UIC Law Review

Volume 41 | Issue 4 Article 11

Summer 2008

European and American Issues in Employee Benefits Law Compared, 41 J. Marshall L. Rev. 1189 (2008)

Yves Stevens

Follow this and additional works at: https://repository.law.uic.edu/lawreview

Part of the Accounting Law Commons, Comparative and Foreign Law Commons, European Law Commons, Insurance Law Commons, International Law Commons, Labor and Employment Law Commons, Retirement Security Law Commons, and the Tax Law Commons

Recommended Citation

Yves Stevens, European and American Issues in Employee Benefits Law Compared, 41 J. Marshall L. Rev. 1189 (2008)

https://repository.law.uic.edu/lawreview/vol41/iss4/11

This Symposium is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

EUROPEAN AND AMERICAN ISSUES IN EMPLOYEE BENEFITS LAW COMPARED

YVES STEVENS*

Paper presented at the 6th Annual Employee Benefits Symposium of The John Marshall Law School, Chicago, Illinois, United States.

TABLE OF CONTENTS

I. Introduction 1190
II. Similarities Between the EU and the US 1191
A. No Model 1191
B. A Pension Law Patchwork 1192
III. Europe Without Legal Competence 1197
A. National Competences Leading to Desperate Disparity 1197
B. Limited European Legal Basis 1200
1. The European Treaty and Some European Directives 1200
2. European Policy Objectives 1204
a. General Pension Policy 1204
b. Occupational Pension Policy 1205
3. OMC and Occupational Pensions 1206
C. No Real European Impact 1209
IV. Comparing the EU and the US 1210
A. Vesting 1211
1. US 1211
2. EU 1212
B. Coverage and Anti-Discrimination 1214
1. US 1214
2. EU 1218
C. Benefit Design and Risk Transfer 1225
1. US 1225
2. EU 1233
D. Portability 1235
1. US 1235
3. EU 1236
E. Information and Disclosure 1239
1. US 1239
2. EU 1241
V. Comparative Lessons: A Right to Own or a Right to Social Security? 1244

---

* Associate Professor at the Law Faculty of the KU Leuven, Belgium.

A. Is There an Insecure Social Security Right? 1244
B. How Much Matthew can be Justified? 1246
C. How Much Government is Wanted? 1247
VI. Conclusion: Disparity or Uniformity – Curse or Blessing ? . 1248

I. INTRODUCTION

This article compares issues in European occupational pension law with the same issues in American Employee Benefits law. The research question addressed is: How different are the European Union (EU) and the United States of America (US) when it comes to private and occupational pensions? Quite unexpectedly, they might seem quite similar at first sight. This has to do with the way pension systems are presented by economists and sociologists in various models. In international comparisons it is quite common to refer to the so-called three pillar model.[1] In Part II this model is refuted. Instead of the model a legal patchwork is presented for the comparison. At first sight this legal patchwork looks very similar in both the EU and the US. However at a closer look, the EU and the US differ widely from one another for some rather obvious reasons.

Therefore, in Part III the institutional and legal differences between the EU and the US are pointed out. In Part IV some specific issues of the occupational pensions and employee benefits are analyzed and compared. For the US this analysis is mainly based on the Pension Protection Act of 2006 ("PPA 2006").[2] For the EU the analysis is mainly based on a European Commission report. The comparison deals with vesting, coverage, benefit design, portability and communication.

In Part V there are some conclusive lessons. The comparison between the US and the EU leads to the conclusion that the differences between the US and the EU on occupational pensions are a consequence of ideological differences with regard to statutory social security.

1. *See* Yves Stevens, 15th Australian Colloquium of Superannuation Researchers: Europe and Pensions: Confronting Risks and Policies (July 19-20, 2007), *available at* https://lirias.kuleuven.be/bitstream/123456789/160068/1/STEVENS_Yves.pdf [hereinafter Europe and Pensions: Confronting Risks and Policies] (stating "this so-called key structure of pensions is often used as a reference model").

2 Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (codified in scattered sections of 26 & 29 U.S.C.) (2006).

II. SIMILARITIES BETWEEN THE EU AND THE US

A. No Model

International comparisons on private pensions or occupational pensions refer commonly to the so-called three pillar model.[3] The reason for all these references is obvious. It is a very easy way of presenting various pension schemes. However, from a legal point of view, it oversimplifies matters drastically and unnecessarily. Legally, there is not even a three pillar model.[4] The differences are too obvious between countries. The sole strength of the three pillar model is indeed of a sociological or economic nature: (nearly) everybody—irrespective of nationality—can recognize his proper national pension system in the model.[5] However,

> the modelling of pension systems always risks to put too much emphasis on a certain element of a pension system without taking into account other – equally relevant – elements. I strongly doubt the practical relevance of all kinds of modelling of pension systems into general types. So, when one looks around in Europe and tries to define - in a legal manner - the different pension systems, one can only notice that there is a huge variety of elements constituting the pension systems. It is this variety of systems that actually complicates the European policy debate.[6]

Apart from the absurd notion of the three pillars, sociologists and economists have invented another – legally non existing – model for Europe. Often reference is made to the so-called European Social Model.[7] Legally, this is nonsense. Although it clearly does not exist, many people take it for granted.[8] To

---

3. *Id.*
4. *Id.*
5. GABRIEL AMITSIS, JOS BERGHMAN, ANTON HEMERIJCK, THEODOROS SAKELLAROPOULOS, ANGELOS STERGIOU, & YVES STEVENS, CONNECTING WELFARE DIVERSITY WITHIN THE EUROPEAN SOCIAL MODEL 103-06 (Theodoros Sakellaropoulos, Jos Berghman, eds., Intersentia 2004). The level of "recognition" of the model is due to the World Bank. The famous report titled 'Averting the Old Age Crisis: Policies to Protect the Old and Promote Growth (Oxford University Press: Oxford, 1994), popularized the concept of a pension system supported by three pillars. Ever since that report, there have been many interpretations. WORLD BANK, AVERTING THE OLD AGE CRISIS: POLICIES TO PROTECT THE OLD AND PROMOTE GROWTH (Oxford University Press 1994).
6. Europe and Pensions: Confronting Risks and Policies, *supra* note 1, at 23.
7. *Id.* at 21.
8. For example, Alain Euzeby states, "[t]he European Social Model has been developed substantially after the second world war." ALAIN EUZEBY, *European Integration and Disparities in Social Protection Systems, in* INTERNATIONAL IMPACT UPON SOCIAL SECURITY 32 (Danny Peters ed., Kluwer

establish the difference with the US, the so-called European Social Model has eight common European dimensions: values, common identity, partnership, common challenges, common institutions, common policy processes, commitment for welfare state/society and some other common European dimensions.[9]

What economists and sociologists try to describe are tendencies and not legal structures. For most lawyers this is meaningless. In their opinion, the similarities that are found can always be found depending on the initial parameters put into an economic or sociological model. The initial parameters will define and delineate the results. There are a multitude of studies claiming the end of the pension world for various Member States based on common economic or sociological parameters.[10]

Fortunately no model can take into account the complexity of reality with all its details and its variations. Models are only models. They should never be overestimated. Unfortunately however, most politicians are not pension experts and simple models are often easier to understand. Hence pension policy is often based on irrelevant economic models that are not related to reality.

B. A Pension Law Patchwork

For lawyers it is easy to dispose of both the sociological and the economic reality of models. For them, there is the "legal reality" of a pension patchwork. In Europe pensions are, as a part of social security, considered a strict national competence under European Union law.[11] Every Member State dictates its own pension scheme. There are almost no unified European rules.

Law International 1998); *see also* Claire Aubin, *A la Recherche du Modèle Social Européen*, 484, 484-90 DROIT SOCIAL (2008).

9. *See* JOHN KVIST AND JUHO SAARI, THE EUROPEANIZATION OF SOCIAL PROTECTION, 280 (Policy Press 2007) (providing a detailed study of the Ministry of Social Affairs and Health of Finland). This book was written during the Finnish presidency of the European Union.

10. *See generally* Aino Salomäki, *Public Pension Expenditure in the EPC and the European Commission Projections: An Analysis of the Projection Results*, at 40 (Dec. 2006), *available at* http://ec.europa.eu/economy_finance/publications/publication825_en.pdf (stating that "[t]he magnitude of the impact of different assumptions on pension spending depends critically on the pension system design: how responsive the system is to changes in economic and demographic developments. Thus, the magnitude of the impact varies across countries."); *see also* EDWARD WHITEHOUSE, PENSIONS PANORAMA: RETIREMENT-INCOME SYSTEMS IN 53 COUNTRIES 43-45 (The International Bank for Reconstruction and Development/The World Bank 2007). The work itself, however valuable for economists and sociologists alike, does not give a legal insight into pension law. Rather, it installs a typology.

11. Europe and Pensions: Confronting Risks and Policies, *supra* note 1, at 15.

Americans would say that there is practically no federal pension law. This is logical from an historical point of view. Historically, the different national pension systems have evolved separately and have upheld typical national characteristics.[12] The EU was founded in 1951 with only six Member States.[13] Its main purpose was (and is) an economic unity and not a social unity.[14] Hence social security and pensions remained a national competence. The EU grew gradually and the purpose remained economic. Currently, there are twenty-seven Member States within the EU.[15]

Although there has been some exchange of elements in a comparative law perspective, these exchanges of bits and pieces of pensions systems and pension policies have certainly not lead to a common unified pension structure or something like a "European Pension Model". It can even be doubted that the classical distinction between the so-called Bismarckian, Beveridge or Scandinavian type of pensions has any sense.[16] Legally, the national systems are very different, and it is almost impossible to put the legal differences in conclusive socio-economic models.

As a result, "the European pension landscape is a huge colourful patchwork of technical pension regulations."[17] The twenty-seven different Member States have reacted differently to

---

12. YVES STEVENS, THE DEVELOPMENT OF A LEGAL MATRIX ON THE MEANING OF "NATIONAL SOCIAL AND LABOUR LEGISLATION" IN DIRECTIVE 2003/41/EC WITH REGARD TO FIVE MEMBER STATES (BELGIUM / FRANCE / GERMANY / ITALY / NETHERLANDS) 8 (European Association of Paritarian Institutions AEIP) (2006).

13. The founding Member States are Germany, France, Italy, the Netherlands, Belgium and Luxembourg. Europe in 12 lessons, Ten Historic Steps, *available at* http://europa.eu/abc/12lessons/lesson_2/index_en.htm.

14. Europe in 12 lessons, Why the European Union?, at IV, *available at*, http:// europa.eu/abc/12lessons/lesson_1/index_en.htm.

15. Current members are Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and United Kingdom. The current candidate members are Croatia, former Yugoslav Republic of Macedonia and Turkey. There are 19 other European countries that are not members of the European Union and are no candidates: Albania, Andorra, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Georgia, Iceland, Liechtenstein, Moldova, Monaco, Montenegro, Norway, Russia, San Marino, Serbia, Switzerland, Ukraine, and the Vatican City State. *See* European Countries, http://europa.eu/abc/european_countries/index_en.htm.

16. STEVENS, *supra* note 12, at 13.

17. Europe and Pensions: Confronting Risks and Policies, *supra* note 1, at 33.

the same pension risks with very polar solutions.[18] The true legal variety in Europe really becomes clear when analyzing the concrete national reforms looking at several occupational pension aspects:[19]

> ACQUISITION CONDITIONS. To acquire an occupational pension various systems exist throughout the EU. Three sets of conditions are clearly present in most systems: a certain citizenship, a certain number of worked years or a certain amount of paid contributions into the pension scheme.[20] These three parameters have been used simultaneously in various stages of different schemes.[21] This leads to the effect that most Member States know a mixed acquisition system for occupational pensions.
>
> BENEFIT DESIGN AND CALCULATION METHODS. There are various calculation methods when it comes to pensions. Well known are: defined contribution (DC), defined benefit (DB) and cash balance (CB). Several variants exist of these types with various elements in the formulas: earnings related, average career earnings, last five years earnings, last year earnings, average job earnings, working years related, average one year calculations, based on the return of investment, guaranteed (ceiled or not ceiled) return, based on bonuses . . .[22]
>
> AFFILIATION RULES AND COVERAGE.[23] Affiliation to an occupational pension can be obligatory, optional with the requirement of insuring oneself with the same pension level, optional without requirements, voluntary, on demand . . . Occupational pension schemes can be nationwide, sector wide, company related or individual.
>
> LEVEL OF ORGANISATION.[24] European occupational Pensions are organised on all different kinds of levels. Mostly it is a synonym for the right to initiate the pension. This right can lay with the State (state based occupational pension schemes (often obligatory affiliation)), the social partners in certain branch of industry (sectoral pensions), the company (occupational pensions within the company) or the individual (personal pension provisions with or without opting-out from employer based scheme). In nearly all Member States the various levels exist next to one another.
>
> VARIOUS ACTORS INTERFERE IN OCCUPATIONAL PENSIONS.[25] The different European actors work legally on different bases. The state, insurance companies, pension funds and banks are the best known

---

18. *Id.*
19. *See id.* at 33-34 (providing a full and detailed analysis of this patchwork).
20. *Id.* at 24.
21. *See generally* WHITEHOUSE *supra* note 10 at 5-9
22. Europe and Pensions: Confronting Risks and Policies, *supra* note 1, at 25.
23. *Id.* at 26.
24. *Id.* at 27.
25. *Id.* at 28.

actors in pension schemes. The applicable regulations and laws differ strongly between them. This has a clear incidence on the schemes themselves. Furthermore there are insurance companies who also run pension funds or banks and vice versa.

BOOKING OF THE OCCUPATIONAL PENSION SCHEME.[26] Some Member States such as Germany allow extensive internal booking by companies of their occupational pension provisions (book reserves). These bookings have a direct impact on the economic viability of the companies and hence the country. Other European Member States only allow external booking with or without booked reserve funds for the contributing country.

FISCAL TREATMENT.[27] There are three possible moments of taxation of occupational pensions: when the contribution is paid, when there is a return on investment or when the pension benefit is actually paid. Theoretically it is possible that there is a tax exemption at all three moments or (less theoretically) that there is taxation at all three moments. All possible variants occur within the EU.

CONTROL MECHANISMS.[28] Various control mechanism exist within Member States to check whether the pension systems are run properly. A mixture of authorities checks the legal, prudential, social and financial constraints of the different pension systems within a Member State. These various authorities work (unfortunately) according to quite different standards throughout the EU.

PARTICIPATION LEVELS OF THE SOCIAL PARTNERS.[29] The role of the social partners in European occupational pension systems is relatively important compared to other Member States outside of the Union. It is not uncommon in European Member States that the social partners participate actively in the policy of the pension schemes. They can for example be found in many governing administrative bodies with advisory or even regulating power.

FINANCING METHODS.[30] Repartition or PAYG is no monopoly of state based pension schemes. Legally, there are occupational pensions based on PAYG in various Member States.[31] Furthermore collective or individual capitalisation are found. There is also open or closed funding.

Looking at all these different elements, it becomes quite clear that Europe is actually a legal patchwork quilt of pension elements. This does not necessarily have to be a negative (or for that matter positive) element. Rather, it is a given fact. Devising cross European legal typologies or legal models of pension systems

26. *Id.*
27. *Id.* at 10.
28. *Id.* at 30.
29. *Id.* at 31.
30. *Id.* at 32.
31. YVES STEVENS & BÉATRICE VAN BUGGENHOUT (ed.), SECTORPENSIOENEN 278 (Die Keure 2000).

is therefore very difficult, if not impossible. Apart from the fact that it is difficult, it is also certain that it has little to no legal consequences. Legally, the various elements and techniques make every Member State unique.[32] Due to the quilt and the multiplicity of solutions it has become almost impossible to give a unique European answer to the various pension problems. The national differences are often quite vast. As such, Europe can definitely not be considered a monolith when it comes to interpreting pension reforms.[33]

Because of these variations among the Member States:

> The consequences of the legal patchwork quilt lead to an evident absence of a uniform "pension" notion within the EU. The debate on what should be considered a pension is far-reaching. In most Member States, there is for example a classical distinction between the invalidity pensions and rest or survival pensions. Often, the notion "pension" is not used as a legal synonym within one Member State.[34]

The legal patchwork gives an insight of the differences between Member States. The complexity of the systems is enormous. At first view it might seem quite impossible that a country such as the US with federal pension laws has a similar patchwork. However, this is the truth. At first sight, nearly all different elements can be found in various forms within the US. The American and European patchwork on occupational and private pensions are not so different. This will become more clear in Part III when comparing the US and the EU. In order to be able to make this comparison, it is first necessary to clarify the European occupational pension mechanisms.

