A European Pensions Union

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1. Introduction

In recent years, tempestuous developments in the financial sector have led to more extensive European cooperation, with the strengthening of European financial supervision within the European Union and now, in the euro zone, initial steps towards developing a banking union and the introduction of a separate Treaty on Stability, Coordination and Governance in the EMU (the Fiscal Compact) which sets out rules for national budgets of the signatory EU Member States. Legislation on for example European insurance funds (the Solvency II Directive[1]) and investment funds (the amendments to the UCITS Directive[2]) have seen further harmonisation at European level.

For some considerable time, the increasing ageing of European populations has obviously been a concern of national governments in relation to pensions. At European level, too, this concern about, on the one hand, the future affordability of the pension system and, on the other hand, the flexibility of the labour market (with pensions being part of the employment terms) has drawn a great deal of attention.[3] In this regard the sustainability of the pension systems cannot be viewed separately from the stability of the European financial system given, for example, the implications for the European economy as a whole as a result of possible social unrest due to uncertainty about pension provisions combined with the increasing ageing of European Member State populations.[4]

In addition, in the European labour market, pension schemes in cross-border situations are often beset with practical problems regarding the relationship between various tax and social laws and regulations.

Despite the explicit European dimension of the pension issue and attempts of the European Commission to, on the one hand, encourage the Member States to future-proof their retirement provisions and, on the other hand, to increase coordination between the national pension systems, in practical terms the European pension sector is still organised mainly along national lines.

The pension institutions in various Member States are, for instance, still principally active within their own national borders. The forms of retirement provisions also vary from one Member State to the next, with some countries, such as the Netherlands and the United Kingdom, which have large well-funded systems for occupational pension schemes, doing relatively well. The lack of a more 'mature' European pension standard is regrettable because an occupational pension scheme, for example, is not available to a considerable number of European employees.

It is therefore not surprising that the European Commission ("EC") keeps trying to take further measures to strengthen the European pension system. At the beginning of this year, for instance, the EC announced that, in relation to labour mobility within the European Union, it would scrutinise the tax obstacles to (among other things) pensions accrued for cross-border activities of individuals, and remind the EU Member States of their obligations under European law.[5]

In the meantime, the EC is also working on revising the current so-called IORP Directive,[6] and, at the request of the EC, the EIOPA[7] has prepared a report on the development of a common European "Personal Pension Plan"[8]. As far as is clear at this point, these proposals seem to strive for further harmonisation of the internal market for pension services within the EU. It is debatable to what extent these proposals will also have consequences, either directly or indirectly, on those areas which, in principle on the basis of the current status of EU law, are delegated to national policymakers of the Member States, i.e. especially (aspects of) social and tax legislation of the Member States.

This harmonisation ultimately serves to protect members of pension schemes and, for example, to prevent pension funds from allowing a lack of clarity to exist about their ability to meet their obligations to their members. Members of pension

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1 *Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJ EU 2009, L 335/1.*

2 *Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), OJ L 375, 1985, 3–18.*

3 *See for example European Commission, Green Paper of 7 July 2010, "Towards adequate, sustainable and safe European pension systems", COM 2010, 365 final.*

4 *See also: European Commission Communication on ageing of 29 April 2009, "Dealing with the impact of an ageing population in the EU (2009 Ageing Report)" and the Commission Staff Working document Demography Report 2008: Meeting Social Needs in an Ageing Society (SEC(2008)2911).*

5 *"Free movement of people: Commission to tackle tax discrimination against mobile EU citizens", press release from the European Commission – IP/14/31, 20 January 2014.*

6 *Directive No. 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision ("IORPs") (OJ EC L 235, 23 September 2003, pp. 10–21).*

7 *European Insurance and Occupational Pensions Authority, ("EIOPA").*

8 *"Towards an EU single market for personal pensions. An EIOPA Preliminary Report to COM", EIOPABoS14/029.*

schemes would obviously, therefore, benefit from clarity about existing pension entitlements. This also presents opportunities for Member States such as the Netherlands, the United Kingdom and Denmark. For example, major Dutch asset management organisations and pension providers as well as insurance companies could very well offer their services and know-how abroad. With greater efficiency and economies of scale, the strengthening and further development of fund entities and the provision of pension services could also benefit the national pension market and those participating in it. Furthermore, an increasing number of European employees work in cross-border situations and certainly stand to gain from a better integration of pension accrual in the European labour market. These include not only employees of internationally operating companies but also, for example, inhabitants of cross-border regions who work and live in different EU Member States. A lack of European integration is keeping the markets closed off and, as a result, opportunities for growth and improvement in the European pension and labour markets are not being sufficiently harnessed.

We see developments that are laying the foundations for what we would like to call a European Pensions Union. We will discuss these foundations in this contribution.

