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Article

Cross-Border Obstacles and Solutions for Pan-European Pensions

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Pensions are currently at the top of the agenda of companies, employees, pension carriers, governments and, last but not least, the European Commission. This is partly because of the economic crisis pension funds are in right now but also because of the ageing population and the impact on public treasuries. These problems however cannot be solved easily. A well-functioning internal market for pan-European pensions without tax barriers can however contribute in solving the current pension crisis. In this article the authors describe the current situation and legislation regarding cross-border pension carriers and pension schemes within the EU. Since taxation is still one of the largest barriers for a well-functioning internal market for pension schemes, this aspect gets a lot of attention of the authors. They do not only describe current legislation and recommend changes; they also present a solution which is already being developed and is in line with current legislation: a multi-country tax-efficient pension scheme.

1. Introduction

In the wake of one of the largest financial crises in history, pensions became an issue foremost in people's minds. The focus on pensions is not, however, prompted by the positive state of the pension market. Rather to the contrary, the way in which the Netherlands and many other EU Member States and countries have structured their pension systems is now under severe pressure. This is obviously due first of all to an omnipresent problem: ageing. The number of pension beneficiaries is seeing higher proportionate increases than the economically active population that is needed to fund the pension benefits.[1] Secondly, there are all manner of more specific, Member State-related factors to consider. In the Netherlands, the unique system in its current form comes with a set of problems.[2] But also other countries that operate more traditional pension schemes find themselves faced with changes no matter what (see below).

The challenge that confronts EU Member States warrants a revision of the pension system – in some cases fundamentally so.[3] Such a revision cannot be implemented on a national level only. After all, the European Union now has influence over practically every aspect of pension policy, which is a natural progression from the 'four freedoms' and their incremental scope. What follows are a few examples. The European Court of Justice ('the Court') has qualified pension funds as undertakings for the purposes of – what is now – the Treaty on the Functioning of the European Union (TFEU) Treaty,[4] although they are entrusted with the operation of services of general economic interest for the purposes of Article 106(2) of the Treaty. The Court ruled more recently that certain German local authorities are required to observe tendering guidelines in awarding service contracts for occupational pensions.[5] Also where tax aspects are concerned, the Court has ruled repeatedly that place of the registered office of a pension institution shall not affect the tax deductibility of pension contributions.[6] The last example we will mention is – not unimportantly – the introduction of the Pension Directive in 2003.[7] This Directive represented the first step towards a Europe-wide organized market for occupation retirement provisions. At present, in 2010, we can establish, however, that this internal market has hardly come off the ground until now. We will address this issue in more detail below.

* This article has been written under personal title and any opinions expressed are solely those of the author.

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1 See for an elaboration: the Commission's Ageing Communication of 29 Apr. 2009: 'Dealing with the impact of an ageing population in the EU', COM (2009) 180 final.

2 See for an elaboration (in Dutch): J.G.E. van Leeuwen, 'Een sterke tweede pijler. Naar een toekomstbestendig stelsel van aanvullende pensioenen', *Onderneming & Financiering* 2 (2010): 137–157.

3 In the Netherlands, the Labour Foundation presented the *Pension Accord Spring 2010* on 4 Jun. 2010. This Accord proposes fundamental changes in occupational pensions in the second pillar.

4 Case C-67/96, Albany International, *ECR* 1999, I-5751, Cases C-115/97 to 117/97, Brentjens, *ECR* 1999, I-6025 and Case C-219/97, Maatschappij Drijvende Bokken, *ECR* 1999, I-61.

5 Case C-271/08, Commission/Germany, *ECR* 2010, I-0000. This might yet lead to problems in Germany. As far as we understand, German law bans foreign pension institutions (IORPs) from offering *German* pension schemes. Before being able to offer German pension schemes, foreign administrators are required to opt for a German *Durchführungsweg im Sinne des § 1b Abs. 2 bis 4 des Betriebsrentengesetzes* in accordance with § 118^{e} (3) of the *Versicherungsaufsichtsgesetz in der Fassung der Bekanntmachung vom 17. Dezember 1992* (BGBl. 1993 I s. 2). See also H. van Meerten, 'Pensions Reform in the European Union: Recent Developments after the Implementation of the IORP Directive', *Pensions: An International Journal* 4 (2009): 259–272.

6 See, for instance, Case C-150/04, Commission/Denmark, *ECR* 2007, I-01163.

7 Directive 2003/41/EC of the European Parliament and of the Council of 3 Jun. 2003 on the activities and supervision of institutions for occupational retirement provision, *OJEU*, 2003, L 235, 10–21.

The European Commission now considers addressing the pension issue as a priority. In 2010, it published a Green Paper entitled 'towards adequate, sustainable and safe European pension systems' ('the Green Paper').[8] The Commission had already pronounced the future of pensions a key priority in the legislative programme for 2010.[9] The Green Paper identifies a number of challenges that lie ahead of the EU Member States over the next few years. In addition to the aforementioned ageing (and the problems directly related to it),[10] these would include changes to pension systems,[11] the impact of the financial and economic crisis,[12] and removing obstacles to mobility in the EU. The Commission takes a cautious approach. It states explicitly that Member States are responsible for pension provision and that the Green Paper does not question Member States' prerogatives in pensions or the role of social partners.[13] The Commission has initiated a public debate to consult with all stakeholders about the identified challenges.[14]

In this article, we will focus on a number of obstacles that stand in the way of an internal market for occupational retirement provision. Pension funds are an integral part of financial markets and their design can promote or inhibit the free movement of labour or capital.[15] A well-functioning internal market does not have any unjustified national obstacles that inhibit the free movement of pension institutions guaranteeing the level playing field between EU Member States on the one hand and financial institutions (banks, insurance companies and pension funds) on the other. In our article, we will address the obstacles that we feel, based on our experience, play a key role in keeping the internal market from developing,[16] that is:

– lack of clarity on the concept of 'cross-border activity' (section 3.1);
– differences in substantive and institutional European and national supervision (section 3.2);
– tax impediments for cross-border pension institutions, pension schemes and workers (section 3.3).