---

32. *See* Europe and Pensions: Confronting Risks and Policies, *supra* note 1, at 35-36 (stating that:

> A certain form of modesty – or even reticence – in explaining and comparing pension systems is also required. An often-heard remark is that economic data are difficult to compare. This is also true for a legal comparison of pension systems. The same social goal can often be reached by different means and it is therefore difficult to draw conclusions that are internationally valid. Certain elements that seem to be regular or standard within a Member State cannot be found in other Member States at first sight. However, they might be found in different elements or techniques.).

Id.

33. Most good analyses indicate that each county is clearly different. The warning the WHO made in April 2007 to developing countries not to copycat pension systems available in the west is therefore important. WHO specialist Somnath Chatterji has argued that based on current ageing issues in the developing world, other regions should not imitate European systems as they will not be sustainable. The warning makes it clear that some people really believe pension systems can be copied. This is obviously not the case.

34. *See* Europe and Pensions: Confronting Risks and Policies, *supra* note 1, at 35.

III. EUROPE WITHOUT LEGAL COMPETENCE

The retirement systems in the United States and in Europe are at crossroads. Government retirement plans such as Social Security are no longer sufficient to guarantee enough retirement funds for the current workforce both in the EU and US. The US took a step in 2006 by installing the PPA 2006. Hence, employer sponsored retirement plans are more than ever integral to proper retirement planning for Americans, and these plans will continue to become more important in the future.[35] The EU, however, has not taken similar steps. The reason is that there is no real European legal competence in the matter. This Section explains how the European Union works when it comes to occupational pensions

A. National Competences Leading to Desperate Disparity

The US is a constitutional federal republic comprising fifty states and a federal district. The EU obviously is not. With regard to occupational pensions (and pensions in general) the national Member States of the EU retain full competence unless otherwise decided. This means that the "federal" EU level can only interfere when asked to do so by the 27 Member States. In principle, the EU cannot take action on itself in these matters. This is called the principle of subsidiarity.[36]

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the EU shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States, either at the central level, or at the regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.[37] Formally, the principle of subsidiarity applies to those areas where the EU does not have exclusive competence. Furthermore, the principle delineates those areas where the EU should and should not act. Social security (and thus pensions) forms a domain of exclusive competence. In principle, the EU has

---

35. Craig Martin and Joshua Rafsky, *The Pension Protection Act of 2006: An Overview of Sweeping Changes in the Law Governing Retirement Plans*, 40 J. MARSHALL L. REV. 843, 866 (2007).

36. Subsidiarity was established in EU law by the Treaty of Maastricht, signed on February 7, 1992 and entered into force on November 1, 1993. The present formulation is contained in Article 5 of the Treaty Establishing the European Community. *See* Consolidated Version of the Treating Establishing the European Community art. 5, Dec. 24, 2002, 2002 O.J. (C 325) 33. (consolidated version following the Treaty of Nice, which entered into force on February 1, 2003 which provides that "[t]he Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.").

37. *Id.*

no right to interfere. When it comes to occupational pensions, the EU can interfere on a limited basis because occupational pensions are not considered to be exclusive social security. Occupational pensions are legally also embedded in financial and economic law. Statutory pensions are not.

This is very different from the US. The US implements federal legislation. The most known legislative act for private pensions is the Employee Retirement Income Security Act of 1974 (ERISA).[38] This federal law regulates most voluntarily-established-and-maintained employee benefit plans in private industry.[39] Such plans may be established and maintained by a single employer, an employee organization, or jointly by one or more such employers and an employee organization (known as multi-employer or multiple employer plans).[40] The creation of such an act is just impossible at a European level due to (1) the subsidiarity principle and (2) the quasi legal exclusive competence on pensions for Member States. With Member States retaining almost full competence, the EU level is seriously handicapped. The consequence is that Member States reform their systems irrespective of one another.

Hence the EU can best be described as a desperate disparity when it comes to occupational pensions. The differences in pensions are overwhelming. There are no models. Member States have various pension systems, and Europe is confronted with an enormous mix of systems consisting of diversity rules.[41] As Alain Euezeby quite correctly states: "The social protection schemes of the Member States of the European Union are amongst the most developed in the world. But they are far from homogeneous."[42] To complicate matters even more: Over the last decade almost all EU member States have undertaken systemic and parametric reforms of their pension policies, many of which are still under process or require further structural initiatives This has led to the inevitable coexistence of different systems in place, even within the same country, covering past acquired rights and new requirements.

The consequences of the desperate disparity are apparent. It is almost impossible to do a decent study of all twenty-seven

---

38. 29 U.S.C. § 1001 (2007).

39. *See* P.L. 93-406 (1974) (codified as amended in various sections of Titles 26 and 29 of the United States Code) (discussing the framers' intent behind The Employee-Retirement Income Security Act of 1974).

40. Kathyrn J. Kennedy, *ERISA's Participant Benefit Statement Requirements: Current Rules Under PPA 2006 and a Suggested Blueprint for Future Interpretations*, 35 TAX MGM'T COMP. PLAN. J. 319 (2007).

41. *See generally Privately Managed Pension Provision, Report by the Social Protection Committee* (February 2005) [hereinafter *"Privately Managed Pension Provision"*], *available at* http://ec.europa.eu/employment_social/social_protection/docs/ private_pensions_en.pdf.

42. EUZEBY, *supra* note 8, at 25.

(occupational) pension systems. Irrespective of the language problem (twenty-three official languages),[43] the technical legal disparity is so immense, that it is quasi impossible to know the exact impact of the legislation changes within Member States. Since there is no true legal European competence in the matter, there is no commonly developed database either. So to keep up with the legal changes in the twenty seven different Member States is practically infeasible. It is no wonder that many international analyses get bogged down in institutional, technical, and legal detail, making it impossible to transfer policy lessons between Member States.

The European Commission knows this problem very well: *Solid information on private pension schemes is essential for the decision-making process for both the private sector and the government. However the present situation is unsatisfactory at a national level but even more so at the European level.*[44] It is not only a problem of gathering legal information. It is also problematic to find comparable data on occupational pensions. The data that exists should furthermore be taken with a lot of precaution. Most data is not based on national data provided by authorities. They are often based on surveys for just a few Member States using distinct economic or sociological parameters.[45]

---

43. Frequently Asked Questions about the European Union's policy on languages, *available at* http://europa.eu/languages/en/document/59.

44. *Adequate and Sustainable Pensions Synthesis Report*, 134 (2006), *available at* http://ec.europa.eu/employment_social/social_protection/docs/2006/rapport_pensions_final_en.pdf.

45. An example of such a limited data survey dates from November 2007 and was commissioned by the European Commission. Hewitt made the study. In my opinion, this survey gives a wrong view on a lot matters because it mainly focused on larger companies. Hence, policy options should not be taken for granted. The information presented in the report relies largely on the results of the ad hoc voluntary survey carried out among organizations, which have established a pension scheme for their employees. Although the structure of the survey has been designed to encompass the diverse practices and types of scheme, the cross-country comparative analysis presented in this section should be examined with caution as national variations may simply be driven by structural systemic differences reflected into a specific business practice. *See generally*, HEWITT ASSOCIATES, QUANTITATIVE OVERVIEW ON SUPPLEMENTARY PENSION PROVISION FINAL REPORT PREPARED FOR THE EUROPEAN COMMISSION DIRECTORATE GENERAL EMPL (Nov. 2007), *available at* http://ec.europa.eu/employment_social/spsi/docs/social_protection /2007/ ec_report_final_nov_2007_en.pdf.

B. Limited European Legal Basis

The subsidiarity principle and the full competence of the Member States might lead to the belief that nothing happens at the European level. However, this is inaccurate. There are limited elements of European occupational pension law.[46] These elements can be found in the EU treaty, some directives and in policy making documents (soft law).

1. The European Treaty and Some European Directives

In the Treaty establishing the European Community ("TEC"), some articles can be found on the basis of which European legislation (such as directives) has been installed.[47] These articles deal with some basic values of the European union: the free movement of people (art. 42 TEC), the freedom of establishment to provide services (art. 43-49 TEC), the free movement of capital (art. 56 TEC), the promotion of high standard regarding workers' rights (art. 137 TEC) and the promotion of equal treatment of men and women (art. 141 TEC).[48]

With relation to the portability of pension rights the free movement of people, art. 42 TEC has proven to be important. Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community is based upon it.[49] The directive ensures equal treatment of migrant workers and national job changers regarding their occupational pension rights.[50] The directive only applies in a very limited number of cases and it only guarantees equal treatment with national residents. So, if the national residents are not protected, then there is no protection for the migrant worker. In the current state of affairs, there is no real

---

46. With regard to statutory, state based pensions, there are specific regulations. EU Regulation 1408/71 and Regulation 574/72 offer practical and satisfactory solutions to most of the cross-border problems that may arise in the field of social security. These Regulations do not harmonize but co-ordinate the social security schemes of EU Member States, i.e. they do not replace the different national social security systems by a single European scheme. Therefore, Member States are free to determine the details of their own social security systems, including which benefits shall be provided, the conditions of eligibility and the value of these benefits, as long as they adhere to the basic principle of equality of treatment and non-discrimination. *See generally Social security schemes and free movement of persons: Basic Regulation, available at* http://europa.eu/scadplus/leg/en/ cha/c10516.htm.

47. Treaty Establishing the European Community, Dec. 24, 2002, 2002 O.J. (C 325).

48. AMITSIS, *supra* note 5 at 103-06 (Theodoros Sakellaropoulos, Jos Berghman, eds., Intersentia 2004).

49. Council Directive 98/49/EC 1998 O.J. (L 209/46) 1 (EC).

50. *Id.*

portability of occupational pension rights in the EU. A new proposal of directive on portability was recently launched.[51] However, the proposal was altered in such a way that it is no longer upheld as a real portability directive.[52]

The articles 43 TEC and 49 TEC have played an important role in creating a single market for occupational pension providers. Several directives have established a single market for life insurances. Three former Council directives related to insurance matters have been amended by directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life insurance.[53] For example, the so-called IORP directive is also based on the articles 43 and 49 TEC. The IORP directive is directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision and applies to funded pension arrangements within a separate legal entity from the employer .[54] The IORP directive 2003/41 fits into the creation of a single market for occupational pensions whereby all obstacles have to be removed. The directive aims at establishing minimum prudential standards,[55] defining the role and responsibilities of supervisory authorities,[56] and proposing a qualitative approach to

---

51. *Proposal for a Directive of the European Parliament and the Council on the improvement of portability of supplementary pension rights*, COM (2005) 507 final (Oct. 20, 2005).

52. *See id.* (providing more information on the work and progress of the directive). Originally the Commission had made an ambitious proposal which would have enabled workers to enjoy true portability of their pensions. Many people have expressed disappointment at the removal of provisions to assist the transfer of pensions, but welcomed the report's clear commitment to setting minimum standards for the access to pension rights and fair treatment of dormant rights.

53. 2002 O.J. (L 345) 1-51. The three former directives are 79/267/EEC of March 5, 1979 relating to the taking up and pursuit of the business of direct life assurance; 90/619/EEC of November 8, 1990 that pertaining to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC; and 92/96/EEC of November 10, 1992 corresponding to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC).

54. Council Directive 2003/41, art. 2, 2003 O.J. (L 235) (EC). This separation guarantees that the assets are safeguarded in the interests of members and beneficiaries in the event of employer bankruptcy. The Directive limits the types of arrangements that can be IORPs. In particular, the following are excluded: social security arrangements, funds that operate on a pay-as-you go basis, funds under which employees have no legal rights to benefits and book reserves.

55. Council Directive 2003/41, 2003 O.J. (L 235) (EC). The Directive sets out a number of safeguards for the protection of members. The Directive requires that an IORP is registered in a national register, is effectively run by persons of good repute, has properly constituted rules and that IORPs technical provisions (basically the pension scheme liabilities) are computed and certified by an actuary or other specialist in the field.

56. *Id.* IORPs are supervised and regulated by national "competent

investment rule, according to which investment portfolio management should comply with the principles of diversification, security, and quality (not uniform quantitative requirements). The directive is also designed to allow cross-border management of occupational pension schemes - an institution in one Member State would be able to manage company pension schemes in other Member States.[57] The IORP directive allows mutual recognition of Member States' supervisory regimes. A mutually recognized pension provider will be able to manage the pension schemes of firms located in other Member States while applying the prudential rules of the Member State in which it is established.[58] This is called the home-country control. It is believed that bigger multinational companies would benefit from the directive by soaking up additional costs of running pensions funds in different countries. The directive ensures that the social and labour legislation of the host Member States (i.e. those applicable to the relationship between the sponsoring undertaking and the members) will continue to apply. The directive does not intend to interfere directly with national pension schemes. An IORP is subject to supervision by the competent authorities of the host

---

authorities." The competent authorities will be able to carry out inspections and intervene to help protect members' rights. The competent authorities are empowered to carry out inspections into compliance with the supervisory rules and where necessary are given powers of intervention, including the levying of fines against the IORP and persons running the IORP. Competent authorities can require IORPs to provide various items of information: investment policy principles, annual reports and accounts, all documents necessary for the purposes of supervision, such as internal interim reports, actuarial valuations and assumptions, asset-liability studies, evidence of consistency with investment policy principles, evidence that contributions have been paid as planned and auditors' reports.

57. *Id.* The directive enables IORPs to accept sponsorship by, and run a pension scheme for, a company located in other member states. Consequently and in the long run, impediments to trans-national membership will be removed throughout the EU (part of the free movement of workers). At present, occupational pension providers, such as pension funds, operate for the most part only in the Member State in which they are established. *See* Gaël Coron, *Retraite par Capitalisation et Union Européenne*: *Retour sur la Directive Institutions de Retraite Professionnelle*, 43 REVUE DE L'IRES 3 (2003) (describing the history and origin of the directive).

58. *Id.* Mutual recognition of pension sponsoring across Member States is the basis of the Directive. An IORP authorized within one single Member State can deploy its activities throughout the European Union. A single license suffices (i.e. the European passport). An IORP wanting to accept sponsorship from a foreign employer must obtain authorisation of the competent (supervisory) authority (or regulator) located in its own country (the home state). It must go through a notification procedure informing this competent authority. This involves providing the host Member State(s). This means the Member State where the sponsoring company (or employer is located); the name of the sponsoring undertaking (employer); and the main characteristics of the scheme to be operated for the employer.

State in respect of the host States' social and labour laws relevant to occupational pensions.[59] A major question is: what does this notion of social and labor legislation mean?[60]

Article 56 TEC prohibits restrictions on the free movement of capital. The IORP directive facilitates the free movement of capital by abolishing uniform quantitative investment requirements.

Article 137 TEC stands for the promotion of high standards regarding workers' rights. Two directives have been based on the article. These are directives 80/987/EEC of 20 October 1980 (on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer) and 2001/23/EC of 12 March 2001 (on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses). The directives require Member States to take the necessary measures to protect workers' supplementary pension rights.

Based on article 141 TEC plenty of pension jurisprudence on the promotion of equal treatment of men and women has been developed. These court cases have partially already been transformed into council directives. Yet, Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, allows discrimination regarding the retirement age and survivors' pensions, but calls for them to be phased out. Article 141 TEC requires equal treatment with regard to occupational schemes which are regarded as pay. This is reflected in Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes amended by Council Directive 96/97/EC of 20 December 1996.

