Protection of EU Consumers vis - à - vis Pension Products

The Dutch case: towards a new regime

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1. Introduction

1.1 General

‘J’accuse’, is the title of a pamphlet that French writer Émile Zola, used to stir up the Dreyfus affair in 1898. It greatly influenced French history.

I have neither the imagination nor the hope that this book will have a similar impact.

However, there are parts of the Dutch and the European financial sector and its supervision that are fundamentally wrong.

There were many scandals in recent years in The Netherlands. To name the biggest one so far, the so-called ˙usury policy affair’. Certain Dutch insurers – that are also EU insurance companies - sold these policies on a large scale, as much as until 2008. Usury policies are investment policies where the costs are so high that little or no return remains for the customer.

The Dutch Financial Times estimated that seven million policies were sold, an average of one per household. A mega financial scandal. The damage amounts to tens of billions of euros. Recently, the courts ruled quite severely: by selling usury policies, insurers were acting ‘unfairly’ and in ‘breach of good faith’. This affair has been going on for more than 20 years and is undermining trust in Dutch financial institutions to a low.

But, even the usury policy affair might pale in comparison to a new financial scandal in the making: the new Dutch Pension Act.

The aim of this book is to prevent this from happening again.

Before I get back to that: the signs of trust in the Dutch, but also European financial sector are not good.

A 2024 report by the European Insurance and Occupational Pensions Authority (EIOPA) has highlighted an important issue within the European Union's financial services sector: consumer trust in institutions for occupational retirement provision (IORPs) is lagging significantly behind. With only 38% of EU consumers expressing trust in their pension funds, there is a clear trust gap compared to insurers and banks, which stand at 45% and 44% respectively.[1]

The EIOPA report is a wake-up call for the EU pension industry. How to rebuild concretely consumer confidence in pension funds across the EU?

The focus here is on the pension reform in the Netherlands and the lessons learned from the usury affair. The Dutch pension reform will have a major impact on Dutch consumers and it contains valuabe lessons for the entire EU consumers. After all, the Dutch second pillar is by far the largest in the EU.[2]

The Dutch pension reform is a perfect case study on how to improve EU consumer protection because it exposes many embarrassing flaws in EU consumer law vis-à-vis pension products.

In the coming years, all Dutch pension funds will have to convert their defined benefit (DB) schemes into defined contribution (DC) schemes, into the new Dutch

[1] Consumer Trends Report 2023, EIOPA, 23 January 2024: https://www.eiopa.europa.eu/publications/consumer-trends-report-2023_en

[2] Costs and Past Performance 2023, EIOPA, 17 January 2023: https://www.eiopa.europa.eu/system/files/2023-01/costs_and_past_performance_report_2023_0.pdf

contract, the Future of Pensions Act (hereinafter: WTP). This involves around 1,500 billion euros. No individual legal protection is possible against this under the WTP in this regard, leading to much anger and misunderstanding among pension participants.

Legally, the WTP is 'not pretty', I said in a hearing before the Dutch Senate in 2023.

It is no longer even two minutes to midnight but already well into injury time. The Netherlands urgently needs to reshape the financial sector before it has a spill over to the entire EU and the trust in financial undertakings drop even further. Much more emphasis should be put on the individual consumer and effective legal protection.

For instance, collective mandatory participation in a pension fund of a certain sector (e.g. healthcare or metal) is no longer appropriate.

That does remain in place in the new pension law. This gives no impetus to work better for the customer. There is a need for this: no one already understands anything about pension contracts. Even worse: for example, from the Dutch 'Uniform Pension Overview' (UPO) - which participants receive and states the pension amounts - participants 'cannot derive any rights', according to the Dutch courts.[3]

The European insurance and pensions regulator (EIOPA) is already setting a good example: pension members are consumers. Thus, the criteria used by the courts in usury policy cases (clear, understandable, effective legal protection, and transparency about costs) are brought into the domain of pensions as well. And that is precisely what is lacking.

[3] The Hague Court of Appeal, 17 January 2023, ECLI:NL:GHDHA:2023:329.

To avoid a financial 'J'accuse', I will present proposals for a better pension system. This book is an endeavor toward that.

Some Chapters (or parts of it) appeared in Dutch in already. I have translated, modified and – when necessary – updated this. Errors are only on my account. I owe gratitude to three co-authors (Tjitsger Hulshoff, Sanne Vlastuin, Amber Pratt) and to Hanna Bekkema, Gina van der Zanden, Jelena Ivanovic and Nathalia Ervedosa for helping me finish the book. Special thanks to Institute Gak for funding this research.[4]

Before I dive into the fascinating world of pensions, some 'basics' and general remarks on EU law will follow. Then is stated how the book is constructed.

1.2 EU Basics[5]

The treaties on which the EU is based consist *grosso modo* of two parts: The Treaty on the EU (TEU) and the Treaty on the Functioning of the EU (TFEU).[6] Not nearly enough attention is paid to these important treaties in national pension discussions, despite the fact, since 1963, that these treaties are supranational and have priority over national legislation.

The famous *Van Gend en Loos* (1962) case is the starting point. In that case, the European Court of Justice (EU Court of Justice, the ECJ) held that European law

[4] https://www.instituutgak.nl/.

[5] Some parts of par.1.2 appeared in: H. van Meerten, EU Pension Law, Amsterdam University Press, 2019 and H. van Meerten, 'Lessons from the Pan European Pension Product (PEPP), in: P.S. Khanna, G. Bhardwaj, *Templatizing micro-Pensions for Africa*, PinBox, 2023.

[6] The protocols, addendums, etc., I leave aside.

constitutes its own autonomous legal order, with – so the ECJ held later - priority over conflicting national law.[7]

As a result, and over the course of time, a great number of European laws are directly or indirectly applicable to pensions. These laws are based on the so-called 'EU free movement provisions'. This will be explained further throughout the book.

There are two main instruments in EU Law, regulations and directives.[8] A Regulation has general application, is binding in its entirety, and is therefore directly applicable in all Member States. A Directive on the other hand, shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and method. Therefore, a Directive leaves notably more room for the Member States to add all kinds of national specificities ('gold plating'). Occupational Pensions are mainly ruled through Directives (IORPs), establishing – in some areas - minimum standards to be sought by the Member States.

The differences between Member States' legislations regarding to pensions are sometimes hurdles on the way of achieving a fully integrated European pension market. Such hurdles (some of which are rather protectionist) deprive market expansion and negatively impact job opportunities.

The role of cross border activities concerning consumer protection and pensions, especially when it comes to pension mobility, cross border pension contributions, regulatory compliance, are of major importance. I will cover this topic in more details later on.

[7] C-26/62, C-6/64. Throughout the book, this short reference of EU court cases is used.

[8] For more information on EU law: P. Craig, G. de Búrca, *EU Law*. Oxford, 2020.

Aiming at facilitating pension mobility and at bolstering savings at the European level to facilitate the creation of the Capital Market Union, the PEPP Regulation was enacted. (see below, Chapter). This instrument gives considerably less leeway to the Member States. Especially when the EU legislator arranges almost every detail in the Regulation (except tax, see below), such as investment strategy, costs and information. Therefore, the PEPP is a special kind of Regulation, a so-called '2nd regime'. Member States are prevented from doing 'gold plating' as much as possible.

EU regulations and directives are established in a complicated procedure. In principle, three institutions of the EU are involved in this legal process: the European Commission, the European Parliament, and the Council of the EU. The Commission submits a proposal, after which the Parliament and the Council must reach an agreement, in order to adopt the legislative act. Furthermore, the Court of Justice of the EU ensures, among other things, that EU law is followed and implemented correctly. The work of these four institutions is complemented by the work of other EU institutions: the European Council, the European Central Bank, the European Court of Auditors and of course the European Supervisory Authorities (ESAs). These institutions are respectively responsible for the general political direction, the financial aspects, and the external audit aspects of the EU.

Following the 2008 financial crisis, the EU established the ESAs, the European Systemic Risk Board, to ensure consistent and adequate macro- and micro-prudential supervision of the financial system across the EU to prevent systemic risks. For pension institutions and insurers, the EU supervisory authority is EIOPA (European Insurance and Occupational Pensions Authority).

The legal basis for the EU's legislative competence in the area of occupational pensions is also the principle of the free movement of workers, services, goods and

capital, as well as the proper functioning of financial services. Article 56 of the Treaty on the Functioning of the European Union (TFEU) plays an important role in this discussion, stating that "services should be freely provided within the EU".[9]

I will deal with these ‘four freedoms’ throughout the book.

1.3 IORP directives[10]

The IORP I Directive was the first attempt in 2003 to create a single market for occupational retirement provision, where providers of occupational retirement provision are free to provide services and investments throughout the EU.

The IORP I Directive regulates institutions for occupational retirement provision (IORPs). A pension institution that qualifies as an IORP under the IORP Directive can provide cross-border pension services (i.e. it has an IORP passport) on the basis of supervision in the Member State in which it is established. This means that if an IORP is established in Member State A, it can automatically provide pension services in Member State B.

The IORP I Directive sets out a number of general solvency and funding requirements, certain investment rules (based on the prudent person principle) and general administrative and governance requirements. These are only general rules providing for a minimum harmonisation of pension institutions, leaving Member States considerable freedom to develop national rules for the IORPs concerned.

[9] H. van Meerten, E. Schmidt, ‘Compulsory membership and the free movement of services in the EU’, *European Journal of Social Security* 2017, Vol 19(2).

[10] See for more detail: H. van Meerten (et.al), ‘EU Pension Law’, Amsterdam University Press, 2019 and P. H. Bennett, H. van Meerten (et. al., eds.), *Handbook European Pension Law*, forthcoming.

The IORP II Directive replaced IORP I in 2016 and contains much more detailed information.

In its Explanatory Memorandum, the European Commission set out four specific objectives in revising the IORP Directive: (i) removing remaining prudential barriers for cross-border IORPs; (ii) setting requirements for good governance and risk management; (iii) providing clear and relevant information to members and beneficiaries; and (iv) ensuring that supervisors have the necessary tools to effectively supervise IORPs.[11]

However, anno 2024 it can concluded that the IORP II did not meet these goals. In fact, it is safe to say that the complexity of the IORP II, along with the significant differences of labor and social legislation of EU member states makes cross-border activity harder, not easier.[12]

The number of cross border pension providers is significantly behind expectation.[13] The European market for pensions has still not been sufficiently developed, after numerous attempts.[14]

[11] The Explanatory Memorandum to the IORP II Proposal, Detailed explanation of the proposal.

[12] See: '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 (Article 12, Paragraph 3 of the IORP II Directive)', https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3320500.

[13] '33 cross-border IORPs were active in the European Economic Area (EEA) at the end of 2020. This number represents a substantial drop compared to the 73 active undertakings in 2017, primarily reflecting the United Kingdom's departure from the European Union.': https://www.eiopa.europa.eu/eiopa-analyses-trends-cross-border-iorps-2021-12-03_en.

[14] See for an overview, H. van Meerten, *EU Pension Law*, op. cit.

The differences among the national pension rules of the Member States form an obstacle in the context of developing simple, cross-border pension rules. The IORP Directive did not take this away. This not only prevents, for example, a cost-efficient pension build-up by an employee working abroad, but the differences among national rules also restrict a local pension participant in choosing a pension fund established abroad.

EU regulations however– based on the free movement provisions and if properly constructed - can help break down these barriers.

1.4 EU Consumer Law

The EU has implemented various measures to protect consumers from fraudulent and unfair business practices.[15] These measures aim to ensure that consumers are well-informed, empowered, and can make informed decisions when purchasing services. I want to briefly mention two.

First, one of the primary tools used by the EU to protect consumers is the Consumer Rights Directive.[16] This Directive sets out a range of minimum rights for consumers across the EU, including the right to clear and concise information about the goods or services being offered, the right to cancel a contract within 14 days, and the right to receive a refund if goods or services are faulty or not as described.

[15] H. W. Micklitz et al, *Understanding EU consumer law*, Antwerp, Portland : Intersentia, 2009.

[16] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Directive 93/13/EEC and Directive 1999/44/EC, and repealing Directive 85/577/EEC and Directive 97/7/EC (*PbEU* 2011, L 304/64).

Second, the – at the time of writing not final – Directive on financial services contracts concluded at a distance[17], with the aim of providing better protection for consumers. The Directive includes measures such as an effective right of withdrawal, clear requirements for pre-contractual information, disclosure of the commercial purpose of phone calls, the right to receive adequate explanations before signing a contract, and a ban on deceptive website designs.[18]

1.5 Digital strategy and financial services

Digital markets encompass the online platforms and services where goods, services, and information are bought, sold, and exchanged. These markets have become increasingly complex and pervasive in our modern economy, and ensuring consumer protection and financial stability within them is crucial. Technology is rapidly changing the world, and this is evident in all aspects of life. Insurance and pension products are no exception.

As stated in EIOPA's Digital Strategy 2023:

'the innovation can increase efficiency and reduce consumer prices', however, 'it can also come with high investment costs, increasingly complex value chains, and

[17] Council of the European Union. *Council adopts legislation that makes it safer to contract financial services online or by phone*. Press Release, 23 October 2023. Available at: https://www.consilium.europa.eu/en/press/press-releases/2023/10/23/council-adopts-legislation-that-makes-it-safer-to-contract-financial-services-online-or-by-phone/.

[18] European Parliament, *Better Protection when Concluding Distance Contracts for Financial Services*. Press Release, 29 September 2023. Available at: https://www.europarl.europa.eu/news/en/press-room/20230929IPR06120/better-protection-when-concluding-distance-contracts-for-financial-services .

lead to new risks that need to be addressed by sufficiently agile undertakings and supervisors to protect consumers and the economy'[19]

EIOPA also notes:

'Technology is evolving fast, and a succession of hype-cycles are expected to continue to stir up the insurance and pensions markets. New players appear and create challenges for those incumbents not strategically adapting to the digital transformation. Insurers and pension providers are being pushed towards innovation by the rapid technological developments that are changing the way insurance and pension products are being developed, commercialised, and managed, having an impact as well in consumer expectations. However, not all insurers and pension providers are adapting to this digital transformation, moreover the speed of the ones that do, varies significantly resulting in a wide spectrum of digitalisation.'

In other words, markets must adapt to innovation, but consumers must be protected. To achieve this, the most important thing is to educate people and make this education available to them. In addition, authorities and regulations must also adapt to protect consumers more, both at EU level and at national level. This is particularly important for supervision. To achieve this, EIOPA sees its role as monitoring developments in digitalization, facilitating the market entry of actors or products that rely on technological innovation, promoting innovation, supporting NCAs and implementing digitalization, all while remaining technologically neutral.[20]

[19] EIOPA's Digital Strategy: Support Consumers, Markets, and the Supervisory Community through Digital Transformation (EIOPA-23/328, 26 September 2023).

[20] Idem.

It's important to remember, for example, that most pensioners don't follow the development of digital markets, and it's difficult for them to keep up with digitalization, which is constantly changing and improving. Therefore, pension funds need to be careful when implementing digital innovations, as they can have a serious impact on older people. In that sense, solutions must ‘being open to a hybrid world combining new digital business models alongside traditional ones’.[21]

In the context of digital markets, the rise of the so-called prosumer, especially with the development of online platforms, deserves special attention. In the article 'The 'prosumer' in the platform economy', Mak gives a great explanation of the prosumer: 'In simple terms, it is a contraction of the terms 'consumer' and 'producer'. The term thus covers cases where the consumer, defined as 'a natural person not acting in the exercise of a profession or business', does not buy goods and services but produces them himself.[22]

Mak is also concerned about whether current consumer law is an appropriate framework for every situation. Another question is what kind of protection should be given to prosumers, whether the authorities should protect them in a similar way to consumers and treat them as vulnerable parties, or whether they should be treated more like traders, as professionals, who would then have a lack of protection.

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[21] Idem.

[22] V. Mak, ‘The ‘prosumer’ in the platform economy’, *NJB*, 2022, 1663.

Mak also makes this point:

'The group of 'prosumers' is itself to some extent vulnerable, as it does not have the same expertise or experience as large companies, nor the same economic resilience to absorb business setbacks or potential liability claims.'[23]

1.6 EU Agencies[24]

In the area of financial services, I must mention the three EU supervisory agencies. The European Banking Authority (EBA) main tasks are to ensure effective and consistent Regulation of the financial sector in the EU and to promote the stability and integrity of the EU banking sector, including its supervision. To comply with its targets, EBA should develop regulatory and technical standards for the banking sector, promoting minimum standards. Among other things, EBA ensures that there is sufficient transparency in financial products and services and support cross-border banking within the EU.[25]

The European Securities and Markets Authority (ESMA) is responsible for safeguarding the integrity of the EU single market, ensuring transparency, protecting

[23] Idem.

[24] See for more information on this topic: https://eulawlive-com.proxy.library.uu.nl/symposia/the-agencies-of-the-european-union-legal-issues-and-challenges/ and earlier: H. van Meerten, A.T. Ottow, *The Proposals for the European Supervisory Authorities: The Right (Legal) Way Forward*?, Tijdschrift voor Financieel Recht, Vol. 1, 2010

[25] European Banking Authority (EBA), 'EBA at a Glance'.

investor interests and investor education, regulating market abuse and manipulation, and overseeing credit rating agencies.[26]

The European Insurance and Occupational Pensions Authority (EIOPA) regulates and supervises insurance and reinsurance companies, pension funds and occupational and personal pensions in the EU. It works to standardize and harmonize insurance and pensions Regulation across the EU, enforces the Solvency II and IORP II frameworks, and ensures the protection of pensioners' interests and the integrity of the insurance and pensions markets. One of the EIOPA's main objectives is to 'enhance consumer protection'[27], 'to strengthen the oversight of cross-border groups'[28], 'to bring about more harmonized and consistent application of the rules for financial institutions and markets across the EU'.[29]

1.7 The Dutch Pension Act[30]

That being said, I now turn to an introduction of the Dutch Pension Act.

On 5 June 2019, former Minister of Social Affairs and Employment, Wouter Koolmees, sent a letter to the House of Representatives reporting that the government, employees' and employers' organisations had reached an agreement in principle on the reform of the pension system.[31] A year later, on 6 July 2020,

[26] European Securities and Markets Authority (ESMA), 'About ESM'.

[27] European Insurance and Occupational Pensions Authority (EIOPA), 'Mission and Tasks'.

[28] Idem.

[29] Idem.

[30] Parts of this Chapter appeared in Dutch: H. van Meerten, S.L. Vlastuin, 'The unbearable lightness of pension reform', *SEW*, 2022.

[31] *Parliamentary Papers II* 2018/19, 32043, no. 457.

Koolmees informed the House of Representatives about the status of the intended 'roll-out' of the reform.[32] In his letter, the Minister stated that the new pension system was intended to be a 'sustainable and durable system that offers the prospect of a pension with purchasing power, transparency and a personal character that is better aligned with developments in society and the labour market'.[33] On 30 March 2022, the legislative bill on the future of pensions and explanatory memorandum was sent to the House of Representatives.[34]

In 2023 the legislation passed. By the 1st of January 2027 – but this might be longer - all Dutch pension funds should transform their Defined Benefit contracts into Defined Contribution contracts.

Most pension funds have now started preparations for the new pension system.[35] This might be understandable in the sense that most of the Dutch pension landscape is very likely to change.

However, first, the legislation on which the new system is based still contains many uncertainties, and even the answer to the question of whether and when the legislation will say the daylight in its proposed form is uncertain. In this sense, it seems premature to anticipate the new system at this stage. This uncertainty is

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[32] *Parliamentary Papers II* 2019/20, 32043, no 520.

[33] *Parliamentary Papers II* 2019/20, 32043, no. 520, p. 2.

[34] Act on Future Pensions of 30 March 2022 (explanatory memorandum, hereinafter: EM).

[35] Most pension funds have started preparations for the new pension system', salarisvanmorgen.nl 9 December 2021.

growing after the Dutch elections in 2023 where political parties won that are not sympathetic to the WTP.

Second, the Dutch pension reform might very well be contrary to European Law. In December 2023 documents were released that contain a serious warning to the government. According to the legal adviser of the Dutch State (own translation):[36]

'Vesting old rights makes unconditional pensions already accrued conditional with retroactive effect. There is thus a violation of individual property rights (...).'

'In summary, it is important that the country's lawyer emphasises that 4 'tests' have to be passed to assess whether this infringement of property rights in the sense of the ECHR, is tenable in a legal sense:

1. It must be in the public interest;

2. There must be a need for the measure (i.e. the encroachment);

3. Regarding the measure, an important question is whether there are real alternatives; and

4. The effects of the measure must be considered.

According to the Landsadvocaat, an absolute necessity will have to be demonstrated with regard to the encroachment of already accumulated rights. In our opinion, this absolute necessity cannot be properly substantiated. In fact, this already runs aground on the fact that the current PW already has the possibility of

[36] 'Vervolg stappen op weg naar een nieuw pensioencontract in het licht van het advies van de landsadvocaat (Beleidsnota Ministerie van Sociale Zaken en Werkgelegenheid), bijlage bij 2023-0000583112' - Next steps towards a new pension contract in light of the advice from the State Attorney (Policy Note Ministry of Social Affairs and Employment), annex to 2023-0000583112.

'expropriation': reduction as an ultimum remedium. But even in financial terms, an 'absolute necessity' will not be easy to define, let alone prove.

In conclusion, there are so many risks involved in substantiating the (absolute) necessity that a legal provision that would allow for saving old rights at fund level should be abandoned.'

Thus, although the reform of the pension system seems a Dutch matter, and therefore reflects developments in Dutch society, on certain points - in addition to the 'national' ambiguities[37] – European law is insufficiently taken into account. Examples are European property law, European competition law, EU aspects of consumer law, the free movement of services and the cost transparency rules that follow from the IORP II Directive.

1.8 The aim of the book

As I said, the aim of this book is ambitious. Many important issues are revisited in this book with the intention of informing people about the flaws in the current Dutch system and pointing out possible ways to fix them. The system seems to be working for now, but as times change, the systems need to follow suit in order to be sustainable and ready to face possible turbulence.

One of the specific aims of this book is to highlight the importance of understanding pensions and making them an important part of people's interests. It seems that people don't take pensions as seriously as they really are, probably because the time when they will need a pension seems so far away, which is why pensions are not a vital issue for most people. However, I believe that pensions are financial products and

[37] See the many reactions to the internet consultation: www.internetconsultatie.nl/wettoekomstpensioenen.

pension funds are players in the financial markets, no less important than banks or, for example, insurance companies.

Clearly, the most important issue in the Dutch pension reform cannot be neglected - the transition from DB to DC. It is already well known that the Netherlands is going through a pension reform and there is a lot to learn about the transition period. Especially since the Netherlands is one of the countries with the 'best pension system in the world', the question arises - if the system is so good, why change it? I'll be exploring this issue throughout the book.

Again, the Dutch pension reform is taken as a case-study to improve consumer protection in the entire EU.

1.9 How is the book structured

In Chapter 2, the new Dutch pension Act is discussed. It starts with a short history. Then, I will address the EU aspects in the light of the so-called 'transition phase', the transitional phase to the new pension system from 2023 to 2027 or 2028,[38] or perhaps even longer.[39] What are the obstacles in the envisaged pension reforms and the chosen plan of action? Are the envisaged reforms sustainable in the light of EU law?

In order to understand the subject matter, I briefly explain the new pension system - and the transition to it. The sub-sections already contain a number of comments in this regard in the light of EU law.

[38] Maybe even longer.

[39] *Parliamentary Papers II* 2020/21, 32043, no. 599, p. 2.

I will then deal in more detail with aspects of EU law that deserve attention from the perspective of the envisaged reform of the pension system. Previous articles have already devoted extensive attention to a number of EU themes relating to the reform of the pension system.[40] In this respect, a few comments will suffice.

In Chapter 3, general aspects of EU law and other financial norms that should be applied to IORPs will be discussed. Problems such as the tenability of compulsory membership to a Dutch IORP, the European property law in combination with conversion, and the infringement on the free movement of services will be addressed. The Chapter will dive into the extensive discussions and debates in the literature regarding the compatibility of large-scale mandatory participation provisions with European competition law, especially in the context of industry-wide pension funds.

Furthermore, the potential challenges related to the envisaged pension system, such as the individual character of the scheme in the accrual phase and the uncertainty surrounding the degree of solidarity in the scheme will be object of reflection.

In addition, it delves into the legal risks associated with the 'import' of accrued pension entitlements into the new pension contract and the potential infringement on property rights under European law.

[40] H. van Meerten , P. Borsjé, 'Pension Rights and Entitlement Conversion ('*Invaren*'): Lessons from a Dutch Perspective with Regard to the Implications of the EU Charter', *European Journal of Social Security* (18) 2016, issue 1; H. van Meerten , E. Schmidt, 'Compulsory membership of pension schemes and the free movement of services in the EU', *European Journal of Social Security* (19) 2017, issue 2; E. Lutjens, *Analyse verplichtstelling na pensioenakkoord houdbaar*, Amsterdam: VU Expertisecentrum Pensioenrecht 2020; H. van Meerten , S.L. Vlastuin, 'Is compulsory membership still tenable?', *PensioenActualiteiten* 2021.

Finally, it touches upon the prohibition of restrictions on the free movement of services under Article 56 TFEU and potential justifications for any infringement. The text provides insights into the complexities and legal considerations surrounding these issues within the context of EU law.

In Chapter 4, the rule of law and legal protection in pension matters will be discussed.

I aim to assess the European fundamental rights in the EU Charter, specifically focusing on articles 17 (property), 21 (non-discrimination), 47 (effective legal protection), and 38 (consumer protection). The Chapter addresses the collective value transfer mechanism under the pension system, outlining the conditions and implications of collective value transfers at the request of the employer and in case of the liquidation of the pension fund.

Furthermore, it points out the absence of an individual right of objection to collective value transfer through conversion, highlighting the lack of fundamental individual legal protection. The text also discusses dispute mechanisms, participation options, and the role of the dispute committee in addressing pension-related disputes.

Overall, the Chapter provides a critical analysis of the legal implications of the new Pensions Act on pension participants, particularly in terms of their rights and legal protections under the EU Charter.

In **Chapter 5**, I discuss the introduction of the Pan-European Personal Pension Product (PEPP) and its potential impact on the pension market. It highlights the reluctance among providers and the need for improvement in the PEPP legislation. The Netherlands is encouraged to innovate in the pension sector and can leverage its expertise by establishing an innovative and transparent PEPP. The Chapter also

mentions the potential for a digital PEPP offer and the importance of cost reduction for the pension saver. Additionally, it emphasizes the role of PEPP in achieving the EU's capital markets development objectives and addressing fiscal challenges due to aging populations. The Chapter concludes by suggesting lessons learned from early implementation and the need for improved PEPP 2.0, including a common tax treatment across EU Member States

In **Chapter 6**, recommendations for the future regime for the pension-consumer are described.

2. The (new) Dutch pension contract

2.1 Historical approach of Dutch Pension system[41]

To understand the system we have today, it's advantages and disadvantages, I need to explain how and why the system was created in the first place.

Sir William Beveridge (1879-1963) was a British social economist. In 1942, he published 'Social Insurance and Allied Services', known as the Beveridge Report, which outlined a set of social welfare principles that formed the basis of welfare reforms in the UK, but whose influence extended beyond the UK and into the 20th century.

One of the key aspects of the Beveridge Report, and its most famous elements, are the 'five great evils'. Beveridge came up with five giants that plagued society and therefore advised the government to work towards eliminating them, these are:

[41] I owe gratitude to Nathalia Ervedosa for co-writing Chapter 2.1. Errors are on my account only.

- *Want - Poverty*

- *Sickness - lack of health care*

- *Ignorance - lack of education*

- *Squalor - poor housing*

- *Idleness - Unemployment*

In his Report, he specifies the 'way to freedom from want' since, also according to his own words, it's the easiest one to attack – 'abolition of want requires a double re-distribution of income, trough social insurance and by family needs.'[42] Fundamental principles were elaborated in the Report, such as: flat rate of subsistence benefit, flat rate of contribution, unification of administrative responsibility, adequacy of benefit, comprehensiveness and classification.[43]

Beveridge divided people into six classes according to their working age and way of life (those below working age; employees; other economically active; housewives; other economically active not in work; retired) and the idea was that the state should provide old age and children's benefits, medical care and rehabilitation, benefits for various risks such as unemployment and disability, and funeral expenses according to these classes.