For a proper understanding of the issue, we have provided some background information below.

In paragraph 4, we will describe a possible scenario that might be useful for multinational companies and their pension funds.

2. Background

In 2003, the European legislature issued a directive on the activities and supervision of institutions for occupational retirement provision (IORPs).[17] The Directive defines an IORP[18] as 'an institution, irrespective of its legal form, operating on a funded basis, established separately from any sponsoring undertaking or trade for the purpose of providing retirement benefits in the context of an occupational activity'.[19]

A few elements need further clarification.

First, it is important to note that there are three main categories of pension schemes in the EU Member States: social security schemes (first pillar), occupational schemes (second pillar) and individual schemes (third pillar).Occupational schemes generally involve employer and employees paying into a savings scheme, out of which retirement benefits will be paid to these same employees. IORPs can only operate occupational schemes.

Second, we can distinguish between funded schemes and pay-as-you-go schemes (PAYG). In a PAYG system, benefits are financed by current contributions. No capital is kept in reserve. In funded pension schemes a capital reserve is created during the accrual period. This reserve is used to fund future benefits.

Third, roughly speaking, *funded* pension schemes can either take the form of a Defined Benefit (DB) scheme or a Defined Contribution (DC) scheme.[20] The Netherlands and the United Kingdom are the forerunners in the EU where DB schemes are concerned. New EU Member States mostly operate DC schemes. The main difference between the two pension schemes lies in who bears the investment risk. In a DB scheme, the sponsor (usually the employer) bears the risk; in a DC scheme, the individual member (usually the employee) bears the risk. In other words, a member of a DB scheme is 'guaranteed' a certain pension benefit whereas, for a member of a DC scheme, the level of contributions, rather than the final benefit, is pre-defined. DB schemes are usually more complex than DC schemes. A DB scheme, which pre-defines the pension benefit, resembles an insurance product, that is, a life insurance. A DC scheme is similar to promises made by investment institutions, which do not usually give firm guarantees on investment returns. The difference between DB and DC scheme has implications for the supervision structure. Financial supervision of DC

8 COM 2010, 365, final.
9 COM 2010, 135, final.
10 For instance: women outlive men. Should they still be treated equally?
11 This includes raising the retirement age, potentially rewarding late retirement and discouraging early retirement.
12 To quote the European Commission: 'By demonstrating the interdependence of the various schemes and revealing weaknesses in some scheme designs the crisis has acted as a wake-up call for all pensions, whether PAYG or funded: higher unemployment, lower growth, higher national debt levels and financial market volatility have made it harder for all systems to deliver on pension promises', Green Paper.
13 It is unclear where those prerogatives begin and end exactly. As mentioned, EU policy affects practically every aspect of 'pension policy'.
14 A website was launched especially for this purpose: *ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=839&furtherNews=yes.*
15 Quoted from the Green Paper.
16 The potential obstacles are plentiful and virtually impossible to grasp. As there is hardly any harmonization in many fields, we have had to select a number of areas. Schouten already discussed a number of obstacles relating to cross-border pension administration by insurance companies. In his opinion, the key reasons why pension insurers undertake hardly any cross-border activities are differences in applicable law, provisions of general interest, varying tax rules and market-related differences. See (in Dutch) E. Schouten, 'Grensoverschrijdende pensioenen bij verzekeraars: grote verschillen tussen theorie en praktijk', *Pensioen & Praktijk* 7, no. 8 (2009): 6–13.
17 Directive 2003/41/EC.
18 This acronym is used throughout the article.
19 Article 6, IORP Directive.
20 All manner of hybrid schemes are possible as well.

schemes can be less complex in structure as there is no need for buffers. After all, in pure DC schemes, no pension promises are made to members; the risk lies with the members/employees.

In the Netherlands, the first pillar is the state old-age pension (Dutch acronym: AOW). Every person with social insurance cover in the Netherlands accrues 2% of a full state pension per annum. A full state pension right is earned after fifty years (currently between the ages of 15 and 65). The state old-age pension is a PAYG system.