59. *Id.* Should irregularities occur, the host State authority shall immediately inform the home State authority. The home State authority, in co-ordination with the host State regulator, will take the necessary action to rectify matters. If the home State authority is unable to stop the breach in the host State's requirements, the host State authority, after informing the home State authority, must take steps to prevent or penalize further irregularities – including preventing the scheme from operating in the host State.

60. On this topic two studies have been written. YVES STEVENS, THE DEVELOPMENT OF A LEGAL MATRIX ON THE MEANING OF "NATIONAL SOCIAL AND LABOUR LEGISLATION" IN DIRECTIVE 2003/41/EC WITH REGARD TO FIVE MEMBER STATES (BELGIUM / FRANCE / GERMANY / ITALY / NETHERLANDS) (European Association of Paritarian Institutions AEIP) (2006); YVES STEVENS, THE MEANING OF "NATIONAL SOCIAL AND LABOUR LEGISLATION" IN DIRECTIVE 2003/1/EC ON THE ACTIVITIES AND SUPERVISION OF INSTITUTIONS FOR OCCUPATIONAL RETIREMENT PROVISION (European Association of Paritarian Institutions AEIP) (2004).

2. European Policy Objectives

Compared to the very small European legal basis on occupational pensions, a lot of work has been put in developing ideas on how Europe should evolve in pension matters. This is logical because pensions are embedded in and part of economic structures. The EU is an economic structure. Pension schemes influence the national economies. So logically, most pension policies are embedded in the general economic policy of the EU. Many policy makers have created European pension policies both in a general way but also specifically for occupational pensions.

a. General Pension Policy

Countless reports and papers indicate the European economic and demographic challenges related to ageing.[61] In most Member States, pensions expenditure is expected to rise significantly from 2015 onwards, giving rise to concern about the capacity of future pensions to ensure decent living standards for the retired and financial sustainability of pension systems. Nevertheless, aging does not imply the financial collapse of pension systems.[62] Then again, it will certainly lead to increased spending pressures, notably in the areas of pensions, health and long-term care. The overall challenge is how to ensure that the additional financial obligations can be met.

The EU has formulated multiple objectives and policies throughout the years in order to tackle these known pension problems. Currently all Member States agreed on eleven common EU objectives designed to secure the future of their pension systems.[63] The eleven objectives refer to three chapters. Under the first chapter entitled "Adequacy," three objectives can be found namely: (1) prevent social exclusion in old age; (2) allow people to maintain their living standard; and (3) promote solidarity between and within generations. The financial sustainability of pension systems is the second chapter whereby the objectives are to (4) raise employment levels; (5) extend working lives; (6) ensure

61. *Budgetary Challenges Posed by Ageing Populations: The Impact on Public Spending on Pensions, Health and Long Term Care for the Elderly and Possible Indicators of the Long-Term Sustainability of Public Finances* (Oct. 24, 2001) (explaining one of the EPC's more accurate reports); Sheetal K. Chand and Albert Jaeger, *Aging Populations and Public Pension Schemes*, WASHINGTON, INTERNATIONAL MONETARY FUND 42 (1996); ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *Maintaining Prosperity in an Ageing Society*, OECD OBSERVER, (June 1998).

62. *Communication from the Commission to the Council, the European Parliament, and the Economic and Social Committee, Supporting National Strategies for Safe and Sustainable Pensions through an Integrated Approach*, at 3, COM (2001) 362 final (July 3, 2001).

63. *Adequate and Sustainable Pensions Synthesis Report*, *supra* note 44 (explaining and developing these eleven objectives).

sustainable pensions in a context of sound public finances; (7) adjust benefits and contributions so as to share the financial consequences of ageing in a balanced way between the generations; and (8) ensure that private pension provision is adequate and financially sound. Furthermore, the pension schemes should respond to changing needs (third chapter). Pensions should therefore, (9) adapt to more flexible employment and career patterns; (10) meet the aspirations for greater equality of women and men; and (11) make pension systems more transparent and demonstrate their ability to meet the challenges. These eleven objectives indicate common policy options and refer to a wanted integrated and comprehensive pension approach. Although they are but common policy options and thus have no legal binding force on the policy level they play the role of mind changer.

The major breakthrough in defining the eleven above-mentioned objectives by the European Council is that pension policies should take a comprehensive and integrated vision. All pension and retirement types form a whole. There is an increasing awareness of the need to get a complete picture of the future challenges to pension systems and the common action that needs to be taken to meet these challenges. Depending on the personal (working) background of an individual, a mixture of retirement provisions or other incomes is required. If the statutory pension provides a sufficient level of replacement income in order to maintain an equivalent living standard during retirement, then there is no need for other retirement incomes. In this respect, the comprehensive and integrated approach requires a form of coordination meaning that all forms of retirement provisions should be taken into account in order to determine and evaluate the height of the pensioner's income.

b. Occupational Pension Policy

Occupational pensions have been on the policy agenda for a long time within the EU. Over the years, many policy options – have been proposed. Most of the statements done by the European Commission, up to 2000, could create the impression that occupational pensions were less a matter of creating a future-proof pensions policy demonstrating social solidarity. Rather, these statemens could be interpreted as addressing budget and financial policy aspects. In other words, until 2000 the idea lived that occupational pensions are associated with a strengthening of the finance and capital markets rather than associated with social policy.[64] Issues such as solidarity and social equality seemed to be

---

64. Historically important years include:
1990: Proponents plead for the European Commission to require Europe-wide

restrained into the background. Only recently, the commission took a more "social" view upon occupational pensions.[65] In its latest report "Adequate and sustainable pensions: synthesis report" of 2006, the European Commission considered occupational pensions as a part of social policy.[66]

This change in the way occupational pensions are perceived, pertain to two general policy objectives. There is first of all objective 8 "making sure that private pension provision is adequate and financially sound" and secondly there is objective 9 stating that "pensions should adapt to more flexible employment and career patterns."[67] These two objectives are part of a specific European process called OMC.

3. *OMC and Occupational Pensions*

In 2001, the European Council recognized that there could be significant benefits by enhancing dialogue and cooperation on issues related to the reform of pension systems. Thus, it endorsed the eleven common objectives of adequacy, financial sustainability and adaptability. The council also decided on a working method,

---

regulation on pension funds because of the financial market.
1991: The European commission puts the first principles on supplementary pensions forward. *Supplementary Social Security Schemes: The Role of Occupational Pension Schemes in the Social Protection of Workers and their Implications for Freedom of Movement*, SEC (91) 1332 final, Brussels (July 22, 1991), http://aei.pitt.edu/ 3458/01/000609_1.pdf.
1998: The Commission's communication of October 28, 1998 on Financial Services stated that the framework contains proposals to complete the integration of financial markets in the Union. Commission of European Communities, *Financial Services: Building a Framework for Action* (1998), http://ec.europa.eu/internal_market/finances/docs/ actionplan/index/fs_en.pdf.
1999: The Commission Communication: "Towards a single market for supplementary pensions" is the first very important green paper in this field. *Communication from the Commission, Towards a Single Market for Supplementary Pensions, Results of the Consultations on the Green Paper on Supplementary Pensions in the Single Market*, COM(1999) 134 final (Nov. 5, 1999), *available at* http://europa.eu/scadplus/leg/en/cha/ c10523.htm.
2000: Report of the Economic Policy Committee concerning the future direction of pension reform. ECONOMIC POLICY COMMITTEE, *Progress Report to the Ecofin Council on the Impact of Ageing Populations on Public Pension Systems*, (Nov. 6, 2000), *available at* http://ec.europa.eu/economy_finance /epc/documents/2000/epc-ageing-report_en.pdf.
2002: First draft joint report by the commission and the council on adequate and sustainable pensions. In this report occupational pensions were taken into account. The latest report dates from 2006. *Adequate and Sustainable Pensions Synthesis Report*, *supra* note 44.

65. *Draft Joint Report by the Commission and the Council on Adequate and Sustainable Pensions* 5 (March 3, 2003), *available at* http://ec.europa.eu/employment_social/spsi/docs/social_protection/cs7165_03_en.pdf.

66. *Adequate and Sustainable Pensions Synthesis Report*, *supra* note 44.

67. *Id.* at 136-40.

which is known as the open method of coordination ("OMC").[68] In this method Member States are required to answer to specific issues related to the eleven objectives in a common framework. The national answers and comments are gathered in National Strategy Reports. Because every Member State has to answer the common questions, valuable comparative information can be examined.[69] The idea is to learn from one another. Basically, the OMC gives a framework to a mutual learning process, including a periodical monitoring of the progress made by each Member State on the basis of commonly agreed and defined indicators. The national strategy reports should contain all relevant data, which will help to assess progress towards the broad common objectives.

In 2002, the first wave of National Strategy Reports ("NSRs") described how the fifteen Member States intended to meet these objectives. On the basis of these NSRs, the Commission and the Council adopted a Joint Report on adequate and sustainable pensions in March 2003. The 2003 Joint Report concluded that "Most Member States see pension reform as a continuous process rather than a one-off, discreet event. The momentum behind reform process to secure the sustainability of adequate pensions must be maintained."[70] The Council requested progress to be presented in 2006 and for the new Member States to be included.[71] A second round of NSRs was thus presented by the Member States in the summer of 2005. The NSRs were discussed in a peer review in mid-September 2005, involving the Social Protection Committee ("SPC") and the Economic Policy Committee ("EPC"). All the results are presented in a report of 2006.[72] The main conclusions were:

> there has been substantial progress in reforming pension systems; disincentives to work longer have been reduced and incentives strengthened; links between contributions and benefits have been tightened; life expectancy has been further taken into account in pension systems; the provision of supplementary pensions has been promoted; and guaranteed minimum pensions have been increased.

For the first time in European history occupational and private pensions were taken into account for examining pension

68. *Id.* at 134.

69. *See Guidance Note for Preparing National Strategy Reports on Social Protection and Social Inclusion, 2008-2010, available at* http://ec.europa.eu/employment_social/spsi/docs/social_inclusion/2008/080207_guidance_note_nsrs_cln_en.pdf.

70. *Adequate and Sustainable Pensions Synthesis Report, supra* note 44.

71. *Id. See* CIA – The World Factbook, https://www.cia.gov/library/publications/the-world-factbook/geos/ee.html (explaining that in 2004 Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovenia, Slovakia and Czech Republic joined the EU). Furthermore, Bulgaria and Romania joined the EU in 2007. *Id.*

72. *Adequate and Sustainable Pensions Synthesis Report, supra* note 44.

policies. The 2006 report holds a specific chapter entitled "Secure private pensions complementing or replacing partially public pension provision." In this chapter some main European conclusions can be drawn:

- Member States place greater emphasis on the contribution of private funded provision than before. Several Member States see a role for the private pension provision as part of the total pension provision. This has traditionally been the case in some Member States (like DK, NL and UK).
- Several Member States see a role for the private pension provision as part of the total pension provision. This has traditionally been the case in some Member States (like DK, NL and UK).
- The importance of private pension provision has essentially been increased by the introduction of a funded tier of statutory schemes in a number of Member States like in SE, PL, HU, EE, LV, LT, and SK.
- Some Member States have increased provisions for occupational or private schemes that complement public pensions (DE, IT, AT).
- In all but a few Member States, the public pay-as-you-go pension schemes are expected to remain the principal source of income of pensioners. The trend towards a broader use of privately-managed pension provision does not allow public policy to retreat from the area.
- Monitoring and regulating private pension provision is becoming an important and complex task for public policy.
- Transparency and competitive markets for financial intermediaries should be promoted.
- If private pensions are to provide retirement incomes for people with lower incomes it is therefore essential that Member States invest in good governance structures for them.
- There is a debate in some Member States about making private savings mandatory, in particular if a major part of the pension provision should be based on private saving (as is the case in many new Member States).
- As far as private pensions are based on a wider use of voluntary private pensions, they are generally used more frequently by higher income groups.
- It is important for Member States to monitor whether the actual development of private pension provision matches needs, by assessing levels of coverage and benefits and their distribution by age and socio-economic status.
- Privately-managed schemes have to operate at a sufficiently high level of security and efficiency. Rules on acceptable

investment risks and prudent assumptions about future returns are important safeguards if their implementation is well-enforced and monitored, while efficiency also means ensuring that administrative charges are kept low.

- The translation of individual accounts into safe and secure annuities will become more and more important, in particular for the regimes recently introduced that will begin to provide first, partial benefits in a few years and often before the end of the decade (like in PL, EE, HU, LV, LT or SK).[73]

Basically, the open method of co-ordination (OMC) is a mutual learning process. Such a process of learning from and with other Member States is very familiar to lawyers. They are used to work that involves comparative cross-country legal analyses. So, it would be wrong to present the basic phenomenon of cross-national benchmarking as recently booming. It is only the framework that has received a boom. It is essential to note that there are no "best practices" in OMC. There are only "most appropriate practices for specific national circumstances." Thus, there are not only numerous legal barriers to the transfer of practices. Member States also have different demographic prospects, pension systems and economic environments for their pension systems. That is why it is impossible to make an overall hit parade of national pension policies. With the OMC, you cannot rank the Member States according to a pension beauty contest. In this manner the OMC can provide innovative policy options for domestic policy-makers without losing respect for local diversity.[74]

C. *No Real European Impact*

The list of common European realizations is far from impressive. At a European level, there is a lot of talk about pensions but little real action. Guidelines and indicators are formulated at regular intervals but without any real impact on the national pension policies. The reality is clear: Europe is confronted with twenty seven different member states when it comes to technical pension issues. These wide national differences are mainly the result of the historical, demographic, economic, political and ideological diversity within the European Union.

Furthermore, the little that has been done in Europe is seriously questioned. There is an increasing criticism toward the European Law field due to the lack of so-called social justice. There is even "[a] number of academics that have formed a Study

73. *See infra* note 110 and accompanying text (providing abbreviations for the EU's Member States).

74. Anton Hemerijck, *Deepening Social Europe Through Open Co-ordination*, *in* BELGISCH TIJSCHRIFT VOOR SOCIALE ZEKERHEID 461 (2002).

Group on Social Justice in European Private Law . . . [t]he Group wishes for a European contract law that respects cultural diversity and at the same time introduces regulatory techniques that enjoy legitimacy in a multi level pluralistic policy."[75] Without any doubt, the social quality of Europe as a whole can indeed be questioned.[76]

IV. COMPARING THE EU AND THE US

A full comparison between the occupational private pension laws in Europe and the US would take more than one doctoral thesis. This article therefore focuses only on some very specific topics allowing some comparative lessons. The issues retained are: vesting, coverage, benefit design, portability and information.

Clearly many other topics could be covered as well. Topics such as funding,[77] taxation, benefit pay-out,[78] the legal powers of the supervisory authorities, and the role of the trade unions are definitely worth examining. However, with regard to the comparative lessons (part IV) the five chosen themes seem appropriate.

Due to the disparity within Europe this comparison is sometimes more based on a comparison between the 27 European Member States and the US. For the US, this article looks at the various topics with much emphasis on the PPA 2006.[79] "The

---

75. Ole Lando, *Liberal, Social and "Ethical" Justice in European Contract law*, 43 COMMON MKT. L. REV. 817, 819-21 (2006) (demonstrating that the Study Group has defined quite a few parameters examining this kind of justice).

76. Jan Baars, Kees Knipscheer, Fleur Thomese & Alan Walker, *Conclusions: Towards Social Quality in Europe, in* THE SOCIAL QUALITY OF EUROPE 297-309 (Wolfgang Beck et al. eds. 1997).

77. Sarah D. Burt, Note, *Pension Protection? A Comparative Analysis of Pension Reform in the United States and United Kingdom*, 18 IND. INT'L & COMP. L. REV. 189, 219-22 (2008) (comparing differences between the US and EU Member States). For example, in the US all plans are funded. In the EU there is a huge variety. There are also European occupational pensions based on PAYG.

