom', *Financial Analysts Journal*, 63, 70–83.

Davies R. (2008) Democratising Pension Funds – Corporate Governance and Accountability, Vancouver-Toronto: UBC Press.

Degoli M.C. (2017) 'Free Movement of workers and the Resaver Scheme for researchers', *European Journal of Social Security*, 19(2), this issue.

De Deken J. (2011) 'The Netherlands: the challenges posed by the unintended universal financialisation of retirement provision', *Working Paper presented at the Conference on 'The new pension mix: supplementary pension schemes in Europe'*, 1–26.

Eatock D. (2016) 'Occupational Pensions- Revision of the Institutions for Occupational Retirement Provision Directive (IORP II)', *Briefing of EU Legislation in Progress- European Parliamentary Research Service*, 1–12.

Ebbinghaus B. (ed.) (2011) The Varieties of Pension Governance – Pension privatization in Europe, New York: Oxford University Press.

European Commission and Social Protection Committee (2015) *The 2015 Pension Adequacy Report: current and future income adequacy in old age in the EU*, 1, 1–396, available at: http://www.ec.europa.eu/social/BlobServlet?docId=14529&langId=en.

Guardiancich I. and Natali D. (2009) 'The EU and supplementary pensions,' *Working Paper – European Trade Union Institute*, 11, 1–28.

Haverland M. (2007) 'When the Welfare state meets the regulatory state: EU occupational pension policy', *Journal of European Public Policy*, 14, 886–904.

Kierman M. (2009) *Investing in a Sustainable World*, New York: Amacom.

Krosinsky C. and Robins N. (eds.) (2008) *Sustainable Investing: The Art of Long-Term Performance*, London: Earthscan, Langbein J.H. and Posner R.A. (1980) 'Social Investing and the Law of Trusts', *Michigan Law Review*, 79, 72–112.

Leisering L. (ed.) (2011) The New Regulatory State – Regulating Pensions in Germany and the U.K., Houndmills: Palgrave Macmillan.

Mignault P. (2013) 'La réglementation des risques associés à la gouvernance des régimes complémentaires de retraite', *Thèse présentée à la Faculté de Droit de l'Université de Montréal*, non publiée.

Mignault P. (2016) 'Une théorie de l'agence des régimes complémentaires de retraite,' *Mc Gill Law Journal*, 62, 111–155.

OECD (2006) *Guidelines on Pension Fund Asset Management*, available at: http://www.oecd.org/finance/private-pensions/36316399.pdf

OECD (2007) 'Recent trends and regulatory implications in socially responsible investment for pension funds', *Working Paper prepared for the 2007 OECD Roundtable on corporate responsibility*, 1–29, available at: https://www.oecd.org/corporate/mne/38550550.pdf.

OECD (2012) *Guidelines for Pension Fund Governance*, available at: https://www.oecd.org/finance/private-pensions/34799965.pdf.

Richardson B.J. (2008) 'Putting Ethics into Environmental Law: Fiduciary Duties for Ethical Investment', *Osgoode Hall Law Journal*, 46(2) 243–291.

Richardson B.J. (2009) 'Keeping Ethical Investment Ethical: Regulatory Issues for Investing in Sustainability', *Journal of Business Ethics*, 87, 555–572.

Sandberg J. (2011) 'Socially Responsible Investment and Fiduciary Duties: Putting the Freshfields Report into Perspective', *Journal of Business Ethics*, 101, 143–162.

Sitkoff R.H. (2003) 'Trust Law, Corporate Law and Capital Market Efficiency', *Journal of Corporation Law*, 28, 565–589.

Stewart F. and Yermo J. (2008) Pension Fund Governance: Challenges and Potential Solutions, *OECD Working Papers on Insurance and Private Pensions*, 18, 1–36, available at: http://www.oecd.org/finance/private-pensions/41013956.pdf

Stevens Y. (2004) 'The meaning of national social and labour legislation in directive 2003/41/EC on the activities and supervision of institutions for occupational retirement', *Research Report commissioned by the European Association of Paritarian Institutions (AERIP)*, Leuven, 1–111.

The Social Protection Committee (2008) *Privately managed funded pension provision and their contribution to adequate and sustainable pensions*, 1–58, available at http://www.ec.europa.eu/social/BlobServlet?docId=743&langId=en

Thornton R. (2008) 'Ethical Investments: a case of Disjointed Thinking', *Cambridge Law Journal*, 67, 396–422.

United Nations Environment Programme Finance Initiative – UNEP FI (2005) *A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment*, 1–153, available at: http://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf

United Nations Environment Programme Finance Initiative – UNEP FI (2009) Fiduciary Responsibility: Legal and practical aspects of integrating environmental, social and governance issues into institutional investment, 1–88, available at: http://www.unepfi.org/fileadmin/documents/fiduciaryII.pdf