Regarding the budget, Beveridge is stating the following:

[42] Sir William Beveridge, *Social Insurance and Allies Services,* Report presented to Parliament by Command of His Majesty, November 1942, HMSO, CMND 6404.

[43] Idem.

'Every person in Class I, II or IV[44] *will pay a single security contribution by a stamp on a single insurance document each week or combination of weeks. In Class I the employer also will contribute, affixing the insurance stamp and deducting the employee's share from wages or salary. The contribution will differ from one class to another, according to the benefits provided, and will be higher for men than for women, so as to secure benefits for Class Ill. '*[45]

In 1948, the National Health Service (NHS) was established in the United Kingdom. The NHS provided free medical, dental and nursing care to every citizen.

The Beveridge Report is important as a document that shaped social policy and the modern welfare state. It contains some important statements and represents a carefully developed plan to improve people's welfare, addressing all the social problems of the time in the UK. The influence it had on the development of social security in other countries confirms the fact that most countries face similar social problems.

As mentioned above, the impact of the report is significant. The Beveridge Report was concerned with social issues in the UK, so it is not surprising that it served as the basis for the modern social security and welfare state in the UK. The impact has been felt in health care systems, as one of the key aspects is a publicly funded and accessible health care system. It also promotes social justice and equality. But perhaps the most important impact, in my view, is the increased awareness of these

[44] The classes mentioned here are in correspondence to previously mentioned six classes, where the Class I is a reference to employees, Class II refers to others gainfully occupied, Class III refers to housewives, Class IV to others of working age not gainfully occupied, Class V to people below working age and Class VI to retired.

[45] Sir William Beveridge, *Social Insurance and Allies Services,* Report presented to Parliament by Command of His Majesty, November 1942, HMSO, CMND 6404.

issues and the global debate that this report has stimulated. In an ever-changing society, it is vital that the system changes with it, while maintaining the core ideas of promoting the well-being of all people equally.

However, the Beveridge Report was criticised for the sustainability of the plan and the cost of implementing it in the post-war economic recovery and the lack of clarity about the funding mechanisms. Particular attention was paid to the level of government intervention proposed in the report. It was suggested that there was not enough support for personal savings and private pensions, as people would become dependent on the state. In this sense, the proposed level of government intervention is indeed excessive.

On the other hand, there is the Bismarckian welfare system, represented by Otto von Bismarck (1815-1898) in Germany in the 1880s. Otto von Bismarck, sometimes referred to as the 'founder of modern pension thinking' or perhaps more famously as the 'Iron Chancellor', was a political figure best known for his role in the unification of Germany. Essentially, the key features of the Bismarckian model of public social welfare are: benefits including health insurance, old age pensions, unemployment benefits, compulsory contributions by working people and their employers. This system has also been criticised, and some of the reasons for this are the following: certain groups of people who weren't in standard employment arrangements were excluded from this plan; people with higher incomes receive more contributions because the contributions are calculated as a percentage of income, which means that this category of people receives more than they need.

Countries with the Bismarck model today include Germany, Japan, Austria, France, Belgium and the Czech Republic.

Considering the similarities and differences between the Beveridgean and Bismarckian systems, there are some important conclusions to be discussed, which will only be briefly done in this book. Both systems develop the idea of the state providing people with indispensable means, while at the same time paying particular attention to the various social risks that individuals may face, and therefore providing them with adequate security in these situations through the measures announced.

On the other hand, there are differences. With regard to the financing of the schemes, the Beveridge Report focuses on general taxation, whereas Bismarck proposes compulsory contributions from workers and their employers. This is evident from the previous elaboration of these two systems, since the Bismarckian system is an occupational scheme, whereas the Beveridgean system is less selective - the same for everyone. In this respect, the Bismarckian system relies partly on employers' associations, whereas the Beveridgean system relies entirely on the state. I note here that these differences are similar to those between the first and second pillars.

It should be noted that the Beveridgean system is sometimes referred to in the literature as the continental system, while the Bismarckian system can be called the Anglo-Saxon system. I can see that the pension systems used in the past were appropriate for the time in which they were invented. However, one of the main problems that pushes us towards reforms is that these systems haven't adapted to 'trends' such as increasing life expectancy, earlier retirement, and international labour migration. One of the reasons given by the World Bank for changing and

adapting system designs is 'weaknesses in the governance and administration of existing pension systems'.[46]

2.2. General aspects of the Dutch pension system

Now let's take a look at the Dutch occupational pension system today. For a description of the current Dutch system, I refer to other studies.[47] Here, it is important to mention that the Netherlands currently has two main pension schemes: the Defined Benefit scheme (DB scheme) and the Defined Contribution scheme (DC scheme).[48]

In a Defined Benefit scheme the benefit/outcome is fixed/defined, meaning that it is specified exactly how much income working people can expect in their retirement. That amount depends on the time one person spent working and the contribution they paid during that time. In the Netherlands, in principle, the outcome is 70% of someone's average wage.

The problem arises with the rise of inflation every year. Especially in these times of turmoil, with the war in Europe and the consequences of COVID-19, money is rapidly losing its value over time. This problem is partly solved – if pension entitlements are adjusted every year in line with inflation or wage increases in the sector - but if the financial situation of the pension fund is not sufficient to make these adjustments, they won't be made (conditional indexation).

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[46] The World Bank, 'The World Bank Pension Conceptual Framework' (2008), Economics Research, World Bank Group.

[47] H. van Meerten, A.J. van de Griend, 'Reforming the pension system: degressive accrual in defined benefit agreements and flat premiums in defined contribution agreements', *SEW* 2017/74, issue 5, p. 190.

[48] Idem.

If this is the case, can it be argued that the benefit is really defined if pensioners cannot be sure of the level of the outcome? Pensioners can only be sure of the amount of the outcome if there is no 'perturbation' throughout the period - otherwise there is always uncertainty. Under these conditions, the question that needs to be answered: is there then a real difference between DB and DC schemes in the above situation?

It is clear that there is a difference in theory, but does the answer remain the same when all the problems considered that can arise in reality?

The government can cover the difference between the amount pensioners were guaranteed and the amount the pension fund can actually provide. That's one of the possible solutions to the problem, and some countries use this method, but the Netherlands is not one of them.

It's already been mentioned that the World Bank mentions the weaknesses in the management of pension systems. In their article "The 'crisis' in defined benefit corporate pension liabilities", Clark and Monk state that "some of the dangers of DB pension liabilities were known decades before the pension crisis".[49]

The examples they give are interesting. I've already mentioned that in some countries today, when inflation rises significantly, the government covers the loss to the pension fund by paying the difference to the pensioners, which was certainly not the case before the 1970s, when pensioners demanded indexation. At that time, some sustainable solutions were offered, but they were not applied and the problem was allowed to persist.

[49] G. Clark, A. Monk, 'The 'crisis' in defined benefit corporate pension liabilities Part I: Scope of the problem', *Pensions: An Internation Journal*, 12, 43-54 (2006).

Another problem is underfunded DB pension schemes. Underfunding occurs when a pension scheme has insufficient assets to meet its future payment obligations to beneficiaries. The reason why this cannot prima facie happen in 'pure' DC schemes is that in these schemes the risk is borne by the employee. In a DB scheme, on the other hand, the investment risk is borne by the employer, because the employer is obliged to pay a defined amount to the pensioners, and even if the pension fund suffers investment losses, the obligation must be met.

There is also the issue of intergenerational equity. The idea behind intergenerational fairness is that each generation should receive a fair and sustainable level of support in retirement, which is fundamental. At the same time, future generations shouldn't be burdened with excessive costs. Contributions are paid by working people and it is from these contributions that pensioners receive their pension benefits, which means that the contributions paid are not directly linked to the individual. Intergenerational fairness aims to balance contributions and benefits between generations.

Returning to the issue of underfunding, there are a number of reasons why assets may be underfunded. One of them is investment returns - in order to meet its obligations, the pension fund turns to investments with the idea of generating income for the fund. These investments should be low-risk, diversified, follow a carefully crafted investment strategy. The investment is bad if the returns generated are negative or lower than expected. Other reasons may be related to the fact that pensioners are living much longer than in the past, so the fund has to pay benefits for a longer period of time; or poor decision making and inadequate monitoring by the fund management. In conclusion, the financial health of a pension fund is crucial

and requires special attention from the fund's management in order to identify potential problems early and to address them in a timely manner.

One of the advantages of DB schemes is predictability, since the important factors are the number of years worked and the salary received over the years - people can easily calculate the amount that will be guaranteed for each of them after retirement and can count on that amount (in most cases); this system brings ‘less risk’ from the people's perspective, which is in line with the widespread risk aversion among consumers and people in general, meaning that more people would choose this defined benefit system rather than defined contribution, although the difference in reality is questionable; employees don't have to make contributions, since all contributions are covered by the employer. One of the features of the old Dutch system is rigid flexibility, as stated by Clark and Monk.[50]

As mentioned earlier, in a DB scheme the risk bearer is a plan sponsor – employer or group of employers that offers a retirement plan as a benefit to employees. Meaning that if the fund faces period of disorder, everyone will contribute to the recovery of the fund irrespective to their will to contribute. In those periods, indexation can be limited. Indexation refers to modification of pension benefit in correspondence to inflation. The idea is that the pension benefit ensures the same purchasing power over the time considering inflation, meaning that with the rise of inflation the pension benefit will be corrected accordingly. However, limited indexation means that those adjustments can be reduced. The decision about limiting indexation should be carefully made by the legislative authority.

[50] Clark, op. cit.

A word on compulsory participation. Europeans do not save enough for their retirement. There are many reasons for this. According to a survey by Insurance Europe, 30% of people said they 'could not afford it', some of the other reasons are the negative impact of COVID-19, lack of transparency and personal circumstances. It was interesting to note that 83% of respondents 'preferred investment security to performance'. Furthermore, this is the justification for compulsory membership of pension schemes. The idea is to force people to save, which theoretically means that compulsory membership offers people some kind of protection. Compulsory participation ensures uniformity within a given sector. Some of the advantages of compulsory participation are cost savings through economies of scale, elimination of competition between employers, and identical pension arrangements for all employees within a given sector and contribution to assets in the Netherlands.[51]

However, the reality is more diverse.

Furthermore, the Netherlands has the so-called ‘large compulsory membership’. This refers to the mandatory participation in an industry pension fund on the basis of the Act on Mandatory Participation in an Industry Pension Fund 2000 (Wet Bpf 2000).[52] In other words, large compulsory membership was established by the Bpf Act.[53] In addition to that, according to the Bpf Act, the employers can request the Ministry of Social Affairs and Employment to declare mandatory participation if they cover at least 60% of employees within a certain sector. In the Netherlands the

[51] Van Meerten, Schmidt, op cit.

[52] E. Lutjens, *Mr C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht (Handbook on the practice of Dutch civil law). 7. Special Agreements. Part XI. Pension*, Deventer: Wolters Kluwer 2019, p.295.

[53] Van Meerten, Schmidt, *EJSS*, op cit.

covered working population is around 90%, so participation is obligatory, since this applies to all employers and employees regardless of their will to participate.

The BPF Act applies to industrial sectors, while the Mandatory Professional Pension Schemes Act (2006) applies to professions such as dentistry, veterinary medicine, midwifery and independent artists.[54] This Act gives people the opportunity to choose a provider from another member state, which isn't given to industrial workers who fall within the scope of the Bpf law.

In the Netherlands, state pension Regulation focuses mainly on the second pillar (fully-funded occupational pension schemes), but it covers all three pillars. The 'Short introduction to the pension system in the Netherlands' states that 'more than 91% of employees have a supplementary pension in the second pillar in addition to the AOW'.'[55]

Although the system is being radically changed, at least on the surface, some of its foundations remain intact, such as the large compulsory membership (see below). The WTP provides for a number of important changes to existing legislation, such as the Pensions Act (*Pensioenwet*) and the Mandatory Occupational Pensions Act (*Wet verplichte beroepspensioenregeling*). The PW initiates a major transformation of the current system, which will create the necessary legal, actuarial, IT and economic challenges.

[54] H. van Meerten, *EU Pension Law* (Amsterdam University Press B.V.), Amsterdam, 2019.

[55]'Questionnaire The Netherlands' in Peer Review on Pension Information, Spain 2013 (Madrid, 02-03 July 2013).

In my opinion, the most important change is the so-called 'transfer' of the already built up 'old' pension schemes into the new system, in Dutch: 'invaren'. The term 'invaren' means the 'transformation of acquired pension rights and entitlements into rights of a different, conditional nature' (conversion). Different types of conversion can be distinguished: horizontal, vertical, contractual and regulatory, or a combination of these.

Since the WTP, any pension scheme can be agreed for retirement must fall within the legal framework of one of the forms of the new DC agreement (see below).[56] This means that a DB agreement, in which the pension is built up in the form of (wage-related) annual pension entitlements or in the form of a guaranteed pension capital on the retirement date, will no longer be recognised as a statutory pension agreement and will therefore no longer be tax-facilitated.

In other words, all existing defined benefit agreements[57] – where the amount is in principle, at least de iure, fixed – will disappear and be transformed into defined contribution agreements, where only the amount is fixed, but not the outcome. Ultimately, the amount of the pension will depend – even more than is currently the case – on the pension contributions paid, the returns achieved, developments in the financial markets and life expectancy.[58]

Financial ups and downs can be divided among the members and the pensioners. The provides for different variants of DC schemes, namely:

[56] EM, p. 15-16.

[57] Still by far the most common figure.

[58] EM, p. 24.

i) the solidarity contribution scheme;

ii) the flexible contribution scheme;

iii) the contribution capital scheme.

In the following paragraphs, the first two schemes that pension funds can offer in the new system are briefly discussed: the 'solidarity' and the 'flexible' DC scheme.[59] I will close this section with a look at the adjusted financial assessment framework during the transition period, i.e., the 'transition FTK'.

2.3. The solidarity contribution scheme[60]

Article 1 of the Act defines this arrangement as follows:

'Solidary contribution scheme: a contribution scheme where the contribution is invested collectively, where the results are, in any event, allocated by age cohorts and where the assets intended for pension payments are used to finance a variable payment during the payment phase.'[61]

This defined contribution scheme is characterised mainly by its supposedly collective aspects in both the accrual and benefit phase. There is one collective investment policy with which the financial ups and downs are shared within the collective. This contribution scheme was developed from the desire to combine a personal and at the same time a solidarity-based pension.[62] The returns achieved are allocated to the

[59] 'Contracts for new system to be renamed', pensioenpro.nl, 17 September 2021.

[60] Based on: H. van Meerten, S.L. Vlastuin, *SEW*, op. cit.

[61] Own translation.

[62] D. Boeijen, 'Het nieuwe pensioencontract'(The new pension contract), *PensioenActualiteiten* 2021, p. 14.

participants by means of fixed allocation rules. This makes the role of the social partners in this scheme significant. Participants and pensioners have - administratively, not legally[63] - a personal pension capital, and they also participate in a form of risk sharing.[64] The requirement of 'one financial entity', where pension schemes do not form a separate legal asset, remains in place with pension funds. Article 123 PW, which stipulates this, is not amended in the legislation.

The so-called 'solidarity reserve' - a kind of buffer of up to 15% of the fund assets - is part of this solidarity contribution scheme.[65] This means that the collective capital of the pension fund consists of the personal pension assets and the solidarity reserve. This reserve can be used, for example, to share risks with future participants. This solidarity reserve - which, by the way, is highly questionable[66] - is perhaps the reason for speaking of a 'solidarity' contribution scheme. In anticipation of the EU-law bottlenecks in the envisaged pension system that will be further elaborated on in Section 3, the following was stated during a seminar at Utrecht University:

'Borsjé wonders whether this is sufficient under European law for fulfilling the 'essential social function' of pension funds. He himself values this 15 per cent as

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[63] C.J. Groffen, R.H. Maatman , A. Steneker, 'Ringfencing, separated assets and the APF', *Tijdschrift voor Pensioenvraagstukken* 2017/19, p. 3; S.N. Hooghiemstra , H. van Meerten, 'Advancing insight: abolish pension custodian for premium pension institutions', *PensioenMagazine* 2018/6 .

[64] Idem.

[65] EM, p. 40.

[66] Netspar, a pension thinktank, writes that three of the four objectives (including sharing certain risks) of the solidarity reserve are not being met: S. van Bilsen, R. Mehlkopf , A. Pelsser, *The benefits of the solidarity reserve unravelled* (Netspar Industry Series, design paper 186), 2021.

very 'meager' but does not dare to say whether the Court of Justice might be satisfied with it.'[67]

The essential social function that compulsory industry-wide pension funds fulfil in the Dutch pension system was reason for the Court of Justice in the *Albany judgments*[68] to deem compulsory Regulation not to be in conflict with the TFEU. The solidarity reserve, among other things, must fulfill this function in the new Dutch pension system. The question is, therefore, what value can be assigned to this 15%. The 'essential social function' of pension funds is discussed in more detail below. Whatever the 'added value' of the solidarity reserve may or may not be, the characteristic of a contribution scheme is by definition that the outcome is uncertain. Many mandatory pension funds and trade unions have already indicated their preference for this contribution scheme,[69] while certain trade unions previously referred to this contribution scheme as a 'casino pension'.[70] Last but not least, this scheme seems to work only if the choice is made for conversion.[71] However, this option is not without its problems under EU law (see below).

[67] C. Jukema, 'Is the large compulsory tenable?: 'I know that I don't know now, but I knew it before', *PensioenMagazine* 2021/153.

[68] C-67/96, C-115/97-C117/97, C-219/97.

[69] 'CNV and VCP also want decentralised choice for the new contract', pensioenpro.nl, 5 May 2021.

[70] 'Members FNV allies reject 'casino pension', vvponline.nl, 16 August 2011.

[71] A. Joseph, 'Three life hacks for the solidarity contract', *Pension Governance , Management* 2022, vol. 1.

2.4 The flexible contribution scheme

The flexible contribution scheme is defined in the Act as follows:

'Flexible contribution scheme: a contribution scheme where the contribution is invested individually and where the capital resulting from the contribution is used, from the retirement date, to fund a variable benefit or to purchase a defined benefit'.[72]

This DC scheme has been possible since 2016 through the Act on Improved Contribution Schemes.[73] However, mandatory industry pension funds could not implement this scheme because this scheme does not have an average premium. Currently, industry pension funds are obliged to work with an average premium.[74] This DC scheme is characterised by a separate accrual and benefit phase. On retirement date, the individually accrued pension capital is converted into lifelong pension benefits.[75] At that moment, the participant can choose for a fixed (i.e., not varying in amount) or a variable pension benefit. If the member chooses a variable payment, part of the built-up pension capital is 'reinvested' in the payment phase. In the accrual phase, the member invests on the basis of a so-called 'life cycle'.

[72] Own translation.

[73] Act of 23 June 2016 amending the Pensions Act, the Mandatory Professional Pension Schemes Act and the Wage Tax Act 1964 in connection with the improvement of premium schemes (*Bulletin of Acts and Decrees* 2016, 248).

[74] After all, Article 8 of the Wet Bpf 2000 states: 'The contribution owed by or for the participants is the same for all participants or amounts to the same percentage of the salary or of the part of the salary taken into account for the pension calculation, on the understanding that different contributions may be determined for different forms of pension and for different pension schemes'.

[75] EM, p. 24.

The member's risk profile is determined by his or her age; the older the member is, the lower the investment risk. The investment risk therefore lies with the participant and a participant can usually choose between different investment profiles. The returns achieved are, in principle, immediately processed in the individual pension assets.[76]

Article 123 of the PW stipulates that if industry pension funds execute several pension schemes, these pension schemes must form a financial whole. This is the so-called ‘ringfencing ban’, which prevents these pension funds from holding separate assets. Since other Dutch pension entities (PPIs, insurers, non-compulsory pension funds) - other than the compulsory industry-wide pension funds in the second pillar - are able to largely ring-fence,[77] I expect that these administrators will opt for this scheme because they find it easier to explain to the individual.

2.5 Transition – FTK

The 'Financial Assessment Framework' (FTK) for pension funds will be 'temporarily' adjusted during the transition phase to the new system, the so-called 'transition FTK'. In short, a lightened regime will be applied to the requirements regarding defined benefit agreements. Also, the requirements for when a fund may index will be lowered (from 110% to 105%).[78] The condition for applying the transitional FTK is that a pension fund expects to use conversion, whereby a declaration of intent

[76] EM, p. 20.

[77] Unless the final legislation again introduces 'buffers' that cannot - in a legal sense - be separated from the participant's pension assets.

[78] Draft decision to amend the Financial Assessment Framework for Pension Funds Decree in connection with supplementation due to intended transition of 30 March 2022, p. 5.

suffices. The form of this declaration of intent is entirely free.[79] Previously, pension funds had to have 'the intention' to 'use conversion of existing pensions' and one of the requirements was that the fund had to submit a net profit calculation to DNB in the conversion-plan'.[80] This is no longer necessary and the requirements for using the transitional FTK have been relaxed further.[81]

The question of whether this is possible under EU law is questionable for the following reasons. First, the government argues that European laws and regulations leave room for an adjusted FTK if this is developed with a view to the transition to a new pension system.[82] The government refers in the explanatory memorandum to IORP II and states:

'The government considers the (temporary) derogation from the (minimum) required capital justified because of the starting point that the transition FTK is aimed at achieving a balanced transition to the new pension system. (...). The combination of the necessity of these adjustments within the framework of the system revision and the requirement to recover to the funding level required for the transition, ensures that the purpose and scope of Articles 14 to 16 of the IORP II Directive are still met'.[83]

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[79] 'Cabinet gives funds freedom to justify earlier indexation', pensioenpro.nl 4 April 2022.
[80] *Parliamentary Papers II* 2021/22, 32043, no. 572, p.

[81] Draft decision to amend the Decree on the Financial Assessment Framework for Pension Funds in connection with indexation due to intended transition of 30 March 2022, p. 6.

[82] EM, p. 51.

[83] EM, p. 51.

The government believes that the 'purpose and scope' of Article 14-16 IORP II[84] are met, in order to be able to continue to operate pension schemes now and in the future. What this assumption is based on is completely unclear. According to article 14 IORP II, the recovery plan must cover a 'short' period. Of course, what is 'short'? Arnot writes:

'In principle, this period could, say, exceed one year; it should be sufficiently long to enable a realistic recovery plan to be effective.'[85]

This transition FTK seems to be valid for years (meanwhile already extended to 2027 or maybe even longer).

Perhaps more importantly, the IORP I and II (and the 'legislative history') do not mention a 'system revision' or a 'necessary future system' that would justify deviating from these articles.[86] There is clearly no legal guarantee as to whether funds will actually be funded. Therefore, it could theoretically be the case that this alleviated regime is used for years, but that the previously expressed 'declaration of intent' is waived. This possibility is not reflected in *any* way in Article 14 IORP II.

Moreover, the recovery system laid down in the IORP II seems to be in line with restoring the amount of suitable assets to fully cover the technical provisions,

[84] These articles stipulate that pension institutions must maintain certain buffers, and they set out the conditions that a recovery plan must fulfil in order to achieve the desired solvency.

[85] S. Arnot, *Directive 2003/41/EC on the Activities and Supervision of Institutions for Occupational Retirement Provisions*, European Federation for Retirement Provisions, October 2004.

[86] I have studied the documents relating to the establishment of the IORP I/II, the opinions of other bodies, such as the European Parliament and the Economic Social Committee.

whereas the transitional FTK involves a reduction of the pension liabilities on the pension fund's balance sheet. Therefore it is entirely inappropriate to give the transitional FTK the character of a 'recovery plan' within the meaning of IORP II. The article in the IORP II simply does not refer to this system revision. The second reason why this is dubious from an EU law perspective is the following. The 'large' compulsory Dutch pension schemes are mostly DB schemes.[87] These benefit agreements are a translation of DB schemes in the IORP II. Kuipers writes:[88]

'The Netherlands has implemented Article 17[89] in the Pensions Act, which is reflected in the minimum capital requirement of about 105%. However, Dutch pension funds do not bear the risks themselves at all. If things are not going well, pension funds can increase the premium that employers and employees jointly pay, temporarily not index (fully) the pensions to wage or price developments or, in extreme cases, even reduce the pension entitlements or adjust the scheme. The risks are therefore ultimately shared by employers and employees.'

In other words, it can be argued that already now, with the Dutch 'DB', the participants bear the risks.[90] However, IORP II stipulates that benefit agreements must 'guarantee', and pension funds do not do that, it can be argued. Article 15 IORP II reads:

[87] Article 1 and 10 PW. See the implementation table of the IORP I.

[88] B. Kuipers, 'Solvency II unsuitable for pension funds', *Tijdschrift voor Pensioenvraagstukken* 2009/8, issue 2.

[89] Now: Article 15 IORP II.

[90] See also: H. van Meerten , P. Bennett, 'How do CDC Schemes Qualify Under the IORP II Directive?', *VUZF Review* 2019, vol. 2.

'The home Member State shall ensure that IORPs [pension institutions, HvM], which operate pension schemes and which themselves, and not the sponsoring undertakings, underwrite cover against biometric risks or guarantee a return on investment or a given level of benefits, hold on a permanent basis additional assets above the technical provisions to serve as a buffer.'

However, the Dutch courts held that the Netherlands had properly transposed IORP II, partly because 'it is not disputed that there are currently no pension funds in the Netherlands that only execute contribution agreements in which no biometric risks are insured'.[91]

Be that as it may, the transitional FTK means that the requirements for DC schemes will (largely) apply to DB schemes. In doing so, the Netherlands appears to be acting contrary to the EU Directive, which (of course) has completely different requirements for both schemes. After all, if the requirements - admittedly minimum requirements - that the IORP II contains for DB are (temporarily) made applicable to DC, this would seem to be an improper mixing of two different legal contracts.

Having said that, with the WTP the legislator has not introduced an additional duty of care for pension funds with regard to the transition plan to the new pension system. The legislator has deliberately chosen to place the primary responsibility for this on the social partners. That does not mean, however, that the pension fund has no duty of care during the transition.[92] The Agenda 2022 of the Netherlands

[91] Court The Hague, 10 February 2021, ECLI:NL:RBDHA:2021:944. Upheld before the Supreme Court, 9 February 2024, https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2024:194.

[92] I. Vermeeren-Keijzers, 'Duty of care and the Pension Agreement: first step in the right direction', *VBA Journal,* 2021/148, p. 26.

Authority for the Financial Markets (AFM) shows, among other things, that the AFM will focus in the coming years on increased supervision of the pension sector, including careful and realistic communication by pension providers.[93]

Also, one of the many reasons for the transition are the rising interest rates in 2023. Concerning that, 'Investment and Pensions Europe' reported that 'The switch to DC was seen as an appropriate answer to the low-interest rate environment that had battered pension funds' funding ratios. Pension funds were richer than ever, but could not index pensions because their liabilities had risen even faster than assets under management.'[94] In that report is also stated that pension funds are preparing for the transition by designing new administrative systems and measuring risk appetite of pensioners.[95] The members' preferences and acceptance of reform should be considered during the reform process.

To conclude, in the next Chapter I will successively discuss EU law in more specific terms: European competition law and European property law as laid down in Article 17 of the EU Charter of Fundamental Rights,[96] the pension participant as a consumer,

[93] AFM Agenda 2022: climate, investor protection, new pension system and expanded supervision of audit firm', afm.nl 13 January 2022, p. 13-14.

[94]T. Hoekstra, 'Netherlands: Pension Overhaul Nears Another Milestone' (April 2023) Magaz ine, source.

[95] Idem.