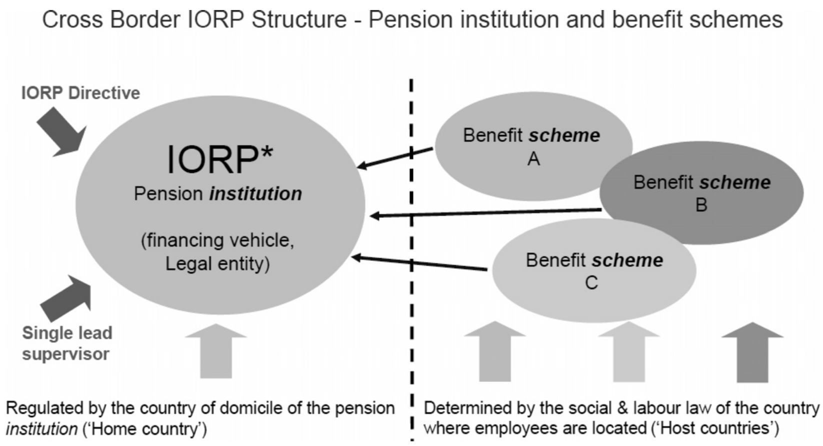
Having said this, the European Commission meant for the Directive to tackle the issue of ageing. Many EU Member States have not yet introduced the PAYG method into their pension systems by which current contributions are used to finance current pension expenditure. Due to ageing, the contributions are often not high enough to cover this expenditure and any shortfalls will have to be cleared using public funds. Given the fact that many governments face budget deficits, our argument that funded pension systems will become the standard in future will come as no surprise.

The implementation date of the IORP Directive expired at the end of 2005. Since then, all the existing pension funds in the Member States can be classified as IORPs.

Several Member States however have used the Directive to establish *new* IORPs.[21] Belgium has introduced the Organisation for Financing Pensions (OFP), Luxembourg has instituted the Pension Savings Company with Variable Capital (SEPCAV), and Ireland has established a Private Pension Fund. Initiatives are being developed in the Netherlands as well. In 2008/2009, the Dutch Ministries of Social Affairs and Employment and Finance drafted a law introducing a financial pension institution, that is, the Premium Pension Institution (Dutch acronym: PPI).[22] A PPI is an IORP that focuses on administrating DC schemes.[23] A PPI will be a new pension administrator wedged between existing financial institutions and pension funds. A PPI is a hybrid of different types of institutions with features of an insurer (more specifically the savings bank), of a standard Dutch pension fund and of an investment institution. In keeping with this, the statutory framework for PPIs is twofold: PPIs are governed by the Dutch Financial Supervision Act and by the Dutch Pensions Act. By offering these new vehicles, Member States are trying to present themselves as an attractive domicile for IORPs.

Expectations are that pension pooling – with multinationals, for instance, having all different pension schemes of their globally based workforce administrated by a single pension administrator – will become a popular option.[24] A recent feasibility study for creating an EU pension fund for researchers confirms this expectation.[25] In this study it can be read that it is expected that the number (of single-employer) cross-border IORPs will increase significantly over the next two to three years once the practice becomes more established, and more multinationals realize that cross-border IORPs have become a practical reality at last.

The following diagram offers a snap-shot of the structure of a cross-border IORP.[26]



To conclude this paragraph, the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) has calculated that there are currently about 80 IORPs in operation. This marks a slow start for the time being of the market for cross-border IORPs.[27]

21 Pension institutions dating from before the Directive also qualify as IORPs.

22 In full: Amendment to the Dutch Financial Supervision Act and some other acts in connection to the introduction and supervision of contributory pension institutions (Act on the Introduction of Premium Pension Institutions), *Parliamentary Documents II*, 2008/09, 31891, no. 2 (the Act) and no. 3 (Explanatory Memorandum).

23 See for a good description of this vehicle (in Dutch): R. van de Greef, 'De PPI: een wassen of een lange neus?', *Tijdschrift voor pensioenvraagstukken* 3 (2009): 82–86.

24 The Dutch government shares this opinion, as voiced in the Explanatory Memorandum.

25 Prepared by Hewitt for the European Commission Research Directorate-General, Final Report 15 Jun. 2010 – Contract no. RTD/DirC/C4/2009/02687944/2009/0268794.

26 *Ibid.*

27 CEIOPS 56/10, 24 Jun. 2010, 2010 Report on Market Developments.

3. Obstacles to a Well-Functioning Internal Market

3.1. Cross-Border Activity

There is uncertainty about the question of when IORPs carry out cross-border activities.[28] This also causes confusion as to which legal system governs an IORP's activity. What do the relevant provisions of the IORP Directive stipulate in relation to cross-border activities?

First and foremost, we would refer to a key provision of the Directive, that is, Article 20(1), which reads as follows.

> Without prejudice to national social and labour legislation on the organisation of pension systems, including compulsory membership and the outcomes of collective bargaining agreements, Member States shall allow undertakings located within their territories to sponsor institutions for occupational retirement provision authorised in other Member States. They shall also allow institutions for occupational retirement provision authorised in their territories to accept sponsorship by undertakings located within the territories of other Member States.

This implies that any IORP interested in carrying out cross-border activity is required to observe the social and labour laws of the Member State that qualifies as the home country of the pension scheme. In the Netherlands, these provisions have been largely enshrined in the Dutch Pensions Act.[29] The observance of 'foreign' social and labour laws poses problems when carrying out cross-border activity. As each Member State is free to interpret the provisions, this legislation ranges widely from country to country. At times, prudential supervision rules even form part of social and labour laws.

A second relevant provision of the IORP Directive is Article 20(2):

> An institution wishing to accept sponsorship from a sponsoring undertaking located within the territory of another Member State shall be subject to a prior authorisation by the competent authorities of its home Member State, as referred to in Article 9(5). It shall notify its intention to accept sponsorship from a sponsoring undertaking located within the territory of another Member State to the competent authorities of the home Member State where it is authorised.

This provision requires any IORP wanting to accept sponsoring (funding) from an undertaking located within the territory of another Member State obtaining authorization from the competent authorities. The Directive qualifies this as a cross-border activity. It would seem as if this interpretation of the concept of cross-border activity is incomplete to say the least. To illustrate, let us consider a potential Dutch situation involving a PPI, the new Dutch IORP.