2. The IORP Directive

2. 1 General

The IORP Directive, which has been in force since 2003, regulates funded pension institutions that provide employment related pension schemes. It provides 'minimum' harmonisation of pension entities, i.e. only general rules that allow the Member States a considerable degree of freedom to set further rules at national level. The underlying notion of the IORP Directive was, among other things, to provide a further stimulus – in the future, because of ageing – for the transition from pay-as-you-go systems – which are barely sustainable – to funded retirement provisions.[9]

When developing the proposals for the IORP Directive, the EC noted that IORPs were already playing an important role in the pension and social security systems of a number of Member States. About 125,000 IORPs operate in the EU. The assets managed by them are estimated at around EUR 2.5 billion, whilst they only represent 75 million Europeans, which is about 20% of the EU employee population.[10]

The number of IORPs and the assets managed by them are shown in Table 1.

In addition to the other financial institutions, such as banks and insurers, IORPs play a highly important role in the funding of the European economy and the functioning of the capital markets in the European Union.

2.2. Revision of IORP I

The IORP Directive did not produce the anticipated results. The number of cross-border IORPs remained modest and the envisaged operation of market forces between European IORPs within a European pension market did not materialise. To strengthen the pension system within the EU and promote a common pension market, the EC is working on a revision of the IORP II Directive (the "IORP II Proposal").[12]

In what follows we will examine a number of aspects of the IORP II Proposal and, in connection with this, discuss a number of specific factors which are generally seen as obstacles to establishing a common pension market. We will in any case look at the following points:

(i) the lack of clarity about the term cross-border when applying the (current) IORP Directive;
(ii) social and labour law and prudential supervision;
(iii) investment rules.

2.2.1 General aspects

We begin however with some general issues. There are a number of general aspects of the draft IORP II Directive presented by the EC that stand out.

Firstly, its legal basis is still primarily the provisions on the freedom of movement of persons and services and the *ordinary legislative procedure* for establishing a common internal market: in principle, if there is a qualified majority, the Member States are to adopt the measures concerned within the EU.[13] Thus, the Directive is and

Table 1 Total number of IORPs and assets managed, end-2011[11]

	Number	Assets (€ millions)		Number	Assets (€ millions)		Number	Assets (€ millions)
BE	226	15,910	IT	352	69,050	PT	197	12,650
BG	1	na	CY	1.651	na	RO	11	110
DK	26	7,060	LV	7	170	SI	9	1,835
DE	181	138,570	LU	19	970	SK	5	1,180
IE	68.500	70,000	HU	1	na	FI	56	4,120
EL	9	60	NL	514	774,060	SE	86	30,900
ES	363	31,690	AT	17	14,760	UK	50.880	1,319,930
FR	1	na	PL	5	360	Total	125,129	2,492,485

9 *For further background to the IORP Directive see, for example, H. van Meerten, B. Starink, 'Cross-border problems and solutions for IORPs, EC Tax Review, 2011,1; H. van Meerten, S. de Vries, 'Regulating pensions; Why the EU matters', Netspar, 2011and H. van Meerten, 'The scope of the IORP Directive', in: U. Neergaard, E. Szyszczak, J. W.van de Gronden, M. Krajewski, Social Services of General Interest in the EU. The Hague: T. M. C. Asser Press, 2013.*

10 *European Commission, Impact assessment on Proposal for a Directive amending Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision, Brussels, 27.3.2014, SWD(2014) 103 final.*

11 *Idem.*

12 *European Commission, 'Proposal for a Directive of the European Parliament and of the Council on the activities and supervision of institutions for occupational retirement provision', Brussels, 27 March 2014 COM(2014) 167 final, 2014/0091 (COD).*

13 *In this regard the proposal refers to Articles 53, 62 and 114 TFEU.*

remains[14] an internal market for services directive, and the competence will not be shifted to, for example, Article 153 TFEU on social protection (*inter alia* with regard to employment terms), which article could, in connection with the establishment of pension rights, possibly be considered as well. The fact that the draft IORP II Directive will not enter into force on the basis of Article 153 TFEU is of importance to the European legislative procedure as, under Article 153 TFEU, any measures must be adopted *unanimously* by the Member States, with each individual Member State in principle being able to block the entry into force of this directive.[15]

It therefore makes quite a difference to the competence of the institutions whether Article 114 TFEU in combination with *inter alia* Article 53 TFEU or Article 153 TFEU is chosen. Article 153 TFEU primarily sets out an additional competence of the EU, whilst Article 114 TFEU confers full legislative authority on the basis of a qualified majority.