[96] I will suffice with a few remarks, because this has already been extensively discussed in: H. van Meerten, J.J.M. Sluijs, 'Dutch pension reform not without Union law risks. Case C-223/19, YS/NK AG', *SEW,* 2021/88.

pension funds as internal market players, the SFDR Regulation and reflex effect, and the cost transparency rules.

3. EU law and the Dutch pension-transition[97]

3.1. General

Already has been written a great deal about the tenability of the compulsory membership to a Dutch IORP, the European property law in combination with conversion and the infringement on the free movement of services. Therefore, I suffice here with some remarks. For more information on these subjects, I refer to the literature in the footnote.[98]

The tenability of the large compulsory provision in the light of European competition law has already been the subject of much debate in the literature. The Ministry of Social Affairs and Employment has advised on this issue in early 2020.[99] Large-scale mandatory participation provisions ensure that companies cannot freely participate in

[97] Parts of these Chapters appeared – in somewhat different form – in Dutch *SEW*, H. van Meerten, S.L. Vlastuin, op.cit.

[98] H. van Meerten, S.L. Vlastuin, 'Is compulsory membership still tenable?', *PensioenActualiteiten* 2021, pp. 71-77; M.J.C.M. van der Poel, *Tenability of mandatory industry pension funds and occupational pension schemes.. Review of competition law and the free movement of services and establishment,* Amsterdam: VU Expertise Centre for Pension Law 2013; H. van Meerten , P. Borsjé, 'Pension Rights and Entitlement Conversion ('*Invaren*'): Lessons from a Dutch Perspective with Regard to the Implications of the EU Charter', *European Journal of Social Security* (18) 2016, afl. 1; M. Heemskerk , J.R.C. Tangelder, 'Changing pensions: stuck between property rights veto right?', *PensioenMagazine* 2016/150; H. van Meerten, 'Free movement of services for insurers and pension institutions: Solvency II basic and the obligation to provide services', *Tijdschrift voor Financieel Recht* 2012, 7/8; R.H. Maatman , J. den Breems, 'Compulsory membership tenable by implementation of pension agreement ', *Tijdschrift voor Pensioenvraagstukken* 2019/41, 5; E. Lutjens, *Analysis of compulsory membership after pension agreement tenable,* Amsterdam: VU Expertisecentrum Pensioenrecht 2020.

[99] E. Lutjens, *Analysis of compulsory membership after pension agreement tenable* Amsterdam: VU Expertise Centre Pension Law 2020.

the market of industry-wide pension funds. In the old *Albany judgments* cited above,[100] the Court of Justice ruled that the justification for the infringement of European competition law must be found in the degree of solidarity, including the extent to which risks are shared. The DC schemes in the envisaged pension system may not be able to pass the test of European competition law; this applies especially to the flexible contribution scheme due to the individual character of the scheme in the accrual phase. Also, the fact that it concerns 'optional' solidarity elements makes it uncertain whether there is sufficient solidarity in the scheme. This is arguably to be partly overcome by making a risk-sharing reserve possible in a flexible contribution scheme; a reserve filled from the premiums.[101] A difference with the solidarity reserve is that the risk-sharing reserve cannot be filled with excess returns and has an optional character. The latter leads to a permanent question mark over the degree of solidarity in this scheme.

Much has also been written in literature about European property law in combination with 'conversion'.[102] In the new pension system, the accrued pension entitlements will have to be 'imported' into the new pension contract. A very relevant question is to what extent this is possible and what the legal risks are. Property protection under European law is described in Article 1 First Protocol ECHR and Article 17 Charter

[100] C-67/96, C-115/97-C117/97, C-219/97.

[101] EM, p. 44.

[102] H. van Meerten , P. Borsjé, 'Pension Rights and Entitlement Conversion ('*Invaren*'): Lessons from a Dutch Perspective with Regard to the Implications of the EU Charter', *European Journal of Social Security* (18) 2016, issue 1; M. Heemskerk , J.R.C. Tangelder, 'Changing pensions: stuck between property rights veto right?', *PensioenMagazine* 2016/150; M.J.C.M. van der Poel, 'Property rights and the pension agreement', *Tijdschrift voor Pensioenvraagstukken* 2019/40, p. 5; H. van Meerten, J.J.M. Sluijs, 'Dutch pension reform not without EU-law risks. Case C-223/19, YS/NK AG', *SEW*, 2021/88.

of Fundamental Rights of the EU). In the *YS case,* the ECJ ruled that pension entitlements can be property rights and that citizens have a direct recourse to Article 17 of the Charter.[103] Justification for an infringement of the right to property requires, inter alia, that the essence of the rights and freedoms be respected. Whether the essential content of pension rights is respected is not a given. After all, in my opinion, conversion affects the essential content, i.e. the essential nature of the pension contract.[104] The question is whether this infringement is proportionate. Are there no other alternatives?[105] Lutjens is positive: according to him, the infringement of the property right does not depend on the change in the nature of the pension scheme, but on whether the agreed amount of benefit substantially changes. If this is the case, compensation must be offered to remain within the limits of Article 17 of the Charter.[106] The final word on this has not yet been said. In the recently published advice of the Advisory Division of the Council of State, property law in the event of conversion is at least briefly mentioned. In my opinion it is too brief, among other things because Article 17 of the Charter - wrongly so - is not mentioned at all.[107]

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[103] C-223/19. Tangelder writes: 'Secondly, I have observed that the liability risk for industry-wide pension funds on the basis of Article 17 Charter has been estimated low in the literature. This estimate is usually based on case law of the ECHR on Article 1 EP ECHR. The differences between the ECHR and the Charter have been overlooked. See: J.C.R. Tangelder, 'Obligatory industry-wide pension fund liable for violation of property rights in the event of a transition', *Tijdschrift voor Pensioenvraagstukken*, 2022/3, issue 1.

[104] H. van Meerten, A. Wouters, J. van Zanden, 'Developments in pension country: Europe is stirring its tail', *PensioenMagazine* 2021/3.

[105] H. van Meerten, 'Conversion: the Pension Custodian', *Pension and Practice* 2021, vol. 4.

[106] E. Lutjens, 'Invaren pensioen: de relevantie van recht op eigendom', *Tijdschrift voor Arbeidsrecht in Context* 2021, issue 1, p. 4.

[107] Further report of the Ministry of Social Affairs and Employment on the bill to amend the Act on Future Pensions of 30 March 2022, p. 22.

Restrictions on the free movement of services are prohibited under Article 56 TFEU. The TFEU and case law provide exceptions in which case an infringement is justified. As I have previously indicated, I do not believe it is tenable under EU law to make a distinction between domestic and foreign (in a Member State) pension providers.[108] The compulsory membership ensures that foreign pension providers can hardly enter the Dutch pension market. The direct distinction on the basis of nationality cannot be justified under the current TFEU or in case law. A justification in this respect can only be found[109] in Article 52 TFEU, namely on grounds of public policy, public security and public health. These grounds do not seem to be able to justify the direct distinction mentioned above. They are so 'strict' that an appeal on these grounds will hardly be honoured, unless situations such as 'football hooligans' at the border or the outbreak of a deadly disease occur.[110] It could be argued that the Court could also find a justification in Article 106(2) TFEU, namely in services of general economic interest. In that case, the Court would look at whether there is a service of general economic interest, whether that task cannot be performed at 'acceptable cost', and whether the obligation is necessary to achieve the social objective.[111] In my opinion, however, this test does not come into play because it is

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[108] H. van Meerten , S.L. Vlastuin, 'Is compulsory membership still tenable?', *PensioenActualiteiten* 2021, pp. 71-77; H. van Meerten , E. Schmidt, 'Compulsory membership of pension schemes and the free movement of services in the EU', *European Journal of Social Security* (19) 2017, issue 2, pp. 125-127.

[109] It is also referred to as Article 106 TFEU. However, this article cannot be a justification for direct discrimination. Extensively argued in: S.L. Vlastuin, *Houdbaarheidsdatum verplichtstelling bedrijfstakpensioenfondsen verlopen? (Expiration date for mandatory industry-wide pension funds expired?)* (Master's thesis University of Utrecht), 2020.

[110] R. Barents , L.J. Brinkhorst, *Grondlijnen van Europees recht (Foundations for European law)*, Deventer: Kluwer 2012.

[111] Idem.

based on an obstacle to the free provision of services, whereas it concerns direct discrimination.[112] If this were the case, the (direct) distinction could fail on the grounds of proportionality.

To what extent is this distinction proportionate? In the aforementioned seminar at Utrecht University, Van de Gronden also expressed his strong doubts about the distinction made between domestic providers and providers from another Member State in the context of the proportionality principle. The realisation of the objective of 'a good pension provision for everyone' is also possible with foreign providers, possibly with extra supervision by the Dutch state. Peters wonders whether the current system is consistent with European law.[113]

3.2 The pensioner as consumer

In the following, I would like to zoom in on the element of consumer protection during the transition period to the new system, that is, the period from 2023 up to 2028 or even longer. The legislation pays insufficient or no attention to European consumer law and the protection it provides in this so-called transition phase to the new pension system. What is more, the pension participant in Dutch mandatory pension schemes - which often have the de iure character of a defined benefit agreement - is not considered a consumer at all.[114] What qualifies as a 'consumer' at

[112] Gruyters writes: ‘In our view, Article 106(2) TFEU does not apply as a general justification in free movement law, and cannot be invoked as a reliable justification in terms of the free provision of services’. J. Gruyters, 'The internal market for supplementary pensions: A long and winding road', *Maastricht Journal of European and Comparative Law,* April 2022, 1-24.

[113] C. Jukema, 'Is the large compulsory tenable?: ‘I know that I don't know now, but I knew it before', *PensioenMagazine* 2021/153.

[114] H. van Meerten, ‘The end of progressive scales?’, *PensioenMagazine* 2016/107, p. 35-38.

EU level is difficult to define. I refer to a standard work by Hondius.[115] I formulate an own definition here, based on EU legislation in particular in EU consumer law and EU financial law. This definition reads as follows: *'an individual customer of a European financial service[116] whereby this customer bears the risks of the financial service to a predominant degree himself*'.[117]

There is ample evidence to support the proposition that pension participants are consumers. Communication during the transitional period therefore requires, in my view, an entirely different approach. If the risk in pension schemes is largely - if not entirely - placed with the individual, or the collective of individuals, this deserves clear communication.[118] This is often lacking in the current DB schemes and (therefore) also in the transitional FTK. Certain information obligations for these schemes, which must apply under IORP II, are even exempt from an information obligation in the Pensions Act. Article 37(1)(g) IORP II - which requires general information to be provided about a pension scheme - states that participants and

[115] E.H. Hondius, 'The Notion of Consumer: European Union versus Member States', *Sydney Law Review* (28) 2006, para. 1.

[116] Defined in Directive 2002/65/EC as follows in Article 2: 'any service of a banking, credit, insurance, individual pension, investment or payment nature'; Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (*OJ* 2002 L 271/16-24). Please note that this definition refers to 'individual' pensions. In my view, this also includes collective individual pensions. See: H. van Meerten , E.S. Schmidt, *The Legal Differences between CIDC and CDC* (The Pensions Institute Discussion Paper, no. PI-1801), 2018.

[117] It can be argued that the pension holder is also a consumer within the meaning of the Solvency II Directive. See: H. van Meerten, 'The end of progressive scales?', *PensioenMagazine* 2016/107, pp. 35-38.

[118] The government agrees with this in the Explanatory Memorandum: 'The new pension system makes it more explicit that in the case of pension funds, the risk of generating an adequate pension lies with the participant', op. cit.

pensioners must be adequately informed about the terms and conditions of the pension scheme implemented, and in particular about:

'If the members bear an investment risk or are able to take investment decisions, information on the past performance of the investments of the pension scheme for at least the last five years or all the years during which the pension scheme has been operated if this is less than five years'.

However, when implementing this article, the Netherlands stated that this provision does not apply to pension agreements, because there is no investment risk of sufficient significance and (former) 'participants cannot take investment decisions'.[119] This can be regarded as (very) doubtful. For example, I already wrote in 2015 that the use of a risk-free interest rate leads to an overvaluation of the pension agreement whereby (ultimately) the risks are for the participants, as is the case with many Dutch pension schemes.[120] In other words, the investment risk is not low. They are almost entirely borne by the participant.

I would also like to point out the following aspects. The Explanatory Memorandum to IORP II states that many scheme members do not realise that their pension rights are not guaranteed or that, 'unlike *other financial contracts*, these rights can be reduced by IORPs, even if they are accrued rights'.[121] The definition of EIOPA, the EU supervisory authority for pension funds, of a defined contribution scheme is:

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[119] *Parliamentary Papers II* 2016/17, 33931, no. 20.

[120] H. van Meerten, F. Valkenburg, 'Towards a European pension directive: on holism, actuarial interest rates and pensions', *PensioenMagazine* 2015/46.

[121] Idem.

'CAs should understand DC schemes as occupational pension plans under which the plan sponsor pays fixed contributions and has no legal or constructive obligation to pay further contributions to an ongoing plan in the event of unfavourable plan experience. '[122]

It is not a risky proposition that Dutch defined benefit agreements also meet this definition (see also above).

3.3 Pension funds as internal market players

The legal basis of the IORP II is based, in particular, on the free movement provisions regarding persons and services and the ordinary legislative procedure (of Article 114 TFEU) for the establishment of a common internal market.[123] These are economic legal bases and indicate the legal treatment of IORPs by the EU legislator: as economic entities to which the free movement provisions apply in principle.[124] This is also in line with recital 32 of IORP II: IORPs are pension institutions with a social purpose that provide financial services. It makes clear that pension funds are primarily actors in the EU internal market.[125]

Article 153 TFEU on social protection (inter alia with regard to working conditions) was not chosen as the legal basis, which could also be considered in connection with

[122] Opinion on the supervision of long-term risk assessment by IORPs providing defined contribution schemes', EIOPA-BoS-21/429, 7 October 2021.

[123] P. Borsjé, H. van Meerten, 'Proposal IORP II Directive: impetus for reforming the Dutch pension system', *NtER* 2014, extract 8, p. 268.

[124] Idem.

[125] That pension funds are financial players has already been explained in: H. van Meerten, 'The Dutch pension sector and the EU: Hannibal at the gate?', *Vennootschap & Onderneming* 2012, p. 4.

the establishment of pension rights. The fact that the IORP II has not been established on the basis of Article 153 TFEU is also important for the European legislative process as the measures under Article 153 TFEU have to be adopted unanimously by the Member States, which in principle would allow a single individual Member State to block the establishment of this Directive. Article 114 TFEU, on the other hand, provides for qualified majority voting.[126]

That pension funds are internal market players is confirmed by the case law of the European Court of Justice. Internal market players are undertakings that are bound by the competition rules of the TFEU and provide services within the meaning of Article 57 of the TFEU. For example, the Court of Justice classified pension funds as undertakings that are in principle subject to internal market rules.[127] For example, in *Commission v Spain*[128], point 37, it was considered:

'It must be noted that the services offered by pension funds and insurance companies in relation to occupational pension schemes are services within the meaning of Article 57 TFEU. They are services normally provided for remuneration, the essential characteristic of which lies in the fact that it constitutes consideration for the services in question (see, by analogy, judgment in Commission v Belgium, C-296/12, EU:C:2014:24, paragraph 28).'

However, pension funds are in principle internal market players - and thus subject to the rules of free movement - bound by the competition rules of the TFEU,

[126] R. Barents, L.J. Brinkhorst, *Grondlijnen van Europees recht (Foundations European law)*, Deventer: Kluwer 2012.

[127] Idem.

[128] C-678/11.

because, according to the Court of Justice, although the granting of an exclusive right was an infringement of Article 102 TFEU, the infringement could be justified by the 'essential social function' fulfilled by pension funds.

Although the precise contours of the concept of 'solidarity' are not very sharply defined in the case law of the Court of Justice, the solidarity character in the Netherlands is based, among other things, on pension law provisions in which no risk selection is applied when participating in and determining the contribution, no direct *economic* connection exists between the contribution paid in by the participant (and employer) and the service provided by an industry-wide pension fund, with, for example, a contribution-free accrual for those unable to work and coverage for premium arrears in the event of the employer's bankruptcy.[129] The Court of Justice considered in *Albany*, recital 109:

'Such a situation would arise particularly in a case where, as in the main proceedings, the supplementary pension scheme managed exclusively by the Fund displays a high level of solidarity resulting, in particular, from the fact that contributions do not reflect the risk, from the obligation to accept all workers without a prior medical examination, the continuing accrual of pension rights despite exemption from the payment of contributions in the event of incapacity for work, the discharge by the Fund of arrears of contributions due from an employer in the event of insolvency and the indexing of the amount of pensions in order to maintain their value.'

[129] P. Borsjé, H. van Meerten, 'Proposal IORP II Directive: impetus for reforming the Dutch pension system', *NtER* 2014, 8, p. 267.

It may be asked whether the elements that justified an obligation to an industry-wide pension fund at the time are sufficient in view of (the transition period of) the pension agreement.[130]

During the seminar at Utrecht University, the *Albany judgments* were dismissed as 'old rubbish' and 'outdated',[131] of which the question is whether these criteria apply to the new pension agreement. These rulings relate to the Dutch pension situation of almost 25 years ago and may no longer do justice to the current situation. Pension indexation, for example, has been discontinued by almost all mandatory pension funds for over a decade.[132] Furthermore, the other solidarity elements – mentioned in the *Albany judgments* - can now also be operated by other second-pillar pension institutions.

3.4 Reflex action[133]

In this respect, a number of developments can be pointed out. Firstly, the 'Sustainable Finance Disclosure Regulation' (hereafter: SFDR), which obliges 'market participants' such as pension funds to provide information to participants on sustainability policy and the 'green content' of pension schemes.[134] Under the SFDR,

[130] S.L. Vlastuin, *Expiration date for compulsory membership in industry-wide pension funds expired?* (Master's thesis, Utrecht University) 2020.

[131] C. Jukema, 'Is the large compulsory tenable?: ‘I know that I don't know now, but I knew it before', *PensioenMagazine* 2021/153.

[132] Funding levels soar, but pension increases are not in the cards', *Financieel Dagblad* 1 July 2021.

[133] Derived from: H. van Meerten, ‘Reflexwerking naar het pensioenrecht’, *Pensioen en Praktijk*, 2023, 2.

[134] The SFDR is part of the EU action plan for sustainable financing.

pension schemes are regarded as financial products and pension funds as ‘financial market participants’.[135] This clearly indicates that the pension participant is a purchaser of a financial service (as already mentioned in recital 32 of the IORP II), and is therefore a ‘consumer’ according to the above definition. Moreover, recital 27 of the SFDR reads:

‘Even though this Regulation does not cover national social security schemes covered by Regulations (EC) No 883/2004 and (EC) No 987/2009, in view of the fact that Member States increasingly open up parts of the management of compulsory pension schemes within their social security systems to financial market participants or other entities under private law, and as such schemes are exposed to sustainability risks and might consider adverse sustainability impacts, promote environmental or social characteristics or pursue sustainable investment, Member States should have the option to apply this Regulation with regard to such schemes in order to mitigate information asymmetries. '

This last quoted sentence raises an interesting parallel with the so-called 'usury policy cases', where the Supreme Court recently gave answers in preliminary proceedings pursuant to article 392 of the Dutch Code of Civil Procedure.[136] These cases concern investment policies and the information obligations of insurers towards their policyholders resulting from them. Policyholders have been complaining for years that insurers have not been transparent about the costs and risks associated with these policies. The Supreme Court ruled that in addition to the

[135] Article 2 Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 concerning sustainability disclosures in the financial services sector (*OJ* 2019 L 317/1).

[136] H. van Meerten, E. Schmidt, 'The usury policy case: a matter of interpretation?', *PensioenMagazine* 2015/98; HR 11 February 2022, ECLI:NL:HR:2022:166.

information obligations that may arise from Article 31(3) of the Third Life Directive (DLR), additional information must also be provided under certain circumstances.[137] It is up to the court to assess whether obligations to provide additional information exist and if so, what they are. If these obligations exist and relate to information that (1) is clear and precise, (2) is necessary for a proper understanding of the essential elements of investment insurance, and (3) ensures sufficient legal certainty, and the insurer fails to comply with these obligations, then the policyholder may enjoy legal protection.[138]

There is also an information gap between a pension fund and a participant in pension schemes. A standard that the European court considers important is transparency. The Court has, for example, considered that a protection system against unfair terms, such as the one of Directive 93/13/EC, is based on the idea that the consumer is in a weak negotiating position compared to the seller and, moreover, has less information than the seller.[139] The fact that a participant often has no freedom of choice because he is a member of a compulsory pension fund does not make the comparison with the - briefly mentioned - usury policy cases 'wrong'. On the contrary, it could even be argued that the obligation to provide information is even greater in that case. The question with regard to pension schemes must now also be: would the participant have entered into the pension scheme if he or she had been fully aware of, for example, the costs (which sometimes amount to more than €1,000 per participant

[137] HR 11 February 2022, ECLI:NL:HR:2022:166, section 3.7.1 and 3.7.2.

[138] HR 11 February 2022, ECLI:NL:HR:2022:166, section 3.7.2 and 3.7.4.

[139] ECJ 29 April 2015 ECLI:EU:C:2015:286 (*NN/Van Leeuwen*).

per year[140]) and/or the redistribution mechanisms of the pension scheme? The Advocate General at the Supreme Court wrote in the recent usury policy case cited:

'Focusing on the NN/Van Leeuwen case, Van Meerten and Schmidt argue that it is highly likely that Van Leeuwen would not have taken out his investment insurance policy if he had known that NN would not use almost 60% of the premiums paid for investments. NN should therefore probably have foreseen that information about the high costs of the policy was an important, if not decisive, factor in Van Leeuwen's (purchase) decision.'[141]

The Rotterdam District Court handed down a judgment with potentially very far-reaching consequences for value transfers of members' pensions and possibly conversion under the Future Pensions Act (WTP).[142]

The ruling - it concerned a merger between two insurers - says that regulator DNB must ensure that participants personally are 'properly' informed when rights and obligations are transferred.

In this following parts of this Chapter, I want to discuss this case and a few more national and European cases - and legislation that will affect pension law via so-called 'reflex effect': the application of duty-of-care standards from financial law in pension law.

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[140] J. van Wensen, 'Supervisor publishes more and more data on pension funds. But it may be even more extensive', *Pension and Practice* 2018, vol. 1.

[141] Concl. A-G T. Hartlief, ECLI:NL:PHR:2021:973, footnote 255, to HR 11 February 2022, ECLI:NL:HR:2022:166 (*Woekerpolis/NN*).

[142] Rb. Rotterdam 13 February 2023 ECLI:NL:RBROT:2023:915.

Pension law was long seen as a rather isolated area of law. It was and is dominated by 'social partners'. With advancing EU legislation and the reflex effect of financial duty-of-care standards, this 'separate status' is not tenable. The time of 'solidarity' and 'collective' as justification for the exceptional position of Dutch pension funds seems to be over.

3.5. The Optas/Aegon case study

Aegon is a Dutch insurance company. The 'Optas/Aegon -saga' has a long history.[143] From late 1997 to late 2007, Optas Foundation was sole shareholder of Optas NV, an insurance group that had partly emerged from the Pension Fund for Transport and Port Companies (PVH).[144]

In 2007, Optas Foundation sold its insurance business to Aegon. Optas wanted to spend the profits from this transaction on 'arts and culture'. PVH Advocacy Foundation felt that the sale profits should go to the participants themselves.

Court proceedings followed, not all of which I will discuss.[145] I would like to point to two recent cases.

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[143] https://www.volkskrant.nl/nieuws-achtergrond/haven-wil-inzicht-in-pensioengelden~beedb739/ - kon ik niet inzien

[144] https://havenpensioen.nl/index.php/component/content/article?id=104:waarover-ging-het-conflict-met-stichting-optas 'Waarover ging het conflict met Stichting Optas', HavenPensioen.nl:2016.

[145] See, for example, 'Annual accounts procedure. Stressed assets as referred to in Article 2:18 paragraph 6 BW', *NJ* 2011/352, HR 21-01-2011, ECLI:NL:HR:2011:BN8852, m.nt. P. van Schilfgaarde and H. Beckman (Stichting BPVH/Aegon c.s.).

In late 2021, the Dutch '*College Beroep voor het Bedrijfsleven'*, CBb - the highest administrative court - ruled that policyholders to DNB's (the Dutch Central Bank) consent decision should be qualified as 'interested parties' within the meaning of the General Administrative Law Act (Awb):[146]

'Unlike DNB, the Board sees sufficient objective and present interest for the defendants in the consent decision. Aegon acknowledges that Optas' tax benefit (the corporate tax exemption) was lost as a result of the merger and confirmed at the hearing that this leads to a reduction in investment returns. DNB also took this into account in the replacement decisions. The defendants thus have a sufficiently objective and current interest.'

In early 2023, the court handed down another important judgment in the Aegon/Optas case.[147] Pursuant to Article 3:119(1) of the Financial Supervision Act (Wft), DNB instructs a life insurer to give notice of a pension transfer in the Government Gazette and in other ways to be determined by DNB. In doing so, DNB shall announce the period within which the policyholders concerned may object to the transfer in writing to DNB. Pursuant to the second paragraph of this article, DNB shall not give its consent if one fourth or more of the policyholders have opposed the intended portfolio transfer within this period.

Based on the history of the creation of Article 3:119(1) of the Wft, the court is of the opinion that 'in another manner to be determined by DNB' should be read as 'in another manner to be determined by DNB in the interests of

[146]CBB 14 December 2021 ECLI:NL:CBB:2021:1063 (r.o. 6.5)

[147] Rb. Rotterdam 13 February 2023 ECLI:NL:RBROT:2023:915.

the policyholders. It follows that DNB cannot determine entirely at its own discretion in what (other) manner the life insurer must notify the proposed portfolio transfer but must at all times keep the interests of policyholders in mind.

The court considered that by instructing the life insurers (Optas/Aegon) to announce the intended value transfer in the Government Gazette and in three national daily newspapers, DNB had 'insufficient regard for the interests of policyholders and therefore misapplied Article 3:119(1) of the Wft'.

Thus, the court considered:

'With the plaintiffs, the court finds that, to the extent that this communication has reached them at all, it has not properly informed policyholders of the proposed portfolio transfer.'

It is also noteworthy that on 24 May 2022, the Dutch 'Landsadvocaat' (the State's Lawyer) issued an opinion to the government under the WTP on stakeholder understanding.[148] The Landsadvocaat (see also above) concluded, inter alia:

'I therefore see no reason to argue on this basis that those concerned cannot be considered interested parties.'

[148] https://www.rijksoverheid.nl/documenten/kamerstukken/2022/05/16/advies-landsadvocaat-belanghebbendenbegrip-awb.

Noteworthy, because the Council of State (RvS) on the WTP on the advice of the Landsadvocaat has not been able to give an opinion on it. Reason for a member of the Senate[149] to suggest that the following question should still be referred to the RvS:

'The advice of the RvS dated 16 February 2022 (https://www.raadvanstate.nl/@127891/w12-21-0366-iii/) does not take into account that an individual participant is an interested party in DNB's decision with regard to conversion. Can the RvS - given the advice of the State Counsel and the ruling of the CBb (ECLI:NL:CBB:2021:1063)- answer the question whether conversion without an individual right of objection and the conclusion of an administrative legal action for the (former) participants is lawful against this background?'

Unfortunately, this proposal was never approved by parliament.

3.6 Reflex effect translated to pensions

Although Article 3:119 Wft thus concerns regulations from the Wft, the so-called 'reflex effect' can ensure that duty-of-care standards from financial law, such as proper information from Central Banks, such as DNB, and transparency of the contract, also apply in a merger of pension funds when a value transfer takes place. Advocate General at the Supreme Court, De Bock[150], already wrote that:

[149] https://www.eerstekamer.nl/commissievergadering/20230314_szw/verslag.

[150] HR 20 December 2019 ECLI:NL:HR:2019:2035.

'Unlike Ettema, I do not believe that the peculiar nature of pension law need preclude a certain reflex effect of duty-of-care norms from financial law.'