As indicated in the Explanatory Memorandum to the Act on the Introduction of Premium Pension Institutions,[30] a PPI – which is required to have its registered office in the Netherlands[31] – can, firstly, administrate foreign pension schemes in the Netherlands (see Article 20(2), IORP Directive, cited above). A PPI can also, secondly, administrate foreign pension schemes in another Member State by setting up an 'infrastructure necessary for the purposes of performing the services in question'.[32] Finally and thirdly, a PPI can, via a branch office as defined in the Dutch Financial Supervision Act,[33] administrate a pension scheme in another Member State.

The three alternatives described above involve cross-border activity that comes under the freedom to provide services enshrined in the TFEU Treaty (Article 56) where the first two alternatives are concerned and under the freedom of establishment when considering the third alternative (Article 49).

What is striking about the Explanatory Memorandum is that the Dutch legislature uses the concept of 'foreign *scheme*' as a reference point, rather than that of 'foreign *undertaking*'. Judging from the Parliamentary Documents, cross-border activity is being carried out if an IORP administrates a pension scheme that is governed by the social and labour laws of a Member State or country other than the IORP's home State. In other words, the 'scheme's nationality' is the decisive criterion. Which national social and labour laws govern the scheme is determined by the choice-of-law rules stipulated in Article 8 of the Rome I Regulation.[34]

There are some advantages to this approach. Let us assume that the undertaking sponsoring the PPI has its registered office in London, in the United Kingdom. In concrete terms, this might involve a multinational that wants to centralize the administration of its pension schemes from a single location. We will then assume that, under the choice-of-law rules of the Rome I Regulation, the pension scheme is governed by Dutch social and labour laws. This would imply that a Dutch PPI qualifies as the administrator of a Dutch pension scheme, although the sponsoring undertaking has its registered office in a different Member State. It is doubtful, to say the least, whether this situation would involve any cross-border activity. The Member States have differing opinions on this issue. In the United Kingdom and Ireland, an IORP is considered as carrying out cross-border activity if a single individual member of a pension scheme is 'domiciled' abroad.[35] Other Member States use different criteria, for example, the nationality of *individual members*.[36]

[28] See for a more extensive discussion of this issue (in Dutch): H. van Meerten, 'De Premiepensioeninstelling: van, maar ook op alle markten thuis?', *Nederlands Tijdschrift Voor Europees Recht*: 12 (2008): 347–355.

[29] For an overview: *Parliamentary Documents II*, 2006/07, 1182, appendix.

[30] Explanatory Memorandum, 36.

[31] The IORP Directive stipulates that the 'home Member State' means the Member State in which the institution has its registered office and its main administration or, if it does not have a registered office, its main administration (Art. 6(i)).

[32] This passage is [obviously] from the Gebhard judgment (Case C-55/94, Gebhard, 30 Nov. 1995, *ECR* 1995, I-4165).

[33] The definition of a branch office that is relevant here reads as follows: 'a section without legal personality of a financial enterprise that is not an insurer or investment firm *permanently* existing in a State other than the State where this financial enterprise has its registered office', s. 1:1 of the Dutch Financial Supervision Act.

[34] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 Jun. 2008 on the applicable law to contractual obligations (Rome I), *OJEU*, 2008, L 177.

[35] J. Lommen, *De API is een no-brainer. De positionering van Nederland in de nieuwe Europese pensioenmarkt* (Tilburg: Netspar, 2009), 24.

[36] See for an overview by country of approaches taken: 'Initial review of key aspects of the implementation of the IORP Directive', CEIOPS Occupational Pensions Committee (OPC), 31 Mar. 2008.

3.2. European Supervision of IORPs

Another important factor that might explain why cross-border activities of IORPs are slow in coming off the ground is the difference in supervision by the different Member States of their IORPs. There are major differences in both substantive and institutional terms.

So far, institutional supervision of financial institutions (and of IORPs) has mostly been organized on a national level. In the Netherlands, the Dutch Central Bank (Dutch acronym: DNB) is the regulator responsible for prudential supervision of all financial institutions (mainly involving compliance with solvency and liquidity requirements), while the Authority for the Financial Markets (AFM) is in charge of supervising business conduct. This model, which is sometimes referred to as the 'twin peaks model',[37] has been copied in a number of other countries. There are plenty of Member States and other countries, however, that will not introduce segregation between supervision of business conduct and prudential supervision and where supervision of the insurance sector, for instance, rests with a separate supervisory authority.[38]

The EU agrees with many experts that these differences in European supervision have not particularly reduced the implications of the crises.[39] The European legislature is now trying to further harmonize institutional supervision. Judging from the proposals for a new supervision system for the entire financial sector that were presented late in September 2009, four new bodies will be instituted.[40] One of them is the European Insurance and Occupational Pensions Authority (EIOPA) for insurers and IORPs.[41] This agency is expected to be granted broad powers. It will, for instance, be competent to impose directly binding decisions ('technical standards') on qualifying institutions. However, EIOPA's powers are expected to be limited where regulations governing IORPs are concerned, as the Dutch have major doubts about the option of imposing technical standards for supplementary pensions. The Dutch government feels that, in drafting these standards, policy-related and political considerations should be weighed as a rule because of the interrelatedness between supplementary pension rules and national social and labour laws.[42]

Substantive supervision has already been broadly harmonized in a European context in some areas. Banks are governed by the Basel II regime,[43] and insurance companies are subject to the Solvency II framework.[44] These Directives define relatively detailed capital, management and disclosure requirements, as well as regulating collaboration among national regulators, which might be compulsory in some instances. The IORP Directive entails minimal harmonization and regulates relatively little. Although all pension institutions in the EU/EEA are expected to meet the requirements set in the Directive (e.g., Dutch pension funds qualify as IORPs), there are substantial differences at European level between the solvency requirements for pension funds, for instance, due to the national interpretation and supplementation of minimum requirements. We will consider this issue in greater detail below.