The European Court of Justice (ECJ) upholds that it follows from the Directive's Recitals 1, 6 and 8 that the Directive seeks to introduce an internal market for IORPs in which IORPs must have freedom to provide services and freedom of investment.[16]

The chosen legal basis can also be viewed as an important political signal: regulation of occupational retirement provisions is to remain primarily a matter for the internal market.

The second striking, but more general, point is that the proposal for the IORP II Directive does not regulate any *new* funding requirements for IORPs. This was the express wish of, among other countries, the Netherlands and the United Kingdom, given their highly developed systems with funded entities and the possible considerable added costs that additional funding requirements would entail. Although the IORP II Proposal does still contain funding requirements (which are practically the same as those of IORP I), these relate to the pension schemes that had already taken effect. In practice, it is precisely the differences in the local funding requirements that are a factor in making it difficult for an IORP to offer cross-border DB schemes, and the IORP Directive currently seems, in practical terms, to stimulate cross-border DC schemes in particular.

Regarding the implementation process of the IORP II Proposal, it should also be noted that it seems that the character of this draft Directive is what, until recently, was termed a 'Lamfalussy directive', in which the harmonised legislation was enacted at four levels.[17]

At level 1, the Council of Ministers (comprising the national ministers) formulate the principles or frameworks and usually adopt them in a directive (which also applies to the current IORP II Proposal). At level 2, with the assistance of the second level committees (made up of representatives of the Member States' sector-specific ministries, also referred to as 'comitology'), the Commission further elaborates these principles (technically) in directives or regulations. At level 3, the national supervisory authorities collaborate in advising on the regulation and implementing the supervision. These third level committees are made up of representatives of the supervisory authorities of all 28 EU Member States, which in this case form part of the EIOPA. At level 4, the European legislation is implemented by the Member States and the European Commission ensures that this is done correctly, if necessary by commencing an infringement procedure pursuant to Article 258 TFEU.

In a certain sense, the 'Lamfalussy' structure has been codified by the establishment of the three supervisory agencies[18], the European Supervisory Authorities (European Banking Authority, European Securities and Markets Authority, and EIOPA), in combination with the Treaty of Lisbon. This Treaty distinguishes between legislative acts and non-legislative acts.[19] Among other things, the introduction of Article 290 TFEU is relevant in this regard because the power to adopt non-legislative acts of general purport, to supplement or amend certain non-essential elements of the legislative act, may be delegated to the European Commission.[20]

In many cases this means that that EIOPA writes the draft versions (of the delegated acts and acts of implementation on the basis of Articles 290 and 291 TFEU[21]) and the European Commission will subsequently (formally) adopt these acts (also referred to as "level 2.5"). Under the measures of the European Commission and EIOPA, it seems that the current draft of the IORP II Directive does not provide any new funding requirements, but for the present it should not be ruled out that developments may yet occur on this point. In this regard it can, for example, be noted that the text of Article 30 of the draft IORP II Directive empowers the European Commission to adopt acts of implementation in instances "beyond those foreseen in this Directive".

"Beyond those foreseen", could mean that the EC could enact further prudential requirements.[22] This is again confirmed by maintaining in IORP II the former recital from the current IORP (I) Directive. This reads:

"In many cases, it could be the sponsoring undertaking and not the institution itself that either covers any biometric risk or guarantees certain benefits or investment performance. However, in some cases, it is the institution itself which provides such cover or guarantees and the sponsor's obligations are generally exhausted by paying the necessary contributions. In these circumstances, the products offered are similar to those of life-assurance companies and the institutions concerned should hold at least the same additional own funds as life-assurance companies."[23]

We note that recent European case law has shown that the solvency of pension funds could also have consequences for the position and liability of the Member States (or their government bodies (or the supervisory authorities)), with the possible attendant financial consequences.[24] In

14 *These were also the legal bases of the IORP Directive in 2003.*
15 *See Article 153(2) TFEU.*
16 *ECJ, 14 January 2010, Case C-343/08, Commission v Czech Republic.*
17 *Cf. H. van Meerten, J. van Haersolte, 'Zelfrijzend Europees bakmeel: de voorstellen voor een nieuw financieel toezicht', Nederlands Tijdschrift voor Europees Recht, 2, 2010 (in Dutch).*
18 *M. Rötting, C. Lang, 'Das Lamfalussy-Verfahren im Umfeld der Neuordnung der europäischen Finanzaufsichtsstrukturen', Europäische Zeitschrift für Wirtschaftsrecht (23) 2012-1, p. 8-14 (in German).*
19 *A concise account of how this relates to the Lamfalussy -structure is given by: H. van Meerten and A. Ottow, 'The proposals for the European Supervisory Authorities: the right (legal) way forward?', Tijdschrift voor Financieel Recht, January 2010.*
20 *M. Charmon, 'Comitologie onder het Verdrag van Lissabon', Tijdschrift voor Europees en Economisch Recht, 2013, 2 (in Dutch).*
21 *This authority is usually stated in the directive itself.*
22 *The relevant provision of Article 30 of the draft IORP II Directive reads: "The delegated act shall not impose additional funding requirements beyond those foreseen in this Directive" –this to our view could imply that other requirements (other than funding requirements as such) could be introduced by the European Commission, for example requirements as to the calculation methods or composition of the relevant funding of an IORP.*
23 *Recital 29 of the IORP II Proposal, copying recital 30 of the current IORP Directive.*
24 *ECJ, 25 April 2013, Case C-398/11, Hogan. In essence, in its decision in the Hogan case the European Court of Justice in Luxembourg ruled that, if an employer is insolvent, there must be a minimum guarantee for the members of the occupational pension schemes. If the value of retirement benefits falls to less than 49% of the benefits originally promised, the Member State can, (partly) on the basis of the Insolvency Directive (2008/94/EC), be liable for the shortfall.*