For a number of ongoing proceedings, such as that between a merger of *Pensioenfonds Reiswerk* and *PGB*[151], where there were reductions of almost 20%, this may be relevant.[152]

But there are a number of other relevant issues.

First, the analogy of current and future pension contracts with the 'usury policy'. For an explanation of this concept, I refer to the Supreme Court's website.[153] In the judgment, the Supreme Court considered that:

'It should then be assessed whether those obligations (i) relate to information that is clear and accurate, (ii) are necessary for a proper understanding of the essential elements of the investment insurance offered or created, and (iii) ensure sufficient legal certainty.

I often get the criticism that the 'usury policy' and the 2e pillar pension scheme are not comparable. But this comparison is not that far-fetched.[154]

[151] Author is attorney for these proceedings.

[152] Reiswerk Pensions subpoena may lead to boom in claims - Kassa - BNNVARA.

[153] https://www.hogeraad.nl/actueel/nieuwsoverzicht/2022/januari/uitspraak-hoge-raad-prejudiciele-procedure-informatieverplichtingen/.

[154] Insurance: usury policy with solutions in sight | Financial: Insurance (infonu.nl).

Moreover: the great similarity with the criteria laid down by the Supreme Court is rather misunderstood. Current pension contracts tend to be ‘DB contracts', where de iure the risks - as mentioned above - do not lie with the participants. However, de facto almost[155] all risks already lie with the participants.

At the Senate experts meeting in February 2022, actuary Agnes Joseph spoke. In this meeting, she indicated that the new DC scheme has an expected return of 9%, and a discount rate of 5%.[156] It is not too bold to call this product risky. And take note: the individual will be obliged to participate in this type of scheme run by industry pension funds in a particular sector.

Moreover, this above-mentioned Supreme Court ruling, in combination with the Optas/Aegon cases, may also have major consequences for conversion: changing and converting existing pensions to the new system. If pension funds have to personally inform the participants - who are interested parties under the Awb and therefore, in my opinion, also able to object to conversion on the basis of these rulings - of any, and sometimes very drastic, changes to their pensions, conversion will become almost impossible.

[155] Unless contracts are insured with an insurer with 99.5% security measure.... But even then, it could be argued that the members bear the risk. After all, they have a liability to the pension fund (with a 97.5% collateral measure), not the insurer.

[156] https://www.eerstekamer.nl/commissievergadering/20230221_szw/verslag.

3.7 Supervisors' and State liability

The liability of Dutch pension regulators, is limited by Article 1:25d Wft, which reads, where relevant**:**

'De Nederlandsche Bank, the members of its management board and supervisory board and its employees shall not be liable for damage caused by an act or omission in the performance of a task assigned or power granted pursuant to a statutory provision, unless such damage is to a significant extent the result of an intentional improper performance of tasks or an intentional improper exercise of powers or is to a significant extent due to gross negligence.'

The same applies to the Financial Markets Authority, according to the second paragraph of this article.

The question is whether EU law can sustain this form of exclusion of liability.[157] Busch and Keunen wrote:

'As a result, the limitation of liability of Article 1:25d Wft may become offside if the AFM or DNB have breached a European standard in the performance of their supervisory duties.'

Under EU law, Member States (including, therefore, supervisors) can be held liable for violations of EU law.

[157] D. Busch, S.A.M. Keunen, 'A broad interpretation of a limited liability for financial supervisors', Ars Aequi, 2018, 513.

I would like to point at the following.[158]

I believe that when judges of a Member State refuse to ask preliminary questions to the EU Court, this might lead to –under specific circumstances– State liability in the sense of the *Köbler* judgement (C-224/01). A recent case *Commission v. United Kingdom* (C-516/22) fuels this believe.

National last instance courts – and even lower courts, arguably[159] - are generally required to refer questions of EU law to the Court of Justice for a preliminary ruling when necessary to reach a decision.

There are two circumstances in which a national court may choose not to make a reference, known as the 'acte clair' and 'acte éclairé' situations.

The 'acte clair' situation arises when the correct application of EU law is so obvious that there is no reasonable doubt as to how the question should be resolved, provided that this is equally obvious to other courts and tribunals of last instance in Member States and the Court of Justice.

The 'acte éclairé' situation arises when the question raised is materially identical to a question that has already been the subject of a preliminary ruling in a similar case or has already been addressed in previous decisions of the Court, even if the questions are not strictly identical.

[158] Derived from: H. van Meerten, 'Op-Ed: 'Breathe new life into Köbler', EU Law Live, 13-11-2023.

[159] M.H. Wissink, R. Meijer, Köbler: staatsaansprakelijkheid voor schending van gemeenschapsrecht door hoogste rechterlijke instanties, *VrA* 2004 / 1.

The AG in this case writes – in my words – the following.

The possibility for a court of last instance not to refer must be assessed based on the characteristics of EU law, the difficulties posed by interpreting it, and the risk of divergent judicial decisions within the EU. This is standard case-law.

In this case, although the AG believes that the national Supreme Court from the UK –the UK was still subject to EU law– misinterpreted the relevant provision, Article 351 TFEU, this alone does not necessarily mean that the court breached its duty to refer.

Other factors suggest that the questions of interpretation raised before the Supreme Court were not easily resolved. The concise wording of Article 351 TFEU did not provide clear guidance, and both parties presented arguments that could not be immediately dismissed as unfounded.

The Supreme Court's interpretation was constructed from various EU case law – 'bits and pieces' in the words of the AG– some of which could have suggested an alternative reading.

It is also unclear whether the interpretation adopted by the Supreme Court would have been equally obvious to other courts and tribunals in Member States and the EU Court of Justice. Given that arguments based on Article 351 TFEU had been raised in ongoing national proceedings before courts of different jurisdictions, the Supreme Court should have exercised caution in reaching its decision, the AG concludes.

The ECJ followed the AG. It held:

'153 It follows from the foregoing that there was, in the present case, sufficient evidence to raise doubts as to the interpretation of the first paragraph of Article 351 TFEU, which, in view of the impact of that provision on one of the essential characteristics of EU law and the risk of conflicting decisions within the European Union, ought to have led the Supreme Court of the United Kingdom to consider that the interpretation of that provision is not so obvious as to leave no scope for any reasonable doubt.

154 In those circumstances, without there being any need to rule on the merits of the other arguments put forward by the Commission in support of the present complaint, it must be held that it was for the Supreme Court of the United Kingdom, as a national court or tribunal against whose decisions there is no judicial remedy under national law, to make a reference to the Court of Justice on the basis of Article 267 TFEU concerning the interpretation of the first paragraph of Article 351 TFEU, in order to avert the risk of an incorrect interpretation of EU law which, as is apparent from paragraphs 71 to 84 above, it did in fact reach in the judgment at issue (see, by analogy, judgment of 4 October 2018, Commission v France (Advance payment), C-416/17, EU:C:2018:811, paragraph 113).

155 Consequently, on that ground alone, the third complaint, alleging an infringement of the first and third paragraphs of Article 267 TFEU, read in conjunction with Article 127(1) of the Withdrawal Agreement, must be upheld.'

'On that ground alone'. It means in my view that a Member State is in itself acting unlawfully by wrongly refraining from referring a question for a preliminary ruling, and that the State is therefore liable on the basis of unlawful case-law within the meaning of the judgment in Köbler.

As is well known, there are three cumulative conditions for assuming State liability, i) the breach is sufficiently serious; ii) the rule of EU law infringed is intended to confer rights on individuals and iii) there is a direct causal link between that breach and the loss or damage sustained.

That the violation (breaching Article 267 TFEU) is sufficiently serious, the first criterion, ('manifest') has been thoroughly pointed out by the AG.

The second criterion is more difficult. It might be argued that the preliminary reference mechanism *does* confer rights on individuals.

First, I would like to point at a Dutch Case (own translation): [160]

'The State has also put forward the defence that the violated rule of Article 267(3) TFEU is not intended to confer rights on individuals. This defence does not stand up. It follows from the Köbler judgment (CJEU, C-224/01) that it is primarily in order to prevent the infringement of rights conferred on individuals by Community law that a court, whose decisions are not appealable, is obliged to refer to the CJEU (at 35). This satisfies the requirement that the rule infringed is intended to confer rights on individuals. The fact that this rule also has other objectives, such as the

[160] Hague Court of Appeal, 25 October 2016, ECLI:NL:GHDHA:2016:2984.

uniform interpretation of EU law, does not preclude it.'

That Article 267 TFEU does not constitute an independent ground (for individuals) for a violation of EU law – for example pleaded by the Dutch State – is of course false. This is standard EU case law (e.g. C-416/17). Moreover, the Dutch Court held (own translation):[161]

'The State argues, first of all, that the mere breach of the court's obligation, against whose decisions there is no judicial remedy, to ask preliminary questions cannot be a ground for liability. According to the State, the failure to ask preliminary questions can only be a circumstance relevant to the question of whether such a court violated substantive EU law. The court of appeal will leave this argument unanswered and presume that, in principle, such an omission can provide an independent basis for unlawful action.'

Second, the failure to comply with the duty to refer deprives individuals from rights to an effective remedy as enshrined in Article 47 Charter.

The idea that the current Article 267 TFEU 'is not a remedy for the benefit of the parties in a dispute pending before the national court' (C-283/81, *CILIFT*, para 9) predates the entry into force of the EU Charter of Fundamental Rights.[162] The rights under Article 47 Charter aim to guarantee

[161] The Hague Court of Appeal 25 October 2016, ECLI:NL:GHDHA:2016:2984, para 3.8.

[162] A. Kornezov, 'The new format of the *Acte Clair* doctrine and its consequences', *Common Market Law Review* 2016, p. 1340.

the right to effective judicial protection, and refusing to ask a preliminary question may, in circumstances, result in a violation of Article 47 Charter.

It must therefore necessarily follow that Article 267 TFEU *does* confer rights.

Then the third requirement from *Köbler*, the causal link between the breach and the damage suffered. Until C-516/22, an almost impossible hurdle to overcome.

If it must be shown what the situation would have been if preliminary questions had been asked, and this would make the *Köbler* State liability a dead letter in this respect. This can never be met. I argue – also before national courts – that this should be read differently. It must suffice that an individual has suffered damages already.

I would like to embrace EU judge Kornezov[163] words, writing extra-judicially, in *Common Market Law Review*:

'The time might thus have come to breathe new life into the Köbler case law and hold, on that basis, that Member States are liable for non-material damage arising from a manifest breach of Article 267(3) TFEU'

Kornezov had a visionary view, because C-516/22 proved him right.

[163] Idem.

That being said, there must be a violation of EU law.[164] The EU Charter of Fundamental Rights[165] contains almost all rights, such as the right to property. In other words, a violation of EU law can, in theory, be constructed relatively easily.

With regard to Article 1:25d Wft, I would like to point to a relevant case, which may be relevant to the pension file: *AFM v Windsharefund*.[166]

In this case, the court considered (own translation):

'The AFM in itself rightly points out this difference and rightly labels the publication as a factual act. However, this does not alter the fact that WSF et al. were entitled to expect in this case - especially after receiving the decision discussed under 3.3 - that in case the AFM would still want to draw' public attention to the issue itself, the AFM would treat their interests carefully in doing so. In this respect, the Court of Appeal refers to Article 3:1 paragraph 2 of the General Administrative Law Act in which sections 3.2 up to and including 3.4 are, in principle, declared applicable by analogy to other acts of administrative bodies than decisions, and not especially to the provisions therein regarding due care and weighing interests.'

In other words, the limitation of liability of 1:25d Wft does not mean that the supervisor is allowed to act unlawfully towards market participants. But

[164] When this applies to pensions see also: J. Tangelder, 'Towards a clear concept of ownership', Netspar Design Paper 107, 2018.

[165] https://eur-lex.europa.eu/legal-content/NL/TXT/?uri=CELEX:12012P/TXT.

[166] Amsterdam Court of Appeal, 21 February 2023, n.y.p.

almost more importantly, supervisors should always adhere to the general principles of good governance, even if they act de facto, and do not take Awb decisions.

3.8 EU legislation and case-law

The EU has developed (far-reaching) rules for financial service providers to better protect consumers in key financial services sectors, including banking, insurance and securities.[167] The same will and must apply to pension legislation. Earlier, I argued that pension funds should also be seen as financial service providers and pension members as consumers.[168] The latest EU pension legislation, the PEPP Regulation,[169] already focuses on consumer protection. In recital 72 it states:

'Full transparency on costs and fees related to investment in a PEPP should be guaranteed.'

Through the reflex effect, this will spill over to 2e pillar pension institutions and schemes, I predict.

Furthermore, EU law[170] may impose an obligation to assess (clauses of) a contract *ex officio* against rules of EU law.[171] This has led to debate as to

[167] See, for example: I. Benohr, *EU Consumer Law and Human Rights*. Oxford, 2013.

[168] H. van Meerten, S. Vlastuin, op cit.

[169] 2019/1238.

[170] C-243/08.

[171] S. van Dijk, M. van 't Ende, 'The recent influence of Union law on Dutch contract law', *NTBR* 2022/15.

whether the doctrine of ex officio review should also apply to other directives aimed at protecting weaker or less informed parties,[172] e.g., pension members.

The EU law doctrine of ex officio application may also affect the law in cases where EU law is *not at issue*: there is a certain - albeit different - reflex effect of the doctrine.[173]

Another interesting question is when the assessment of whether a pension agreement is 'transparent' or 'fair' to consumers should be assessed: during the dispute or during the conclusion of the agreement? This becomes an important issue in the case of conversion: is the 'conversion moment' leading, or perhaps a later point in time?[174]

Reference can be made here to EU Court case *Raiffeisen Bank International AG*[175] , in which the EU Court considered:

'Consumer protection can be assured only if account is taken of his actual and therefore current interests, and not his interests in the circumstances existing when the contract at issue was concluded, as the Advocate General also observed, in essence, in points 62 and 63 of his Opinion. Similarly, the

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[172] Idem.

[173] Idem. On this form of reflex effect, see: K.J.O. Jansen, 'Reflex effect of European private law', *NTBR* 2022/1.

[174] Note that this is therefore not a question of whether the 'inward value' has been calculated correctly.

[175] C-260/18, p. 51.

consequences against which those interests must be protected are those which would actually occur, in the circumstances existing or foreseeable at the time when the dispute arose, if the court were to annul that contract, and not those which would result from the annulment of the contract on the date of its conclusion.'

The effects of an annulment of a contract must be assessed in the light of the circumstances that existed or could be foreseen at the time of the dispute, and that for this assessment, the will of the consumer in this respect is decisive. This jurisprudence was reiterated, but later the EU Court added, however, that 'that will cannot, however, take precedence over the assessment - which falls within the sovereign jurisdiction of the court seized - of whether the implementation of the measures contained in the relevant national legislation is actually capable of restoring the situation in which the consumer would have found himself, de jure and de facto, in the absence of that unfair term.'[176]

So, in the end, that assessment is up to the court and will vary from case to case.

[176] C-80/21.

3.9 Who bears the risks?

According to the Dutch Supreme Court, pension funds bear the risks.[177] In the forthcoming Handbook 'Pension Law', prof. Bennett and I argue this is a wrong view.[178]

As things stand, pension members of compulsory industry pension funds, for example, are treated differently from normal consumers/savers in financial law. This is no longer justifiable.

Pension participants in mandatory pension schemes are not seen as consumers.[179] The decisive criterion however should be: who bears the risks of the pension scheme - a financial product under EU law?[180]

Having said that, I want to introduce a definition of consumer (see above), based on EU legislation in EU consumer law and EU financial law in particular. This definition reads: *'an individual consumer of a European*

[177] https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2024:194.

[178] P.H. Bennett, H. van Meerten, *European Pension Law. A Practitioners' Guide, 2024, forthcoming.*

[179] H. van Meerten, 'The end of progressive graduated scales?', *Pension Magazine* 2016/107, pp. 35-38.

[180] See also: V. Mak, 'The prosumer and the digital economy: an exploration of the private law of the future. Leiden: Leiden University, 2021.

financial service[181] *where that consumer bears the risks of the financial service predominantly entirely by himself'*.[182]

There is ample evidence to support the contention that pension members are consumers.[183] EIOPA in its 2023 document in the consultation on IORP II, Chapter 2, point 356:[184]

Remark:

'Members of an IORP are consumers. They are not sufficiently protected against all the risk they bear.'

Answer EIOPA:

'Agreed, EIOPA maintained its advice with some amendments, in particular in relation to proportionality.'

[181] Defined in Directive 2002/65/EC as follows in Article 2: 'any service of a banking nature or relating to credit, insurance, individual pensions, investment and payments'; Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directives 90/619/EEC, 97/7/EC and 98/27/EC (*OJEC* 2002, L 271/16-24). Note that this definition refers to 'individual' pensions. My view this includes collective individual pensions. See: H. van Meerten , E.S. Schmidt, *The Legal Differences between CIDC and CDC*. The Pensions Institute Discussion Paper, no. PI-1801, 2018.

[182] It can be argued that the pension participant is also a consumer within the meaning of the Solvency II Directive. See: H. van Meerten, 'The end of progressive graduated scales?', *Pension Magazine* 2016/107, pp. 35-38.

[183] H. van Meerten, S. Vlastuin, *SEW*, op. cit.

[184] https://www.eiopa.europa.eu/document/download/ac18688a-39ba-4980-a803-4ec29f804f07_en?filename=EIOPA-BoS-23-343-Resolution_table_IORPII_review.xlsx.

In other words, the high level of legal protection[185] that individuals rightly enjoy in areas other than pension law should also apply to pension members.

'Collectivity' and 'solidarity' - which long served as justification for the exceptional position of (Dutch) pension funds - have been worked out. In this sense, it is incomprehensible that the individual right of objection is being removed in the WTP. This seems also a breach of the rule of law.

Finally, in a decision of the Kifid, the Dutch Institute for Financial Disputes, ruled that there is a collective duty of care for (advisers of) certain pension schemes. It considered that:

'It is part of the duty of care of the adviser, also in the light of the provisions of article 4:20 section 3 and article 4:24a of the Financial Supervision Act (Wft), that he carefully advises and informs the client about the nature and operation of a financial product, in order to enable him to make a well-informed decision whether or not he wants to buy that product. This also includes that the adviser informs the client during the term of the agreement about relevant changes in the product and their consequences, in order to enable him to make a well-informed choice whether or not to continue (unchanged) with that product.'[186]

It is interesting, incidentally, that in the lower legislation, the transitional phase is aligned with the Dutch Consumer Disputes (Extrajudicial Dispute Resolution) Implementation Act.[187] Also, the regulations as contained in the Decree on Conduct

[185] Which also has its gaps, cf: V. Mak, op. cit.
[186] Disputes Committee for Financial Services 17 December 2021, GC 2021-1072, ov. 3.10.

[187] Act of 16 April 2015 (*Stb.* 2015, 160).

of Business Supervision of Financial Undertakings in the Financial Supervision Act (‘*Besluit Gedragstoezicht financiële ondernemingen Wft’)* are followed as closely as possible.[188] This is because dispute resolution at pension funds has common ground with dispute resolution at financial undertakings: 'both types of disputes involve (substantive) potentially large financial effects for the parties concerned. In terms of requirements there are also the necessary interfaces', according to the legislator.[189]

Having said that, Advocate General De Bock discusses the pension funds duty of care in more detail in a 2019 Opinion. As far as an employer is concerned, a superfluous duty of information may arise from good employment practice within the meaning of Article 7:611 of the DCC (Dutch Civil Code, ‘Burgerlijk Wetboek’).[190] For the pension funds, a non-statutory information duty may be based on Article 6:2 or Article 6:162 of the DCC.[191]

Reference can also be made to Article 3:35 of the DCC:

‘The absence of a will corresponding to that statement cannot be invoked against a person who, according to the meaning he could reasonably have given to it in the given circumstances, understood another person's statement or conduct to be a statement of a certain purport addressed to him by that other person'.

[188] Decree on Conduct of Business Supervision of Financial Undertakings Wft (*Stb.* 2006, 520).

[189] Draft decision to amend the Financial Assessment Framework for Pension Funds Decree in connection with supplementation due to intended transition of 30 March 2022, p. 68.

[190] Concl. A-G R.H. de Bock, ECLI:NL:PHR:2019:954, ov. 3.7, to HR 20 December 2019, ECLI:NL:HR:2019:2035.

[191] Concl. A-G R.H. de Bock, ECLI:NL:PHR:2019:954, ov. 3.7, to HR 20 December 2019, ECLI:NL:HR:2019:2035.

Article 3:35 of the DCC contains the concept of 'legitimate expectations' and, taken together with Article 3:33 of the DCC, constitutes the doctrine of ‘trust in will’. For a reliance on Article 3:35 DCC, there must be a legal act aimed at some legal consequence. In a judgment of the District Court of Midden-Nederland, the court ruled that the question whether information by (two) pension funds on equalisation is a legal act within the meaning of Article 3:33 DCC in conjunction with Article 3:35 DCC depends on the nature and content of the information. In addition, it also depends on the length of the period in which the information is provided once or several times, whether it is a (directed or untargeted) legal act aimed at any legal effect. In this case, the information was aimed at some legal effect and was considered by the court to be a legal act.[192] This means that in such circumstances a pension member or pensioner can rely on legitimate expectations pursuant to Article 3:35 of the DCC.

From all these cases and circumstances, it can be concluded that pension funds (and employers) have the duty to inform the 'participant' properly and correctly. So-called 'reflex effect' of duty-of-care standards and jurisprudence on banking and financial service providers to pension providers is now assumed and no longer imagined.[193] A reference to the EU case law and legislation mentioned in this book would certainly not be out of place either. After all, pension schemes members are also 'normal' consumers of a (financial) service. Although a pension fund within

[192] Rb. Midden-Nederland 28 November 2018, ECLI:NL:RBMNE:2018:5853.

[193] M. Heemskerk, 'Alignment between pension law and private law desirable. Developments and case law', *WPNR* 2018, issue 7178, p. 25. Cf. also Asser/Lutjens *7-XI* 2016/599.

the meaning of the PW and the Wft does not perform a financial service de iure,[194] -as shown above- this is different under EU law. It is no longer justifiable to treat pension members of a mandatory industry-wide pension fund differently from a normal consumer, who (rightly) enjoys a large degree of legal protection.[195]

3.10 Cost transparency rules based on IORP II[196]

However, the protection of the pension member is rather lacking. Information to individuals should, on the basis of IORP II, also be given on the structure of the costs borne by them.[197] This transparency of costs incurred by pension funds is important for the trust of the individual in the fund. In addition, this transparency is necessary in order to have an insight into the relationship between return, risk and costs and to be able to give an opinion about that.[198] Former Member of Parliament Maatoug has asked critical questions regarding the lack of transparency of Dutch pension funds. Research by the AFM has shown that the majority of annual reports of pension funds do not meet the requirements of IORP II (which has now been incorporated into the Pensions Act).[199] According to the answers by former State Secretary of Social Affairs and

[194] See concl. A-G R.H. de Bock, ECLI:NL:PHR:2019:954, ov. 4.25, at HR 20 December 2019, ECLI:NL:HR:2019:2035: 'PMT is also not a financial undertaking within the meaning of Article 1:1 Wft, nor does it provide a financial service within the meaning of Article 1:1 Wft'.

[195] Concl. A-G R.H. de Bock, ECLI:NL:PHR:2019:954, ov. 3.12, at HR 20 December 2019, ECLI:NL:HR:2019:2035: 'Unlike Ettema, I believe that the specific character of pension law does not have to stand in the way of a certain reflex effect of duty-of-care standards from financial law.

[196] Based on: H. van Meerten, S.L. Vlastuin, *SEW*, op. cit.

[197] Article 37(1)(h) IORP II.

[198] *Appendix Handelingen II* 2021/22, no. 637, p. 1.

[199] More attention needed for cost accounting by pension funds', afm.nl 1 April 2021.

Employment, Wiersma, to the questions posed, the government acknowledges that there are major shortcomings in the cost transparency rules. He confirms the fact that this makes it more difficult for pension participants to indicate how pension funds should act in line with their wishes.[200] When these rules are violated, it is up to the AFM to judge and decide to take appropriate measures.

In the new pension system it is of great importance that this transparency exists. Because of the single option of a DC scheme with an uncertain outcome in a (later) pension payment, members and pensioners have a greater interest in good returns from the pension fund. Because the costs weigh on the gross return, information provision is necessary. The Commission will evaluate IORP II around 2024. However, no reason has been given to reconsider and amend the standards for the cost transparency rules. Maatoug also asked what additional expectations the SFDR had for the pension sector in terms of transparency about ESG aspects and sustainability risks, compared to the Pensions Act and IORP II. Wiersma indicated that IORP II imposes different requirements than the SFDR. The obligations from the SFDR are formulated more specifically and more openly than the IORP II, so that it has a more general scope.

3.11 Conclusion

In the foregoing, I have shown that the reform of the pension system touches on EU law in many areas. Much has already been written about the sustainability of the large-scale mandatory rules and the legal risks of conversion with a view to European property law. These subjects will continue to play a role in the coming years. Newer are the discussions about the qualification of the pension participant as a consumer

[200] *Appendix Handelingen II* 2021/22, no. 637, p. 6.

and the question about the information obligations that pension funds have towards their participants and pension beneficiaries. The increasingly individual pension participant (whether or not in a collective) has, certainly with the transition to the new pension system, a lot of 'work to do' when it comes to understanding the new structure of the system and sometimes making his own choices. In my opinion, a pension participant can be regarded as a consumer, because pension schemes already constitute a financial product under EU law whereby the 'consumers' bear the risks, and because pension funds are businesses and financial service providers. Information obligations exist from, among others, the SFDR Regulation (information on sustainability policies and the green content of pension schemes) and the cost transparency rules from the IORP II. The information gap of the pension participant and the resulting obligations call for serious compliance and enforcement of rules. At the moment, the Pension Act and practice do not yet convince that members and pensioners are fully and correctly informed. This is a bad thing. Taken together, the points of criticism mentioned should weigh more heavily in order to ultimately create a transition to the new pension system that is EU-and truly future proof in all areas.

4. Legal protection and the EU Charter[201]

4.1 Introduction

The Utrecht professor Alex Brenninkmeijer, who sadly passed away far too soon, said in an interview:[202]

'*The* […] *affair shows that our democratic constitutional state simply does not work. I have a legislator who does not abide by the rule of law, an administrator who blindly follows the law, without caring about fundamental rights and decency, and a judge who adopts a governmental attitude and merely confirms the policy.'*

Tilburg constitutional law professor Leijten[203] has 'the conviction that the protection of citizens can only really be strengthened if social issues are also seen as a structural part of the rule of law issue'.

Inspired by the words of Brenninkmeijer and Leijten, in this Chapter 4, I will discuss the new Pensions Act and an essential part of it: the so-called 'conversion' of old pension rights on the basis of the new Pensions Act.

There seems to be great social dissatisfaction among pension participants about the new law. That discontent is pervasive on social media, echoes in internet

[201] Based on: H. van Meerten, 'Invaren onder de nieuwe pensioenwet', in: N. Hummels (e.a. eds.), *Heroriëntatie op arbeid en sociale bescherming,* Liber amicorum prof. mr. F.J.L. Pennings. Deventer, Kluwer, 2024

[202] 'Former ombudsman Alex Brenninkmeijer sees in the benefits affair not a business accident but a failing system', *Trouw.nl,* 31 December 2020.

[203] *Letter Ingrid Leijten to the State Commission on the Rule of Law*, 28 July 2023, available at <statecommissionsrights.com/topics/letters/letters>.

responses[204] and unites in the large number of participants who have signed up for various mass claims.

In this Chapter, I want to limit myself to a global assessment of the European fundamental right in the EU Charter, namely article 17 (property), article 21 (non-discrimination), article 47 (effective legal protection) and article 38 (consumer protection).