Article 17 of the IORP Directive stipulates that home Member States shall ensure that institutions operating pension schemes, where the institution itself underwrites the liability to cover against biometric risk (e.g., longevity risk), or guarantees a given investment performance or a given level of benefits, hold on a permanent basis additional assets above the technical provisions to serve as a buffer (the 'solvency margin'). This presents a new problem. After all, there is another type of institution that can administrate pension schemes, that is, an insurer. There are a lot of similarities between insurance companies and pension funds.[45] Insurance companies and some pension funds (mostly those who offer DB plans) underwrite the liability to cover risk themselves. In other words, they both 'insure'.

As indicated earlier, insurance companies of a certain size are subject to Solvency II. What does the IORP Directive say about the solvency regime of pension funds insuring defined benefits? Article 17(2) of the IORP Directive stipulates that, for the purposes of calculating the minimum amount of the additional assets, the rules laid down in Articles 27 and 28 of Directive 2002/83/EC shall apply. This refers to Solvency I, the 'old' insurance directive, which requires a buffer of just under 5% of obligations.[46] In other words, IORPs that are insuring a certain benefit would be subject to the same rules as insurance companies.

However, as indicated above, recently the Solvency II Directive entered into force. The old Solvency I directives have all been incorporated into the new Solvency II regime in the interim. This would mean that the Solvency II regime becomes applicable to IORPs. But the

[37] See for a description of different supervision models: E. Wymeersch, 'The Structure of Financial Supervision in Europe: About Single Financial Supervisors, Twin Peaks and Multiple Financial Supervisors', *European Business Organization Law Review* (2007): 2.

[38] Poland and Luxembourg, for instance.

[39] See the recommendations of the De Larosière Group, which spoke with experts, market specialists and regulators (ec.europa.eu/internal_market/finances/committees/index_en.htm#delarosierereport).

[40] See for a more extensive discussion of these proposals (in Dutch): J.C. van Haersolte & H. van Meerten, 'Zelfrijzend Europees bakmeel: de voorstellen voor een nieuw toezicht op de financiële sector', *Nederlands Tijdschrift Voor Europees Recht*: 2 (2010): 33–42.

[41] See for a discussion of the question of whether the agencies have been founded on the correct legal basis in the Treaty: H. Van Meerten & A.T. Ottow, 'The Proposals for the European Supervisory Authorities: The Right (Legal) Way Forward?', *Tijdschrift voor Financieel Recht* 1, no. 2 (2010): 5–16. The authors conclude that questions can be raised about the correct legal basis.

[42] *Parliamentary Documents II*, 2009/10, 22112, No. 940.

[43] Directive 2006/48/EC of the European Parliament and of the Council of 14 Jun. 2006 on the taking-up and pursuit of the business of credit institutions, *OJEU*, 2006, L 177, 1–200.

[44] Directive 2009/138/EC of the European Parliament and of the Council of 25 Nov. 2009 on the taking-up and pursuit of the business of insurance and reinsurance (Solvency II), *OJEU*, 2009, L 335/1.

[45] There are also certain differences. See D. Broeders et al., *An Institutional Evaluation of Pension Funds and Life Insurance Companies* (Amsterdam: DNB Working Paper, 2009), 227.

[46] Consolidated in Directive 2002/12/EC of the European Parliament and of the Council of 5 Mar. 2002 amending Council Directive 79/267/EEC as regards the solvency margin requirements for life assurance undertakings (*OJEU*, 2002, L 77) and Directive 2002/13/EC of the European Parliament and of the Council of 5 Mar. 2002 amending Council Directive 73/239/EEC as regards the solvency margin requirements for non-life insurance undertakings (*OJEU*, 2002, L 77, 17–22).

European legislature has used a stratagem. In order to prevent the Solvency II framework applying to IORPs – which meets with resistance from Dutch pension funds, among others[47] – the old provisions (the above mentioned Articles 27 and 28) of the Solvency I directives were transposed in the new Solvency II framework as they were, meaning that IORPs with insurance activities effectively continue to be governed by the Solvency I framework.

But the matter becomes even more complex as Article 4 of the IORP Directive offers an interesting option. It allows Member States to choose to apply the provisions of Articles 9–16 and Articles 18–20 of the IORP Directive to the occupational retirement provision business of insurance undertakings.[48] In that case, all assets and liabilities corresponding to this business will be ring-fenced, managed and organized separately from the other activities of the insurance undertakings, without any possibility of transfer. The application of Article 4 IORP can lead to a situation in which an insurance company is split into two separate entities: an 'insurance' entity and a 'pension' entity.

