

EU Pension Law

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with contributions of

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Preface

EU pension law – a unique field

Among scores of publications on the topic of pensions, there are remarkably few that focus on European pension law. Their focus is mostly local, often on domestic pension solutions and not on cross-border innovations. There is often reluctance to delve deeper into useful pension experiences from abroad as well. This book is different.

EU pension law is a relatively new and rapidly growing field. The call for knowledge of EU pension law and a broader practical understanding is growing, as pension markets are increasingly internationalized. More experts in this field are desperately needed.

This handbook contains a collection of relevant articles and offers necessary basic knowledge. More importantly, it contains interesting practical cases, creating a unique bridge between theory and practice. Whether you are a student, a committed policymaker, an experienced market practitioner, or 'just' someone interested in European pension developments, this handbook is designed for you.

European pension solutions in practice

The growing need for EU pension law knowledge is most striking in two areas. On the one hand, the effects of EU law are becoming increasingly prevalent on local pension markets, while on the other, it remains important in the European internal pension market.

In the local Member States, awareness about the influence of EU law is often limited. Pension provisions are based on local social, labour and tax law. This domain largely belongs to the mandate of the Member States and therefore falls outside the EU sphere of influence. It is often insufficiently recognized and acknowledged that EU pension law determines pension systems in Member States through other means. After all, Member States must comply with EU legislation and implement it in local legislation. In addition, we increasingly experience in legal practice how European law overrules local law.

This concerns, for example, the governance structure of pension institutions and competition legislation, property law and tax non-discrimination legislation, but also EU legislation on new pension products, investment and communication policy. The European Pensions Directive, which regulates

pension institutions, is a good example of the enormous impact of EU law on local pension markets.

In the cross-border European pension market on the contrary, awareness about the influence of EU pension law has traditionally been very high. EU legislation provides the foundation for being able to act freely in the EU internal market, as a working and pension participant, as an employer and plan sponsor, and as a pension provider and service provider. It is elementary to its function. The EU internal market for capital, labour, and services is growing. Cross-border activities and solutions are by definition based on EU pension law.

For example, multinational companies have established cross-border pension funds (cross-border institutions for occupational retirement provision or IORPs), which manage pension schemes for participants from different countries. This is a steadily growing market segment. The PEPP (pan-European personal pension product) has also been created for cross-border use. The PEPP encourages retirement savings in Member States where this still receives little attention, and serves the growing group of internationally mobile workers. Increased standardization allows more providers to be active across borders, increases the quality of the products and lowers fees.

Both the IORP and the PEPP are pension solutions initiated by the EU with the aim to meet new needs in the market and to support the European capital market and make long-term funding sources available.

International collaboration

As part of the EU internal market, Member States increasingly exchange pension knowledge and experience. Local pension systems are different. However, the underlying trends are the same and require similar legislative changes and modern, innovative solutions.

These trends include having to work longer as we all get older, the need to combine part-time retirement and continued work, and the need for more insight and making pension saving easier through finance technology solutions, such as apps and robo-advice. Countries can learn from each other how pension provisions can be personalized, with more options and tailor-made solutions. The 'gig economy' has a strong need for this flexibility to enable increased financial health in old age.

EU pension forums allow for this cooperation across borders, for example, through the European Commission, the European Parliament and the European pension authority, EIOPA. The various interest groups in the

pension sector, such as PensionsEurope, the European Fund and Asset Management Association (EFAMA) and the Cross Border Benefits Alliance (CCBA), also support the exchange of best practices. All of these bodies need experts who are trained in EU pension law.

State Street Global Advisors

State Street Global Advisors wholeheartedly supports the creation of this European pension law handbook. We are an international pension asset manager and service provider and have been at the core of the pension sector for many years and in many countries. We not only help ensure that people receive good pension benefits, but also facilitate efficient retirement saving for working people, by providing them with an understanding of and control over their pension plan, thereby giving them the confidence and peace of mind that they are well on track on their 'pension journey'. We ensure a sound investment policy with a controlled degree of risk-taking and provide asset management administration and accessible reporting. Our strength is innovation through the exchange of experience and knowledge across borders and regions.

Sometimes our company name is prominent, as in this handbook. More often we work behind the scenes, where our asset management services, pension solutions and thought leadership help pension funds and policymakers.

In conclusion

The more experts there are to help shape the above-mentioned European pension developments, the better. These experts should have a deep understanding of European law and acknowledge its importance. These experts should by nature have an international perspective and look beyond national borders, and stimulate exchange of knowledge and experience between countries.

Prof. Dr Hans van Meerten has taken the lead. He is an initiator in the field of European pension law, a scholar who knows how to combine his knowledge, experience and network with his scientific role as a professor at the University of Utrecht. He is also a researcher, who does not hesitate to actively propagate and safeguard European ideas in local pension sectors. We are proud to support him in this endeavour.