Other aspects are also discussed indirectly. The Chapter is structured as follows. The status and applicability of the Charter of Fundamental Rights of the European Union (hereinafter: Charter) and the right to property of Article 17 Charter are discussed in section 4.3. In the following sections (4.4- 4.8) article 47 EU Charter, article 21 EU Charter and article 38 EU Charter are discussed. Section 4.8 contains an alternative to the Dutch 'conversion'.

Section 4.9 contains some concluding remarks. For a proper understanding I start with the collective value transfer mechanism in the Dutch Pension Act.

4.2 Collective value transfer

Under the pension system, the possibility exists for individuals to file individual objection rights against a domestic collective value transfer. The new Pensions Act (Pw) provides for two forms:

[204] See the internet consultation Wet toekomst pensioenen, available at <internetconsultatie.nl/wettoekomstpensioenen>.

i) Article 83 Pw - the collective value transfer at the request of the employer, and

ii) the collective value transfer under Article 84 Pw - the collective value transfer in case of liquidation of the pension fund. For a value transfer at the request of the employer, the requirements include that the participants, former participants, former partners and pensioners concerned must be informed about the intended collective value transfer and, if requested, have not expressed any objections (right of consent). This condition does not apply if Article 84 Pw applies, as it is not possible for entitlements and rights to remain with a pension fund when it is liquidated.[205]

Conversion is designed as a collective internal (within a pension fund) value transfer without the member's consent. An individual right of objection to this collective value transfer is missing. In my view, this creates a lack of fundamental individual legal protection.[206]

Admittedly, the pension fund can choose, in case of 'disproportionate disadvantage' or 'disproportionately unfavourable' consequences for stakeholders, not to transfer accrued pension to the new contract.[207] There are also collective dispute mechanisms and various participation options.[208] However, these do not seem to be fully-fledged

[205] R.M.J.M. de Greef, H. van Meerten , J.J. van Zanden, 'Transition under the new pension contract: crossing the boundary of European law?', *TPV* 2022/48.

[206] See my contribution to a consultation by the Senate, available at <papers.ssrn.com/sol3/papers.cfm?abstract_id=4355690>.

[207] Article 150l WTP.

[208] S. van Alfen, 'Stop this law, it's outright theft', *Pension Pro* 11 January 2021.

legal protection mechanisms. With Van der Poel, it can be argued that the right to object can also qualify as a property right, as exercising that right can represent an economic value.[209] Indeed, the law does provide for a dispute body, included in Article 48cPw. However, the chances of success of an individual action by an employee towards a pension fund seem limited because, authors believe, the substantive balance assessment is marginally reviewed by both De Nederlandsche Bank (DNB) and judges.[210] Stefels even calls the dispute committee 'mustard after the meal' and writes: 'The external dispute body offers no real compensation for the removal of the individual right of objection, because this is simply not the government's intention either. On the contrary, the point is to give ample space to collective raiding.'[211]

4.3. The EU Charter and the new Pensions Act

Introduction

Under Dutch law, there is no right of ownership to a pension. The situation is different in European law. Property - unlike property under Dutch law - includes not only things and tangible goods, but also property rights such as pension entitlements

[209] 'The will right under Section 83 Pw is, I believe, (somewhat) comparable to the voting right on shares: both rights are personal and non-transferable and the (non-)exercise of the right may represent an economic value.' M.J.C.M. van der Poel, 'The property right to supplementary pension', *TPV* 2018/29.

[210] M.C.D. Janse , S. van der Vegt, 'Equilibrium and the Future Pensions Act', *TPV* 2022/35, p. 12.

[211] M.E. Stefels, 'The external dispute resolution body Wtp: a curtain-raiser or mustard after the meal?', *TRA* 2023/79.

and rights (including accrued indexation).[212] The Charter has the status of primary Treaty law.[213] National provisions must be interpreted in accordance with the Charter. National provisions that conflict with EU law should also be disapplied between two or more private contracting parties in circumstances.[214] The CJEU judgment in *Cresco Investigation*[215] shows the (far-reaching!) way in which a private employer can be directly bound by a Charter provision.[216]

The YS judgment

Of crucial importance for the matter is the *YS* judgment of the Court of Justice of 24 September 2020 on Article 17 Charter in an Austrian pension case.[217] This judgment makes several things clear. First, in this judgment, the Court not only confirmed that 'accrued pension rights' are to be regarded as property rights under EU law, but that this also applies - under circumstances - to 'indexation'. The Supreme Court had previously held that 'a pension entitlement constitutes an independent (contingent) property right'.[218] And property rights are subject to European property law.[219]

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[212] C-223/19.

[213] Pb. EC 2000/C 364/01.

[214] C-555/07.

[215] C-193/17.

[216] M. de Mol, 'The doctrine of horizontal direct effect of Union fundamental rights closely followed', *Ars Aequi*, 2019, pp. 371-382.

[217] C-223/19.

[218] HR 3 February 2012, ECLI:NL:HR:2012:BT8462.

[219] See, inter alia, Concl. A-G J. Spier 20 March 2009, ECLI:NL:PHR:2009:BG9951 .

Second, this judgment does not test, even ex officio, the equivalent in the ECHR, Article 1 First Protocol. Infringements of property rights are more likely to be allowed under this framework, it seems. The fact that this was therefore not assessed in YS seems justified. Indeed, these are entirely different assessment frameworks *in the present case*, where the minimum standards of the ECHR do have to be observed.[220] Thirdly, the Court applied Article 17 of the Charter between a pensioner and a pension fund. Incidentally, whether this is a horizontal or vertical relationship is, in my view, irrelevant to this case: since the *YS judgment*, it is clear that an individual can directly invoke the Charter against a particular pension fund. But of course, violations of fundamental rights are permissible. In the YS judgment, recital 92 states:

'However, as is apparent from paragraph 88 of the present judgment, any limitation on that right to property must be provided for by law and respect the essence thereof and, in compliance with the principle of proportionality, must be necessary and actually meet objectives of general interest recognised by the European Union. The limitations on the pension rights at issue in the main proceedings are indeed provided for by law. In addition, they limit only part of the total amount of the pensions in the form of 'direct defined benefit pensions' concerned, so that they cannot be considered to affect the essence of those rights. Moreover, subject to verification by the referring court, those restrictions appear to be necessary and to actually meet the objectives of general interest of ensuring the long-term funding of State-funded retirement pensions and narrowing the gap between the levels of those pensions.'

[220] H. van Meerten , P. Borsjé, 'Pension Rights and Entitlement Conversion ('Invaren'): Lessons from a Dutch Perspective with Regard to the Implications of the EU Charter', *European Journal of Social Security* 2016, 18, episode 1.

Some pension funds are state bodies

The YS ruling concerns pension schemes of 'state-controlled companies'. In the YS case, the government (Land Lower Austria) held the majority of the shares of the company that made the pension commitment. As a result, the Austrian government can be said to have decisive influence over the 'personal scope' of the pension scheme in question. The ruling therefore seems relevant for Dutch industry pension funds operating a statutory compulsory industry pension scheme. After all, the Dutch state determines, for example, the scope of these provisions. Thus, with Dutch mandatory pension funds (such as ABP or PFZW), similar to that Austrian *YS case*, there is a certain degree[221] of authority or supervision of a public body, which performs a task of general interest with special powers.[222] The actions of a pension fund can, I believe, in some respects - for example, in terms of enforcement of the compulsory order - even be equated with government actions.[223] An industry pension fund can be compared to an enforcing authority.

[221] D. Curtin, 'The Province of Government: Delimiting the Direct Effect of Directives in the Common Law Context', *European Law Review*, 15, 1990.

[222] C-413/15.

[223] J. Tangelder, 'Compulsory industry pension fund liable for breach of property rights in transition?', *TPV* 2022/3.

When does the Charter apply?

Much has already been written about this. Property protection under the Charter cannot be invoked in isolation: there must be a rule of EU law applicable to the situation, this is called the 'connexity requirement'. According to Fierstra, the interpretation of the scope of application of EU law, as a central criterion for determining the applicability of the Charter to acts of Member States, should mean that there are no cases in which EU law applies without those fundamental rights applying. [224]

As the AG[225] with the EU Court rightly pointed out:

'18. Second, the fundamental rights recognized in the EU legal order apply when a Member State derogates, by means of national legislation, from EU law and invokes a justification recognized by EU law in defense of that national legislation. In that regard, the Court has made it clear, on the basis of what it had already held in the ERT judgment (12) before the Charter had entered into force, that recourse by a Member State to exceptions provided for by EU law in order to justify an obstacle to a fundamental freedom guaranteed by the Treaty also constitutes 'implementing Union law' within the meaning of Article 51(1) of the Charter, even if, in itself, the legislation in question is not intended to implement a provision of EU law.'

[224] See also M.A. Fierstra, 'Åkerberg Fransson: broad scope of application of Charter to acts of Member States', *NTER* 2013/6.

[225] C-655/21.

Legal certainty

Let me add two things. First, it follows from settled case-law of the Court of Justice that national implementing laws, 'where they are intended to create rights for individuals, must be implemented with an indisputable binding force and with the specificity, precision and clarity necessary to satisfy the requirement of legal certainty, which entails that the beneficiaries must be able to ascertain the full extent of their rights'.[226] The rationale behind this is to ensure the *effect utile* of EU law. The 'effect utile standard' implies that governments may not deprive EU law of its effect.[227]

Based on the same arguments that led to the *effect utile* doctrine, it can be argued that EU fundamental rights cannot 'just be set aside' by national law. National legislation that allows infringement of an EU fundamental right thus constitutes, as it were, the mirror image of that which is at issue when directives are transposed into national law. The 'beneficiary' of fundamental rights must be able to know accurately, on the basis of national legislation allowing a limitation of an EU fundamental right, when that limitation may be at issue. If there were no requirements for such legislation, fundamental rights could too easily be set aside by legislation of national states.

[226] See, for example, C-125/21.

[227] Already laid down in C-13/77.

Second, EU law may impose an obligation to assess (clauses of) an agreement ex officio against rules of EU law.[228] This has led to discussion as to whether the doctrine of ex officio review should also apply to other directives that aim to protect weaker or less informed parties, e.g., pension members. The EU law doctrine of ex officio application may also affect the law in cases where EU law is not at issue: there is a certain reflex effect of the doctrine.[229]

I have previously taken the position that, as more and more responsibility is placed on the participant, the pension participant qualifies as a consumer. A DC contract is a financial product under EU law and the consumer must be protected against the interests of the provider(s).[230] The Court has repeatedly held that a system of protection against unfair terms is based on the idea that the consumer is in a weak negotiating position vis-à-vis the seller and, moreover, has less information than the seller.[231]

4. 4 Violation of property rights?

I believe that conversion as such and *a fortiori* without an individual right of objection is contrary to European property law and possibly even to effective legal

[228] S. van Dijk, M. van 't Ende, 'The recent influence of EU law on Dutch contract law', *NTB* 2022/15.

[229] On this form of reflex effect, see K.J.O. Jansen, 'Reflex effect of European private law', *NTBR* 2022/1.

[230] H. van Meerten, S.L. Vlastuin, 'The unbearable lightness of pension reform', *SEW* 2022, *vol.* 6, para. 4.

[231] C-34/13.

protection (enshrined, inter alia, in Article 47 Charter). Several authors[232] and also, apparently, the state advocate (see above)[233] already in 2011 (!) seem to think so, but the future will have to show whether conversion is a (permissible) infringement.

Incidentally, several authors do believe that there is no violation of property rights at all.[234] In short, is this about the classic opposition between individual versus collective interest? Which interest should prevail? Does the oft-repeated adage 'pension is a working condition, and the social partners deal with it and represent the workers'[235] still hold true?

The government believes that the benefits of the intended transition outweigh the interests of the individual participant and his possibility of individual objection. Lutjens, Maatman and Heemskerk believe that, as long as it is properly justified, the abolition of the individual objection right can be justified by the public interest in reforming the pension system.[236]

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[232] R. Maatman, 'Future Pensions Act to Senate: select issues', *Business Law* 2023/24; J. Tangelder, 'Compulsory industry pension fund liable for breach of property rights in transition?', *TPV* 2022/3.

[233] F. van Alphen, G. Herderscheê, 'Blockade for pension agreement', *Volkskrant*, 11 March 2011.

[234] The most important and most frequently heard is: E. Lutjens, 'Retirement savings: the meaning of property rights - savings are not legally untenable', *TPV* 2020/20.

[235] One concern, incidentally, is this representativeness. This concern has been around for some time, see e.g. *Parliamentary Papers II* 2011/12, 29544, no 391. According to CBS, 1.5 million people were affiliated to a trade union at the end of March 2021. In other words, 16% of female workers and 19% of male workers are union members.

[236] E. Lutjens, R. Maatman, M. Heemskerk, 'Collecting pensions: alternatives to abolishing individual right of objection', *TPV* 2021/19.

A 'dissenting opinion' to the ECtHR *Stec v UK* judgment also already warned about the far-reaching consequences of 'pension as a property right':[237]

'If I accept that the protection of property extends to protecting property owners, the Court's new interpretation has an undeniable attraction! Without any need for a revolution, all Europe's citizens have become property owners, protected by Article 1 of Protocol No. 1. Everyone, from a billionaire right down to the poorest person subsisting on social security, has become a property owner.'

4.5 Pre-conclusion

I have indicated that the conversion without individual right of objection in the new Pensions Act is seriously flawed in terms of property protection and possibly effective legal protection.[238] More research and case law on this is needed. I believe that individual property rights should prevail when it comes to conversion. Pension is the main source of income for most people. Many have geared their life pattern to certain expectations that have been raised. The legislator cannot tamper with that. For now, the Dutch courts rather easily step over the fundamental right to property protection for pension rights.[239] The future will show whether this will remain so.

[237] ECHR (GK) 12 April 2006, nos 65731/01 and 65900/01 (*Stec and Others v UK*).

[238] See extensively H. van Meerten, S.L. Vlastuin, 'The unbearable lightness of pension system reform', *SEW* 2022, vol. 6.

[239] Rb. Amsterdam, 6 July 2023, ECLI:NL:RBAMS:2023:4296.

As mentioned above, the individual right of objection should also apply in the case of conversion. If only to satisfy the participant's sense of justice. It is also a matter of civilization, as Prof. Eijffinger remarked in the Senate in 2023.[240]

4. 6 Article 47 Charter[241]

Introduction

Since the EU Egenberger judgment,[242] it has been clear that Article 47 European Charter can be invoked in private disputes to render rules of national law inapplicable. Article 47 EU Charter thus has direct horizontal effect.[243]

Having said this, the Dutch government's new pension legislation is not entirely watertight on many fronts. Especially in the light of European law (EU law), there appear to be question marks with regard to conversion and the lack of the individual objection option.

The compatibility of these legislation with property rights, as enshrined in the EU Charter of Fundamental Rights (Charter), among others, has been the subject of many papers. As shown above, Van Meerten believes that there is an infringement, Lutjens does not.

[240] https://www.eerstekamer.nl/nieuws/20230214/deskundigenbijeenkomst_wet

[241] Partly derived from: H. van Meerten, A. Pratt, 'De WTP en goede rechtsbescherming?', *Pensioenactualiteiten*, 2024.

[242] C-414/16.

[243] S. Peers et al, *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Bloomsbury Publishing Plc, 2021.

Now I will focus on another aspect: does the conversion violate the right to effective judicial protection guaranteed by EU law (Article 47 Charter)?

Article 47 Charter of Fundamental Rights of the EU

Article 47 Charter, first paragraph, reads as follows:

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.'

This article is similar to Articles 6 and 13 ECHR, but Article 47 Charter has a wider scope. Both articles enshrine the fundamental right to a fair trial.

Article 47 Charter applies to all EU law. Besides being descended from Articles 6 and 13 of the ECHR, the article's general principle of effective judicial protection has been developed in EU case law since 1980.

The landmark *Johnston*[244] judgment was the first in which the ECJ recognised the principle of effective judicial protection as a general principle of EU law. Then, in the *Heylens* case, the ECJ ruled that the principle of effective judicial protection required national authorities to substantiate their decisions in order to give the persons concerned the opportunity to defend their rights in the best possible way. Subsequently, the ECJ further developed the principle in several cases, from which a number of sub-rights and sub-principles have been derived. For example, with regard to remedies for violations of EU law, the ECJ made it clear in *Factortame I*

[244] C-222/84.

and *Unibet* cases that the principle of effective judicial protection entitles the applicant to interim judicial protection if a judgment is awaited. In the *Wilson* case, the ECJ held that within the principle of effective judicial protection there had to be access to justice, which are independent and impartial.

Article 47 Charter consists of several elements, these are divided among its three paragraphs. Paragraph 1 contains the right to an effective remedy. Paragraph 2 deals with the right to a fair trial and a public hearing by an independent and impartial body, along with the opportunity to be advised, defended and represented. Paragraph 3 is committed to legal aid; it also obliges to make it available to those who lack sufficient resources. Paragraph 1 of this article can be seen as a *lex generalis vis-à-vis* the other rights derived from Article 47. Paragraph 3 is mainly concerned with ensuring that legal aid is provided to ensure an effective remedy for the right.

As stated above, conversion is designed as a collective internal (within a pension fund) value transfer without the member's consent.

No access to justice?

The individual right of objection within Pension Law sees to it, in popular terms, that accrued entitlements cannot be adjusted against the will of the member.

The government has a particular reasoning as to why there will be no possibility of individual objection after the review of the current pension system:

'The government is of the view that a substantive collective assessment of whether inflation is balanced best safeguards everyone's interests. It is known from behavioural science research that a choice regarding an event that is a one-off, has

financial implications and whose consequences may extend over the (very) long term is a major mental burden for the participant.'[245]

In other words, according to the government, individuals experience great stress when they have to make choices regarding major financial events whose consequences may extend over the long term. They question whether individuals can foresee the consequences of any objection.

This is an outdated and erroneous notion. Individuals are perfectly capable of making choices when it comes to major financial events, such as taking out a mortgage to buy a house.

Whatever else, effective legal protection must prevail over the capacity of individuals to make proper consideration. It seems that the legislature is exclusively concerned with combating the unwanted symptoms of freedom of choice that the government has identified. But attention to fundamental legal principles of the rule of law seem less important to the legislature.

Restriction of fundamental rights possible?

Whether a limitation of Article 47 Charter is permissible can be tested - in a general sense[246] - by reference to Article 52(1) Charter. The criteria included in the article were originally developed in ECtHR case law. Using paragraph 1, three requirements can be qualified:

[245] *Parliamentary Papers II*, 2021, 36067 no 7.

[246] Pension rights can also be tested against the criteria mentioned in the YS judgment, C-223/19.

i) The restriction should be set by 'law';

ii) The restriction must respect the essential content of recognised rights and freedoms;

iii) Only a restriction is possible if it complies with the principle of proportionality.

The bottom line, therefore, is that the test is whether a proposed restriction restricts the essence of the right (in this case, Article 47) or only touches a more derivative element. Restrictions affecting a derivative element may be permissible if they pursue the public interest and are proportionate.

Ad i) Stated by 'law'

The first criterion to be tested is whether the restriction is established by 'law'. In *État Luxembourgeois,*[247] the ECJ indicates that in the case of such a restriction, there must be a specific law authorising the restriction. In doing so, this law must be clearly and precisely defined.

The quality requirement applies here, as mentioned above, the 'law' must be sufficiently accessible, clear and foreseeable. In addition, the 'law' must also be precisely worded. ECtHR case law shows that the term 'law' must be understood in a substantive sense. This means that it includes both written and unwritten rules of law. These requirements apply more heavily when the 'law' may have financial consequences for individuals, the *Ireland v Commission* judgment shows.[248]

[247] C-245/19.

[248] C-85/11.

Ad ii) Respecting the 'essence'

Article 52(1) Charter further makes it clear that the 'essence' must be respected by the restriction. It means that the essence of the principle and/or fundamental right must not be affected. Specifically, there must be no impossibility with regard to exercise of the principle/fundamental right. In *Schrems I,*[249] the ECJ invalidated an act of the EU institutions for violating the 'essential content' of a fundamental right protected by the EU legal order. The right to an effective remedy is the law in which the concept of 'substantial content' and its violation is most developed. In this judgment, the ECJ held that a Regulation that does not provide for a remedy when it comes to obtaining, rectifying or deleting personal data does not respect the substantial content of Article 47 Charter.

Other cases in which the ECJ has found violation of the 'essence' of the right to an effective remedy have since occurred in the areas of data protection and information exchange in relation to taxation. At the same time, the ECJ refers to a long history of case law according to which '*the very existence of effective judicial review, designed to ensure compliance with provisions of EU law, is inherent in the existence of the rule of law*.' In *État Luxembourgeois*[250] , the ECJ interpreted the 'essence' of the right to an effective judicial remedy very broadly.

According to the ECJ, the right to an effective judicial remedy, as enshrined in Article 47 of the Charter, means that the person who has this right must have access to a court that ensures that the rights deriving from European law are respected and must examine all relevant issues of fact and law relating to the pending case.

[249] C-362/14.

[250] C-245/19.

Ad iii) Proportionality

Member States should protect the essential interests of security and the guarantee of the procedural rights of EU citizens when considering whether a restriction on the right to an effective remedy is proportionate. Such restrictions should be balanced by appropriate procedural rules that can ensure a satisfactory degree of fairness in the proceedings. The following example outlines a situation in which a restriction is indeed proportionate. ECJ case-law establishes that a disproportionate restriction does not exist if a Member State's procedural rules require additional steps to be taken by an individual before access to justice can be granted. Statutory limitation periods applicable to bringing actions before national courts, for example, are not necessarily contrary to EU law, *Commissaire general aux réfugiés et aux apatrides* shows.[251]

To test the proportionality of a restriction on fundamental rights, the appropriateness of achieving the objective must be considered. Then the necessity criterion also applies: the interference or restriction must not go beyond what is necessary to achieve the intended purpose. If several measures are possible, the least burdensome one should be chosen. Finally, the disadvantages caused by the interference must not be disproportionate to the objective pursued.

Now, the review of Article 83 Pw - and thus the absence of the individual right of objection - should be tested against the three-step test of Article 52(1) Charter. In most cases, the test criteria are not discussed separately by the ECJ. Through this approach, space is left by the ECJ for a tailored interpretation for a Member State's circumstances of the right to access to justice.

[251] C-651/19.

Infringement of effective legal protection

I suffice here - for brevity's sake - with an initial assessment. First, the requirement 'laid down by law' seems to have been met. The individual right of objection was included in Article 83 of the Pw but has been removed from the law. After all, individuals are no longer given the opportunity to exercise this right. It is complex, because Article 150l paragraph 5 Wtp - which applies to inversions - is 'laid down by law'. However, the restriction should be sufficiently clear and precise. Whether the removal of this right is sufficiently clear and precise is then the question.

Regarding respect for the fundamental right, or effective legal protection, I will look at the reasoning of the ECJ in *État Luxembourgeois*.[252] The holder of the Article 47 Charter right must have access to a court with jurisdiction to guarantee certain rights. This too is complex. In this case, if the right to object is removed, for this situation - apart from the general go to the civil[253] court - there is no longer access to a court competent to safeguard the rights normally protected by 83 Pw. Due to the ECJ's broad interpretation, there seems to be no respect for Article 47 Charter in this sense.

The government states:

'In doing so, the government looked at several alternatives, ultimately opting for a heavily balanced package of collective safeguards. The government believes that in a substantive collective assessment of whether rafting is balanced, the interests of all are best safeguarded.'[254]

[252] See above for this reasoning.

[253] On cutting off the administrative legal process see: A. W van Leeuwen, Conversion is not the same as coming home', *TPV*, 2022.

[254] *Parliamentary Papers II*, 2021, 36067 no 10, p 46.

Whether the measure is proportionate depends on the following circumstances. Is limiting the individual right of objection appropriate to achieve the government's goal? In fact, it does achieve the goal of inking the new premium agreements, as it will be easier for the government to inking them without the participation of individuals. However, the necessity criterion also applies, the restriction should not go beyond what is necessary to achieve the intended purpose. Where the least burdensome measure should be chosen. In this situation, a less burdensome measure was indeed possible namely the pension custodian. This has been written about extensively.[255]

Case C-715/20

I want to separately mention this groundbreaking EU Court Case, dating from February 2024.[256]

The case concerns the end of a temporary employment contract under Polish law. In principle, private individuals cannot directly invoke an EU Directive among themselves. This is established case-law[257], but it is starting to get more and more sticky. Especially since the EU Charter of Fundamental Rights can increasingly be invoked between individuals (articles 17, 21, 31 and 47 can meanwhile be invoked amongst individuals).

[255] Idem.

[256] C-715/20.

[257] C-91/92.

The Court considers that if there are proceedings between two private parties, employer and employee, as well as pension provider and participant, a court must disapply national law if EU law is violated by the employer (or pension provider).

And that is via a direct appeal by the employee, pension participant, to Article 47 of the EU Charter. That article – as set out above - guarantees an effective remedy for anyone who feels that the national government, or thus a private organisation, is violating their rights - based on EU law. Article 47 EU Charter is almost identical to Article 6 ECHR. But the Charter can thus also be invoked between private individuals, while the ECHR in principle cannot. A very important difference.

The ruling extends the possibility for citizens to bring direct actions against private parties for national laws that violate EU law. It regularly happens those national laws conflict with EU law and EU directives.

The judgment ties the fundamental legal protection from the EU Charter to the direct effect of EU directives for the first time. This may be called startling. This presents opportunities for employees and pension members and retirees. For employers, this in turn means uncertainty. Because, in principle, employers follow national law, but - to the extent that national law has a European source - they will therefore have to start thinking about whether that national law complies with EU law.

Whereas individuals previously had to rely on the rather cumbersome route of holding the state liable (see above) for incorrectly implementing EU rules in national law, this ruling offers new opportunities for workers/pensioners to sue the private employer/pension fund.

Pre-Conclusion

In order to revise the Dutch pension system, a process of conversion should take place whereby an article from the Pw should be revised, namely article 83 Pw. Revising this article removes the individual right of objection, and with it - also related in this context - access to justice. The government believes that individuals experience ‘great stress’ when faced with major financial decisions. It also says that in a substantive collective assessment, everyone's interests will be best safeguarded. However, the removal of the individual right of objection still seems to violate Article 47 Charter to some extent. Article 52(1) Charter then gives three criteria that can be looked at when there is a potential violation of a fundamental right.

First, the revision of Article 83 Pw omits the individual right of objection. This leads to a limitation, where it seems that it is indirectly 'stated by law'. Nevertheless, the question arises whether this limitation is described with sufficient precision and clarity.

Secondly, given that the entire right to object is removed and there is no longer access to a court for an individual in this sense, it can be said that there is no respect for Article 47 Charter.

Thirdly, in a way proportionality does exist; the removal of the individual right of objection will make the conversion of the new premium agreements easier. However, observing the necessity criterion, it will indeed be possible to choose a less burdensome measure.

Thereby, the disadvantages of removing the individual right of objection do not seem proportionate to the purpose.

In short, the justification criteria of Article 52(1) Charter do not seem to have been met, leading to a possible violation of Article 47 Charter. Further research is needed and will be done in the coming time.

4.7 Article 21 Charter and the compulsory membership[258]

Introduction

Article 21 Charter has direct horizontal effect.[259]

That being said, in all the discussions surrounding the renewal of the pension system, the starting point of the social partners and the government has always been that the compulsory nature of the pension provision must be maintained no matter what. To achieve this, the new Pension Act *prima facie* provides for intergenerational risk sharing by including a collective solidarity reserve (see above). This is a collective capital filled from contributions and/or excess returns.

From the premium and from excess returns, a maximum of 10 percent may benefit the reserve. The reserve may not exceed 15 percent of total fund assets (the solidarity reserve). The fund board must make agreements 'in consultation with social partners' on how the reserve will be filled and how it will be distributed.

An employee may be required to participate in an industry-wide pension scheme run by an industry pension fund. About 80 per cent of employees in the Netherlands

[258] Based on: H. van Meerten, S. A . Vlastuin, Is de verplichtstelling nog houdbaar? *Pensioenactualiteiten,* 2022. This article has been updated and revised by H. van Meerten.