What this means is that insurance companies administrating occupational retirement provisions are subject to Solvency II where their 'regular' insurance activities are concerned (the insurance entity), that they may be subject to Solvency I – depending on the question of whether a Member State has implemented Article 4 of the Directive – as regards their solvency regime relating to the occupational retirement provision (the 'pension' entity) *and* that they come under the IORP Directive in respect of technical provisions and investment policy. As a result of this fragmented regime, Dutch insurers may be subject to a stricter system (Solvency II) than French insurers who are governed by Article 4 of the IORP Directive, which entails less stringent requirements (Solvency I) for the *same* activities.[49]

In the Netherlands, the solvency framework for pension funds is regulated by the Financial Assessment Framework (Dutch acronym: FTK); the legislature has implemented Article 17 of the IORP Directive such that the minimum capital requirement for pension funds is about 105%. The question is – somewhat as an aside – whether the Dutch government did the right thing in implementing Article 17 of the IORP.[50] Dutch pension funds do not bear the ultimate risks themselves after all. In an adverse climate when funds fall short of the required funding ratio of 105%,[51] pension funds can raise the contributions paid by employers and employees jointly, and/or temporarily unlink pensions from wage and price developments, or in extreme cases, even reduce pension entitlements or write down pension rights. In other words, employers and employees ultimately bear the risks. The paradox is that the Dutch choice to implement Article 17 of the IORP Directive has accelerated the unwanted application of Solvency II.[52]

In Belgium, the solvency calculation method of IORPs has been described in detail in the Prudential Royal Decree of 12 January 2007.[53] Belgian law does not require an IORP to create buffers over and above assets funding the technical provisions and assets covering the solvency margin.[54] The Dutch and Belgian regimes – but the other national regimes as well – are substantially different from one another.[55] The differences in supervision (of solvency) between the Netherlands and Belgium have even been the subject of Parliamentary questions. There were (and are)[56] concerns about the potential relocation[57] of Dutch pension funds to Belgium and Ireland.[58]

3.3. Tax Aspects of European Pensions

The Green Paper does not go into much detail with regard to the tax aspects of European pensions. This is a missed opportunity. Tax impediments currently form a major obstacle to the internal market for occupational retirement provisions: EU citizens hardly have the option to accrue cross-border pension benefits and/or to have their pensions administrated on a cross-border basis. This is standing firmly in the way of allowing pension pooling as mentioned earlier.

The potential options for, and advantages of, cross-border pension accrual would seem tremendous. A pension administrator managing to offer several European pension schemes from a single jurisdiction could benefit from numerous efficiencies of scale. These would not only include administration efficiencies (after all, a separate pension scheme is required for each country) but more importantly create a potential for pension pooling. Underlying assets and liabilities could be joined and bundled,[59] for instance. It does not take an economics degree to understand that this would generate synergies. Pension pooling options, which are open to both pension insurers and pension funds, can be used in particular to capitalize on the growth of multinationals. Pension pooling will allow undertakings with branches in different

47 See for a discussion the Position Paper of the pensions industry umbrella organisations: 'Extension of Solvency II to pension funds is unwarranted' <www.vbportal.nl/bibliotheekvb/grp4/Position%20Paper%20Solvency.pdf>.

48 Some Member States (e.g., France) have availed themselves of this option, others (including the Netherlands) have not (*Parliamentary Documents II*, 2004/05, 30 104, no. 3, 7).

49 As Solvency II has stricter (regulated) capital requirements as well as being more risk-oriented, it imposes more requirements on insurers than does Solvency I. See M. Lechkar, O. Nijenhuis & H. van Meerten, 'The Solvency II Directive: The Long and Winding Road', *Verzekeringsarchief* 4 (2009): 162–166.

50 See (in Dutch) B. Kuipers, 'solvency II ongeschikt voor pensioenfondsen', *Tijdschrift voor Pensioenvraagstukken* 2 (2009): 53–58.

51 In July 2010, the funding ratio at ABP, the largest pension fund in the Netherlands, was 95%. See (in Dutch): <www.fd.nl>, 18 Jul. 2010.

52 See B. Kuipers *supra* n. 50.

53 Royal Decree on the Prudential Supervision of Institutions for Occupational Retirement Provision, *Belgian Bulletin of Acts and Decrees*, 23 Jan. 2007.

54 See (in Dutch) A. Van Damme, J. Beernaert, J.A. Gielink & C.A. Hoekstra, 'Het pan-Europees pensioenfonds: een Belgisch-Nederlandse kijk op de zaak', *Tijdschrift voor pensioenvraagstukken* 1 (2008): 2–14.

55 See B. Kuipers *supra* n. 50.

56 Holland Financial Centre, a Dutch public/private initiative, seeks to keep Dutch IORPs in the Netherlands and to attract foreign schemes that can be administrated by a Dutch IORP (e.g., a PPI).

57 See (in Dutch) H. van Meerten, 'De zetelverplaatsing van dochterondernemingen van financiële instellingen', *Verzekeringarchief* 4 (2010), not yet published.

58 *Parliamentary Documents II*, 2007/08, no. 666.

59 See the diagram in para. 2.

Member States, hence operating company pension funds in several Member States, to establish an IORP in a single Member State to administrate all different pension schemes.

Before addressing this issue in greater detail, we will first provide some background information about the Dutch pension system.