78. *See* Monika Bulter, *Should You Take a Lump or Annutize? Results from Swiss Pension Funds* (Oct 5, 2005), *available at* http://www.cerge-ei.cz/pdf/events/papers/ 060330_t.pdf (demonstrating that both in the US and the EU the accumulated capital at retirement is sometimes either paid as a lump sum or converted into a pension). National legislation or scheme regulations in Europe define the possibilities. *Id.*; Emma C. Eriksson, Note, *The Pension Protection Act of 2006: Is it too Late to Save Traditional Plans?* 41 SUFFOLK U. L. REV. 133, 147 (2007). In the US, the PPA 2006 changed the funding rules quite strongly. Under the Pension Act, most pension funds must be completely funded within seven years, and "at-risk" plans must comply at an accelerated pace. *See id.* at 148 (referring to the Pension Protection Act of 2006 § 501). Furthermore, the Pension Act mandates that underfunded plans pay higher premiums; disclose the plan's funding status to plan participants; and produce more accurate actuarial plan assessments. *Id.*

79. This act was signed into law on August 17, 2006. Pension Protection

primary focus of the Act is to stabilize pension plans and ensure they are fully funded to avoid problems, such as those associated with the collapse of Enron. Considering that approximately 44 million Americans are covered by traditional pension plans, to say that the Act is far-reaching is a vast understatement."[80]

Congress approved the new funding rules in response to a growing alarm about the risk posed to the retirement security of US workers and to US taxpayers by the magnitude of the liability from underfunded defined benefit pension plans. The use of unrealistic assumptions to value plan assets and liabilities, pension laws that deterred – or even prohibited – adequate funding, and weak economic conditions all contributed to the problem.[81]

According to Martin and Rafsky the PPA 2006 also fulfills a hidden agenda. Specifically, "[o]ne of the PPA's main purposes is to eliminate defined benefit plan underfunding by revamping the old rules governing defined benefit funding." Further, "[o]ther major, and intended consequences of the PPA . . . are the encouragement and promotion of the use of defined contribution plans, as well as the legitimization of controversial cash balance plans."[82]

A. *Vesting*

Legally, vesting is an important issue in both the US and the EU. Vesting gives an immediately secured right of present or future enjoyment. A vested right to an asset cannot be taken away by any third party, even though one may not yet possess the asset. Both in the EU and the US a vested right is quite absolute as a right. The funding that goes with the vesting entitles the employee to a kind of ownership on the assets.

1. *US*

In the US, vesting provisions secure for an employee a nonforfeitable right to pension benefits when changing jobs or otherwise ending employment before becoming eligible for a pension. Employees in the US always have a non-forfeitable right to their own contributions. So the vesting problem is only a topic for the employers' contributions.

Before ERISA in 1974, some defined benefit pension plans required decades of service before an employee's benefit became

---

Act, Pub. L. No. 109-280, 120 Stat. 780.

80. Douglas L. Lineberry, *The Pension Protection Act of 2006*: *Wide Ranging Changes to ERISA Not Limited to Just Employee Benefits*, 19 S. C. LAW. 16, 16 (2007).

81. *Id.* at 18.

82. Martin, *supra* note 35, at 843.

vested. It was not unusual for a plan to provide no benefit to an employee who left employment before retirement (age 65 or sometimes age fifty five), regardless of the length of the employee's service. Historically, virtually all vesting provisions were in two forms—deferred full (or "cliff") and deferred graded (or "graduated")—both of which required the employee to meet service conditions. When conditions for deferred full vesting are satisfied, all accrued benefits are receivable at a later date. Under graded vesting, an initial percentage of accrued benefits are first earned, and the vested percentage increases as additional services are credited. ERISA incorporated both cliff and graded vesting in establishing vesting rules, but minimum age requirements (apart from a minimum age for plan participation) and deferred partial grading were not permitted. The law also prescribed minimum vesting schedules, and it set a maximum of ten years for cliff vesting schedules.

Generally, a plan may require a person to reach age twenty one to be eligible to participate in the plan and to have a year of service. The waiting period for workers age twenty one or older cannot be more than one year of service, unless the plan provides immediate full vesting. In that case, a waiting period of up to two years may be applied.

As of 2007, employees' benefits in a defined benefit pension plan must become vested at one hundred percent after five years or under a seven-year graded-vesting schedule (twenty percent a year for each year of service beginning with the third year of service and ending with one hundred percent after seven years).

Under the PPA 2006, employer contributions made after 2006 to a defined contribution plan must become vested at one hundred percent after three years or under a six-year graded-vesting schedule (twenty percent a year for each year of service beginning with the second year of service and ending with one hundred percent after six years). "While this sounds like a significant impact on businesses, market research suggests that more than eighty five percent of current 401(k) plans provide for vesting that is at least as favorable as the new provisions of the Act."[83] Full vesting must always occur when a member reaches the plan's normal retirement age, which usually is age sixty five for defined benefit plans, or if the plan is wound up. Different rules apply with respect to employer contributions made before 2007.

2. EU

To vest an occupational pension, various systems exist throughout the European Union. Three sets of conditions are clearly present in most systems: (1) citizenship, (2) number of

83. Lineberry, *supra* note 80, at 16.

worked years and (3) amount of paid contributions into the pension scheme. Most analyses start from one of these three parameters in describing the acquisition condition of pension systems.[84] However, when looking at the pension legislation in various Member States it becomes obvious that the three systems have been used simultaneously in various stages of different schemes. Diversity rules.[85]

Instead of looking at the twenty seven different Member States, some examples make the diversity apparent:

- Most schemes in the UK are subject to statutory vesting requirements. These require vesting periods of no more than 2 years, reducing to 3 months if a cash transfer is chosen. A significant proportion of UK based schemes have either no vesting period or a short period of between one and six months.
- In Spain most qualified pension schemes are subject to statutory vesting conditions. These require immediate and full vesting independently of the type of scheme. This rule is also applicable to insurance contracts where premium is considered taxable income for participating employees. On the other hand, no specific statutory requirements apply in insurance contracts where premium is not considered taxable income for participating employees. A proportion of Spanish-based schemes have either no vesting period or a short period mainly in a range between one and twenty four months. For Defined Benefit schemes longer vesting conditions can apply.
- In Ireland nearly all schemes are subject to a statutory vesting period of not more than 2 years. A significant proportion of Ireland-based schemes either have no vesting period or a short period of between one and six months.
- Most German schemes are subject to statutory vesting requirements. These require vesting periods of 5 years for schemes that are sponsored by employers and no vesting period for schemes that are sponsored by employees. Employers are free to voluntarily shorten the 5-year vesting period but hardly ever do so.
- In France rights under defined benefits schemes cannot be vested before retirement age without losing the favorable tax regime that allows tax deductibility. Benefits under defined contributions schemes and collective retirement saving plans are fully vested.

It is legally inaccurate to state that most occupational pension

84. *See* WHITEHOUSE, *supra* note 10, at 5-9 (providing an analysis of pension systems).

85. *See Privately Managed Pension Provision*, *supra* note 41, at 6 (demonstrating that it is difficult to assign a system certain parameters).

schemes in Europe base their acquisition condition on paid contributions. For example, an increasing number of occupational pension schemes of Eastern European Member States require European citizenship. In the Dutch system, the working years are a more important acquisition condition than the paid contributions. With some of the book reserves systems in Germany, the working years condition is clearly the most important condition.

Another interesting element is related to the waiting periods. Here, also, there is a lot of diversity in Europe.

- In Belgium the law requires employees of twenty five or older to be immediately affiliated to pension schemes. Waiting periods can only be applied to employees younger than twenty five.
- In the UK, Ireland, France and Spain most schemes have very few employees in waiting periods. This is because most schemes have a short or no waiting period and have a low or no minimum age.
- For the Polish qualified pension plans there is a minimum waiting period of three months (established by the EPP Act), and written in the company agreement. For non-qualified plans, the waiting period is defined by the contract governing the plan.
- In the Netherlands there is a limitation of the waiting period to two months.

B. *Coverage and Anti-Discrimination*

A main question with regard to private or occupational pensions in both Europe and the US is: who is covered? Additionally, what percentage of the population enjoys a private occupational pension? The topic is strongly debated in the EU and the US alike. The coverage rate is legally linked to the possibility to discriminate in plans. Who can be left out?

1. US

The US pension system is mainly employer-based and it is voluntary. "That is, nothing in the law requires an employer to offer any pension at all. Although many employers may feel competitive pressures to offer some retirement vehicle for their employees, many do not."[86] Moreover, "it has been reported that over seventy one million of the 153 million working Americans—almost half—worked for an employer sponsoring no retirement plan."[87] The PPA 2006 provides in part that:

---

86. Susan J. Stabile, *Is it Time to Admit the Failure of an Employer-Based Pension System?*, 11 LEWIS & CLARK L. REV. 305, 321-22 (2007).
87. *Id.*

> rules for testing defined benefit plans and hybrid plans (which specify contributions to an account like a defined contribution plan but guarantee final benefits like a defined benefit plan) to determine whether they violate the age discrimination provisions of the Tax Code, ERISA and the Age Discrimination in Employment Act.[88]

Sponsoring employers have quite a lot of flexibility in determining who will be covered under a plan and can create different plans for different groups.

Originally, if an employer offered a DB plan, the participation was automatic and thus compulsory for covered employees. Employers were not required to cover all employees, but they needed to meet minimum employee coverage and non-discrimination rules. With the decline of DB plans a lot has changed however. Participation to DC plans may be automatic or voluntary for covered employees depending on the type of defined contribution plan and/or plan rules.

However, in order to receive a tax-qualified status, however, a plan must satisfy legal requirements concerning non-discrimination in contributions and benefits. Coverage and participation must not discriminate in favor of highly compensated employees. In this regard, the fiscal rules are used as a means to determine the discrimination rules.

The US has always considered taxation a means of influencing the coverage rate. This is due to historical underpinnings.

> Private pension plans were also subject to nondiscrimination rules, which limited the employer's ability to skew plan benefits in favor of highly compensated employees. In testing for nondiscrimination, however, employers were allowed to claim full credit for Social Security benefits by 'integrating' them with employer-provided pension benefits. As a result, while Social Security benefits were weighed in favor of low-income workers, private plans channeled benefits to high-income workers, who stood to gain the most from tax incentives.[89]

There was a kind of social equivalence between low income workers with full social security benefits and high income workers with private pensions. Social Security benefits were tilted in favor of low-income workers due to a progressive benefit formula, which produced a declining ratio of benefits to pre-retirement income for higher-income workers. However, social security benefits have declined and ERISA has created the plans under section 401(k). The difference between high and low income workers faded and the high income workers gained a lot by the changes.

---

88. Lineberry, *supra* note 80, at 16.

89. Karen C. Burke & Grayson M.P. McCouch, *Social Security Reform: Lessons from Private Pensions*, 92 CORNELL L. REV. 297, 298 (2007).

Consequently, the effects of using taxation as a means to streamline affiliation are limited.[90] Burke and Mc Couch give a clear qualification:

> As the attractiveness of qualified plans has diminished, many employers have resorted to nonqualified deferred compensation arrangements to remunerate highly paid employees. In general, a nonqualified plan consists of the employer's unfunded, unsecured promise to pay pension benefits to the employee in the future. Both the employer's deduction and the employee's inclusion are deferred until the benefits are actually paid. Even if the employee and employer could earn the same pre-tax rate of return on an equivalent investment, deferral is advantageous to the employee whenever the employer's marginal tax rate is lower than the employee's. The principal attraction of nonqualified plans is that they are exempt from the regulatory requirements associated with qualified plans. As a result, private pension plans have evolved toward a two-tier system, with qualified plans for the rank and file and nonqualified plans for highly compensated employees.[91]

Not surprisingly, those who lack pension coverage tend to be lower-income employees. "Because the system is driven by tax benefits, employers whose workers are less well-paid, hence less tax-sensitive, tend not to offer pension plans." [92] "Lack of coverage is particularly an issue for employees of small employers."[93] "Moreover, that an employer sponsors some pension plan does not mean that all of the employees of that employer have pension coverage." "Employers are free to design their plans so as to exclude certain categories of employees, so long as the plan does not run afoul of the Code's prohibitions against discrimination in favor of highly-compensated employees, and many do so."[94] "Additionally, employers are able to effectively exclude part-time

---

90. *Id.* at 300.

> In 1986, as part of a comprehensive revision of the tax code, Congress imposed new limits on contributions and benefits for highly compensated employees as well as stricter coverage and nondiscrimination requirements. These changes were intended both to encourage broader pension coverage and benefits for low-and moderate-income workers and to limit revenue losses from the tax expenditure for qualified plans. The efficacy of the tax subsidy, however, was undermined by declining marginal tax rates, and the attraction of qualified plans was reduced by restrictions on contributions and benefits for highly compensated employees. Given the voluntary nature of qualified plans, it is hardly surprising that employers responded to the 1986 legislation not by expanding pension coverage or broadening benefits among the rank and file but rather by searching for more valuable alternative forms of compensation.

Id. at 300-01.

91. *Id.* at 301.

92. Stabile, *supra* note 86, at 322.

93. *Id.*

94. *Id.*

employees by virtue of their ability to exclude from plan participation employees who do not work 1000 hours in a year and many have, in fact, increased the number of part-time employees, thereby reducing their benefit costs."[95]

"Finally, a number of employers have also effectively excluded workers from coverage by having certain work performed by independent contractors. Since independent contractors are, by definition, not employees, they do not receive the benefit of any protection from ERISA."[96]

The conclusion on the US coverage is quite clear: "[t]he private pension system may be failing to accomplish its goals. While the nondiscrimination rules may have helped to limit tax expenditures for highly paid employees, they have done little to improve qualified plan coverage for the rank and file."[97] "Indeed, private pensions provide a negligible amount of retirement income for employees in the bottom 40 percent of the income scale."[98]

Moreover, the growth of 401(k) plans is unlikely to result in expanded coverage. "A 401(k) plan puts the decision whether to participate in the plan in the hands of the employee. Studies consistently find that upwards of one-quarter of employees eligible to participate do not do so."[99] Further, "lower income employees - those least likely to have private sources of retirement savings - are less likely to participate in a 401(k) plan."[100]

Congress was aware of the coverage problem when passing the PPA 2006. The PPA 2006 introduced automatic enrollment features. "[E]mployers may now unilaterally enroll [new] employees in 401(k) retirement plans" and set default contribution

---

95. *Id.* at 322-23.

96. *Id.* at 323.

97. Burke, *supra* note 89, at 301.

98. *See also* Daniel I. Halperin & Alicia H. Munnell, *Assuring Retirement Income for All Workers*, 2 (2000), *available at* http://www2.bc.edu/~munnell/wp_2000-05.pdf (indicating that "[i]n 1996, pensions accounted for only 3 percent of the retirement income of the lowest quintile of the over 65 income distribution and 7 percent of the second-lowest quintile."); Nat'l Acad. of Soc. Ins., *Uncharted Waters: Paying Benefits from Individual Accounts in Federal Retirement Policy* 31-32 (Virginia P. Reno et al. eds., 2005), *available at* http:// www.nasi.org/usr_doc/Uncharted_Waters_Report.pdf (explaining that the distribution of retirement savings in defined contribution plans and IRAs is similarly skewed; in 2001, the median account balance for families in the lowest two quintiles was zero).

99. *See* Stabile, *supra* note 86, at 311 ("Most workers who do participate in 401(k) plans fail to contribute enough to accumulate sufficient retirement savings."). Furthermore, "[o]nly about ten percent of participants contribute the maximum amount permitted under the Code, and those who do are likely to be the highest income employees."). *Id.* at 311-12. Additionally, "[o]nly one percent of workers earning under $60,000 made the maximum annual contribution to their defined contribution plan in 2004." *Id.* at 312.

100. *Id.* at 311.

levels starting at three percent of the employee's gross income.[101] This automatic enrollment means that an eligible person is automatically enrolled unless he protests.[102] "Employees who do not wish to participate must opt out of the plan . . . considering that one-third of eligible employees do not participate in their employer's 401(k) plan, automatic enrollment provisions can potentially help those who are not preparing actively for retirement."[103] However, it remains questionable whether this increase will indeed take place. The real question is actually whether or not there should be a mandatory system. Anyhow, "[a]llowing employers to automatically enroll employees in defined contribution plans reflects the trend away from socialized retirement programs in favor of private wealth providing for the bulk of retirement security."[104] Additionally, age discrimination against older employees is prohibited.