[259] S. Peers et al, *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Bloomsbury Publishing Plc, 2021, p. 1066.

participate in a pension scheme run by an industry pension fund. This compulsory participation is also known as the ‘large compulsory membership‘. Small compulsory membership refers to contractually agreed participation under a collective agreement. It can be administered - depending on the contract - by any entity in the second pillar.

Only a Dutch foundation can qualify as an industry pension fund. In other EU countries there is a similar mechanism.[260]

This means that this market of mandatory industry pension funds is not open to non-Dutch pension funds. The ultimate goal of the compulsory industry pension funds is to prevent competition on the employment condition of pensions and to guarantee equal pension provision for every participant in the same industry. Currently, industry pension funds use the so-called 'average premium' and 'average accrual', which is collectively referred to as the average system. Every participant pays the same premium (whether or not expressed as a percentage) and has, in principle, the same pension accrual.

In the new Pension Act this will change (again, for a description, see Chapter 2).

Obligations in industry-wide pension funds have often been the subject of debate in recent decades. In the field of European competition law and the free movement of services, important remarks can be made when it comes to the compulsory nature of occupational pension funds. A French court made even a preliminary reference to the EU Court:

[260] Van Meerten, Schmidt, *EJSS,* op.cit.

'Must Article 56 TFEU, providing for the freedom to provide services, be interpreted as precluding the obligation to join and to pay contributions to a public social security scheme, laid down in Article L 111-1 of the Social Security Code – in the present case, the CARCDSF old-age pension scheme – taking into account, first, the criterion of consistency, and, second, the criterion of systematicity, in so far as the national restrictive measure pursues the objective of maintaining and guaranteeing the financial balance of the social security system, but without ever achieving it, and by organising the management of recurrent deficits?'[261]

Focusing on the Dutch system, the question is whether the obligation to participate in a Dutch only fund, is still tenable partly in view of the changes envisaged by the Pension Act. The EU paragraph of the Pension Act can be called rather disappointing. For instance, it does not address at all the compatibility of the obligation with the free movement of services and the non-discrimination principle. This - as I will explain - is unjustified for various reasons, but also with regard to the compatibility with article 21 Charter.

European competition law

European competition law allows companies to participate freely in different markets within the EU and respond to supply and demand there. This is mainly regulated in in the TFEU, where the cartel ban (Article 101 TFEU), abuse ban (Article 102 TFEU) and rules on exclusive rights and state aid (Articles 106-109 TFEU) are described.

[261] C-401/23: https://curia.europa.eu/juris/showPdf.jsf?docid=276502&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=543566

Mandatory Regulation creates a restriction for companies to freely participate in the market of industry-wide pension funds. Whether this restriction was justified was before the Court in 1999 in three different cases, including Albany. The Court ruled that occupational pension funds do indeed obtain an exclusive right under Article 106 TFEU (formerly Article 90 EC Treaty). However, this exclusive right can be justified where Member States entrust certain undertakings with services of general economic interest in order to achieve their national policy objectives. And that, according to the Court, was the case here. If there were no obligation, it would no longer be possible for occupational pension funds to offer pensions at an acceptable cost, especially as occupational pension funds are characterized by a high degree of solidarity.

The degree of solidarity is concretized by the Court (also EU Court) by naming a number of solidarity elements. These elements can be found in several cases before the Court. Based on the presence of solidarity, the Court seems to find a justification for the exclusive right granted to industry-wide pension funds. In any case, this includes the sharing of risks between (former) participants in an industry-wide pension scheme and pensioners, the absence of risk selection by the industry-wide pension fund, the absence of an (economic) link between the premium levied and the performance delivered by the industry-wide pension fund, and the guarantee of a certain level of pension due to the social function performed by the industry-wide pension fund.

The question at hand is whether this justification for the exclusive right of industry pension funds can also be found in the envisaged, renewed pension contract. The pension system should become more personal and transparent, according to the Pension Act. Starting points include completely abolishing the average system,

allowing only premium schemes and abandoning nominal security. Also worth mentioning is a revamped investment policy tailored to each member and pensioner, and the option for social partners to choose an open or closed distribution method of the pension fund's risks.

Is the breach of European competition law still justified with the new pension contract?[262] Are there enough solidarity elements to justify the exclusive right of industry-wide pension funds? Important here is to distinguish between the two different DC schemes envisaged by the new regime: the renewed DC scheme with extended risk-sharing and the DC scheme with limited risk-sharing. The firtst has intergenerational risk sharing in the accrual and benefit phases. A collective solidarity reserve, filled from contributions and/or excess returns, should ensure that shocks can be spread as much as possible. In 'worse times', this reserve can be used to reduce a deficit. In the second DC scheme, risk sharing mainly takes place in the benefit phase. The question is whether this limited risk-sharing is sufficient to qualify the scheme as solidarity-based. The Outline Memorandum of the Pension Act addressed this question. Additional solidarity elements, such as a solidarity reserve and the sharing of the micro longevity risk, have been mentioned to make the compulsory nature sustainable. However, in both DC schemes ‘solidarity’ – if we follow the Albany definition of the EU Court - is not a given.

In the new Pension Act, both DC schemes will provide a more direct (economic) link between the premium levied and the performance delivered. In the past, the EU Court seems to value precisely the absence of this link. Is the degree of solidarity therefore at risk? Some critics see dangers in the creation of an economic link

[262] H. van Meerten , E. Schmidt, ‘Compulsory membership of pension schemes and the free movement of services in the EU’, *European Journal of Social Security* (19) 2017, issue 2.

between the premium and the performance, simply because the EU Court has not previously considered it a sign of solidarity, quite the contrary. Others see more solidarity in this: it does more justice to current economic realities and population composition.

It is therefore questionable what the weight of the absence of this link is for the qualification of the degree of solidarity in the Dutch Pension Act.

Guarantees are completely abandoned in the new DC schemes. Although it can be said that in the current pension contract these guarantees have long since ceased to be a given, the transition to DC-only schemes does make this uncertainty a reality. The expectation of the government is that letting go of this certainty will result in stable pension benefits. This is only an expectation; no certainty can be given about this. The value the EU Court seems to give to guaranteeing a certain minimum pension level should not be underestimated.

The sustainability of the compulsory membership from the perspective of European competition law depends on the extent to which the new pension system can be seen as a solidarity-based system. Since the concept of solidarity is understood differently in the literature and the EU Court has not made any firm pronouncements on this either, it is difficult to give an opinion on the extent to which the intended DC schemes are solidarity-based.[263]

[263] H. van Meerten , E. Schmidt, 'Compulsory membership of pension schemes and the free movement of services in the EU', European Journal of Social Security (19) 2017, issue 2; E. Lutjens, *Analyse verplichtstelling na pensioenakkoord houdbaar*, Amsterdam: VU Expertisecentrum Pensioenrecht 2020

The free movement of services and non-discrimination principle

Compulsory membership to a Dutch foundation not only touches on European competition law. Market freedoms also play a role here, in terms of the free movement of services. Restrictions on the free provision of services within EU law are prohibited under Article 56 TFEU. The starting point is equal treatment, or non-discrimination. However, an infringement can be justified depending on how it occurs. A distinction can be made between directly discriminatory, indirectly discriminatory and non-discriminatory restrictions.

The compulsory order discriminates against foreign pension providers on the basis of nationality. Indeed, an industry pension fund must qualify as a Dutch foundation, it follows from Article 1 of the Pensions Act. There is debate as to how this breach of the free movement of services should be characterized. Is this a case of direct discrimination on grounds of nationality or is it an obstacle to the free provision of services? Several authors see a so-called convergence between the general principles of European competition law and the free movement of services. On review, the Court will therefore arrive at the same judgment, namely that in certain cases Member States are free to entrust undertakings with services of general economic interest in order to achieve their national policy objectives. Reference is made here to the essential social function performed by occupational pension funds in the Netherlands.

However, the Court will not be able to reach this test; as a matter of principle, this is not an obstacle to the free movement of services, but a direct discriminatory measure that creates discrimination on the basis of nationality. By definition, foreign pension providers cannot participate in the Dutch market in which industry-wide pension funds are located, even though they account for about 80% of the entire pension

market. A justification for such an infringement seems only to be found in Article 52 TFEU, namely public policy, public security or public health. However, these grounds do not seem to apply here.

The Pension Act do not change these potential legal pitfalls. The risk that the Court would deem compulsory levies in occupational pension funds to violate the non-discrimination principle already exists now and will continue to exist in the future with the new pension system. It is therefore necessary to include safeguards in the new system that eliminate as many risks as possible. Several solutions have already been put forward in the literature. Examples include opening up the mandatory market of industry-wide pension funds to foreign pension providers or changing the mandatory status to an obligation to the scheme instead of the fund.

Tenability of the obligation?

To answer the question of the extent to which I consider the compulsory membership tenable, I would distinguish between review under European competition law, the four freedoms and the principle of non-discrimination under article 21 Charter. As far as European competition law is concerned, no unequivocal answer can be given. Court rulings dealing specifically with how far an infringement is justified are dated. How the justification for the exclusive right what occupational pension funds have is to be colored and what the Court would now consider solidary is not clear. At least for the new pension contract, a distinction can be made between the two intended DC schemes. In it, the DC schemes seems to contain less solidarity. If so, or too few

solidarity elements are present, an obligation in industry-wide pension funds does not seem tenable.[264]

Regarding the non-discrimination principle, the sustainability of the compulsory scheme is already at risk and the Pension Act does not seem to have removed this risk. What the European Court would rule in a future case is uncertain.

However, the situation at hand seems to involve direct discrimination on the basis of nationality; a justification for this cannot be given outright. It is therefore important that the Pension Act renewed legislation have safeguards that ensure legal risks are minimized.[265]

In short, in my view, the envisaged pension system is not without legal risks. To keep or make the compulsory scheme sustainable, the elaboration of the Pension Act should pay special attention to the sustainability of the compulsory scheme. Without this attention, the sustainability date of the compulsory scheme may expire in the least favorable case.

[264] Jukema, op. cit.

[265] Jukema, op. cit.

4. 8 Article 38 Charter[266]

Introduction

Recently, there have been new developments in the 'usury policy' cases. There have been two judgments[267] that have caused a stir in the insurance world.[268] I focus here on the judgment of the Court of Appeal of The Hague, which concerns the case of 'Vereniging Woekerpolis.nl' versus 'Nationale Nederlanden' (NN). This case had a first and second instance, after which preliminary questions were put to the Supreme Court.

The Supreme Court ruled that it must be considered whether obligations to provide additional information exist and, if so, what they are. If such obligations exist, such information must (1) be clear and accurate, (2) be necessary for a proper understanding of the essential elements of investment insurance and (3) ensure sufficient legal certainty.

The case was referred back to the Court of Appeal of The Hague for its consideration. The court was clear and even unusually fierce: some terms were ‘unfair’ and ‘contrary to good faith’.

These cases assessed standards in the Civil Code (BW), including the operation of reasonableness and fairness (article 6:248 BW). This Chapter will look at whether

[266] Article appeared in slighty amended form in Dutch: H. van Meerten, A. Pratt, ‘Consumentenbescherming: de Woekerpolis revisted’, *Pensioenmagazine*, 2024, 2.

[267] https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:12213 and https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHDHA:2023:1854.
Meanwhile, ASR/Aegon reached a settlement: 'ASR settles for €300 mln in usury policy affair', FD, 29 November 2023.

[268] 'Tough verdict on usurious policies brings claim against NN Group step closer, shares take sharp hit', FD, 27 September 2023.

'unfair' pension and insurance contracts could constitute a violation of Article 38 Charter of Fundamental Rights of the EU (hereinafter: Charter): consumer protection. In my view, the Charter is a very powerful instrument.

These findings are also relevant to the pension industry because the criteria laid down in usury policy cases will also apply to pension contracts, I predict.

Article 38 Charter of Fundamental Rights of the EU

Article 38 Charter reads as follows:

'Union policies shall ensure a high level of consumer protection.'

Article 38 Charter covers broad consumer protection and finds its basis in Article 169 TFEU.[269] For example, economic interests and the right to information are mentioned in this article.

EU consumer protection covers two main areas.[270]

First, the application of the general Treaty provisions on free movement, where - since the landmark *Cassis de Dijon* ruling[271] - it has been common practice for national consumer protection measures to be tested against cross-border situations. Importantly, in *Cassis de Dijon*, the ECJ was in principle prepared, as it put it, to

[269] H. van Meerten, E.S. Schmidt, 'The usury policy case: a matter of interpretation?', *PM* 2015/51, vol. 13.

[270] S. Peers et al, *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Bloomsbury Publishing Plc, 2021, p. 1066.

[271] C-120/78.

determine whether the German Regulation serves a purpose that is in the public interest and takes precedence over the requirements of the free movement of goods, which are the fundamental rules of the Union. That was not the case - and so market autonomy prevailed over the choices made by the German regulator.

Another example: the requirement that beer can only be called beer if it complies with the '*Reinheitsgebot*' (a consumer measure) clashed with the free movement of goods.[272]

Secondly, the development of EU legislation affecting consumers based on Article 114 TFEU:[273] the legal basis for EU legislation governing the harmonisation of law for the EU internal market. Article 114 TFEU also refers to consumer protection. This legal basis can therefore include, for example, harmonisation of national consumer protection laws. Article 114(3) TFEU states that the Commission, in its proposals referred to in paragraph 1 in the areas of health, safety, environmental protection and consumer protection, shall take as a base a high level of consumer protection.

But how does all this translate to usury policies and pension contracts? First, some background on usury policies.

Investment insurance[274]

Investment insurance is a life insurance contract, usually long-term in nature, as described in Article 7:795 of the Civil Code. In this type of contract, the portion of

[272] C-178/84.

[273] The IORP directive is also partly based on this article.

[274] Retrieved from: W.M.A. Kalkman, 'What is an investment insurance policy?', *R,P* 2013/7.3.

the premium suitable for investment is invested on behalf of the insurer in various investment categories such as shares, bonds, interest, real estate and other forms of investment. All or part of the risk of these investments rests with the policyholder. How investment insurance usually differs from conventional life insurance is that the sums insured are not expressed in euros, but in investment units (also called participations), and these sums are not guaranteed. With investment insurance, the policyholders do not participate directly in an investment institution. The insurer holds investment units in an investment institution in the name of the policyholders. Policyholders are only entitled to receive euro amounts from the insurer depending on the value of the investment units held. Premiums are converted into units, which at maturity are converted into an amount in euros and paid to the beneficiary.

Why problematic?

A number of judges have found in the usury policy cases that compliance with disclosure obligations also implies that consent was reached.[275] In contrast, other judges have concluded just the opposite.[276] For example, the Court of Appeal of The Hague, which, as mentioned, decided to refer preliminary questions to the Supreme Court.[277] The following paragraphs will explain the course of these proceedings.

[275] E.E. Ribbers, D.P. van Strien, W.A.M. Jitan, 'The Woekerpolis.nl Association v Nationale-Nederlanden', *RP*, 2023/28.4.3.1.2, para VR2.

[276] HR 11-02-2022, ECLI:NL:HR:2022:166 (conc. A-G T. Hartlief), marg. 11 - 11.43.

[277] Court of Appeal of The Hague 31-03-2020, ECLI:NL:GHDHA:2020:543, para 14.3.

Association Woekerpolis.nl/Nationale-Nederlanden

On 19 December 2013, the Vereniging Woekerpolis.nl filed a class action lawsuit against NN. This litigation focused, among other things, on the following questions: whether NN adequately informed customers about the costs that NN deducted from the (gross) premium; about the consequences of this for the asset accumulation; and whether NN deducted certain costs without a contractual basis for doing so.

At first instance, the court rejected Woekerpolis.nl's request, emphasising that the general view at the time was that 'indirect cost transparency' was sufficient to enable consumers to understand the 'essential elements' of the insurance policy. Woekerpolis.nl then appealed to the Court of Appeal of The Hague, after which, as mentioned, the Court of Appeal referred preliminary questions to the Supreme Court.[278]

Answer preliminary questions

On 11 February 2022, the Supreme Court gave the decision in the context of the preliminary questions. The Supreme Court answered that under civil law, additional information obligations can fall on the insurer, provided that the criteria of the *NN/Van Leeuwen judgment* are met. The preliminary ruling also implies that the policyholder is entitled to additional legal protection even if the insurer has complied with public law information obligations. The Supreme Court justifies this position

[278] E.E. Ribbers, D.P. van Strien, W.A.M. Jitan, 'Prejudicial questions to the Supreme Court', *RP* 2023/28.4.3.1.2.1, vol. VR2.

by referring to the intention of the Dutch legislator, which noted that the application of the relevant regulations is '*governed by civil law, which includes, for example, the requirements of reasonableness and fairness (Article 2 Book 6 of the Civil Code).*' [279]

This leads to the conclusion that an insurer that has complied with its sector-specific information duties does not automatically comply with private law standards, such as wills. The Supreme Court ruled that compliance with the information duties in place at the time does not automatically mean that the insurer has fulfilled its obligations under civil law or the EU Unfair Contract Terms Directive.[280] The case was sent back to The Hague Court of Appeal.

Final verdict

The court of appeal of The Hague considered, among other things, whether the agreement per cost item constituted an 'agreement of will'.[281] In the context of the Supreme Court's standard of interpretation, the court of appeal identified a number of circumstances as important: 1) nature of the agreement, 2) the circumstance that both the agreement, terms and conditions and brochure were drafted by the insurer, 3) the prospectuses and brochures and 4) the standard applied by the CJEU that implies that clauses must be formulated clearly and comprehensibly.

[279] HR 11-02-2022, ECLI:NL:HR:2022:166, para 3.7.4 (*Vereniging Woekerpolis.nl/Nationale-Nederlanden*).

[280] Directive 93/13.

[281] Court of Appeal of The Hague 26-09-2023, ECLI:NL:GHDHA:2023:1854, para 6.6.

The Hague Court of Appeal concluded that there was no agreement of will on the 'first costs' that NN requested from customers, as the agreement only later explained what these costs entailed, without establishing a link to the gross premium. In doing so, it was also not made clear that these charges would not benefit invested securities.[282] The court also concluded that two included clauses were unfair and should therefore be annulled. To reach this assessment, all the circumstances were taken into account. For instance, it appears that investment insurance policies can indeed be problematic, due to insufficient and/or unclear information about the costs and some clauses in the contract. While not necessarily ‘unfair’ in nature, they are poorly understood due to complicated wording.

The link to retirement

That said, the Netherlands is on the eve of a new pension system (the WTP). The question is whether the old and new pension scheme meet the requirements formulated by the Supreme Court (and the EU Court).[283]

As explained earlier, this is not the case for many pension contracts implemented by compulsory industry pension funds.[284] Moreover, the European Directive for pension institutions - the IORP - is partly based on Article 114 TFEU (consumer protection).

[282] Court of Appeal of The Hague 26-09-2023, ECLI:NL:GHDHA:2023:1854, para 8.8.

[283] For more information, see section 3.

[284] H. van Meerten, S.L. Vlastuin, 'The unbearable lightness of pension reform', *SEW* 2022, vol. 6. With regard to non-mandatory contracts, the situation is different; I will not go into that now.

Article 38 Charter may have added value vis-à-vis the IORP Directive (which contains standards on transparency) and vis-à-vis Article 48 PW. Regarding the IORP Directive, just as the EU Court ruled in relation to usury policies, an additional disclosure duty - over and above national standards - can also be distilled from it. Article 38 EU Charter can 'trigger' this additional information duty.

Regarding Article 48 PW, the added value of Article 38 EU Charter lies in particular in the following circumstance. Article 48 PW requires the pension fund to communicate 'correctly, clearly and even-handedly' to the member.

This sounds nice, but a participant cannot derive any rights from the UPO (*Uniform Pensioen Overzicht*, the Dutch pension overview) provided (which contains the information).[285]

To cite an example, many (mandatory) pension funds simply still cannot provide a good insight into costs.[286] The AFM's 2021 annual report also shows that:

'*In 20% of the annual reports examined, at least one mandatory amount or ratio was missing and in 34% of the annual reports, the amounts and ratios were present, but not all in the correct form*.'[287]

[285] This, incidentally, comes in for a lot of criticism, including from Hoekstra and Van Leeuwen, https://pensioenpro.nl/pensioenpro/30055607/hof-oordeelt-deelnemer-kan-geen-rechten-ontlenen-aan-upo,Pensioenpro, 'Court rules: participant cannot derive rights from upo', 27 March 2023.

[286] Omtzigt drew attention to this as early as 2013. https://www.eerstekamer.nl/behandeling/20130604/motie_van_het_lid_omtzigt_c_s_over/document3/f=/vja7n4g10rzt.pdf See also: H. van Meerten, S.L. Vlastuin, 'The unbearable lightness of pension system reform', *SEW*, 2022, vol. 6.

[287] 'More focus needed on cost accountability by pension funds'; AFM investigation into cost transparency and accountability in annual reports of pension funds, 01-01-2021, p. 31.

It was explained earlier that members barely understand pension contracts.[288]

Furthermore, with regard to pension savings, the question must also be: would a participant have made the same choices if they had been fully aware of, for example, the above-mentioned additional - little or no communicated - costs of the pension scheme? The A-G at the Supreme Court writes in the cited recent usury policy case:

'Focusing on the NN/Van Leeuwen case, Van Meerten and Schmidt argue that it seems very likely that Van Leeuwen would not have taken out his investment insurance had he been aware that NN would not use almost 60% of the premiums paid for investments. NN should therefore perhaps have foreseen that information about the high cost of the policy was an important, if not decisive, factor for Van Leeuwen's (purchase) decision.'

But Article 38 Charter can also provide additional protection compared to national options, such as, for example, 'good employment' practice (7:611 BW) - when the employer changes the scheme with an industry pension fund.

It is interesting to point to a judgment of the Rotterdam court:[289]

'There is no doubt that if [claimant] had known that he would lose his prospect of the conditional pension by joining FNGM, he would not have agreed to this and would have remained employed by [name of company 1].'

[288] H. van Meerten, 'Reflex effect to pension law', *Pensions and Practice*, May 2023.

[289] Rotterdam District Court, 12 November 2021, ECLI:NL:RBROT:2021:11058.

In a ruling by The Hague Court of Appeal[290] (upheld in cassation), the court considered that in the case of a drastic change in terms of employment, such as the pension scheme, the employer must provide employees with information in such a way as to prevent the employee from agreeing to a change under the influence of misrepresentation:

'The court first of all stated that the standard of good employment practice requires the employer to carefully consider the interests of the employee in the event of drastic changes to his terms of employment, such as a change in his pension scheme. More specifically, the employer must provide sufficient information to the employee and do everything that can reasonably be required of the employer to prevent the employee from agreeing to a change in his pension scheme under the influence of misrepresentation. Furthermore, under circumstances, the employer should warn the employee of risks associated with the change.'

The ruling shows that when changing the pension scheme, the employer must inform employees sufficiently, adequately and correct about the financial consequences of the change. This is very similar to the criteria from the 'usury policy' case. The employer must warn of risks associated with the change before the employer can be relied on to agree to the change. This is therefore also a form of consumer protection and a piece of legality, as consumers and/or employees should know where they stand in terms of pensions and finances. Requirements of reasonableness and fairness and the Unfair Terms Directive should also be taken into account, as the Supreme Court has ruled.

If an employee has not been informed, he is not aware of the change. A change detrimental to him cannot then be held against him. Furthermore, if the employee is

[290] Court of Appeal of The Hague 16 February 2016, ECLI:NL:GHDHA:2016:231.

unaware of the change, he will not be able to take substitute measures himself, which may cause him damage. Breach of the duty of care may be a ground for the duty to pay damages.[291] Reference was made earlier to the risks to the employer's conversion, e.g. agreeing to a change without knowing the advice of the 2011 country lawyer - who apparently warned that conversion is not allowed.[292]

As said, in an explanatory letter, the country lawyer succinctly summarizes that conversion is not the recommended course of action. The process of merging old entitlements renders unconditionally accrued pensions conditional retroactively. This constitutes a breach of individual property rights. The four criteria to assess whether a violation of property rights under the European Convention on Human Rights (ECHR) has occurred, are emphasised. The country lawyer identifies a particular challenge in substantiating the necessity criterion.

The country lawyer explicitly advises against enacting a legal provision that would enable the merging/conversion of old entitlements at the fund level. Instead, three potentially superior alternatives are proposed:

1. Social partners refrain from collectively merging old entitlements.

2. Funds present individual participants with the choice of opting in or out of the merging process.

3. New variations are developed within the existing financial assessment framework (FTK).

[291] PHR 9 June 2017, ECLI:PHR:2017:511.

[292] https://www.uu.nl/opinie/blog-het-nieuwe-pensioenstelsel-en-de-informatieplicht-van-werkgevers.

Violation of Article 38 Charter?

Back to Article 38 Charter. In the usury policy cases, this article was not invoked. As mentioned, the Charter is a powerful tool and can add value. The Charter takes precedence over the Pensions Act and can be directly invoked by an individual against a pension fund. But does this also apply to Article 38 Charter?

Under Article 38 Charter, the EU is obliged to ensure a high level of consumer protection in its policies.[293] The literature does argue that that the wording of Article 38 Charter (and Article 169 TFEU) is too general and vague, and therefore could not provide a right enforceable in a court of law. The explanatory memorandum to Article 38 Charter also calls it 'a principle', and not a right.[294]

I believe this view is no longer tenable. I derive inspiration from the opinion of Advocate General (AG) to the EU Court, Bobek.[295] AG Bobek indicates that - the Article 21(1) Charter relevant in that case - does not result in a defined set of rights and obligations for employers and employees (as does Article 38 Charter). Nonetheless, according to Bobek, it is specifically within the competence of national courts to ensure the legal protection arising from Union law and to ensure its full effect. He then states:

[293] H. van Meerten, E. Schmidt, 'The usury policy case: a matter of interpretation?', *PM* 2015/51, vol. 13.

[294] Commentary on the Charter of Fundamental Rights, OJEU 2007/C 303/02, https://eur-lex.europa.eu/legal-content/NL/TXT/PDF/?uri=CELEX:32007X1214(01),from=EN.

[295] C-193/17 (Opinion of A-G Bobek), para 150.

‘*A remedy must be available to combat discrimination, in line with the principle of effective judicial protection*.’[296]

This means that Article 38 Charter should also ensure the 'full effect' of EU law. This also refers to the *'effet utile'*, which complements the principle of community loyalty.[297] The principle of community loyalty and the ‘effet utile’ of EU law require that, in order to ensure the full and unimpeded effect of EU law, Member States cannot merely adopt a passive attitude.

On the contrary, Member States should take active steps to bring their national legislation into line with EU law and ensure effective application, enforcement and, if necessary, punishment. This 'useful effect standard' thus implies that governments may not take away the effect of EU law.[298] This does seem to be happening now that Article 38 does not seem to have 'full effect' and therefore cannot find application in Dutch law. I believe that the 'full effect' means that EU fundamental rights cannot 'just be set aside' by national law, which applies not only to Article 21 Charter, but to all rights and principles, including Article 38 Charter.

Furthermore, I would like to point out the principle of effectiveness. This is the responsibility of each Member State to ensure that the exercise of rights granted to rights holders is not rendered impossible or excessively difficult in practice when

[296] Made clear in C-432/05, para 37.

[297] Handbook Legislation and Europe: The preparation, creation and national implementation of European regulations, p. 182.

[298] Already laid down in C-13/77.

shaping the EU internal legal order.[299] Article 38 Charter stresses the importance of consumer protection in EU policies, and the principle of effectiveness can be invoked to ensure that this protection is actually realised by national measures and procedures. It thus appears to impose an obligation on Member States to actively contribute to achieving the goals of consumer protection as set out in the Charter.

Pre-Conclusion

In 4.7, I discussed recent events in the insurance sector, in particular the case *Vereniging Woekerpolis.nl v Nationale Nederlanden,* which raises questions about possible violations of Article 38 Charter. The article aims to ensure a high level of consumer protection in EU policy, with Article 169 TFEU as its basis. The usury policies came under the spotlight because of problems with information disclosure and will.