our view, this could also be a reason to further develop the role of the European Commission and EIOPA in this context.

The third and last general point of note concerns the observations on subsidiarity. The European Commission is of the opinion that "Member States […] *will* not: (i) remove obstacles to cross-border activities of IORPs (ii) ensure a higher EU-wide minimum level of consumer protection; (iii) take into account positive externalities from scale economies, risk diversification and innovation inherent to cross-border activity; (iv) avoid regulatory arbitrage between financial services sectors; (v) avoid regulatory arbitrage between Member States; and (vi) take into account the interest of cross-border workers."[25]

Regarding these points, according to the European Commission the removal of obstacles to *cross-border activities* cannot be left to the Member States, and implementation of the IORP II Directive is therefore necessary.

2.2.2 Specific aspects

In what follows we examine a number of specific aspects of the IORP II Proposal.

(i) Cross-border activity

Article 16(3) of the current IORP (I) Directive provides the following:

"In the event of cross-border activity […], the technical provisions shall at all times be fully funded in respect of the total range of pension schemes operated. If these conditions are not met, the competent authorities of the home Member State shall intervene […]."

Many in the European pension market consider this "fully funded" requirement as one of the greatest obstacles facing IORPs in developing *cross-border activities* between Member States. The fact is that, if a pension scheme is not fully funded, contributing companies simply cannot transfer it to an implementing institution in other Member States. Given the problematic state of, for example, many Dutch and English pension funds, this requirement would at least constitute a potential obstruction. Although the "fully funded" requirement had been removed from a previously leaked draft of the IORP II Proposal, it nevertheless appears to have been retained in the recent proposal of the European Commission.

It is still unclear what "in respect of the total range of pension schemes operated" means. It could mean that that host schemes can be underfunded and home schemes cannot (as long as the total range is fully funded) and vice versa. It is also unclear whether "fully funded" means the *moment* of transfer of the scheme, or does it also apply when the scheme has already been transferred? Once it has been transferred, Member States might allow an institution, for a limited period of time, to have insufficient assets to cover the technical provisions.[26]

Unfortunately, the explanatory memoranda attached to the original proposal for the IORP Directive of 2003 and (also) to the current IORP II Proposal do not shed light on this.[27]

On the other hand, the definition of "cross-border" has been clarified in the IORP II Proposal in the sense that, in classifying an activity as a cross-border activity, it seems that the basic premise whereby the applicable social and labour law of a pension scheme differs from the jurisdiction in which the IORP is established, has been adhered to; this means, for example, that under the text of the IORP II Proposal, the situation in which a contributing company and the IORP are in the same Member State qualifies as a "cross-border activity" specifically when the members of the pension plan in question are in a different Member State.[28] A striking aspect of this is that, in principle, the host country (i.e. the jurisdiction in which the IORP is established) plays a leading role, whereby intensive information-exchange and approval procedures between the home and host countries should be avoided.[29]

In addition, a provision has been added to Article 13 regulating the transfer of pension schemes from one IORP to another IORP.[30] The aforementioned new articles of the draft IORP II Directive thus contain improved provisions on how a cross-border activity should be established.

(ii) Social and labour law and prudential supervision

It may be concluded from the current IORP Directive that the realisation of "social and labour law" is virtually an exclusive authority of the Member States.[31] This is, in principle, in line with the aforementioned basis of the IORP Directive under the TFEU, which, after all, aims to elaborate relevant provisions on free movement in establishing an internal market – and which do not, therefore, (primarily) concern the development of social protection or measures relating to employment terms. The system of the directive is also, therefore, that the pension scheme is regulated by the social and labour law of the country in which the member of the pension scheme maintains an employment relationship. In addition, under the current IORP Directive the institutions (the IORPs) are regulated by the prudential law of the country in which the IORP is established, with the Member State in question having to comply with certain basic norms set out in the IORP Directive. The IORP Directive contained little or nothing regulating social and labour law.