2. EU

In the EU pension systems are—like in the US—mainly employer-based. However the systems are not voluntary. This results in higher coverage rates. The European main idea on coverage can be explained as follows: the ability to maintain one's living standard after retirement should be looked at in an integrated way. In other words, coverage in Europe is linked to the basic social security scheme.

This means that the state based pension schemes and private occupational pension schemes are linked to one another. If the income after retirement depends to a large extent on private occupational pensions, then the access to funded private occupational pensions should be increased. In this way, some Member States plan to partly compensate for the decline in statutory replacement rates by the development of privately managed pension provision (in particular Germany, Italy, Denmark and to a lesser extent Belgium).

The role of private occupational pensions differs immensely between Member States. These differences in roles become

---

101. Eriksson, *supra* note 78, at 148 ("Projections estimate that the automatic enrollment feature will increase 401(k) participation by more than twenty percent.").

102. *See Sample Automatic Enrollment and Default Investment Notice, available at* http://www.irs.gov/pub/irs-tege/sample_notice.pdf (describing a model of automatic enrollment).

103. Lineberry, *supra* note 80, at 18-19; US Dept. of Labor, *Proposed Regulation Relating To Default Investment Alternatives Under Participant Directed Individual Retirement Account Plan, available at* http://www.dol.gov/ebsa/newsroom/ fsdefaultoptionproposalrevision.html. The Department of Labor estimates automatic enrollment will increase aggregate 401(k) plan account balances by between $45 billion and $90 billion. *Id.*

104. Martin, *supra* note 35, at 861-62.

apparent when analyzing the differences in coverage rates.

In Member States, where the private occupational pensions are necessary to prevent poverty in old age, the affiliation is thus obligatory. Few Member States are familiar with such an obligatory membership. Private schemes are only mandatory for new entrants to the labor markets in Estonia, Latvia, Poland, Hungary and Slovakia.[105]

In Member States such as Denmark, Netherlands and Lithuania, private occupational pensions also play an important role, but the affiliation is not made obligatory by state law. For most of these occupational pension schemes, membership or affiliation is organized through the employer or representative organs of employers and employees (on a sector-wide scale usually). For the affiliated employee, self-employed, or civil servant, the affiliation is thus a consequence of the labor agreement with the employer. Most of the time, the employee cannot refuse the affiliation because the affiliation is obligatory. For example, in Lithuania, access to the funded tier of statutory scheme is voluntary, but once individuals are members they do not have the option of opting out. For the employer, the organization of the occupational plan can either be voluntary, whereby he chooses to organise (or participate in the organisation of) an occupational pension scheme or has, at least, the right to refuse the participation in an occupational pension scheme. When an employer cannot refuse to organise or participate in the scheme, affiliation is mostly obligatory for all or a certain category of employees (mixed affiliation systems).

In the Netherlands, Denmark and Sweden, social partners conclude collective agreements on occupational pension provision at the level of sectors, and membership in these schemes is thus mandatory. This obligation is not nation wide on the basis of a national law. However the effect is nearly the same. Coverage rates of such schemes are particularly high, up to 91 percent of employees in the case of the Netherlands.

Other Member states have recently increased provisions for making affiliation to occupational or private schemes more attractive (Belgium, Czech Republic, Germany, Italy, Austria).[106] Also, in these Member States, the affiliation is based on the employment relationship and thus obligatory for the employee if the employer decided to give an occupational pension. In these Member States, social partners are increasingly seeing pensions as a central part of the employer employee contract and are

105. *Techinical Annex, Adequate and Sustainable Pension*, 20 (2006) [hereinafter *Technical Annex*], *available at* http://ec.europa.eu/employment_social/social_protection/docs/2006/sec_2006_304_horizontalanalysis_en.pdf.

106. *Id.*

increasingly taking action in order to protect workers pension rights.

Membership of pension provision can also be based on voluntary decision, as employees may be free to decide whether to contribute to an employment-related pension scheme or to save in a personal retirement scheme unrelated to their employment status. The clearest example is the United Kingdom. However, in Germany (*Riester pension*), the Czech Republic (*State Supplementary voluntary pension*), and Spain, specific private individual pensions are also developing. In the United Kingdom pension schemes are voluntary for the employee, but employers above a certain size (five or more employees) have to make pension products available if they are currently not offering an appropriate occupational pension scheme (the stakeholder pensions). A similar arrangement is present in Ireland with the Personal retirement savings accounts. In the UK, the State second pension provides a compulsory earnings-related additional pension which is particularly beneficial to people on low incomes or people with interrupted careers. Opting out of this system is possible, but only into a private or occupational scheme that has fulfilled certain criteria that provide at least the benefits of the foregone state scheme. In the UK, a significant number of the employed workforce is not covered by any supplementary pension schemes. This issue has been addressed by the Turner Commission which reported in late 2005. A key proposal of the report is the creation of a new National Pensions Savings Scheme based on the defined contribution design, mandatory for employers with automatic enrolment for employees, but with an employee right to opt out.[107]

Instruments for promoting private pension provision are diverse and include collective bargaining (i.e. Belgium, the Netherlands), tax incentives (i.e. UK and Ireland) and direct financial support in the form of subsidies (i.e. Germany and the Czech Republic).

For the EU, it is clear that tax incentives alone generally do not translate into comprehensive coverage. Several Member States rely on the collective bargaining or mandatory membership to achieve better coverage rates.[108]

The following table gives an overview of the coverage rate of occupational pensions in Europe. The differences can be explained by the different role and the linked importance of private occupational pension schemes in the different Member States.[109]

---

107. Pensions Commission, *Implementing a National Pension Savings Scheme*, 368-69 (2005), *available at* http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/30_11_05_chapter10.pdf.

108. *Technical Annex*, *supra* note 105, at 20.

109. *Id.* at 21 (noting that figures for coverage from different types of schemes do not necessarily add up because there can be double counting).

Member State	COVERAGE
European Member States[110]	
BE	About 40-45 percent for occupational pensions and for individual provisions.
CZ	Around 40 percent for individual provision.
DK	Around 95 percent.
DE	About 60 percent of people covered by the first pillar scheme are also covered by occupational schemes and about 13 percent make individual provision according to the Riester legislation.[111]
EE	Around 75 percent of the employed population for the mandatory funded scheme and 8 percent for individual provision.
EL	Nearly no coverage for occupational schemes.
ES	Around 44 percent of the employed for the second or third pillar were estimated in 2004 (10 percent for occupational provisions).[112]
FR	Around 10 percent for occupational provision and around 8 percent have subscribed a life insurance plans

110. Country abbreviations: AT: Austria; BE: Belgium; BG: Bulgaria; CY: Cyprus; CZ: Czech: Republic; DE: Germany; DK: Denmark; EE: Estonia; ES: Spain; FI: Finland; FR: France; GR: Greece; HU: Hungary; IE: Ireland; IS: Iceland; IT: Italy; LI: Liechtenstein; LT: Lithuania; LU: Luxembourg; LV: Latvia; MT: Malta; NL: Netherlands; NO: Norway; PL: Poland; PT: Portugal; RO: Romania; SE: Sweden; SI: Slovenia; SK: Slovakia; UK: United: Kingdom.

111. Germany has a long-standing tradition of supplementary occupational pension schemes dating back to the 19th century. Today, pension schemes in Germany cover the entire spectrum of possible benefits and financing methods. Approximately 10.4 million private sector employees, corresponding to about 46 percent of the total private industry work force, are entitled to company pensions. Well over 12 million private sector employees in Germany are not covered by any supplementary pension schemes. HEWITT ASSOCIATES, *supra* note 45, at 94.

112. *Id.* at 8. According to the latest information supplied by the National Statistic Institute in 2005 the number of employees affiliated with Social Security was 17,835,400. The most recent information for 2006 published by the Insurance Authorities indicates that 1,814,362 employees had subscribed to a pension scheme (company or professional) and 5,464,276 employees were associated with an insurance contract. These statistics include double counting because employees can participate in more than one scheme.

	specifically for retirement purposes.
IE	About 52 percent of the workforce, including occupational and individual schemes.
IT	Around 8 percent of the employed population for occupational schemes and 2 percent for individual provision.
CY	Around 27 percent of the population in employment for provident funds in the private sector and 13 percent or occupational pensions in the public sector.
LV	Around 45 percent of the employed population for the mandatory funded defined contribution scheme and around 3°/0 for individual provisions.
LT	Around 54 percent of the employed population for the statutory funded pension schemes and around 8 percent for individual schemes.
LU	Around 20 percent of the employed population for occupational schemes and 5 percent for individual provision.
HU	About 60 percent of the employed population are members of the funded tier of the first pillar and about 31 percent have a voluntary pension plans.
MT	Negligible for occupational schemes (SPPS), not available for other private schemes (TPPS).
NL	Around 90 percent of employees for occupational pension schemes.
AT	Around 35 percent for occupational provision and around 10 percent for individual provision.
Poland	Around 49 percent of the workforce for mandatory and occupational provision.
PT	Around 4 percent of the employed population for occupational schemes and 1.5 percent for individual provision
SI	Around 51 percent of the workforce is covered by occupational schemes.
SK	

	About 27 percent of the population in employment are covered by SPF schemes.
FI	Around 5 percent of the population aged 15-64 for occupational schemes and 12 percent for individual provision.
SE	About 90 percent of the workforce for occupational schemes and 40 percent for individual schemes
UK	Around 50 percent of the employed population currently contribute to supplementary pension schemes (about 45 percent contribute to occupational and about 14 percent to personal pensions)

The anti-discrimination rules in the EU have a main focus: gender. Over the years, much work was done in the field of gender equality and occupational pensions.

Pensions paid in the context of occupational social security are considered as payment and must respect the principle of equal pay for women and men. This includes all forms of private occupational pensions. The European Court of Justice had decided so in a constant stream of jurisprudence.[113] The consequences of this jurisprudence has led to three directives on the matter (86/378, 96/97 and 2004/113). The main conclusions of both this jurisprudence and legislation on gender equality in occupational pensions[114] are:

- the use of actuarial factors which differ according to sex are allowed. This means that where the employer makes the commitment to pay a defined benefit this benefit has to be the same for men and women. So, the employer may have to pay higher contributions for women in order to bring about the same benefit. In a defined-contribution scheme, by contrast, the individual pension benefit is determined according to the amount of the accumulated savings. Due to the use of sex-based actuarial factors for calculating the monthly pension provision, this may result in lower benefits for women. In this case the employer's commitment, which has to be equal for men and women, is

113. Evelyn Ellis, *The Supremacy of Community Pensions Equality Law: A Two-Edged Sword?*" 25 E.L.REV. 564 (2000); Bilka-Kaufus GmbH and K. Weber von Hartz, *Conclusie Van Adovocaat-Generaal M. Darmon*, JUR. H.V.J.1607 (1986); Dominique De Vos, *Les pensions professionnelles ou l'art de l'interrogation*, SOC. KRON. 358 (1990)); Douglas Harvey Barber and Guardian Royal Exchange, *Assurance Group, Conclusie van Advocaat-Generaal W. Van Gereven*, JUR. H.V.J. 1889, (1990).

114. *Adequate and Sustainable Pensions Synthesis Report*, *supra* note 44; *see also Technical Annex*, *supra* note 105, at 89-90.

his contribution to the scheme.

- For private annuities, the use of sex-based actuarial factors in insurance and related financial services is banned in principle, but Member States may decide not to apply the ban in cases where "sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data."
- Several Member States introduced unisex-tariffs in second pillar provisions, or like in Sweden and the Slovak Republic (AND ALSO Poland is planning to do so), in the mandatory funded part of the first pillar provisions, in order not to worsen the pension situation of women due to a shift to funded pension provisions.
- Sex-related life tables single out one factor among many which may determine life expectancy of an individual person. Other important factors are, for example genetics, social environment, working - and living conditions and healthcare during one's lifetime. To quantify only one criteria out of this portfolio tends to discriminate against women purely on a basis of quantifiable ease. For that reason the following Member States prevent the use of gender life-tables in order to calculate pension entitlements in occupational pension schemes: the Netherlands, Denmark, Ireland, Sweden, Hungary, Slovenia, Slovak Republic, Greece, and Luxemburg. In Germany, using unisex-life-tables can be agreed between the social partners only on a voluntary basis. However, for state supported private saving "Riester-contracts" unisex-tariffs are mandatory since beginning 2006. Luxemburg and Slovenia have also put in place legislation in order to prevent private insurance companies using gender life-tables in private pension contracts.[115]

Other prohibited discrimination grounds are the exclusion of part-time workers (due to the indirect discrimination of women) and the exclusion of workers with fixed employment contracts. The difference with the US is enormous. In the US employers are able to effectively exclude part-time employees by virtue of their ability to exclude from plan participation employees who do not work one thousand hours in a year and many have, in fact, increased the number of part-time employees, reducing their benefit costs.[116] In the EU such exclusion is clearly forbidden on the basis of gender discrimination.

Other exclusion criteria are linked to the coverage rate in each specific Member State. In Member States where the

115. *Technical Annex*, *supra* note 105, at 89-90.
116. *Id.* at 323.

affiliation is mandatory or obligatory, all discrimination is (obviously) excluded. In Member States where the affiliation is based on the employment relationship or collective bargaining the national labour law applies. This means that—depending on the situation—labor law allows differences in coverage. This could mean for example that affiliation can be based on the height of the remuneration, the social law category (blue collar, white collar . . . the age of the employee, the health of the employee, etc. All these categories can be forbidden in one Member State and allowed in another. However if there is an indirect discrimination on gender the EU law forbids the specific discrimination ground.

C. Benefit Design and Risk Transfer

In both in Europe and the US, the era of the defined benefit plan is over. Some changes in benefit design are common between the EU and the US. The impact of these changes remain however significant.

1. US

In the US—like elsewhere in the world—there are two basic types of plans, defined benefit and defined contribution plans. All plans must meet standards established by ERISA to receive a tax-qualified status and must apply to the Internal Revenue Service if they want a determination of that status.[117] Some of the ERISA standards for tax qualification include minimum coverage, participation and vesting requirements. Originally, plans could not include a disproportionate amount of highly compensated employees over non-highly compensated employees or pay disproportionately greater benefits to the former (non discrimination rules). All plans must be operated in a fiduciary sound manner and be adequately funded. All plans may or may not be integrated with the social security scheme.

In a traditional defined benefit plan, the employer promises to pay specified pension benefits to each covered employee upon retirement. The pension formula is typically based on the employee's years of service and final or average compensation. The employer sponsors the plan, funds it with contributions, directs the investment of plan assets, and bears the financial risk if those assets prove insufficient to pay promised benefits. A great variety of defined benefit plans with different benefit formulas exist. Benefits may be earnings-related or flat rate. Formulas may be based on average career salary or final salary etc. Cash balance plans are defined benefit plans under which the employer

117. U.S. Department of Labor, *Frequently Asked Questions about Pension Plans and ERISA*, *available at* http://www.dol.gov/ebsa /faqs/faq_compliance_pension.html.

records notional contributions into hypothetical individual accounts and periodically adds interest at a predefined rate. These plans have developed as an alternative to traditional plans.