3.3.1. An Adequate and Sustainable Pension

We believe that a funded pension system is preferable to a PAYG system. In an ageing society, a funded system offers the assets that are needed to provide pensioners with an income. There is less pressure on general resources as pension benefits do not have to be funded from current contributions. This is all the more relevant in a society with an economically active population that contributes to GDP and pensioners who do not contribute or do so to a lesser extent because they are able to provide for their own income. Moreover, a funded pension system spreads income evenly over a beneficiary's life so that they can enjoy an income after their service period. A funded pension system does, however, exist by the grace of the so-called EET system,[60] a tax facility. Under this system, contributions to a pension scheme are tax-deductible (i.e., non-taxable or Exempt), the capital accrual of the pension benefit is also Exempt and the effective benefits being liable to Tax. This is how a funded pension system that is based on the EET-system also generates tax revenues for a State when pensions are in payment. This can be considered as a plus point since, in an ageing society, tax revenues would fall dramatically if the economically active population were the only contributors to these revenues. Taxing pension benefits allows States to maintain their revenues in a period in which ageing costs (e.g., healthcare costs) are generally soaring. The advantages of a funded pension system based on the EET-system have been recognized by the European Commission in the past.[61]

Against this backdrop, we are most surprised that the Green Paper would question the usefulness and need of the EET system. The Green Paper states that 'the costs of tax relief can be considerable and its effectiveness and redistributive impacts questionable'.[62] This comment would seem to be diametrically opposed to earlier pronouncements by the European Commission.[63]

3.3.2. Pension Administrators, Pension Schemes and Workers

The tax impediments mostly affect pension administrators, pension schemes and EU workers.

The European Commission issued a Pension Communication in 2001.[64] In it, the Commission took the view that a foreign pension institution should qualify for tax relief if a domestic pension institution does the same. This view was later confirmed by the Court of Justice. It can be concluded from the judgments in the Wielockx[65] and the *Commission v. Denmark* cases[66] that pension contributions paid to pension administrators located in other Member States should no longer be subject to tax discrimination.[67] This does not mean, however, that paying pension contributions to a foreign pension administrator is always an option. This is a possibility only if the pension scheme administrated by a foreign pension administrator meets all the tax criteria that the country providing the tax relief has imposed on the pension scheme. And that is rarely the case in practice. What follows is an example.

In the EU, Member States have considerable tax autonomy,[68] the result being that Member States are free to devise their own national tax regimes as long as they have regard to the equality principle. This had led to most EU Member States structuring their pension systems such that pension contributions paid into a foreign pension scheme do not qualify for tax relief unless that foreign pension scheme meets their national tax rules for pensions.[69] In practice, this proves hardly ever to be the case because national tax rules for pensions vary so strongly from Member State to Member State that these rules seldom correspond in two countries. There is no single pension scheme that meets the tax requirements in more than one country. In order to offer qualifying pension schemes in different countries, a pension administrator is forced, therefore, to offer domestic pension schemes in several countries. This is definitely a tall order.[70] In practice, pension administrators (insurers) leave it to their local associates or subsidiaries to serve the market in other European countries with the law of the host country defining the scope of the pension scheme.

The fact that a pension scheme operated in a Member State hardly ever qualifies for tax relief in other Member States does not, in principle, seem in contravention of European law because the denial of tax relief is not

60 Stands for Exempt, Exempt, Taxed.

61 See <http://ec.europa.eu/taxation_customs/taxation/personal_tax/pensions/index_en.htm>.

62 Green Paper, p. 7.

63 See <http://ec.europa.eu/taxation_customs/taxation/personal_tax/pensions/index_en.htm>.

64 The Communication was entitled 'The elimination of tax obstacles to the cross-border provision of occupational pensions', COM 2001, 214, final.

65 Case C-80/94, *Wielockx v. Inspecteur der directe belastingen, ECR* 1995, I-02493.

66 Case C-150/04, *Commission v. Denmark*.

67 See, for more details (in Dutch), P. Schonewille, 'Hof van Justitie elimineert belangrijk belastingobstakel voor pan-Europese pensioenfondsen en mobiele werknemers', *Pensioenmagazine*, 79 (2007): 21–25.

68 See, for instance, C-96/08, CIBA Speciality Chemicals Central, *ECR* 2008, p. 5. Consideration 28 reads as follows: 'It follows from this that, in the current state of the development of European Union law, the Member States enjoy a certain autonomy in this area provided they comply with European Union law, and are not obliged therefore to adapt their own tax systems to the different systems of taxation of the other Member States in order, *inter alia*, to eliminate the double taxation arising from the exercise in parallel by those States of their fiscal sovereignty'.

69 Consideration 9 of the IORP Directive reads as follows: 'In accordance with the principle of subsidiarity, Member States should retain full responsibility for the organisation of their pension systems as well as for the decision on the role of each of the three "pillars" of the retirement system in individual Member States'. The Directive seems to confuse the subsidiarity principle with the legal basis principle in this consideration. After all, if the Member States should have 'full responsibility' for the organisation of their pension systems, the EU would be powerless in this area. The subsidiarity test is irrelevant if there were no legal basis for EU action.

70 See E. Schouten & H. van Meerten, 2008.

prompted by the fact that a scheme originates in another Member State but rather by its non-compliance with national tax rules. Obviously, such 'measures without distinction' do qualify as prohibited restrictions of the free movement of goods and services because they form a major obstacle to the internal market.[71] Due to the autonomy in tax matters, the principle of mutual recognition does not, however, apply for the time being in the tax arena.

In addition to impediments for pension administrators, there are for cross-border EU workers, who are divided into mobile (posted) workers and non-mobile workers. As far as mobile workers (who are temporarily stationed in another Member State) are concerned, the non-acceptance for tax purposes of the pension scheme in their home country would seem to be in contravention of European law. This follows from the European Commission's Pension Communication of 2001 and the Safeguarding Directive[72] among other documents. In order to explain this matter clearly, we shall describe the situation.