A striking innovation in the IORP II Directive is, therefore, the list of prudential requirements in Article 60 of the draft:

"Member States shall ensure that institutions for occupational retirement provision are subject to prudential supervision including the supervision of the following:

a) conditions of operation
b) technical provisions
c) funding of technical provisions
d) regulatory own funds
e) available solvency margin

25 *See paragraph 3.2 of the "Explanatory Memorandum" (page 6) of the European Commission to the IORP II Proposal.*
26 *Article 16 of the current IORP (I) Directive and (also sustained in) Article 15 of the draft IORP II Directive.*
27 *For IORP I see, COM (2000) 507, final, Brussels, 11.10.2000, 2000/0260 (COD) and for IORP II, op. cit.*
28 *See commentary to Article 12, in paragraph 3.4 of the "Explanatory Memorandum" (page 7) of the European Commission to the IORP II Proposal.*
29 *Under the current applicable regime in respect of the IORP (I) Directive, this cooperation is further elaborated in the so-called "Budapest-protocol": Protocol Relating to the Collaboration of the Relevant Competent Authorities of the Member States of the European Union in particular in the Application of the Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the Activities and Supervision of Institutions for Occupational Retirement Provision (IORPs) Operating Cross-Border Activity, CEIOPS-DOC-08-06 Rev1, 30 October 2009.*
30 *See Article 13 of the draft IORP II Directive.*
31 *See inter alia Recital 37 of the directive. The extent to which this can genuinely be seen as an "exclusive" authority is doubtful. In this area, for example, only the European anti-discrimination prohibition of Article 12 TFEU is itself applicable to the national legal order.*

f) required solvency margin
g) investment rules
h) investment management
i) conditions governing activities; and
j) information to be provided to competent authorities"

By formulating the required (basic) framework for prudential supervision, it can be said that legal uncertainty is avoided in this area, because it means that Member States will no longer be able to create *de facto* national obstacles (or will less easily be able to do so than under the text of the current IORP Directive) by imposing (obvious) prudential requirements on the basis of (local) social and labour law, thus frustrating the objective of the IORP Directive in this regard. That is a step in the right direction. In the Netherlands, for instance, there was for some time the possibility of applying social and labour law to the relevant Dutch prudential rules, i.e. the Financial Assessment Framework (*Financieel Toetsingskader*).[32] That seems now to have been made impossible.

(iii) Investment rules

As explained in section (i) above, it will be made easier to place pension schemes abroad. Recital 24 states that everyone should be able transfer pension schemes across borders, subject only to authorisation from the competent authority in the receiving Member State. If, therefore, a Dutch scheme is transferred to a Belgian IORP, the Belgian supervisory authority may prevent that happening whilst the Dutch supervisory authority may not. The authorisation of the fund's interested parties is, however, required, insofar as this is required by Dutch law; withdrawal from an obligatory sectoral fund is still not allowed.[33]

In this example, the Netherlands may not, in addition, impose any extra information requirements, any extra restrictions on investment policy, or any prudential requirements on the Belgian IORP; that supervision is in the hands of the Belgian authorities. According to Article 20, the host Member State may not impose any additional investment rules on the home Member State.

In this example, the Belgian IORP must, in the Netherlands, comply with the Dutch social and labour laws, but these may not include any extra prudential rules. If social legislation is infringed, then the Dutch Central Bank (*De Nederlandsche Bank* ("DNB")) must inform the Belgian authorities, which must enforce this legislation. Only then may DNB intervene.[34]

3. Tax aspects

In general, the different tax treatment of pension schemes in the Member States concerned is also seen as a considerable obstacle to establishing a common pension market in the EU. In practice it can, for example, be difficult for a pension scheme, designed according to the law of one Member State, to comply with the requirements for applying a tax facility in another Member State. And in some cases the operation of various tax regimes of various Member States can, for example, result in double taxation because both the country where the member of the pension scheme (formerly) worked and the country where that recipient of retirement benefits (currently) lives, taxes the income (as the pension is accrued in a different Member State from the one in which (following emigration) retirement benefits are received). In practice, double taxation in such cases can only be prevented (or mitigated) if the Member States in question have concluded a treaty to prevent double taxation. Apart from the treatment of pension schemes, the tax treatment of the pension entities themselves (which may qualify as IORPs) also plays a role. Pension entities are often accorded tax-favourable treatment, for instance an exemption from income and capital gains taxation. Facilities that can limit taxation are also often applicable to the entities in which the pension institutions invest (e.g. investment funds). Given the fact that investments are often made across borders and investment structures are thus subject to various tax regimes, international investment structures in particular (also within the EU) are far from always being entirely tax-neutral.[35]