All DC plans promise an employee only the value of her account balance at retirement. While that means unlimited upside potential for employees, it also means no floor below which benefits cannot fall. In contrast, DB plans enjoy the benefit of insurance which assures that no matter what financial difficulties a plan suffers, participants will receive at least some level of pension security. ERISA does not extend that insurance protection to DC plans.[118]

Defined contribution plans feature individual accounts for members. The benefits are based on employer and employee contributions along with income, gains, losses and forfeitures (from other employees' accounts). The plan member bears the risk under this type of plan. There are many types of defined contribution plans and the most important ones are:

> *Profit-sharing plan:* A plan established and maintained by an employer to provide for the participation by employees in the sponsoring employer's profits.
>
> *An Employee stock ownership plan (ESOP):* A plan that provides shares of stock in the sponsoring employer to plan members. An ESOP invests at least 51 percent of its assets in the sponsoring employer stock and is permitted to borrow money on a tax-deductible basis to purchase this stock.
>
> *A Stock bonus plan:* A plan under which contributions are made in the form of company stock derived from a portion of the company's profits. Benefits are also paid in the form of company stock.[119]

Apart from the type of DC plans, there are also special "features" on DC plans. The best known is 401(k). A defined contribution plan can be a 401(k) plan. This means that employees are allowed to make before-tax contributions from their salaries. This feature may be incorporated into most types of defined contribution plans. These 401(k) plans have become the dominant form of defined contribution plans.[120] 401(k) plans give individual employees unprecedented control over decisions concerning participation, contributions, investments, and withdrawals of funds in their own accounts. Thus, 401(k) plans represent a major shift of risk and responsibility from employers to employees.[121]

Another feature of DC plans is "IRA". IRA stands for Individual Retirement Arrangements. IRAs are Tax-favored

---

118. Stabile, *supra* note 86, at 312-13.
119. U.S. Department of Labor, *supra* note 117.
120. Burke, *supra* note 89, at 299-300.
121. *Id.* at 305.

defined contribution arrangements which may be established by individuals in the form of either an individual retirement account or an individual retirement annuity. There are several types of Individual Retirement Arrangements (IRAs) including traditional, Roth, SIMPLE,[122] and SEP[123] IRAs. The latter two types are employer-sponsored plans that are implemented through IRAs.

When ERISA was enacted in 1974, its regulatory provisions focused primarily on DB plans, which at that time predominated over DC plans.[124] The situation has changed dramatically in the intervening years, as DC plans have grown steadily and DB plans have dwindled in relative importance.[125] Literature mentions a combination of structural reasons linked to these changes.[126] These reasons mainly come down to a heightened liability and increased costs which outweigh tax incentives. Thus employers prefer DC because of the uniform investment growth,[127] the

---

122. An employer with less than 100 employees may establish a SIMPLE through a contract with an IRA provider to which employees earning at least USD 5,000 can contribute a portion of their before-tax salaries. The maximum employee contribution is USD 10,000 (USD 12,000 for employees age 50 or older). Employers either match the employee contribution by as much as 3 percent of salary or make a straight contribution of as much as 2 percent of salary. Both employee and employer contributions vest immediately. *Savings Incentive Match Plan for Employees of Small Employers (SIMPLE IRA Plan) under § 408(p) of the Internal Revenue Code, available at* http://www.irs.gov/ pub/ irs-utl/simpleplan_lrm.pdf.

123. *See SEP Retirement Plans for Small Businesses, available at* http://www.dol.gov/ ebsa/publications/SEPPlans.html (providing that a plan for small employers in which they establish SEP-IRAs through a contract with an IRA provider for themselves and their employees. The maximum contribution limits are 25 percent of salary or USD 42,000, whichever is less, and contributions vest immediately).

124. Burke, *supra* note 89, at 299-300.

125. *See* Stabile, *supra* note 86, at 307-09 (providing a detailed analysis including recent figures on the shift from DB to DC).

126. *See* Samuel Estreicher and Laurence Gold, *The Shift From Defined Benefit Plans to Defined Contribution Plans*, 11 LEWIS & CLARK L. REV. 331, 332 (2007); Eriksson, *supra* note 78, at 152-53; *see also* Burke, *supra* note 89, at 302 (including structural proposals such as:

intense competition from low-wage labor overseas;
employers downsizing workforces and demanding significant concessions from the remaining employees;
a decline in average job tenure;
an erosion of labor union membership and bargaining power;
the emergence of health care as the most important employer-provided fringe benefit;
a widening gap in compensation between highly compensated and rank-and-file employees;
an increasing heavy burden of government regulation;
stringent funding requirements;
the investment risks for the employers; and
the longer life expectancies of retired employees).

127. Martin, *supra* note 35, at 846. Furthermore, defined contribution plans

relative simplicity, and transparency.[128] Whatever these reasons, the traditional idea of creating defined benefit plans leading to a stable workforce with secure job tenure is outdated.[129]

Defined contribution plans, particularly those of the 401(k) type, have decisively overtaken traditional defined benefit plans as the predominant form of private pension plan.[130] The 401(k) model is thought to be attractive for both employers and employees.

For employers, 401(k)s are less burdensome than defined benefit plans, both financially and administratively. In a 401(k), retirement benefits are based on the balance in each employee's individual account, which in turn depends on the employee's net contributions and investment performance; the employer is not responsible for providing any specified level of pension benefits.[131] Furthermore, a standard 401(k) plan serves the enterprise's interests by providing its participants—particularly those earning

---

allow for more uniform investment growth because salary and longevity do not dictate contributions; rather, contributions are based on whatever portion of the participant's salary the participant wants to contribute (up to the statutorily allowed maximum) coupled with the employer's matching contribution (provided to all participants). *Id.*

128. *See* Estreicher, *supra* note 126, at 333 (noting that from the sponsor's viewpoint, DC plans are preferred because they are relatively simple and inexpensive to establish and administer). Further, DC plans are partially financed by participant contributions. Sponsors can fund their contributions year by year on a tax-advantaged basis, without being exposed to any of the financial risks associated with providing a defined retirement benefit, or to any appreciable regulatory risk. *Id.*

129. Martin, *supra* note 35, at 846. According to Martin and Rafsky, the defined benefit plan is the representative model of the "American Dream" for some people. The model represents an American workplace based on manufacturing and exporting and a workforce that remained loyal to its employers. Historically, employees did not conceive of working for several different companies throughout their careers. In other words, employees worked hard and devoted the bulk of their careers to one employer that provided a defined benefit plan and, in turn, received hefty pensions to cover retirement expenses. *Id.*

130. Burke, *supra* note 89, at 299-301; Martin, *supra* note 35, at 863. Not all shifts are towards 401(k) plans. Other shifts are towards cash balance plans. The PPA 2006 legitimizes cash balance and hybrid pension plans. Before PPA 2006, the question arose whether there was no age discrimination. The PPA 2006 clarifies that a defined benefit plan is not considered age discriminatory "if a participant's accrued benefit, as determined as of any date under the terms of the plan, would be equal to or greater than that of any similarly situated, younger individual who is or could be a participant." Pension Protection Act § 701. A cash balance plan does not violate the prohibition against ceasing or reducing the rate of an employee's benefit accrual because of age as long as a participant's accrued benefit meets the similarly situated standard described above. Consequently, there is no discriminatory violation being committed as long as similarly situated employees receive equal annual credits to their accounts.

131. Burke, *supra* note 89, at 306.

higher compensation and enjoying greater job mobility—a personal, tangible, and portable means of providing for retirement.[132]

For employees, the attraction of 401(k)s is thought to be that participation is voluntary. Each employee can choose either to contribute to his or her account (subject to deferred tax on withdrawal) or to receive compensation in cash (subject to immediate tax). Moreover, the entire account balance is fully vested and freely portable. Changing jobs has no impact on account balances or future benefits. In addition, 401(k)s are believed to foster a sense of ownership which many employees find reassuring.[133] No matter what the said advantages are believed to be, there are also clear disadvantages to the voluntary affiliation (a Matthew effect and an insecure social security).

The shift away from defined benefit plans has major implications for the allocation of risks and opportunities in the private pension system.[134] Although the nature of this shift is clear, its implications for retirement policy remain controversial. While employers usually contribute to each defined contribution account at specified rates, employers do not guarantee accounts. Risk of decline in account assets is therefore borne by each individual employee based on the investment choices he or she makes.[135] Hence some worry that employees, especially those at the lower end of the wage scale, are likely to make poor decisions and be left with inadequate retirement income. In contrast, others believe that employees are in the best position to make choices concerning saving and investing for their own retirement. Moreover, some welcome 401(k) plans as an evolutionary step on the road to unlimited tax-favored saving.[136]

When the PPA 2006 was enacted, Congress was aware of the problems related to the shift from DB to DC.[137] However, not everybody is convinced that the PPA 2006 does what it should do. Eriksson writes: "The implicit defects of the Pension Act counteract its proclaimed goals. Instead of rescuing defined-benefit pension plans, the Pension Act eradicates them." [138] One

---

132. Estreicher, *supra* note 126, at 333.

133. Burke, *supra* note 89, at 306. In 401(k) plans employees receive periodic statements showing their account balances; plans typically allow employees to withdraw the entire balance in a lump sum upon retirement or termination of employment; and any balance remaining in an employee's account at death passes to his or her designated beneficiaries.

134. *Id.* at 299-300.

135. Martin, *supra* note 35, at 846.

136. Burke, *supra* note 89, at 305.

137. *See, e.g.*, Eriksson, *supra* note 78, at 133-57 (explaining that The PPA 2006 has given rise to a lot of controversy within the US and that there are many articles on the topic that are quite pessimistic.).

138. *Id.* at 152-53.

can indeed not deny that PPA 2006 promotes defined-contribution plans. While employers are consistently eliminating defined-benefit plans, other employers are taking advantage of the automatic enrollment feature of defined-contribution plans to increase employee participation. Features like automatic enrollment and lifecycle funds tend to increase actual employee participation, but also fail to address lingering issues of individuals failing to provide sufficient funding to their accounts and fail to utilize sound investing strategies.[139]

Nevertheless, some parts of the PPA 2006 are meant to react to the shift from DB to DC.[140] The most important element is the fact that the PPA 2006 installs a New Defined Benefit 401(K) Plan. Beginning with the 2010 plan year, employers with at least two and no more than 500 employees will be able to create a new hybrid defined benefit/401(k) plan. The plan is exempt from nondiscrimination and top-heavy testing. This should lure the employers. The new hybrid DB/401(k) plan should be particularly attractive to small professional corporations and partnerships, where owners want to defer more income for retirement than is possible under defined contribution rules and are willing to give their employees' pension benefits. The DB/401(k) plan will combine a final average pay defined benefit plan with a safe harbor-type 401(k) plan.[141] In addition, the plan uses one plan document and trust fund, and will be treated as a single plan for reporting purposes.

139. *Id.*

140. *See generally* Daniel Klaff, *The Pension Protection Act 2006: Reforming the Defined Benefit Pension System*, 44 HARV. J. ON LEGIS. 553, 553-68 (2007) (offering a detailed analysis on the changes the PPA 2006 brought for Defined Benefit Schemes).

141. The 401(k) feature will require automatic enrollment with an employee deferral of four percent of compensation and an employer matching contribution of fifty percent of an employee's contributions up to four percent of compensation. The rate of matching contributions for highly compensated employees cannot exceed the matching contribution rate for non-highly compensated employees. The defined benefit plan must provide a benefit equal to one percent of final average pay times years of service, to a maximum of twenty percent of final average pay. If a cash balance plan is used instead of a final average pay plan, then the PPA 2006 requires the following pay credits: at least two percent of compensation for participants age thirty and under, four percent of compensation for participants who have reached age thirty but not age forty, six percent of compensation for participants who have reached age forty but not age fifty, and eight percent of compensation for participants who have reached at least age fifty. *The Penstion Protection Act of 2006: New Rules for Retirement Plans: New Plan Design Options, New Plan Requirements, New Fiduciary Protection* (November 2006), *available at* http://www.haygroup.com.

The increasing trend to use DC plans, like 401(k) plans, and IRAs for retirement savings leaves an increasing number of participants responsible for making their own decisions with respect to retirements funds.[142] This is clearly controversial in the US. The following extracts make this very clear:

> [i]n sum, a pension plan design that shifts the decision-making responsibility on plan financial matters - participation, the level of funding, and the handling of the accumulating corpus of assets - from the sponsor (who is in a superior financial decision-making position) to the participants (who are highly unlikely to have the knowledge and expertise necessary to make these financial decisions and are if anything even more unlikely to have the time or the capacity to enable them to acquire, and to then continuously apply, the necessary financial knowledge and expertise) is severely flawed.[143]

> Instead of a small cadre of experts making investment decisions, the switch to 401(k) put millions of investment novices in charge of their own future. Folks who don't know asset allocation from Alsatian hunting dogs are expected to choose a proper mix of age- and risk-appropriate investments. Many, if not most, employees lack the knowledge to make the necessary financial decisions. The result appears to be that participants in general follow simple investment strategies and end up with either too much or too little stock in their portfolios. Worse, having made an investment decision, most employees fail to ever change their plan investment allocations.[144]

> Whether through inexperience, bad advice, or poor judgment, 401(k) participants often make objectively bad investment decisions: most participants fail to diversify or rebalance their portfolios, more than half either hold no stocks at all or invest virtually their entire accounts in stocks, and many invest a substantial portion of their accounts in employer stock when they are allowed to do so. Finally, in deciding when and how to withdraw funds from their accounts, most participants take a lump sum distribution upon termination or retirement. Although large lump sums received at retirement are likely to be rolled over into IRAs, smaller amounts are likely to be spent rather than saved for retirement.[145]

The debate in the US is ideologically important. The debate can be described as a fight between the right to "own" or the right to "social justice". One can argue that the success of 401(k) plans lies in the opening of opportunities for individual employees to make their own decisions about saving and investment. However one can also argue that the rewards of 401(k)s are heavily skewed

---

142. Lineberry, *supra* note 80, at 16.
143. Estreicher, *supra* note 126, at 334.
144. *See* Stabile, *supra* note 86, at 313.
145. Burke, *supra* note 89, at 307-08.

toward highly paid employees, who can accumulate savings even without a tax subsidy. Proof of this is that less than 10 percent of participants contribute the maximum allowable amount.[146] The PPA 2006 has not significantly changed this debate. The basic element of the discussion is not answered. The need for social protection for the employees in DC plans is unanswered. Yet, several options arise. For example, one could make compulsory plans or install insured guarantees. The PPA 2006 does not answer this basic question.

The PPA 2006 has responded limitedly when it comes to the ideological debate with regard to the shifting of the investment risk. Two (rather limited) aspects can be mentioned: the investment advice and the diversification right.

Initially, ERISA prohibited 401(k) plans from offering investment advice to plan participants. In the past, pension managers handled investment selection and allocation for employees.[147] Under a statutory safe harbor for self-directed accounts, employers are thus relieved of fiduciary liability for losses and breaches resulting from the exercise of control by employees. Nevertheless, employers always retained (and still do) residuary responsibility for maintaining a "broad range" of available investment options and ensuring that employees have access to sufficient information to allow them to make informed decisions. Relieving employers of fiduciary responsibility for self-directed accounts, however, has had the perverse effect of discouraging employers from providing specific investment advice that many employees desire. Indeed, self-directed plans offer an ever-expanding array of options, far beyond the minimum range required by the safe harbor.[148] The PPA 2006 now allows ERISA-covered plans to offer participants investment advice through an "eligible investment advice arrangement." The arrangement must be authorized by disinterested plan fiduciaries that are not affiliated with the advisor providing investment advice.[149] The advisors must disclose compensation, potential conflicts, plan investment option past performance, available services, fiduciary relationship(s), use of participant information, and inform participants they can obtain advice from an advisor not affiliated with the plan. Participants now will have access to investment advice but ultimately still make their own investment decisions.[150]

---

146. *Id.*

147. Lineberry, *supra* note 80, at 16.

148. Burke, *supra* note 89, at 306.

149. Investment advice must be provided through either: (1) a fiduciary advisor whose fees do not vary based on the investment option selected, or (2) a computer model that meets the Act's requirements as well as independent third-party certifications. Pension Protection Act § 601.

150. *See* Joel Daniel, *Chip Hunt and Chip Hardy, Employers and 401(k)*

The PPA 2006 now grants diversification rights to participants in DC plans. These rights will allow eligible participants to divest and reinvest those plan portions attributable to employee contributions and elective deferrals invested in publicly traded employer securities. This diversification should minimize the risks associated with holding too few and too risky investments. Consequently, the PPA 2006 requires plans that must allow diversification to offer at least three investment alternatives other than employer securities. Diversified alternatives with materially different risk and return characteristics are required. In order to prevent employer discouragement of diversification, employers cannot impose restrictions or conditions on investment of employer securities that they do not impose on investments of other assets of the plan, except as provided by application of securities laws.[151]

2. EU

Compared to the EU, the US has at least one advantage when it comes to benefit design, namely, the US has federal uniform legal definitions. For Americans, it might therefore be quite incredible to note that what is meant by the terms DB and DC can vary greatly from State to State.[152]

At the European level, only CEIOPS uses uniform definitions.[153] For CEIOPS, a DC scheme is defined as an occupational pension system scheme where the only obligation of the scheme sponsor is to pay a specified contribution to the scheme on behalf of the employee. No further promises or 'guarantees' are made. As for the DB scheme, it is an occupational pension scheme other than a defined contribution scheme.