The Supreme Court ruling has confirmed that insurers may not have adequately fulfilled their disclosure obligations, which may result in additional legal protection for consumers.

This raises the question of whether individuals can invoke Article 38 Charter - as an additional powerful tool - if there is a violation of a high level of consumer protection.

Although the wording of Article 38 Charter is considered vague and too general, it can be argued that Article 38 Charter can indeed be invoked directly by a consumer

[299] EU concepts (A to E), European Law Expertise Centre. Also follows from CoJ, C-33/76 (*Rewe-Zentral AG v Landwirtschaftskammer für das* Saarland) and CoJ, C-415/11 (*Mohamed Aziz v Caixa d´Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)).*

against an insurer and also a pension fund, thus generating additional legal protection.

4.8 Intermezzo: an alternative to Dutch Conversion[300]

Above I stated that there are alternatives to conversion. As the *Landsadvocaat* already wrote in 2011, the cutting of pension rights is the most logical one. There is however another possibility.

As said, converting 'old' - to 'new' pension rights is becoming a major issue in developing the new pension system. Many stakeholders, legal experts and economists are very concerned about its necessity and sustainability. It was one of the main themes in the consultation responses to the draft bill.

A major problem with conversion is how to justify the infringement of European property rights. In several contributions, I have been explained that changing from DB to DC is an encroachment on European property rights that will not be easily justified. After all, the legal contract changes. That the outcome may be the same is irrelevant.

How do we get out of this impasse? In fact, pension funds need a solution. They are afraid of legal claims if they convert. As Tangelder[301] pointed out, they are ultimately liable for this if things go wrong. The fear of claims is further reinforced by the circumstance that the individual right of objection from Article 83 of the Pensions

[300] Parts of this article appeared in Dutch and has been translated and updated. H. van Meerten, 'Invaren: de pensioenbewaarder', *Pensioen en Praktijk*, 2021, 4.

[301] Tangelder, op. cit.

Act (PW) will be rendered inoperative (as far as conversion is concerned). This makes the infringement of property rights even more difficult to justify.

In contrast, pension funds will not be obliged to conversion. If they can provide reasoned evidence that there are ‘disproportionately unfavourable outcomes’, they can refrain from it.

The so-called Pension Custodian (Article 124a PW) can provide the solution to this. What is the Pension Custodian? How can it provide relief?

I will outline that in this Chapter. The Pension Custodian has been included in Dutch legislation since the Introduction of Premium Pension Institutions Act (hereinafter: PPI legislation) came into force. Its sole purpose was to shield the assets of the PPI. With the implementation of the IORP II Directive, the Pension Custodian became applicable to pension funds as well. Consequently, the Pension Custodian is the 'ultimate ringfencing' tool for pension funds that cannot legally separate pension schemes internally. Not only can large cost advantages be achieved by 'pooling' different activities in a Pension Custodian (at least between 20-25%, is estimated), but perhaps more importantly: by means of conversion in a Pension Custodian, the right of ownership is not affected, the individual right of objection from Article 83 PW can be maintained and a legal 'carve-out' is created for the ‘conversion refusers’. For example, pension funds that feel it is 'disproportionately unfavourable' for certain stakeholder groups to enter the new system can use the Pension Custodian.

How exactly does the above work? Before this question can be answered, I will first outline - for a proper understanding of the matter - the legal framework of the Pension Custodian. Then, I will specifically discuss how the Pension Custodian can be an alternative to conversion.

Definition, purpose and tasks

Article 1 PW refers to Article 1:1 of the Financial Supervision Act (Wft) for the definition of Pension Custodian. Article 1:1 Wft defines the Pension Custodian as a 'legal person entrusted with the custody of the assets of a premium pension institution or a pension fund to the extent arising from the administration of pension schemes'. Only a legal entity with the sole statutory purpose of being the owner of the pension assets and being the debtor of debts of the pension assets concerning a pension scheme (Article 4:71b Wft) acts as Pension Custodian.

The purpose of a custodian is thus to protect pension assets, prevent contagion risks between different assets and thus protect the interests of beneficiaries and pensioners.

Appointing a Pension Custodian is not mandatory, but this does not prevent a pension fund from voluntarily deciding to appoint a custodian. It is aligned with the rules set out in the Wft on the Pension Custodian. Pension funds may also jointly establish a Pension Custodian.

Duties under the Wft

The Pension Custodian is a separate legal entity whose sole task is to preserve these assets. At least the following activities fit the task of preserving a pension asset:

a. *Being the owner of the components of pension assets;*
b. *Disposing of the components of pension assets (in agreement with the premium pension institution or pension fund);*

c. *Keeping records of the components of pension assets.*

Depositary duties under the IORP II Directive

As touched upon above, the Pension Custodian is a combination of the Wft/PPI legislation and the IORP II Directive. This makes the Pension Custodian difficult to interpret. The duties under Article 35 IORP II are, among others:

a. *The depositary shall carry out instructions of the IORP unless they are contrary to national law or the rules of the IORP;*

b. *The custodian shall ensure that in transactions involving the assets of an IORP relating to a pension scheme, the consideration is paid to the IORP within the usual time limits, and;*

c. *The custodian ensures that the income from the assets is used in accordance with IORP rules.*

These tasks are more comprehensive than follows under the Wft. The IORP II Directive provides that the 'home Member State of the IORP' (in this case, the Netherlands) may determine other supervisory tasks to be performed by the depositary (Article 35(2)). Where no depositary has been appointed to perform supervisory tasks, the IORP shall establish procedures to ensure that the tasks otherwise subject to the supervision of depositaries are duly performed within the IORP (Article 35(3)).

Obligations of Pension Custodian under the agreement

That said, Article 124a(1) PW stipulates that a pension fund transfers ownership of a pension asset to a Pension Custodian only after it has entered into a management

and custody agreement with it. This agreement at least regulates (so may be more) that:

a. *The Pension Custodian acts in the interests of members, former members, other beneficiaries and pensioners;*

b. *Pension assets held in custody can only be disposed of by the fund and the Pension Custodian together (Article 124a(2)).*

Article 124a (2) PW stipulates that the pension fund must take measures so that the Pension Custodian will only dispose of the components of the pension assets with the cooperation of the pension fund. The background to this is that it is the task of the pension fund to determine, for example, the investment policy to be pursued with regard to the pension assets, to decide on the purchase and sale of investments and to indicate when a withdrawal should be made from the pension assets for the purpose of a distribution of pension money. However, since the pension fund does not own the pension assets, it is important that the pension fund is assured of the cooperation of the Pension Custodian and that the Pension Custodian - in line with the (statutory) limited role of the Pension Custodian - will dispose of the pension assets only in cooperation with the pension fund.

Minimum equity

Is setting up a Pension Custodian 'expensive'? Article 48(1)(q) Prudential Rules Wft Decree (Bpr) stipulates that the minimum amount of equity referred to in Article 3:53(1) of the Act for a Pension Custodian is € 112,500.

The minimum equity of a Pension Custodian, in accordance with Article 51 Bpr, is formed by the value of the assets referred to in Article 26(1)(a) to (e) of the Capital Requirements Regulation, or Article 27 of that Regulation insofar as the Pension Custodian has the legal form of a foundation.

Ringfencing

After this outline of the legal framework, I now turn to the question of how the Pension Custodian can be used as an alternative for conversion. Through the Pension Custodian, a legal separation is created between the assets of the pension schemes. For this, reference can be made to the Explanatory Memorandum of the PPI Act (TK, 31891, 2008-2009, no. 3) in which, as mentioned in the introduction, the Pension Custodian was already introduced.

'The protection of pension members aimed at safeguarding the pension contributions paid in and the investment returns obtained from them is regulated by obliging the PPI, in certain cases, to place the assets or assets associated with pension schemes with a legal entity independent of the PPI, the Pension Custodian. In formulating this obligation, which results in the pension assets to be invested being separated under property law from the assets of the institution that determines the investment policy with regard to the assets (the PPI), explicit consideration was given to the obligation to place the assets of an investment institution with a custodian.'

With the Pension Custodian, a split is made between legal and economic ownership. Legally, the Pension Custodian becomes the owner, but not economically.

As mentioned, the pension assets held in custody can only be disposed of by the fund and the Pension Custodian together. The Pension Custodian will only surrender the pension assets held in custody against receipt of a statement from the fund indicating

that surrender is required in connection with the regular conduct of the pension fund's business. This is reflected in Article 42 of the Pension Act Implementation Decree (which was taken over from the PPI legislation, Article 168c BGFO).

Specifically, how does it work?

If one or more pension funds establish a Pension Custodian (or a commercial party offers one), the pension assets belonging to the 'old' DB agreements, can be 'parked' in the Pension Custodian. The agreement should contain the terms on this, and the Pension Custodian's duties outlined above make this possible. Subsequently, this Pension Custodian will be subject to the requirements for DB agreements. Ownership is thus not affected: the pension agreement stays a DB agreement.

Thus, no use is made here of the 'conversion regime' as laid down in the pension legislation (including Articles 150o and 150l). One uses the - under the circumstances mentioned there - the 'regular' Article 83 PW route with individual right of objection. Those who object is given a place in the Pension Custodian. It is true: during the period of the existence of this Pension Custodian, two schemes apply: the new DC scheme and the old DC scheme. However, a separate pension fund - with all its costs - need not then be set up. However, I cannot call the existence of 'two schemes' an objection either for the following reason: even within a DC scheme, there are numerous flavours for which separate administrations will have to be kept even in the future. With modern technology, this should not be a problem.

Conclusion

At the time, the PPI legislation devised the Pension Custodian. It could only be used for the PPI. With the implementation of the IORP II Directive, the Pension

Custodian can also be used for pension funds. This offers new - but already existing! - opportunities for cooperation between pension funds. All the mechanisms that apply to the Pension Custodian already exist since 2011 when the Act introducing premium pension institutions came into force.

The Pension Custodian can thus potentially be used as the ultimate 'ringfencing tool' for pension funds. The Pension Custodian creates a legal separation between assets belonging to pension schemes. As the right of ownership is also not affected and the individual objection is preserved, the Pension Custodian, as outlined above, can be a very good alternative for conversion.

4.10 Conclusion

The Charter of Fundamental Rights is a very powerful tool. It should be in the toolbox of every EU lawyer. I this Chapter I discuss the implication of article 17, 21 and 38 of the EU Charter. In par. 4.8 I discuss – in light of this – an alternative to Dutch Conversion. And remember:

'*Never mind human rights law, EU law is much more powerful'*.[302]

[302] The Guardian, 9 October, 2013: https://www.theguardian.com/law/2013/oct/09/human-rights-eu-law-powerful.

5. PEPP: Catalyst for pension innovation?[303]

5.1 Introduction

In the past two decades, several traditional markets have been 'disrupted' by parties with new business concepts, new technology and, above all, a big focus on consumer experience. Music, video, books, taxi, hotels, banks, meal delivery; examples abound. Is the personal pension savings market up for grabs? If it is up to the EU, yes. Through new PEPP legislation. But will this actually happen? Are providers and consumers ready for this? And what problem is the PEPP aiming to solve with this and will PEPP solve this problem? Also is briefly outlined the origins of PEPP. Then some common misunderstandings that stand in the way of the development of PEPP are also addressed.

5.2 PEPP General

PEPP stands for 'Pan European Personal Pension Product'. PEPP came into force in March 2022. Meanwhile, the first PEPPs are on the market.[304] PEPP aims to be a simple, transparent and low-cost pension solution for European consumers.[305] PEPP introduces a 'PEPP account': an account where an individual can save pension [306] regardless of where they live or work. A collective PEPP may also be offered. PEPPs

[303] This is an updated, slightly modified and translated version of an article that appeared in Dutch: H. van Meerten, T. J. B. Hulshoff, 'PEPP: katalysator voor pensioeninnovatie?', *PensioenMagazine* 2022/135. Errors are on my account only.

[304] PEPP register EIOPA: Home Page - PEPP (europa.eu).

[305] For more details, see H. van Meerten, The new European pension agreement: the PEPP, VBA Journal, 2021: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3816785.

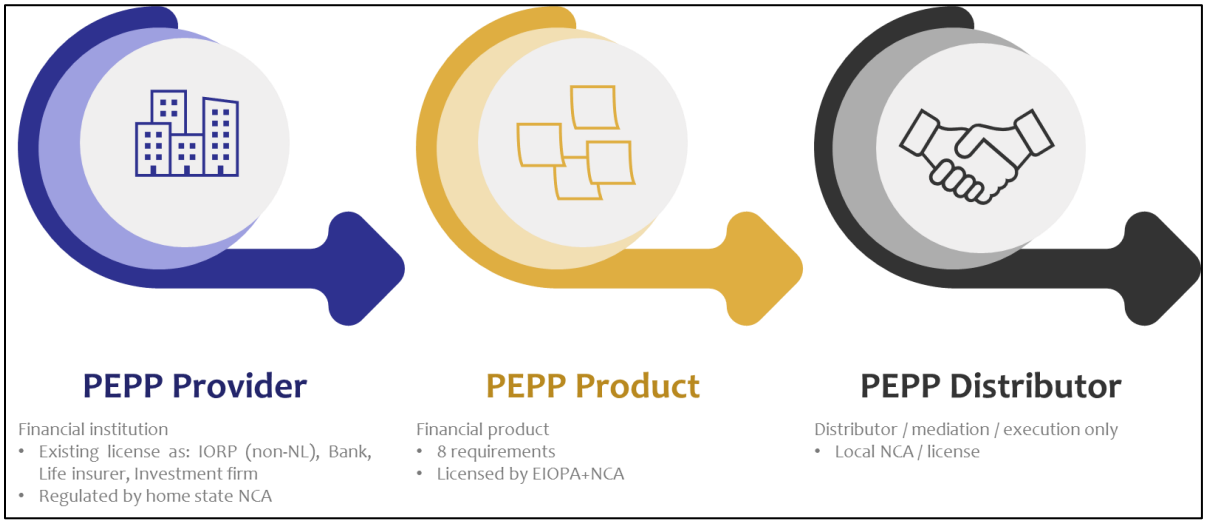
[306] PEPP is EU legislation. From a European perspective, PEPP is 'pillar-less', as there is no European definition of 2nd or 3rd pillar.

can take many forms, from 'Solvency II PEPPs' with a 99.5% guarantee, a 'lifecycle PEPP', to a 'Tontine PEPP'.

In many contributions I outlined the PEPP. I refer to these studies.[307]

The PEPP legislation distinguishes between PEPP provider, PEPP product (hereinafter PEPP) and PEPP distributor (Figure 1).

Figure 1: PEPP parties (source: EU, Hulshoff, Van Meerten)



A PEPP provider can be any party with an existing licence as a bank, asset manager, insurer or pension fund. These entities already have an 'EU passport' and are therefore automatically suitable to offer a PEPP. A PEPP has licensing requirements and must be approved by the regulator, based on the criteria in the PEPP legislation.

[307] Many of them can be downloaded at my SSRN page: https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1340792

A PEPP consumer[308] can be a self-employed person, an employee, a student, or a pensioner.

Pension funds (IORPs) can only offer a PEPP if this is allowed under national law. This is excluded for Dutch pension funds and PPIs.[309] Pension funds from other countries - as things stand at the time of writing (February 2024)- are allowed to offer PEPPs.

PEPP distribution is, according to the PEPP Regulation, advising on, proposing or carrying out other preparatory work for the conclusion of agreements to offer a PEPP, entering into such agreements, or assisting in the administration and execution of such agreements, including the provision of information on one or more PEPP agreements based on criteria chosen by PEPP clients through a website or other media and the preparation of a PEPP ranking, including price and product comparison or a discount on the premium of a PEPP, when the PEPP client may conclude a PEPP agreement directly or indirectly through a website or other media.

PEPP distributors are bound by EU legislation for distribution, namely IDD legislation[310] (for insurance-based PEPPs) or MIFID legislation[311] (for uninsurance-

[308] On the concept of consumers, see H. van Meerten, S, Vlastuin, 'The Unbearable Lightness of the Pension Reform', SEW, 2006, 6. Available at: 'The Unbearable Lightness of the Reform of the Pension System': SSRN.

[309] See: H. van Meerten, A. Wouters, 'Can a Dutch IORP Offer a PEPP?
Cross Border Benefits Alliance, Europe Review, July 2018, p. 8-32. Online at*:*
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3206838

[310] 2016/97.

[311] 2014/65.

based PEPPs). A PEPP provider can also be a PEPP distributor, but it can also do so independently.

Last but not least, there is the PEPP association.[312] This is a collective, any form or origin, which can enter into a PEPP on behalf of individual consumers. Through the PEPP association, a collective PEPP can be used.

5.3 What problem should PEPP solve, and will PEPP solve the problem?

Europe is aging. The labour market is constantly evolving on the path of mobile careers. The more elderly relative to employed people, the more important the role of capital funding of pensions. Capital funding requires pension saving. Pension saving requires high level of confidence on the pension sector, good quality and quantity of pension companies. Also, to accommodate the mobility of workers, pension entities should engage in cross boarders' activities. The IORP II Directive has not adequately settled the basis for the increase of IORP's cross border' activities; nor was able to address the lack of trust in the system.[313] These factors contributed to the European scenario we observe nowadays: too few people save enough for retirement.

[312] See the definition of PEPP in the Regulation, 2019/1238, Article 2(2).

[313] Only 38% of the EU population have trust in IORPs.

PEPP should be seen as a new opportunity for European pensions

How big is the problem? Only 27% of EU citizens have personal pension savings, considering second and third pillars' products.[314] That percentage is an average, which varies greatly from country to country. In the Netherlands, for instance, this figure is much higher. Europe-wide, there are a limited number of pension product providers; 83% of pensions are built up with insurance companies. That percentage is neither good nor bad but note that a licence for a life insurance business is difficult to obtain and requires not inconsiderable capital buffers and risk management. Furthermore, favourable tax regimes applicable to insurance companies may contribute to insurance companies' dominance of the sector.

Europe is seeking a comprehensive capital market union. But pension provision is still regulated by member states. Pension providers cannot - or very complexly - offer products and services outside their own member state. There is no unitary pension market in Europe, as in, say, the US or Australia.

But in the EU, we do have a well-functioning single market for investment funds. What UCITS (an EU regulated collective investment fund) means for investment funds, perhaps PEPP can mean for pensions? Can a market emerge where any European consumer, living anywhere in the world, can buy a PEPP from a provider based in any member state, under a standardised model? Yes, in theory it could. Although the first PEPP Regulation raised quite a few questions, such as 'what is a guarantee', it is expected that in PEPP II or PEPP III, the ambiguities will be further removed. UCITS too became really successful only after several revisions.

[314] Infographic: a pan-european personal pension product (europa.eu) Refers to citizens aged 25-59.

PEPP could, in theory, help get Europeans into retirement savings.

5.4 PEPP misunderstandings

PEPP is new and still unknown. I find that there are still many misunderstandings about PEPP.

1) *'We can do that a long time ago anyway'*

PEPP is underestimated. PEPP should not be understood as the same as any national 3rd pillar product. PEPP can be used not only for self-employed people, but also for employed people, non-employed people, students on a cross-border basis. So, the reach of PEPP is much wider. Also, a PEPP collective can be constructed even in such a way that it can be an alternative to 2nd pillar DC schemes, with unique benefits (see below).

Distribution can be via 'execution only' purely online. But distribution can also be via a 'PEPP association' of PEPP savers: this can be any collective that binds consumers. A consumer organisation, an employee representation, a 'Big Tech', a bank, a self-employed association or an employer (think 'trust-based execution' as common in UK). It can even be a trade union. Indeed, a PEPP can also be offered on a non-commercial basis. Couldn't such a union of PEPP be a solution to the 'white spaces', for there is a lack of pension accrual?

An employer or collective can deposit premiums in a personal PEPP account. The investments are collectively pooled with the PEPP provider and thus institutionally, collectively managed. Consumers have choices and retain the PEPP if they change jobs or emigrate.

Also, existing 3rd pillar schemes (and possibly even 2nd pillar schemes, as in Belgium) can be converted into a PEPP product.

Incidentally, also was heard the argument 'we've been able to do that for a long time' about the Dutch DC provider, the PPI at the time. Apart from the circumstance that it did lead to 50% cost reduction,[315] meanwhile all the big insurers 'have' a PPI and are even transferring their insured DC schemes to the PPI vehicle.

2) *'PEPP is way too complicated, all those languages you have to master'*

PEPP can also be offered in a single Member State. So, PEPP does not have to be cross-border. There is no doubt that PEPP is a complex product, but that is now true for all financial products.

However, there is a legitimate fear of 'gold-plating'; that Member States will continue to impose their national requirements on PEPPs. However, the PEPP regulations seek to prevent this by harmonising the requirements for PEPP products in the underlying standards. It is not without reason that the EU legislator has chosen the legal instrument of a Regulation and not, as in the case of IORPs, a Directive. A Regulation of this kind - second regime regulations - leaves hardly any room for manoeuvre for the member states.

3) *'The tax regime remains national, therefore the PEPP will not work'*

The national tax regime applicable to the PEPP provider and PEPP (often,

[315] J.W. Hoitsma, PPIs score excellent in evaluation report, *Pension Magazine* 2014/134.

incidentally, already EET[316]) continues to apply to the deposit of pension contributions and the distribution of pension monies. In principle, PEPP regulates only the accrual phase; indeed, the benefit phase is regulated nationally. However, no distinction - and this applies to both the accrual and benefit phase - may be made in the tax treatment (in all areas) between PEPP and national 3rd pillar products. Under EU case law, this tax equality can be enforced. The Skandia ruling[317] considered:

'In the light of the foregoing observations, the answer to the question referred must be that Article 49 EC precludes an insurance policy issued by an insurance company established in another Member State which meets the conditions laid down in national law for occupational pension insurance, apart from the condition that the policy must be issued by an insurance company operating in the national territory, from being treated differently in terms of taxation, with income tax effects which, depending on the circumstances in the individual case, may be less favourable.'

With this ruling in hand, the same benefits that apply to a comparable national pension product can be enforced for a PEPP. Moreover, the Dutch Future Pensions Act will apply the annual margin of up to 30% of salary for 3rd pillar, and thus also for PEPP. This will equalise the maximum contribution deposit between 2nd and 3rd pillar.

[316] Accruals and investments are 'exempt' from tax, distributions are 'taxable'.

[317] C-422/01, Skandia.

I also want to point at the very powerful EU 'four freedoms', goods (article 36 TFEU), persons (article 45 TFEU), services (article 56 TFEU), capital (article 63 TFEU).

These freedoms can be invoked directly by an individual and they can even set aside national fiscal measures that impede these four freedoms. That happened in two cases.

In C-360/22 the EU Court held (own translation):[318]

'56 In that context, it should be recalled that, while reasons of a purely economic nature cannot constitute an overriding reason in the general interest capable of justifying a restriction on a fundamental freedom guaranteed by the Treaty, national legislation may nevertheless constitute a justified restriction on a fundamental freedom when it is motivated by economic interests pursuing an objective in the general interest. Accordingly, it cannot be ruled out that a serious deterioration in the financial balance of the social security system constitutes an overriding reason in the public interest capable of justifying the infringement of the Treaty provisions on the right to freedom of movement for workers (judgment of 21 January 2016, Commission v Cyprus, C 515/14, EU:C:2016:30, paragraph 53).

57 However, according to settled case-law, it is for the competent national authorities, when adopting a measure derogating from a principle enshrined in Union law, to prove in each specific case that that measure is appropriate for ensuring that the said objective is achieved and does not go beyond what is

[318] Only available in French and Dutch.

necessary for that purpose. The justifications which a Member State may put forward must be accompanied by sound evidence or by an examination of the appropriateness and proportionality of the restrictive measure adopted by that Member State, as well as by specific data in support of its arguments. Such an objective, detailed and numerical analysis must be capable of demonstrating, by means of serious, consistent and probative data, that there are genuine risks of imbalance in the social security system (judgment of 21 January 2016, Commission v Cyprus, C 515/14, EU:C:2016:30, paragraph 54 and case-law cited there).

58 It must be determined that such evidence is lacking in the present case.'

In C-459/22 the EU court held:

'The national legislation at issue, which lays down conditions for workers' access to the labour market in Member States other than the Kingdom of the Netherlands, may therefore constitute an obstacle to the free movement of workers prohibited in principle by Article 45 TFEU.'

4) 'A PEPP product requires guarantees and that is not feasible in the current market'

The PEPP legislation has two types of PEPP products: a Basic-PEPP and a Non-Basic-PEPP. Both forms present some form of risk mitigation. For the Basic-PEPP, a form of 'lifecycle' investing is the norm; the way to combine asset classes depending on a participant's age and risk profile, with increases in security as the need and desire to do so increases.

For Non-Basic-PEPP, additional forms of risk mitigation can be used. For example, a guarantee on the premium deposit, return or a rate guarantee.

The Basic-PEPP will become the norm. Through modern LDI investments,[319] unifying investment portfolios and banking investment systems can create standard or customised investment policies using the same underlying investment instruments.

5) '*That 1% cost cap is unachievable'*

Basic PEPP has a cost cap of 1% of assets under management. Plenty of 'PEPP-like' products (e.g. in the UK and the US, but also in the Netherlands) are well below that, around 0.4%-0.7%. A given standardisation, 'robo-advice' and modern distribution, a PEPP product of 0.3% should be possible. So, the 1% is rather too high.

5.5 The supply side

A market of 300 million potential consumers and over € 2 trillion in assets. Surely that market should be entered by hundreds, if not thousands, of providers.

However, at the time of writing, only one provider is known in the EU PEPP register. Where is the friction? Is there limited interest? And why? Besides the misunderstandings mentioned above, there is something else at play.

[319] Liability Driven Investments, namely investments that mimic expected outcomes.

Because let's turn the question around: which type of PEPP provider is ideally positioned for PEPP? The answer is: none. At least, not in isolation. PEPP should be seen as a 'managed investment' product[320] with a pension nature, far-reaching duty-of-care and consumer protection requirements, no or limited scope for commission, no possibility for a fixed 'administration fee', and a context with insurance technical products and an embedding to/in the other three pillars of personal wealth planning. More generally, the PEPP market can be characterised as a 'low-margin, high volume, high growth market'.

For insurers, a PEPP is in line with the long-term trend, but the distribution network does not seem to fit the 'fee cap', and the 'managed investment' character is atypical within the product palette. For banks, PEPPs fit within the financial fitness ambition, but pension investment propositions offer a limited profit margin and are not a 'core capability', partly due to the split into retail bank and private wealth bank.

For administration parties, the implementation of a PEPP fits on the technical infrastructure, but administrators are not an authorised PEPP provider, do not have the necessary investment expertise and administration fees cannot be billed on a euro-per-participant basis to a participant (only an AuM fee is allowed).