The tax aspects are left intact under both the current IORP Directive and the IORP II Proposal. The fact is that under the TFEU taxation is, in principle, the exclusive domain of the Member States, with harmonising measures only being permissible if they are adopted unanimously.[36] On the other hand, under the TFEU the national tax policy and legislation of the Member States must be in accordance with the provisions on free movement, thus safeguarding the basic premise that cross-border activities and purely national activities be accorded equal treatment (including equal tax treatment). This means, for example, that the payment of pension contributions to an IORP established in another Member State must come under the same tax facility as the payment of pension contributions to a local IORP. On the other hand, double taxation (of, for example, retirement benefits received) cannot therefore, in principle, be avoided in all cases.[37] In the past, the EC has taken initiatives to achieve further harmonisation on the taxing of pensions, but it has not yet adopted any more far-reaching measures.[38]

4. Personal Pension Plan and possible roadmap for a solution

At the beginning of 2014, the EIOPA issued a voluminous and impressive report (referred to above) entitled the "Personal Pension Plan (PPP)".

It seemed that the reporters had had some difficulties in establishing a good legal definition of a PPP.

The OECD's definition of a "private pension plan"[39] and EIOPA's initial definition of a PPP[40] differed considerably. The perspectives of the various stakeholders also differed widely. The difficulty of defining a PPP is also reflected in the wide-ranging legal/regulatory design and tax requirements of PPPs in various jurisdictions.

32 *See, for example, the plans of the Dutch policymakers regarding the developments of a new pension vehicle (the General Pension Institution) (Algemene Pensioeninstelling), www.internetconsultatie.nl.*
33 *M. van Wijk, in collaboration with H. van Meerten in an analysis in het Financiële Dagblad, 10 April 2014 (in Dutch).*
34 *See Articles 12 and 13 of the draft IORP II Directive.*
35 *Cf. the observations regarding the UCITS in the EIOPA PPP report, pp. 34-35. In this regard see also, for example, P. Borsjé, W. Specken, 'Taxation and Cross-Border Pooling in the EU Pension Sector: From UCITS to IORP', Derivatives & Financial Instruments 15 – 2013, pp. 27-34.*
36 *See, for example, Article 114 paragraph 2 TFEU.*
37 *(Additional) taxation that is imposed when the value of pension entitlements is, upon emigration, transferred to another Member State can also pose an obstruction to worker mobility within the internal market. Nor does the current proposal for the Portability Directive (Amended proposal for a Directive of the European Parliament and of the Council on minimum requirements for enhancing worker mobility by improving the acquisition and preservation of supplementary pension rights, COM/2007/0603 final – COD 2005/0214), provide (full) protection.*
38 *See, for example, the communication from the European Commission entitled "The elimination of tax obstacles to the cross-border provision of occupational pensions", COM (2001) 214, 19 April 2001.*
39 *http://www.oecd.org/finance/private%19pensions/38356329.pdf*
40 *"PPP _ a pension plan that hosts members only on an individual basis.", see paragraph 37, p. 11 EIOPA PPP report.*

In EIOPA's PPP report it has now been decided to examine the following definition and to refine it to a greater degree:

"Products which under national law are recognised as having the primary purpose of providing the investor an income in retirement and which entitles the member to certain benefits."[41]

In this regard, EIOPA notes that the term "investor" must be replaced by a "more suitable term" and that a PPP is always understood to be a "funded product" and that, in principle, a PPP is established on the basis of an agreement between a "provider" and an "individual".[42]

More specifically, a Member State's recognition of a pension plan which has been established under the regime of another Member State can present problems in practice.[43] In principle, this could be resolved if, when designing a pension plan, the (common) legal and tax requirements of the different Member States are adhered to as far as possible. In the literature, it has been pointed out in the past that there certainly are practical possibilities in this regard, including, for example, a flexible DC-plan.[44] The EIOPA PPP report also refers to this.[45] To promote mutual recognition and equal legal and (facilitated) tax treatment of plans originally established under the laws of another Member State, it might be an idea to develop a kind of 'standard' EU pension plan in which, in our view, it makes no difference at all whether the plan in question qualifies as "occupational" in the Second Pillar or "personal" in the Third Pillar.[46] A PPP could thereby qualify as a "29th" or "second" regime; a completely optional regime, in additional to the existing legal systems of the Member States.[47]

We would also like to put the case for initiating such a second regime, initially on the basis of a "communication" or a "recommendation" (i.e. "soft law"); since, in principle, a measure of this sort can be adopted more quickly by the EC (in collaboration with EIOPA), it could provide a further stimulus for the European pension market in the short term. We would like to remind that there are many examples of soft law sorting legal effect. In general, recommendations are in principle deprived of legally binding force (as reflected in Article 288 TFEU), but the ECJ considered that this did not mean that they were deprived of legal effects as well:

"However, national courts are bound to take those recommendations into consideration in order to decide disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provisions of national or Community law."[48]

The EU Courts note that soft law instruments lay down rules of conduct that are binding on the institutions and Member States because they create legitimate expectations, enhance legal certainty, equality, ensure the respect of human rights and non-retroactivity of laws.[49] Furthermore, in the field of competition law, there are many examples of soft law sorting legal effect. [50]

Along with this a (parallel) procedure could eventually be developed to incorporate elements of such a second regime into a directive or regulation, thereby expediting the requisite further cooperation and coordination between the Member States. Insofar as the second regime can be termed a flexible financial product, the Member States would have to be able to facilitate the applicability of the second regime to their own social and labour law. Here, too, formulating a second regime with the information and transparency requirements envisaged in the draft IORP II Proposal could also be brought into line with this.

The flexibility of the second regime plan in question should then make it possible for the ultimate *status* of a particular (pension) implementing body not to have to be decisive in this regard (if sufficient safeguards are provided). We believe that, for example, a flexible DC plan can, in accordance with the legal character of the local pension system of the Member State in question, be transferred to a (more traditional) pension fund or insurer, but also, for example, to an investment fund (or similar) entity with an asset manager and separate custodian, whereby the framework of the IORP Directive, the Solvency Directive or perhaps even the UCITS Directive (or in combination with this directive) can provide the specific regulatory framework for the entity in question. In this regard it should be noted that it was precisely in relation to the application of the *VAT exemption on management services rendered to special investment funds*, that the European Court of Justice recently ruled that the character of a DC pension entity can be so similar to a UCITS that a DC pension entity can also be entitled to this VAT exemption.[51] It should be borne in mind here that this exemption under the VAT Directive in fact served to limit the VAT burden on the manager for the collective asset management for entities qualifying as a UCITS, or entities that are *sufficiently similar* to the characteristics and activities of a UCITS.[52]

Regarding the flexibility outlined above, a distinction will in certain cases have to be made between the accrual phase of the plan and the benefits phase whereby, if the pension has, for example, been accrued via a UCITS, the benefits phase can be administered by a suitably equipped party (e.g. an insurer or perhaps a relevant IORP).[53]

5. The Charter

Since 1 December 2009, the Charter of Fundamental Rights of the European Union (hereinafter: the Charter) has legally binding force and, as discussed in the literature, can have direct legal effect in national disputes between individuals in proceedings before the courts of the EU, provided the dispute falls within the scope of Article 51 of the Charter.[54]

It can be inferred from a number of judgments[55] that the conditions of Article 51 paragraph 1 Charter are fulfilled when a national regulation (1)

41 *See paragraph 54, p. 14 of the EIOPA PPP report. This definition was taken from the European Council as used in "Proposal for a Regulation on key information documents for packaged retail investment" Document 11430/13, 24 June 2013, http://register.consilium.europa.eu/pdf/en/13/st11/st11430.en13.pdf.*

42 *Here EIOPA also inserts the comment: "This does not necessarily exclude products where an employer also makes contributions into the product".*

43 *In our view, the recognition of pension plans of (temporarily) transferred workers follows from the operation of the so-called "Safeguarding Directive" (Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community).*

44 *H. van Meerten, B. Starink, 'Cross-Border Obstacles and Solutions for Pan-European Pensions', EC Tax review, 2011-1.*

45 *See paragraph 613, EIOPA PPP report.*

46 *We note that for example in respect of the UCITS entities, recent EU Court rulings may give room for the development of the mutual recognition and (a consequently) equal tax treatment of UCITS on the basis of its common EU regulatory framework with reference to the free movement provisions under the TFEU, as argued in P. Borsjé, W. Specken, op. cit.; see in this respect ECJ in Santander, 10 May 2012, joined Cases C-338/11 to C-347/11; cf. also EMS of DFA Investment Trust Company-case, 10 April 2014, Case C-190/12. A similar development might be anticipated as to the equal tax treatment of a PPP on the basis of a common EU regulatory framework, i.e. such as a contemplated under a "29th" or "second" regime.*

47 *Cf. furthermore also G. Dietvorst's proposal: 'Proposal for a pension model with a compensating layer', EC Tax review, 2007-3.*

48 *See ECJ, 13 December 1989, Case C-322/88, Grimaldi, paragraph 18.*

49 *O. Stefan, Soft Law in Court Competition Law, State Aid and the Court of Justice of the European Union. Deventer: Kluwer, 2013.*