Although these European-wide CEIOPS definitions exist, they have no true legal impact. Furthermore, CEIOPS admits that even with their rather uncomplicated definitions there are DB

Service Providers: The Looming Battles Over Hidden Fees and Costs, 18 S. C. LAW. 20, 20 (2007) (illustrating a more detailed discussion of the motivations for change to, and impact upon, the provisions relating to 401(k) plans); Lineberry, *supra* note 80, at 16. Advisors cannot decide investment amounts or direct where the employee should invest funds. Further, the PPA 2006 requires the plan to undergo annual independent audits of the investment advice process.

151. Martin, *supra* note 35, at 860-61.

152. *Survey on Fully Funded, Technical Provisions and Security Mechanisms in the European Occupational Pension Sector*, at 11, COM (2008) Final (Mar. 31, 2008), *available at* http://www.ceiops.eu/media/docman/ public_files/publications/ submissionstotheec/ ReportonFundSecMech.pdf.

153. CEIOPS is the Committee of European Insurance and Occupational Pensions Supervisors. It was established under the terms of the European Commission Decision 2004/6/EC of November 4, 2003 and is composed of high level representatives from the insurance and occupational pensions supervisory authorities of the European Union's Member States. The authorities of the Member States of the European Economic Area also participate in CEIOPS. CEIOPS, http://www.ceiops.eu.

schemes in some Member States which are so hybrid that they can be considered DC under national legislation and vice versa. This hybridism is mainly reflected in some national occupational pension systems allowing book reserves (internal funding), which operate in AT, DE, ES, LU and SE.[154]

The lack of true uniform legal definitions clearly complicates legal research. As stated earlier, Europe is in a state of desperate disparity. Further, for six Member States (BG, LV, PL, RO, SI and SK) there is no discussion because they are only familiar with DC.[155] In Italy, DB schemes play a marginal role, as they are closed to new members and all new funds are DC. Conversely, all German schemes are considered DB from a legal and statutory point of view (although some are clearly DC under the CEIOPS definition). According to a recent survey held within large companies in nine Member States forty-nine percent of schemes are DB; thirty-four percent are DC; and seventeen percent are hybrid.[156] Additionally, the nine Member States do not include those Member States where there is no DB (except Poland).[157]

Nonetheless, the desperate disparity, the scarce national research on occupational pensions in the EU clearly indicates that there is a shift from DB to DC. However, there are no exact figures. The impact of these shifts is much less felt in Europe than in the US Due to the basic social security benefits which remain relatively high, the impact of these shifts much less felt in Europe than in US The social security benefits remain—compared to the US—relatively high. Anyhow, some Member States have installed —as a reaction to the shift from DB to DC—some form of minimum guarantee for some DC plans. The most common examples are in Germany and Belgium.

IRA's as existing in the US, also exist in Europe. The UK, Ireland and some new Eastern Member States of the Union legally acknowledge these forms. Otherwise, these so called self-directed investment accounts are rarely considered occupational pensions in Europe.

This has to do with two reasons. The first is taxation. IRA's are often seen as a form of individual saving that is fiscally subsidized. This subsidy is often considered socially unjust because the richer can profit more from it than the poor (the so-called Matthew effect). The second reason is social policy in general. For most Europeans, DC schemes transfer the risk of not achieving an adequate retirement income to the household level. This quasi individual level is too dangerous from a societal European point of view. The self-directed investment accounts

---

154. *See supra* note 110 and accompanying text.
155. HEWITT ASSOCIATES, *supra* note 45, at 8.
156. *Id.*
157. *Id.*

transfer two risks to a near individual level: the market investment risk and the longevity risk. For most European experts, these risks should be covered at a higher level than at the individual. The ideological debate of the US is thus, less present in the EU. Nevertheless, it is present.

The debate on risks in the EU is more focused on the longevity risk than on the investment risk. This is because of a double given. First, many occupational pensions can be paid in a lump sum. Hence, the longevity risk is shifted to the individual. Different Member States have adopted various solutions to these problems by, for example, installing an obligatory index that is linked to the general welfare level.[158] It is believed the participants should not exclusively bear the mortality risk of outliving an installment stream of benefit payments.

Secondly, there are very few plans in Europe whereby the individual employee can choose how to invest. The investment decisions usually do not lie with the individual or the employer. Commonly, the plan administrator decides on the investment strategy (the insurance company, the pension fund, the bank, the provident fund, the mutual fund or any other retirement provider).

D. Portability

Portability is defined as the possibility of acquiring and keeping pension entitlements in the event of professional mobility.[159] This issue is regulated in the US by a federal law. In Europe, the very first steps are being taken to develop a common portability framework.

1. US

Upon termination of employment before retirement, plan members may, if the plan provides for this option, withdraw the cash value of their accrued benefits or their own accumulated and vested employer contributions as a lump sum. Defined contribution plans usually provide for this option whereas it is rare under defined benefit plans.[160] In addition to income tax, an excise tax generally applies to such lump-sum withdrawals made before the age of fifty nine and six months.

In the case of defined benefit plans, accrued benefits are usually preserved in the plan. There are no legal requirements concerning the adjustment of preserved benefits. In the case of

---

158. *Survey on Fully Funded, Technical Provisions and Security Mechanisms in the European Occupational Pension Sector*, *supra* note 153, at 13.

159. *See generally Adequate and Sustainable Pensions Synthesis Report*, *supra* note 44, at 138 (indicating that transferability refers to one specific way of achieving portability, namely by transferring a capital representing the acquired pension entitlements from one scheme to another).

160. U.S. Department of Labor, *supra* note 117.

defined contribution plans, it is, depending on the type of plan, possible to transfer the accumulated capital to another plan. For 401(k) plans, the entire account balance is fully vested and freely portable. Thus changing jobs has no impact on account balances or future benefits. Employees cannot continue contributing to a plan after terminating employment with the sponsoring employer.

In 2001, the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") increased transferability by expanding the types of plans that can take transfers and made it easier to transfer rights from one type of plan to another (e.g. between public-sector and private-sector plans).[161] In addition, the law provides for easier transfer of benefits that a surviving spouse receives as a beneficiary to plans that the spouse participates in.

3. EU

Portability of pension rights is a hot and heavily debated issue in Europe. This has to do with one of the basic values of the EU: free movement of workers within the Union. This free movement means that there should be no impediments in transferring pension rights from one Member State to another Member State. However, the decision to change jobs depends on a variety of factors including the impact on future pension entitlement, because often a significant share of an individual's remuneration is in the form of pension rights. In the European context, the transfer of these rights includes:

- the conditions of acquisition of pension rights;
- the conditions of preservation of dormant pension rights;
- the transferability of acquired rights (the actual funds);
- the information given to workers on how mobility may affect; supplementary pension rights.

Directive 98/49/EC of 29 June 1998 relates to safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community. This Directive ensures equal treatment of migrant workers and national job changers regarding their occupational pension rights. Additionally, the Directive only applies in a very limited number of cases and it only guarantees equal treatment with national residents. So, if the national residents are not protected, there is no protection either for the migrant worker.

A lot of Member States lack proper rules on the transferring of the rights within their own Member State. All Member States with high minimum ages for affiliation and long maximum vesting

161. The Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (codified as amended in scattered sections of 26 U.S.C.) (2001).

periods clearly create and have problems. A small selection to sketch the problem:

- In the United Kingdom, for instance, some personal and occupational pension schemes (other than stakeholder pensions) are able to refuse to accept the transfer of vested rights into their system. The European survey states that "In over half of UK-based schemes, transfer-in rights are either not permitted or only permitted with employer/trustee discretion."
- In over half of Spanish-based schemes, transfer-in rights are either not permitted or only permitted with employer/trustee discretion. In the case of Defined Contribution schemes, none of the organizations allow transferring.
- Denmark indicated in their National Strategy Report that while reduced transfer fees have improved the possibilities for transfer, the bonus potential is not transferable between pension providers, which make the consequences of a transfer less transparent.
- Cyprus reported that transferability of pension rights amongst Provident Funds is not possible and for most funds full vesting of rights does not occur before seven or even ten years membership.
- Finland pointed out that supplementary pensions are considered as part of corporate personnel policies rather than essential elements of pension provisions.
- Germany has improved portability by introducing a right for employees (under certain conditions) to take occupational pension entitlements with them to their new employer. This right applies to new agreements concluded since January 1, 2005 and implemented through direct insurance, 'Pensionskasse' or pension fund.
- In Poland the transfer of pension rights (after termination of job contract) in and out are permitted only between the same type of plan —from qualified plan into another qualified plan or IRA (individual retirement account). In Poland there is no possibility to transfer rights and assets from non-qualified into qualified plans and from qualified into non-qualified plans.
- In all defined benefits schemes in France, rights cannot be transferred in or out since benefits are not usually vested and are only available at retirement. Rights under defined contributions schemes or collective retirement saving plans can be transferred in or out.[162]

---

162. *Adequate and Sustainable Pensions Synthesis Report*, *supra* note 44, at 138-39; HEWITT ASSOCIATES, *supra* note 45, at 8.

Under the principle of subsidiarity, the EU is allowed to interfere when the mobility of the national residents is hampered by national legislation. Therefore, in order to improve the overall conditions of portability and accompany the initiatives already taken by some Member States, the European Commission has recently adopted a proposal for a directive improving the portability of private pension rights. This proposal aims to reduce the main obstacles to portability (besides taxation) both within Member States as across borders relating to acquisition conditions (waiting, vesting periods, minimum ages), preservation of dormant rights and transferability of acquired rights.[163] Initially, the proposed directive foresaw:

•ceilings for acquisition conditions (i.e. affiliation requirements):

•a maximum permitted entry age 21

•a maximum permitted waiting period 1 year (or the period until employee reaches age 21, if later)

•a maximum permitted vesting period 2 years

•the preservation of rights. The draft directive required member states to ensure that deferred benefits 'are adjusted in order not to penalize the mobile worker'. In an attempt to avoid excessive administration costs for low-value dormant rights, it allowed schemes to opt not to preserve these rights but to transfer out, or pay a capital sum representing, acquired rights which do not exceed a threshold established by the member state concerned.

•the transferability of rights. Schemes had to allow leavers the option of:

•deferred benefits (unless those rights were so small that this would lead to excessive administrative costs); or

•a transfer to another scheme within 18 months after termination of employment (member states had the option to exclude this requirement in the case of unfunded occupational schemes).

•the disclosure of information. Workers had to be well informed about leaving service rights. *Any* potential outgoing worker, whether or not a member of the scheme, may request this information, and the information must be provided within a reasonable period of time.[164]

However, no consensus could be reached until now on a lot of these issues. Thus, the proposal was altered in such a way that it is no longer upheld as a real portability directive.[165] Currently, a

163. *Adequate and Sustainable Pensions Synthesis Report*, *supra* note 44, at 139.

164. *Directive of the European Parliament*, *supra* note 51.

165. The full title of the original directive was: *Proposal for a Directive of the*

new proposal (with less portability rights) is put before the European Parliament. It remains unclear in the current state of affairs what the effect will be.[166] For the time being, there can be no doubt that there is no real portability of occupational pension rights in the EU.

E. Information and Disclosure

Information plays a key role for the provision of private pensions. There are two reasons, and both are reoccurring in the EU and the US. First, information is necessary for the public policy debate and the decision-making process. Information is the governmental tool for monitoring the development of privately-managed schemes. This is an information requirement at a macro level.

Secondly, people participating in private schemes are entitled to a clear understanding of how the schemes are operated. However, to provide understandable information on private occupational pensions to employees seems to be a pervasive problem in the world. The complexity of the schemes is probably one of the reasons for the problem.

Another element in Europe and the US is finding the right balance between the meaningful disclosure to participants and beneficiaries on one hand, and the apprehension not to unduly burden plan administrators on the other. This second reason is the information requirement at a micro level.

1. US

Traditionally, the US knew few legal requirements on disclosure at a micro individual level. The requirements have grown increasingly extensive over the years. Now, there is quite a lot of legislation on the topic. All plans must be disclosed to members in a written plan document.[167] Plan members must receive a simplified form of the plan document known as summary plan description ("SPD") and a summary of material modifications when plan features are changed.[168] If the participant wants to see

---

European Parliament and the Council on the Improvement of Portability of Supplementary Pension Rights. Id. Originally, the Commission had made an ambitious proposal which would have enabled workers to enjoy true portability of their pensions. Many people have expressed disappointment at the removal of provisions to assist the transfer of pensions, but welcomed the report's clear commitment to setting minimum standards for the access to pension rights and fair treatment of dormant rights.

166. *Amended Proposal for a Directive on Minimum Requirements for Enhancing Worker Mobility by Improving the Acquisition and Preservation of Supplementary Pension Rights*, at 507, COM (2005).

167. U.S. Department of Labor, *supra* note 117.

168. *Id.*

the plan document, the plan administrator must hand it over.[169] Annual plan reports must be made publicly available.[170]

The PPA 2006 act mandates certain automatic disclosure of benefit statements, as well as more timely and expansive disclosure, to ERISA participants and beneficiaries, effective beginning in 2007.[171] The changes apply to all forms of plans (both DC and DB). The PPA 2006 requires that individual benefit statements be distributed on (1) a quarterly basis for individual account plans that permit participants to direct their own investments, (2) at least annually for individual account plans that do not permit participant-directed investments, and (3) at least once every three years for defined benefit plans.[172] Section 102(b) of ERISA now provides an extensive list of the information that must be included in a SPD. McMorran perceives six different disclosure elements:

- information that should assist a participant in locating the plan sponsor and the fiduciaries who are charged with the administration of the plan, as well as the agent for service of process;
- instructions on how a participant may obtain copies of the plan document and, if applicable, a related collective bargaining agreement;
- technical information concerning the type of the plan (pension or welfare benefits), the nature of its administration (such as third-party administration, insurance, self-insurance, etc.) and the plan's funding arrangements;
- an explanation of the requirements for eligibility to participate in the plan and eligibility to receive benefits under the plan;
- a description of the benefits provided under the plan and any limitations or exclusions that might be applicable to a claim for benefits; and
- a statement notifying participants of their rights and obligations under ERISA.[173]

---

169. *Id.*

170. *Id.*

171. Kathryn Kennedy, *ERISA's Participant Benefit Statement Requirements: Current Rules Under PPA '06 and a Suggested Blueprint for Future Interpretations*, TAX MGMT. COMP. PLAN. J. 319, 319 (2007). Although the Department of Labor provided good faith reliance regarding these requirements through a field assistance bulletin, that guidance left plan sponsors and third party administrators with a number of unanswered questions.

172. Allison McMorran Sulentic, *Secrets, Lies & ERISA: The Social Ethics of Misrepresentations and Omissions in Summary Plan Descriptions*, 40 J. MARSHALL L. REV. 731, 737-40 (2007).

173. *Id.*

Under the new law, a penalty is automatic for a plan administrator who fails to comply with the requirements. As a result, instead of being limited to those participants/beneficiaries who requested but did not receive such disclosure, the new rules would impose such a sanction on behalf of all participants/beneficiaries who should have received such disclosure, regardless of whether they made a request.[174] Apparently the new requirements of the PPA 2006 will have a significant impact on the administrative burdens and costs of employee benefit plans, which unfortunately, in the defined contribution plan model, may be passed along to the participants and beneficiaries either directly or indirectly.[175]

Another new element in the PPA 2006 that relates to information is linked to the diversification right. In order to encourage diversification, the PPA 2006 requires DC plans to provide notice to participants regarding their diversification rights. The notice must set forth the participants' rights to diversify their accounts and describe "the importance of diversifying the investment of retirement account assets."[176] The notice must be "written in a manner calculated to be understood by the average plan participant and may be delivered in a written, electronic, or other appropriate form."[177] The notice requirements are effective as of January 1, 2007.[178]

Furthermore, due to the PPA 2006, ERISA now requires a significant amount of information to be filed with government offices (primarily, the Department of Labor, although many plans are also subject to additional filing requirements under the Internal Revenue Code). This relates to the governmental wish to monitor the retirement schemes (macro level).