Asset managers, especially Anglo-Saxon ones, are very familiar with individual pensions, but shy away from the administrative implementation and duty-of-care requirements. For fiduciary managers, the product development processes for individual propositions as well as the duty-of-care requirements and underwriting

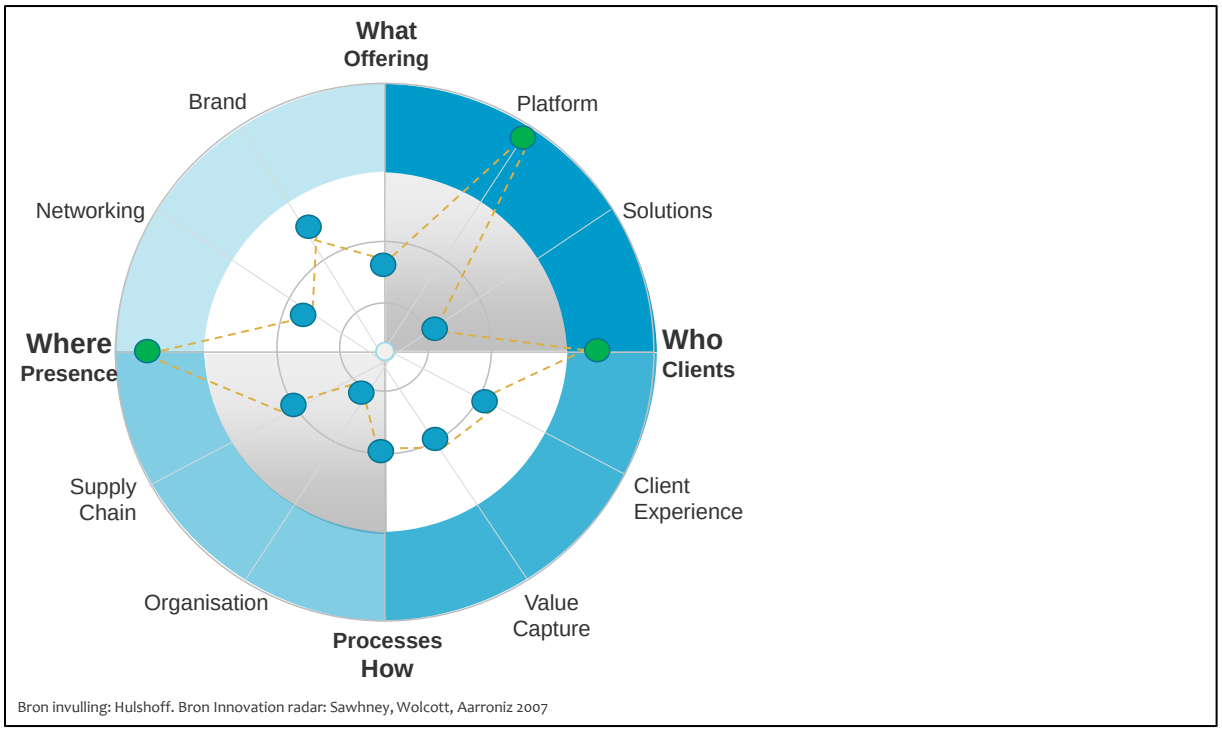
[320] PEPP does not include an 'execution only' list mutual funds, but an investment managed by the PEPP-Provider, with the PEPP-Provider taking care of the investment decisions and the ongoing suitability and appropriateness of the product with the consumer.

components are unfamiliar within the current institutional investment advisory environment. For Dutch pension funds, the task delineation places them outside the PEPP market. This also excludes Dutch PPIs - although ideally positioned - from access to the Dutch PEPP market by Dutch law.[321]

No single party covers the full spectrum of required services. Interestingly, the disadvantages of one party are the advantages of the other. This observation provides opportunities for a combination of areas of expertise, balance sheet and systems, if linked and integrated within a scalable platform. Innovation (Figure 2) lies not so much on the end product as on the platform side and linking a multitude of markets, regions and customers.

[321] That Dutch PPIs can indeed offer a PEPP is set out here: H. van Meerten, A. Wouters, 'Can A Dutch IORP offer a PEPP?', CBBA, 2019. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3206838.

Figure 2: Innovation radar for PEPP platform (source Hulshoff, Van Meerten)



5.6 The demand side

Retirement is not sexy. Pension products' analysis is embedded in extremely complex matters both theoretically and practically.[322] Such complexity brings to the fore all sorts of cognitive biases to play against the final decision of getting enrolled in a pension scheme.[323] Yet pension is an important topic. 'Auto enrolment', or some

[322] See the broad literature of 'behavioural finance', and more specifically to the 'exponential discounting' problem and present bias.

[323] THALER, H, and Cass R. Sustein. 'Behavioral Economics, Public Policy, and Paternalism: Libertarian Paternalism' *in The American Economic Review*, Vol. 93, nº 2, Papers and Proceedings of the One Hundred Fifteenth Annual Meeting of American Economic Association, Washington, DC, January 3-5, 2003, pp. 175-179.

form of compulsory purchase, is a traditional, proven effective way to encourage retirement savings.[324] But it is not completely effective.

In the Netherlands alone, we have more than a million self-employed people and just under a million employees without pension accrual. On a European scale, these figures are many times larger.

Encouragingly, the Dutch 'Decree on Experiments in Pension Schemes for the Self-Employed' allows value transfer from the 2nd pillar to PEPP.[325]. In other EU Member States, it seems already possible.

Yet, there is (latent) demand for more pension accumulation, and - in many EU markets - an insufficiently functioning market. For this reason the EU is stimulating the supply side by facilitating a market and encouraging member states to identify white spots.

How can the PEPP market help materialise latent pension demand for retirement savings? First, there must be sufficient high-quality supply with institutionalised market forces. The PEPP market does this by laying down freedom of choice and shopping rights for participants by law, standardising information provision and product characteristics, requiring cost transparency and establishing low-threshold

[324] See, among others, J. Beshears, J. J. Choi, D. Laibson, B. C. Madrian, Behavioral Economics Perspectives on Public Sector Pension Plans, NBER Working Paper No. 16728, 2011; R. Thaler, S. Benartzi, Save More Tomorrow: Using Behavioral Economics to Increase Employee Saving, Journal of Political Economy, 2004, vol. 112.

[325] Besluit van 22 juni 2023, houdende vaststelling van regels omtrent experimenten voor een pensioenregeling voor zelfstandigen (Besluit experiment pensioenregeling zelfstandigen).

market access for providers. For participants, this provides comparability of providers and products. It also provides trust through the European quality seal and the possibility (not obligation) to make their own choices from time to time.

From a European regulatory perspective, and as set out above, consumer protection is becoming more important: pension participants are viewed as consumers of a (complex) financial product under the SFDR Regulation,[326] with providers responsible for the 'suitability and appropriateness' of PEPP to the individual participant, both at inception and throughout the term.

PEPPs have standardisation, but also variation. The same investment funds in a PEPP can be combined in a multitude of ways, there is choice of deposit, distribution and forms of risk coverage.

That variability also makes PEPP suitable from a 'total remuneration' perspective. Research[327] shows that 75% of employees want employment conditions to match individual needs. We know what pensions cost, but the perceived value of pensions can differ significantly from that.

Each consumer's financial situation is obviously different. Roughly speaking, an individual has four major blocks of financial wealth planning (Figure 3). Retirement is one of them. Education (and lifelong learning), housing and health are the other three (perhaps energy is a new addition to the trunk). Now I look at the four pillars in 'splendid isolation'. Not because the value of an integrated view is not taken into

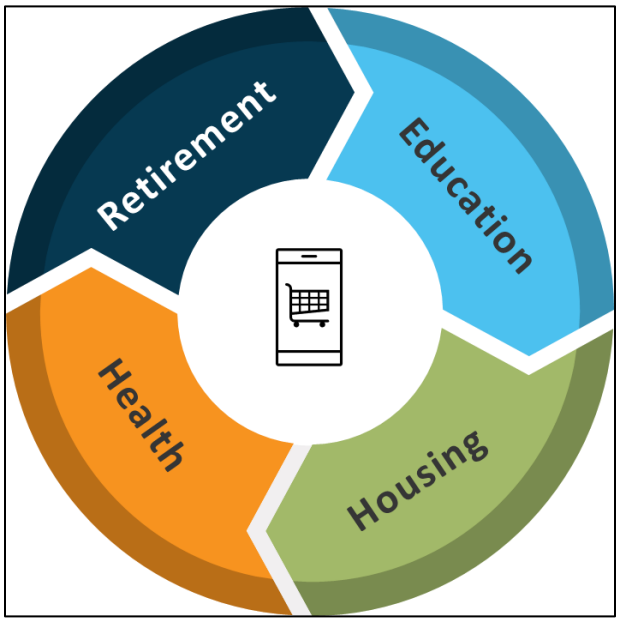
[326] 2019/2088.

[327] MetLife Re:Me, The Importance of individualism in a changing world, 2021.

account, but because the landscape is fragmented, both from a regulatory and legislative perspective, and from providers' perspectives. PEPP platforms do not know many of these limitations and could potentially bridge the four blocks of welfare planning and provide innovation.

Finally - and this is not directly linked to PEPP - the EU has the 'Open Finance' initiative. The idea behind this possible legislation is the release of financial information to third parties, following consumer consent. This 'democratisation of financial data' could reinforce the aforementioned trend, as well as further specialization in communication and financial planning within PEPP platforms.

Figure 3: The four pillars of personal financial wealth planning (source unknown)



PEPP brings multiple benefits to consumers: a wider range of products, option of choice and shopping rights, guarantee of appropriate and suitable investments, portability independent of employer or country, personal ownership of pension

value, ESG integration, EU consumer protection, competitive and capped costs and innovation in financial integration.

For employers, the employment condition pension can be filled without administrative costs for the employer. Through flexibility and opportunity to optimise the 'total remuneration' perspective for all employees, harmonisation of pensions across multiple countries, wider choice and negotiating space through growth in number of providers and embedding in 'workplace investing'. For the other PEPP associations, there may be 'white label' PEPPs specifically suited to the characteristics of the association's members, e.g. in financial objective or situation, ESG characteristics, communication requirements or other (financial) products or services of the association in question.

Finally, how does PEPP fit into the Dutch system? On one hand, it is a catalyst to provide a solution for self-employed people and employers without a pension. But PEPP also fits as a net annuity or top-up pension, or as an alternative to the flexible contribution scheme.

5.7 Concluding remarks

The PEPP market is out of the starting blocks. It is an attempt by the EU to introduce the 'UCITS of pensions'. A big ambition. And with a lot of potential. For now, there is reluctance among providers and the market has not yet started. Of course, there are reasons for reticence. Perhaps even scepticism. Experiences with EU pensions are predominantly not good.

Moreover: the Dutch pension market has a high savings rate, especially in 2nd pillar, and has a relatively well-developed range of 3rd pillar products. But as mentioned, PEPP is more, and broader than 3rd pillar products.

In addition, the PEPP legislation still has some not insignificant points to improve. From the EU, there is a lot of enthusiasm about PEPP, from consumers, collectives and asset managers alike. Will PEPP cause disruption in pensions? It is to be hoped. In any case, it is a welcome boost.

When it comes to pensions, the Netherlands innovates far too little. Maatman once aptly said '(w)hat the financial sector innovates at a gallop, however, the pension sector apparently follows at a snail's pace.'[328]

The Netherlands can build on the lead it still has in pensions if it establishes a highly innovative, transparent and online PEPP. Such a PEPP from the Netherlands, consumers will gladly join. So apart from the nice solution PEPP can be, it is also an opportunity to export Dutch pension knowledge.

The PEPP is underestimated yet it has interesting characteristics. It introduces simple pension transfers, clear property rights, standardised investment options and advice, and a portable personal pension account.

An exclusively digital PEPP offer, which consumers could set up and access online from anywhere in the world, is imminent. Some providers are already developing

[328] R.H. Maatman, E.H.A. Schram, A.P.C. Godlieb, 'Pension innovation, insight and prospects for action: a path to confidence in our pension system', Business Law, 2019/9.

this. '*PEPP on WhatsApp*' (similar to the digital micro-pension platform and WhatsApp for India and Kenya[329]) is something that could be explored further.

If the PEPP will develop in term of costs like, for instance, the '401(K)' in the US or the Dutch 2nd pillar DC vehicle, the PPI, (which meant a cost reduction of DC by as much as 50 percent),[330] it can be said that the PEPP will eventually lead to considerable improvement in benefits for the pension saver. Less costs, after all, means more pensions.

As the PEPP hopefully gathers momentum in 2024 – especially with asset managers - it can help achieve the EU's capital markets development objectives while dealing more effectively with the fiscal challenges that EU Member States are facing due to their huge aging population. To solve this is a top priority of the EU.

The rationale, design principles, features and the administration of PEPP, as also its early implementation experience, has several important lessons other continents in the world. Based on the experience with PEPP thus far, there is also scope for an improved PEPP 2.0. For example, the definition of 'guarantees' should be clearly articulated in the legislation.

A product such as PEPP should have a common tax treatment. For many EU Member States, this may appear to be a 'bridge too far'. However, as per EU case law once a Member State provides a certain tax treatment to its national third pillar pension products, such tax treatment should also apply to similar other EU third pillar

[329] H. van Meerten, 'Lessons from the Pan European Pension Product (PEPP), in: P.S. Khanna, G. Bhardwaj, Templatizing micro-Pensions for Africa, PinBox, 2023.

[330] https://www.eiopa.europa.eu/sites/default/files/sg/opsg-20-13-irsg-20-14-joint-advice-on-pepp-consultation.pdf.

pension products and thus, mutatis mutandis, the PEPP. Tax measures should also not impede core fundamental rights, such as the 'four freedoms'.

Third, last but not least, at EU level some sort of auto-enrolment[331] of pension schemes can be introduced: a quasi-mandatory participation, where the employer can choose the provider, but with an opt-out.[332]

Cross-border portability is one of the main features of the PEPP. However, national requirements make a transfer of pension capital sometimes impossible. This is contrary to the very objectives of the PEPP and the EU.

PEPP 2.0 should seek to specifically avoid this. It should clearly be stated that the concept of free movement of persons and capital precludes any national measure that may impede the exercise of the guaranteed fundamental freedoms.[333]

It is safe to conclude that the PEPP is a 'Catalyst for Pension Innovation'.

[331] See for more detail: H. van Meerten, J.J. van Zanden,' Shaping the Future of Retirement: Aspects of Sustainability', European Journal of Social Security, 2021, 8.

[332] H. van Meerten, E. Schmidt, 'Compulsory Membership of Pension Schemes and the Free Movement of Services in the EU', European Journal for Social Security, 2017, 19(2).

[333] K. Borg, A. Minto, H. van Meerten, 'The EU's regulatory commitment to a European harmonised pension product: The portability of pension rights vis-à-vis the free movement of capital', Journal of Financial Regulation, 2019, 5(2).

6. Recommendations

At the end of the book, I want to propose concrete recommendations for the problems described.

- **Take basic EU Law into account**

This was also a recommendation in 2015 by the EU regarding the CMU.[334]

In short, the treaties that form the basis of the EU, namely the TEU and the TFEU, play a crucial supranational role, but they're often overlooked in national pension debates. The Van Gend and Loos case in 1962 confirmed the autonomy and primacy of European law over conflicting national laws, leading to the establishment of the EU's own legal order. EU legislation, mainly regulations and directives, covers various aspects of pensions, with regulations being directly applicable in all Member States. While directives allow Member States some flexibility in implementation, they can create challenges for cross-border activity due to differences in national legislation. Cross-border activity of financial institutions, particularly in the area of pensions, is a fundamental core of EU Law.

And let's not forget, as EU Court President Lenaerts already said: 'EU Law is national law!'[335] EU Law knows many powerful tools. Let's apply them.

[334] Building a Capital Markets Union , COM/2015/063 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015DC0063

[335] https://www.linkedin.com/feed/update/urn:li:activity:7146878642361364480/.

- **The pension participant is a consumer**

As the Netherlands undergoes significant changes to its pension system with the proposed 'Act on the Future of Pensions', a major change is the transformation of existing pension schemes into a new system. Financial ups and downs will be shared between members and pensioners, reflecting the evolving nature of the Dutch pension landscape.

The pension reform in the Netherlands presents a nuanced landscape with two primary DC schemes, the solidarity contribution scheme and the flexible contribution scheme. The former, characterised by collective investment and risk sharing, raises questions about the adequacy of its 'solidarity reserve' and its compliance with EU law.

The extended duration of the Dutch transitional FTK (see above) and its potential conflict with the provisions of IORP II further complicate the regulatory landscape.

As the pensions sector navigates these changes, the role of social partners and pension funds will be crucial. While social partners have primary responsibility for transition plans, funds (and administrators) are expected to exercise due diligence, and increased oversight by regulators adds another layer of accountability.

Looking ahead, the examination of specific aspects of EU law, such as competition law, property law, the consumer role of pension participants and the impact on the internal market, promises to provide a comprehensive understanding of the implications and challenges of these reforms. This analysis sets the stage for a thorough exploration of the legal and practical dimensions of pension reforms,

making this book an essential resource for understanding the evolving pension framework in the EU.

I advocated for extending similar protection to pensioners, treating them as consumer and emphasizing their right to information, education and decision-making regarding pensions.

Contemporary issues, such as the digital market, product safety, financial services and the rise of prosumers, are elaborated as well. Therefore, I stressed the need for adapting consumer protection to innovations, especially in digital markets and acknowledging the challenges faced by vulnerable groups like pensioners in keeping pace with technological changes.

- **Make a pension scheme mandatory, not a domestic only pension fund: apply article 21 Charter**

The compatibility of large-scale compulsory participation provisions with European competition law has been a subject of debate. The degree of solidarity and risk-sharing, as emphasized in the Albany judgement, poses challenges for the envisaged pension system. Also, questions about the importation of accrued pension entitlements and the legal risks associated with this process remain pivotal.

In addition to that, the legal foundation of the IORP II underscores the classification of pension funds as internal market players, subject to competition rules. The elements that justified obligations to industry-wide pension funds in the past are scrutinized for their relevance in the current pension agreement.

Mandatory participation has both advantages and disadvantages, that can be based on individual perspectives. The debate over mandatory participation in pension funds is complex and often involves balancing the benefits of collective saving and risk sharing, against limitations on individual choice and potential risks. However, I am convinced that mandatory participation to a sectoral pension fund is outdated. Choice must be given to the employers concerning pension funds, in other words, employers must choose a pension fund. This is already the case in Germany, for a matter of exemplification.[336]

While doing that, employers must carefully evaluate the impact of joining a particular pension fund to ensure it aligns with their financial capacity, workforce needs and long-term business goals.

- **Make the costs of the scheme transparent and enforceable**

Cost transparency in pension funds is crucial for individual confidence and understanding of the relationship between return, risk and cost. The Dutch AFM's research reveals shortcomings in pension fund annual reports' compliance with IORP II requirements. It should be noted again that the AFM has the power to judge and take action when rules are broken. The government recognises that there are significant shortcomings in cost transparency, making it difficult for participants to match pension funds to their preferences.

[336] In Germany the exception to the free choice of the employers is the case of the existence of collective agreement between an association of employers and a trade-union on occupation pensions, then there is no free choice of the pension provider neither for the employer nor for the employee.

The Sustainable Finance Disclosure Regulation (SFDR) heralds a paradigm shift by recognising pension participants as consumers of financial services. The SFDR mandates transparency on sustainability policies and presents pension schemes as financial products. Clearly, the information gap between pension funds and participants remains. The judicial emphasis on transparency and the interests of policyholders underlines the evolving nature of pension law within the broader financial context.

SFDR imposes additional expectations on transparency about ESG aspects, with more specific and open requirements than IORP II.

- **Apply other financial norms to pensions**

The reflex action activated by the Financial Supervision Act adds a subtle complexity to the integration of current pensions into the future system. The forthcoming decision of the Supreme Court on the comparison of 'usury policies' and current pension contracts introduces an element of unpredictability.

In addition, the limitations on the liability of supervisors as outlined in the Wft Act raise questions about its compatibility with EU standards. The ongoing shift towards consumer-centric Regulation, as in the PEPP Regulation, signals a wider application of transparency and fairness principles to pension institutions, through the reflex effect.

The duty of care imposed on pension funds and the recognition of a collective duty of care for certain pension schemes, as highlighted by the ‘Kifid’ decision, emphasise the importance of informing participants of changes and their consequences. The recognition of the reflex effect indicates a paradigm shift,

recognising pensioners as consumers of financial services under EU law, with duty of care standards extending from banking and financial services to pension providers.

- **Offer true legal protection in line with article 47 Charter**

The removal of the individual right of objection in the Dutch pension legislation has been criticized as incompatible with the principles of the rule of law and could lead to increased legal challenges.

Dutch pension funds might be considered as entities with a certain level of public authority, especially considering the state's determination of the personal scope of provisions. The 'connexity requirement' is emphasized for invoking property protection under the Charter, stating that there must be a rule of EU law applicable. The application of EU law implies the application of fundamental rights, with an assertion that fundamental rights cannot be set aside by national law without clear and specific justification. National laws, when it comes to the individual rights, must be implemented with indisputable binding force, specificity, precision and clarity, all that to ensure legal certainty.

- **Provide information that is clear, precise and necessary**

Solvency II insurers should provide policyholders with clear, precise and necessary information, in line with the EU Charter of Fundamental Rights and various directives. The NN/van Leeuwen case serves as a focal point, illustrating the importance of informing policyholders about the use of premiums and the allocation of funds. Advocate General Sharpston's opinion underlines the obligation to provide information in certain circumstances to enable policyholders to make informed decisions.

I also discussed the broader question of which EU test framework should be used to assess the transparency and fairness of insurance contracts, particularly in the event of a dispute. Recent EU case law is referred to, which indicates a shift in the assessment criteria, emphasising the importance of assessing consumer interests at the time of the dispute.

The information provided by IORPs should be clear and precise and should never be misleading. The information should be simple enough to be understood by all participants, regardless of their background and education.

- **Take article 38 Charter seriously**

In the book I have discussed recent events in the insurance sector, in particular the case *Vereniging Woekerpolis.nl v Nationale Nederlanden*, which raises questions about possible violations of Article 38 Charter. The article seeks to ensure a high level of consumer protection in EU policy, with Article 169 TFEU as its basis. The usury policies came under the spotlight because of problems with information disclosure.

A Dutch Supreme Court ruling confirmed that insurers may not have adequately fulfilled their disclosure obligations, which may result in additional legal protection for consumers.

This raises the question of whether individuals can invoke Article 38 Charter - as an additional powerful tool - if there is a violation of a high level of consumer protection.

Although the wording of Article 38 Charter is considered vague and too general, it can be argued that Article 38 Charter can indeed be invoked directly by a pension participant (a consumer) against an insurer and also a pension fund, thus generating additional legal protection.

The Supreme Court has held that compliance with the information duties applicable at the time does not automatically mean that the insurer has complied with its obligations under civil law or the EU Unfair Terms Directive.

Would a participant have made the same choices if they had been fully aware of, for example, the additional - not communicated or barely communicated - costs?
Article 38 Charter seems to impose an obligation on Member States to actively contribute to achieving the goals of consumer protection as set out in the Charter.
Although the wording of Article 38 Charter is considered vague and too general, it can be argued that it can indeed be invoked directly by a consumer against an insurer and also a pension fund.

All this may also be of interest to old and new pension schemes. The criteria laid down in the usury policy cases will also apply to pension contracts, I predict.

- **Pension schemes are a financial product**

In the Cambridge Dictionary a financial product is defined as ‘a product that is connected with the way in which you manage and use your money, such as a bank account, a credit card, insurance, etc’.[337] From what I've said, I can conclude that there is no reason why pensions should be excluded from this definition, because

[337] https://dictionary.cambridge.org/dictionary/english/financial-product.

pensions are linked to the way our money is managed. In the Dutch second pillar, it is the pension funds that manage their members' money. Participants need to be more involved in the management of their pensions.

EU law doesn't provide a single, comprehensive definition of a financial product across all its directives and regulations. The term 'financial product' can cover a wide range of instruments, assets or services offered in financial markets.

I have formulated my own definition here, based on EU legislation, in particular EU consumer law and EU financial law. This definition is as follows:

'an individual customer of a European financial service whereby this customer bears the risks of the financial service to a predominant degree himself'.

- **Pensions are property rights**

The characterisation of pensions as property implies that these rights are subject to legal protection and may have implications in various legal matters. This classification gives individuals certain rights and legal protections in relation to their pension benefits.

Recognising pensions as property reinforces the importance of these assets, emphasising their value and contribution to an individual's financial security in retirement. There are some shortcomings in the stated understanding of pensions, such as potential tax complexities, challenges in accurately valuing pension rights, i.e. determining the present and future value of pensions.

- **Transparency of information: find a balance**

With transparent information, pensioners are allowed to make informed decisions about their retirement planning, they can better understand how their contributions are managed and invested, transparency is boosting trust and confidence among pensioners and the public since they can see the investment strategies and the financial health of the pension fund.

Furthermore, clear and accessible information enables scrutiny and oversight over pension funds, ensuring responsible and ethical management of funds. Also, the availability of detailed information offers educational value, helping pension beneficiaries understand financial markets, investments and the overall operation of pension funds. On the other hand, excessive information or immoderately technical details can lead to overwhelming pensioners, making it challenging to interpret the data effectively. Complete transparency could lead to market speculation or increased volatility, since the investment moves would be totally exposed to the public. Also, complex financial information can be misinterpreted, leading to confusion or misinformed perceptions about the pension fund's performance or strategies.

The balance between transparency and managing the complexity of information is critical. In 'Guidelines on Good Governance' from 2019, ISSA is highlighting the following:

'To be transparent, such information, which is a basic right for stakeholders, members and beneficiaries of the social security institution, should be timely, reliable, relevant, accurate and objectively verifiable'.[338]

The EIOPA PEPP Key Information and Benefit Statement templates, can give good guidance on how to address transparent and concise information.[339] Concerning disclosure, ISSA is stating that the complete transparency must be kept 'between the board, the management and the relevant competent authorities'.[340] Furthermore, the management ought to regularly furnish all members and beneficiaries of the institution with comprehensive information regarding the entitlements owed to them, that information needs to be relevant and easily comprehensible. Information should be promptly available upon request of the members. Not only that, but the management has the responsibility to guarantee that members have a clear comprehension and receive consistent updates about their entitlements and obligations, program features, as well as any alterations that may impact their existing commitments or prospective benefits.[341] Lastly, 'the management regularly, accurately and in a timely manner informs the stakeholders and the general public of the status of the institution, its operations and the financial sustainability of the programmes it administers',[342] and that by submitting timely reports to the board.

[338] ISSA, Good Governance (2019).

[339] https://www.eiopa.europa.eu/publications/pepp-benefits-statement-and-key-information-document-kid-template_en

[340] Idem.

[341] Idem.

[342] Idem.

It is essential to find a middle ground where pensioners receive relevant, comprehensive information without overwhelming them. Pension funds must continuously refine how they disclose information to ensure it remains accessible, relevant and informative for their beneficiaries.

- **Alternative to conversion**

The Pension Custodian has been included in Dutch legislation since the Introduction of Premium Pension Institutions Act came into force. Its sole purpose was to shield the assets of the PPI. With the implementation of the IORP II Directive, the Pension Custodian became applicable to pension funds as well. Consequently, the Pension Custodian is the 'ultimate ringfencing' tool for pension funds that cannot legally separate pension schemes internally. Not only can large cost advantages be achieved by 'pooling' different activities in a Pension Custodian (at least between 20-25%, is estimated), but perhaps more importantly: by means of conversion in a Pension Custodian, the right of ownership is not affected, the individual right of objection from Article 83 PW can be maintained and a legal 'carve-out' is created for the ‘conversion refusers’. For example, pension funds that feel it is 'disproportionately unfavorable' for certain stakeholder groups to enter the new system can use the Pension Custodian.

- **Learn from the PEPP**

PEPP contains many consumer-friendly features. It must serve as an inspiration for local pension products. The PEPP introduces innovative features such as easy pension transfers, standardised investment options and portable personal pension accounts. An all-digital PEPP offering is on the horizon. The potential cost reduction, similar to models such as the 401(K) in the US or the Dutch second-pillar

DC vehicle (the PPI), could significantly enhance the benefits for pension savers. The advantage is clear: less cost - more pension.

Of course, the lessons learned from the early implementation of the PEPP provide insights for possible improvements in PEPP 2.0. The need for a common tax treatment and considerations for auto-enrolment of pension schemes at EU level are highlighted. The aforementioned cross-border portability, a key feature of the PEPP, faces challenges due to national requirements that hinder the transfer of pension capital, contrary to the objectives of the PEPP. PEPP 2.0 should aim to address these issues and uphold the principles of free movement of persons and capital. Tax regimes are not harmonized across the legal systems of the EU Member States. Taxation of the pension schemes is under the competence of Member States. However, there is EU case law that prevents discrimination and unfair tax treatment.

The PEPP is – in some areas – ahead of its time.

It is clear that the success of PEPP depends on effective implementation, consumer education and ongoing regulatory oversight. PEPP is a new product, so its impact and effectiveness will become clearer over time when more people use it for their retirement planning.