50 *An interesting overview is written by AG Kokott in her opinion of 6 September 2012 to ECJ, Case C-226/11, Expedia.*

51 *ECJ, 13 March 2014, Case C-464/12, ATP Pension Service A/S v. Skatteministeriet.*

52 *See Article 135(10)(g) of Directive 2006/112/EC.*

53 *Preferably, in our view, the alternative of continuing investment activities in the benefits phase, too, could be opted for.*

54 *M. A. Fierstra, 'Åkerberg Fransson: ruim toepassingsgebied van Handvest op handelingen van lidstaten', NTER, 6, 2013 (in Dutch).*

55 *Inter alia ECJ, 13 July 1989, Case C-5/88, Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft and 26 February 2013, Case C-617/10, Åklagaren vs Hans Åkerberg Fransson.*

transposes EU law or (2) "otherwise" makes reference to EU law. The Charter applies primarily to the institutions and bodies of the Union, but also to Member States when they act in the context of Community law.

The scope of the Charter is rather broad.[56] Next to the European Convention of Human Rights (ECRM), under the competence of the European Court for Human Rights at Strasbourg, pension beneficiaries across the EU can directly invoke the Charter, with the ECJ in Luxembourg, when their fundamental rights would be violated. This route is not so much highlighted yet.

An interesting Article to mention here is Article 17 Charter:

"Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law insofar as is necessary for the general interest".

For example, pension beneficiares whose rights have somehow been cut, could invoke this article. The explanatory memorandum of the Charter states that the meaning and scope of the right are "the same as those of the right guaranteed by the ECHR and the limitations may not exceed those provided for there."[57] It might be worthwhile to investigate whether this is actually the case. There are many cases known where the ECJ offers different – and potentially more far reaching – protection than the Court of the ECHR in Strasbourg.[58]

In connection with the above it should also be considered that Article 25 of the Charter contains a specific provision to protect the rights of the elderly:

"The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life."

To ensure such "dignity" and "independence" of the elderly, and their ability "to participate in social and cultural life", Article 25 of the Charter can be understood to include the relevant arrangements facilitating certain basic pension provisions.[59]

The Charter therefore to our view holds the general (social) framework and commitment of the European Union and its Member States to establish at least a basic and in any case sustainable pension provision for the elderly within the EU.

6. European Pensions Union

The development of a European second regime for a PPP can, in combination with the revision of the current IORP Directive and the general (social) framework of the the Charter, form the basis for a *European Pensions Union*. We have already discussed above the fact that, for the present, the revision of the IORP II Directive is not focused on elaborating further solvency requirements for IORPs. That also seems to be of lesser relevance in the promotion of a cross-border DC plan. If the IORP II continues in the current direction, with additional requirements apparently only being established with regard to the manner in which the plan is to be implemented, additional requirements as to the solvency or legal design of the IORP vehicle that implements the plan could be of lesser importance. It could be sufficient for the institution itself to elaborate and adopt the relevant information and governance requirements under the IORP II Directive, with consideration also having to be given to the role that could be played by insurers and investment entities – and any other possible (financial) service providers, such as banks – in accordance with the obligations that these parties have under the relevant European regulations and directives. This, in our view, would enable the outline of a future European Pensions Union to slowly, but effectively, be drawn up.

Consistent with the structure of a European Union, a European second regime pension plan would actually provide protection to members of European pension schemes in accruing pensions and enjoying retirement benefits. It would also provide support to the pension sector and internationally operating companies with regard to cross-border activities. More generally, this would also benefit Europe's economic stability and social objectives.

7. Conclusion

Establishing (gradually, in our view) a European Pensions Union in which the pension law of the Member States would be provided with a stronger European framework and a clearer (basic) norm, introduced through a second regime for a PPP, in combination with a revised IORP Directive, would be a welcome development.

This could, for example, preclude the situation in which retirement provisions are insufficiently facilitated or even negligently managed in a European Member State (other than the one in which pensions were accrued) with the attendant adverse socio-political consequences in the Member State concerned. Potential economic (and social) problems of this sort would also entail risks for the state budget in question, which in turn could have consequences on the European financial system as a whole.

The pension matters therefore call for a European approach, and the first steps have been undertaken to laying the foundations of a European Pensions Union.

56 *Fierstra, op. cit.*
57 *CHARTE 4473/00.*
58 *For an analysis of the Charter, see: D. Sarmiento, 'Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe', Common Market Law Review, 5, 2013, pp. 1267–1304.*
59 *It might for example also be further investigated whether the Charter provisions could mitigate the double taxation issues that might arise for pensioners in cross-border situations as set out above; we do not rule out that the Charter can be successfully invoked by a pensioner, and could at least mitigate the effects of double taxation, preventing the (complete) erosion of a basic pension benefit.*