2. EU

Information and disclosure are topics on which the EU has already worked quite a lot. There is, compared to other topics, quite a lot of common concern. For pension funds, there is even European legislation (IORP directive 2003/41). Although there is no such European regulation for insurance companies, similar rules apply. Most Member States already have disclosure regulations applicable to all schemes and plans. The rules in the IORP directive can therefore, be seen as minimum standards. There are two sets of information stream. There is information to be provided to members and beneficiaries (micro level), and there are reporting requirements to the supervisory authorities (macro

174. Kennedy, *supra* note 171, at 211.
175. *Id.*
176. Martin, *supra* note 35, at 860.
177. *Id.*
178. *Id.*

level).

Under the Directive, members and beneficiaries have the right to receive certain information with regard to the scheme.[179] The Directive distinguishes between information to be provided automatically and information to be provided on request.

> Details of changes to the rules on pension schemes are to be provided automatically and within a reasonable time.
>
> On request:
>
> - annual reports and accounts,
> - statement of investment policy principles,
> - details of the target level of retirement benefits,
> - the level of benefits in the event of leaving employment,
> - details relating to transferring benefits,
> - details of benefits payable and payment options when the benefits become due,
> - for money purchase schemes details of the investment options and the actual investment portfolio, together with information on risk exposure and costs.[180]

Following an amendment by the European Parliament, members will need to annually receive brief particulars concerning the situation of the institution and the current level of financing of their accrued individual entitlements. Most Member States however go further and several Member States have already pointed out that expanded information obligations to private providers of pensions are necessary. For example:

> The Netherlands want to improve the information furnished by pension providers about for instance indexation, investment policy, capital position and setting of contributions.
>
> The German government expanded already the obligations to inform prior to conclusion of contract. Providers must give information on possible investments, the structure of the portfolio and the risk potential. Furthermore, standard calculations by the providers should enable consumers to compare products better. Concerning pension fund management,
>
> Ireland established an ombudsman procedure that investigate and determined complaints made by beneficiaries who suffered losses as

---

179. Directive of the European Parliament and of the Council (EC) No. 41/2003 of June 3, 2003, O.J. (L235) 10.

180. *See Initial review of key aspects of the implementation of the IORP directive*, at 8-9, CEIOPS - OP - 03 - 08, *available at* http://www.gcactuaries.org/documents/ceiops_ReportIORPdirective _march08.pdf (providing an overview on the current state of implementation).

result of maladministration.[181]

These requests from some Member States to go further are based on the proven financial illiteracy of members in a scheme. It remains without any doubt a real challenge to increase the insured persons' knowledge of the operation of the pensions systems. Better individual information should raise awareness about pension matters. But, it does not necessarily enable individuals to take appropriate action if they feel that they should do more to provide for their retirement. While individual choice gains more importance in the preparation of adequate pensions, the state has to provide its citizens with a suitable financial education.[182]

In most Member States, pension schemes already had to provide periodical reports to supervision authorities prior to the IORP directive (macro level). The IORP directive made it into a European rule. The directive requires that the competent authorities, in respect of any institution located in their territory, have the necessary powers and means to obtain regularly the statement of investment-policy principles, the annual accounts and annual reports, and all the documents necessary for the purposes of supervision.

As of April 2008, recent analysis shows that, although it is a European rule, these reporting requirements currently differ widely between Member States. This difference does not only apply to the amount of information/documents that have to be submitted to the supervisory authority but also to the content of information/documents, the time interval/frequency and the institution/party on which the reporting obligation lies. Some Member States also reported different reporting requirements for different types of schemes.[183] No wonder CEIOPS concluded that "further analytical work may be beneficial."[184] Hence, Member States undoubtedly plan to reinforce the monitoring capacity of the supervision authority in the coming years.

The macro and micro level are clearly linked to one another in the EU. Information to members of private pension plans is crucial with regard to the amount of benefits individuals are likely to receive. While these depend on expected return rates and administrative expenses, it is also crucial that regulators

181. *See Technical Annex*, *supra* note 105, at 93-96.

182. *Id.* The UK government, including the Financial Services Authority, is developing a combined national strategy for improving financial capability mainly in schools and through the workplace. This strategy aims to ensure that people in the United Kingdom are better informed to allow them to take greater responsibility for their financial affairs. Poland has included banking, service and capital markets as mandatory curriculum subjects in secondary schools since 2003. *Id.*

183. CEIOPS, *supra* note 152, at 8-9 and appendix 5.

184. *Id.*

determine tight and uniform standards for the simulation of benefits, allowing individuals to be confident on the information they receive and to assess their options.[185]

V. COMPARATIVE LESSONS: A RIGHT TO OWN OR A RIGHT TO SOCIAL SECURITY?

The third Section makes it quite obvious that the US and the EU differ strongly when it comes to legal aspects of occupational and private pensions. These differences form a clear wealth for a comparative law analysis. The main difference between the EU and the US is of a clear ideological background. Legally this ideological debate can be summarized as follows: do occupational pensions create primarily a right to ownership or primarily an entitlement to a retirement security that is based on a social good? From a European perspective, the answers lie within three closely interrelated sub questions:

Is there an insecure social security right?

How much Matthew can be justified?

How much government is wanted?

A. *Is There an Insecure Social Security Right?*

All pension systems are embedded in more general legal structures of states. Pension systems do not stand in a legal vacuum. Especially occupational pensions or private pension provisions are legally embedded in civil/common law, in taxation law and—last but not least—social security law. The classical example of this link with social security is the traditional off set plans whereby the state based pension scheme is integrated in the occupational pension scheme.

There can be no doubt: it is the height and the strength of the social security scheme that defines and delineates the need for and the strength of occupational and private pensions. Social security is considered a collective responsibility while private and occupational pensions are more inclined towards the individual responsibility. Hence, it is the way society at large looks at collective and individual responsibility that defines the role of the occupational and private pensions.

185. *See Technical Annex*, *supra* note 105, at 93-6.

The US underwent a major shift in this perspective: from collective to individual responsibility. Burke and McCouch state it clearly:

> When ERISA was originally enacted, defined contribution plans were viewed mainly as supplements to a basic tier of retirement benefits provided by traditional defined benefit plans and Social Security. As defined benefit plans have given way to 401(k)s as the primary plan for many workers, the premise of ERISA's lenient regulatory framework for self-directed plans appears increasingly at odds with the goal of ensuring that employees will end up with adequate income during retirement. Various reform proposals focus primarily on improving default rules to provide guidance for employees without impinging on their freedom of choice. It remains to be seen whether such 'soft' paternalism will lead to greater retirement security across the board for 401(k) participants.[186]

Hence, the role of private occupational pensions changed dramatically.

Many American authors have recently reflected on this way of looking at private and occupational pensions. They seem to stress that there is too much legal emphasis on the individual responsibility within the occupational pension schemes. In combination with low social security benefits, this leads to unstable social security. Especially with regard to the shift from DB to DC (more specifically ERISA 401(k) plans) a lot of skepticism can be found.[187] Two clear examples include:

> Whatever else can be said, it is undeniably the case that 401(k) plans are also more consistent with the individualist/consumer approach that has become so prevalent in so many areas of law and society. Employers argue that 401(k) plans give employees personal autonomy over their financial future and many have bought into this way of thinking. Sold on 401(k) plans during a time of stock market boom, employees became enamored of the ability to control their retirement destiny.[188]

> The Bush Administration has consistently pressed for individual accounts as an essential component of Social Security reform. In keeping with President Bush's insistence that '[m]odernization must include individually controlled, voluntary personal retirement accounts,' the President's Commission to Strengthen Social Security outlined three alternative proposals featuring individual accounts as part of its final report issued in December 2001. Although the proposals vary in detail and are not fully specified, they signal a fundamental change in the structure of the existing Social Security

186. Burke, *supra* note 89, at 306.

187. *See generally* John Burit McArthur, *Private Pensions and the Justification for Social Security*, 48 S. TEX. L. REV. 1, 1-47 (2006) (providing a historical analysis on the private accounts and its dangers for the American society).

188. Stabile, *supra* note 86, at 309-10.

> system by shifting significant risk from the public system to individual participants.[189]

Not surprisingly does the influence of an increasing insecure American social security lead to a call for reform from quite a lot of academics. Stephen Befort for example, suggests a three-step reform agenda:

> (1) adopting a mix of tax increases and benefit reductions, including a slight rise in the retirement age, that would eliminate the projected Social Security Trust Fund deficit while still preserving the integrity of Social Security's critical social insurance function; (2) making changes in the default settings for defined contribution pension plans that would both encourage plan participation and improve plan security; and (3) enacting a modest refundable tax credit that would encourage low- and middle-income wage earners to save for retirement, whether in a defined contribution plan or in a personal savings account.[190]

A plea for more security of a social nature within private occupational pensions goes against the classical way of looking at these pensions in the US. In most European Member States, occupational pensions are still linked to a part of social security and remain a collective responsibility. Private pension plans in the US are mainly voluntary and largely tax-driven. Thus, the US legislation emphasizes the individual responsibility.

The debate in the US is ideologically very important. The debate can be described as a fight between the right to "own" or the right to "social justice". A possible need for social protection for the employees in DC plans is still unanswered. This becomes very clear in the comparison with the EU when looking at the chapters on coverage and benefit design. The emphasis in the US lies clearly on the individual responsibility. The question is whether this individual responsibility is the correct way of looking at the problem. This theme is well known in European literature by the so-called Matthew effect.

B. *How Much Matthew can be Justified?*

The Matthew effect refers to a sentence in a parable in the Gospel of Matthew: "For unto every one that hath shall be given, and he shall have abundance: but from him that hath not shall be taken away even that which he hath." [191] The parable deals with a sewer. His seeds fall on all kinds of soil: roads, rocks, thorns as

---

189. Burke, *supra* note 89, at 312.
190. Stephen F. Befort, *The Perfect Storm of Retirement Insecurity: Fixing the Three-Legged Stool of Social Security, Pensions, and Personal Savings*, 91 MINN. L. REV. 938, 938-88 (2007).
191. *Matthew* 25:29 (King James).

well as on good soil. For Christians the seeds symbolize the word of God that, although it is spread to everyone, is only received by those whose hearts are open to it. In social policy, it means that the effect of the seeds—the policy measures that are targeted to everyone—will only attain those that are aware of the measures and live in conditions that allow them to benefit from them.

In social policy the Matthew effect is seen as a form of equality inefficiency. All people are legally considered equal, but social policy cannot fully reach its goal because this equality rule leads in practice to another inequality. Due to socio-cultural and socio-political factors, higher incomes will benefit relatively more from social policy measures than lower incomes. In general, persons with higher income have more means, possibilities and opportunities to claim rights. Legally these rights are the same for lower incomes, but they lack the possibility or experience to claim them. For example, legally everybody has the same possibility to participate in pension savings and to benefit from the tax allowances. However in order to be able to save, you need money first. Obviously, not everybody has the same opportunities for acquiring money and getting the tax allowances.

It is rather clear that there is a Matthew effect in the US private pension system. This is linked to both the lack of pension coverage and to the voluntary aspect of a lot of DC plans (401(k)). The results are predictable: those who lacked pension income are more likely to be poor. With the fairly low social security benefits, the lowering coverage rate of the private pensions and the lacking of significant private saving, the number of poor elderly people will increase. All tax incentives, to encourage all forms of retirement savings, need one condition fulfilled to be effective from a social policy point of view: the free possibility to put cash aside for savings. This clearly leads to the Matthew effect because only the rich have this free possibility. Workers who do not earn enough to save will therefore never benefit from the advantage.

Hence, from a European perspective it is wrong to state that a voluntary participation to 401(k) plans is an advantage for employees or that automatic enrollment is an answer to the Matthew effect. The classical European answer for reducing a Matthew effect is compulsion for all, leading to a more social security oriented policy. However, this always requires more governmental interference.

C. *How Much Government is Wanted?*

Social security is considered a collective responsibility while private and occupational pensions are more inclined towards the individual responsibility. On various aspects, such as vesting, benefit design, coverage, portability, communication, the US is clearly inclined towards the accentuation of the individual

responsibility. Historically, this can be seen in the ideological importance the US has given to individual freedom. This ideological importance of the individual freedom leads evidently to another vision on the role of the government. Individual freedom and governmental interference are nearly considered dichotomous when it comes to private pensions.

In a European context, this dichotomy is well known. It is the difference between public and private law. Social security is a classical element of public law, while occupational and private pensions are seen as private law. The difficulty is to reconcile the goals of private and public law in social policy. Historically, the US has been less keen on government interference than most (old) European Member States.

The balance between individual freedom and collective responsibility will undoubtedly come on the American policy agenda. The debate will be very similar to the current American debate on health provision. The political question will be: how can a modern welfare state such as the US justify a growing number of poor seniors?

VI. CONCLUSION : DISPARITY OR UNIFORMITY – CURSE OR BLESSING ?

The EU and the US have clear different views on private and occupational pensions. Ideologically, they are worlds apart. However, some Member States such as the UK, Ireland, Poland, Bulgaria, Latvia and Lithuania are closely linked to the US. Yet, some other Member States such as the Netherlands, Belgium, Spain or Portugal are dissimilar to that of the US. Legally, the main difference between the US and the EU is clearly the presence and the lack of federal legislation on private or occupational pensions. Is this main difference in legal structure a curse or a blessing? It is evident that there is little common European framework while there is an increasing level of detailed regulation in the US.

I believe the European disparity remains a true problem for creating a true Europe. I would therefore like to join two scientific colleagues, Leibfried and Piersson, who wrote: "When it comes down to real social policy in Europe: a saga on high aspirations and modest results, marked by cheap talk."[192] This problem is generally recognized. The differences between Member States seriously complicate matters. As Mario Monti, a Member of the European Commission responsible for the Internal Market and the Financial Services, stated: "Any solution to the pension problem will be inadequate unless we can clear the confusion that currently

---

192. Stephen Leifried & Paul Pierson, *Semisovereign Welfare States: Social Policy in a multitiered Europe*, *in* EUROPEAN SOCIAL POLICY BETWEEN FRAGMENTATION AND INTEGRATION, at 46 (1995).

exists between Europe's divergent systems."[193] So, Europe's disparity is a curse.

However, looking at the American more unified structure, the question arises what would a more unified European structure look like? Comparing Europe's systems to the US could be a very meaningful lesson. In the US, it is clear that occupational pensions are not considered social goods. They do not form a part of social security, there is a Matthew effect due to the voluntary nature and the role of government is very limited. Poverty amongst the elder can be foreseen.

Thus, it might be better to have a working (but clearly legal annoying) disparity than a non-working unity when it comes to social protection. In the current state of affairs, the European Union is legally quasi entirely focused on the economic structures. The social European Union is quasi non-existent due to the legal constraints. If there would be for example one American state that would like to be more "social" than the others, how would this work? Today, each European Member State can still define the social role of its occupational pensions. The differences between the ten new Member States of the former Soviet Union alliance and the other Member States are unmistakable in this respect.

In these new Member States the role of occupational pensions is less related to the social security idea than in the other Member States (for example all mandatory affiliation with a DC plan). In other Member States, the social role of occupational pensions still dominates. However, the current economic view of the European Union jeopardizes this. From a strict economic perspective, it is a lot easier to understand occupational pensions as financial instruments than as social goods. So, from that point of view, I believe Europe's disparity is currently a blessing.[194]

---

193. Mario Monti, *Opening Speech*, *Pension schemes: Features and Challenges of the European Social Model*, 12 (W. Van Velzen ed., Paris M & M 1998).

194. *See supra* note 110 and accompanying text.