Marie-Anne Heeren
Head of Continental Europe
State Street Global Advisors

Foreword

Before you lies the book *EU Pension Law*. This is a new field of law and it foresees in a growing need for universities and practice throughout the EU.

Pension law is approached mainly from a national point of view. An EU point of view is lacking. The book tries to shed some light on a number of important pension issues that should be approached from an EU perspective.

It discusses the most important financial EU legislation (IORP and PEPP) and non-financial legislation (such as the Charter of Fundamental Rights of the European Union [CFR]) and how it has consequences for pensions.

EU Pension Law comprises a plethora of legal fields, such as financial law, company law, competition law, etc.

We therefore needed to make a selection. This book deals with the following – we believe the most important – issues:

- The EU competences in the field of pensions
- The IORP I and II Directives
- Compulsory membership in an IORP
- Application of EU law on pensions: The property issue
- The PEPP

The EU competences in the field of pensions

Pension is often perceived as a national competence. This chapter sets out the fact that numerous EU laws give the EU competence to regulate national pension systems.

The central question in this chapter is how the institutional system of the EU affects the regulation of pensions at the EU level. First, the powers of the EU to regulate pensions and the way in which these are defined and limited will be examined. This involves the principles of conferred powers, subsidiarity and proportionality which establish and regulate the exercise of EU legislative powers. The second part of this chapter addresses the EU legislative system with its distinction between legislative, delegated and implementing acts. Each of these acts has individual characteristics, defining the specific powers and roles of the EU institutions and the matter such acts may cover. The impact thereof on EU pensions legislation will be assessed.

The IORP I and II Directives

In 2003, the European legislature issued a directive on the activities and supervision of institutions for occupational retirement provision (IORPs). The IORP Directive as adopted in 2003 sets a number of general solvency and financing requirements, certain investment rules (based on the prudent person principle) and general administrative and governance requirements (in particular regarding the provision of information. The IORP Directive of 2003 ('IORP I Directive' or 'IORPD I') has been subject to revision, and the recast directive ('IORP II Directive' or 'IORPD II') was published in 2016 and came into force in January 2017.

This chapter describes the IORP I and II Directives and its cross-border legal framework.

Compulsory membership in an IORP

This chapter explains, first, the relationship between compulsory membership and European law and jurisprudence from the European Court of Justice (ECJ or the Court). It will then study how compulsory membership is organized in the Netherlands and a selection of other EU countries and will assess those systems of (quasi-) mandatory participation from the perspective of European law and the ECJ's case law. Because of the size of the Dutch schemes, some extra attention will be paid to the Netherlands.

The main question that is addressed in this chapter is: Can a justification be found in EU law for mandatory participation in a pension fund and/or in a pension scheme?

Application of EU law on pensions: The property issue

Since the entry into force of the Charter of Fundamental Rights of the European Union ('the Charter') in 2009, it can be argued that all of the European Union's general principles of law are essentially 'covered.' The Charter codifies, directly or indirectly, all existing EU fundamental rights and legal principles. According to Barents and Brinkhorst, it can even be stated that the Charter must always be applied by the ECJ as well as the national courts.¹

In this Chapter we want to address the property rights issue, a fundamental right both covered by the Charter and the European Convention on Human Rights (ECHR). How are your pension rights protected?

1 R. Barents, L.J. Brinkhorst, *Grondlijnen van Europees Recht* (Deventer: Kluwer, 2012).

The PEPP

On 29 June 2017, the European Commission proposed a framework for a pan-European personal pension product (PEPP).

This framework aims to offer EU citizens a value for money option to acquire an income after retirement. Furthermore, the PEPP could help in meeting the objectives of the capital markets union (CMU) by increasing voluntary pension savings, aiding savers by expanding the available market of personal pension products and enabling providers to offer products to a larger customer base.

The pan-European personal pension product is a one of a kind initiative by the Commission to strengthen the CMU. While most European legislation governing pensions is aimed at establishing prudential requirements for pension providers, the PEPP creates a 'label', guaranteeing the quality of certain features of the product itself. One of the key features of the PEPP is that it is a portable product, in which savers can continue to contribute after moving from one Member State to another. However, considering that only 3.7% of the working population of the EU is considered a mobile worker, the added value of the PEPP may be especially prevalent in Member States without well-developed multi-pillar pension systems.

The chapters in this book are the result of new insights and include sections that are prepared on the basis of existing articles which I partly co-wrote with different authors. These are Ton van den Brink, Pascal Borsjé, Elmar Schmidt and Jorik van Zanden.

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