A person lives and works in country A (home country) and is a member of the pension scheme in country A. For a period of time, this worker is posted in country B (host country) but stays in the pension scheme of his employer in country A. Whilst working in country B, the worker falls under the tax system of country B and therefore pays taxes, such as wage tax and/or income tax, in country B. The pension scheme of which the worker stays a member whilst working in country B temporarily, does not comply with tax system of country B. The question therefore is if the pension premiums into the pension scheme in country A are tax deductible in country B. Normally, this would not be the case because the pension scheme of country A does not comply with the tax rules of country B. However, the Pension Communication,[73] which does not, in principle, have any legal effects, states that the free movement of workers would be unduly restricted if a host state (i.e., country B) were to impose its conditions for tax approval on a migrant worker's pension scheme. This would mean that the pension premium into the pension scheme of country A is fully tax deductible in country B, irrespective of the fact that this tax deductible premium may be higher than locals of country B can deduct from their taxable wage/income. Although this sounds hopeful, the Communication also mentions that, under the equal treatment principle, the total tax deduction that the host state is obliged to grant would normally be limited to the relief granted for contributions to domestic pension institutions. In other words, tax relief in country B is granted subject to the substantive limits used by the country B. A pension scheme does not, however, have to meet all procedural criteria defined by the host country. Therefore, one aspect that forms a particular impediment in practice is the condition that the host country (i.e., country B) will grant relief only to the level that is customary in that country. The following example serves as an illustration. The second pension pillar in the Netherlands is tax favourable. A Dutch employee who is temporarily stationed in France, for instance, and wants to continue their Dutch pension, would, under European law, qualify for tax relief to the level that is customary in France. The problem here would be that the French pension system relies heavily on the first (state pension) pillar, offering little tax relief for pillar-two pensions, even in purely domestic situations. The Dutch employee would, therefore, have only limited tax relief in France, thereby disqualifying themselves from tax-efficient pension accrual.

As mentioned, in the European Commission's view, this situation is *not* in contravention of European law. Relying on the equality principle, the Commission feels that a worker should not qualify for any tax relief other than that granted under the rules of the host country.[74] In literature, doubts have been raised about this reliance on the equality principle, however. The question is, after all, whether mobile (i.e., posted) workers should be treated equally to non-mobile workers in the home country (i.e., country A) or to persons employed in the host country (i.e., country B). Judging from the Safeguarding Directive and Regulation 883/2004, mobile workers and non-mobile workers in the home country should be treated equally.[75]

This view would advocate unrestricted tax acceptance of a pension scheme originating in the home country irrespective of the amount of the contributions. Although the Safeguarding Directive does not explicitly refer to tax situations, the Dutch legislator allows tax relief for contributions to a foreign pension scheme for up to five years, even if the foreign scheme is broader in substance than allowable under tax law.[76] In other words, the Netherlands (in the case of being the host state, that is, country B) grant tax deduction for the full pension premium paid into the pension scheme of country A, even is this means a larger deduction than domestic workers receive in the Netherlands. With this, the Netherlands fully respects foreign pension schemes for tax purposes as well, having ultimate regard for the freedom of movement for workers of Article 45 of the TFEU Treaty and setting an example for many EU countries. The question is, however, whether other EU Member States have the same broad tax recognition of pension schemes of mobile workers. This does not always prove to be so in practice. Judging from Article 17(6) of the UK/Dutch Tax Convention, the United Kingdom does have this recognition, at least where Dutch workers and Dutch pension schemes are concerned.[77] Belgium also offers this option, based

71 See, for instance, Case C-187/84, Commission/Germany, *ECR* 1987, 01227.

72 Directive 98/49/EC of 29 Jun. 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community, *OJEU*, L 209.

73 COM 2001.

74 COM 2000, 214, 12.

75 See for a more detailed discussion (in Dutch): L.J. Roos, *Pensioen en werknemersmobiliteit in de EU* (Tilburg: Competence Centre for Pension Research, 2006).

76 Order by the Dutch Under-secretary of Finance, 31 Jan. 2008, no. CPP2007/98M, *Government Gazette*, no. 27.

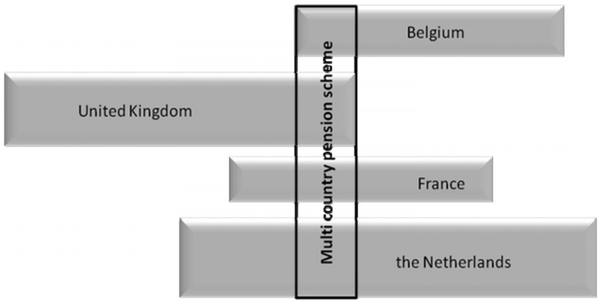
77 Convention between the Government of the Kingdom of the Netherlands and the Government of the United Kingdom of Great Britain and Northern Ireland for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital gains, Treaty No. 010276, *Treaty Series* 2008-201 and 2009-123. This Convention has not yet taken effect.

in part on Article 26(7)(b) of the Belgian/Dutch Tax Convention,[78] which states that the Belgian tax authorities need to be convinced that the Dutch pension scheme corresponds with a Belgian qualifying pension scheme before the pension contributions are eligible for tax relief in Belgium. The main obstacle occurs when employees are posted to countries that have little or no domestic tax facilities for pension accrual. In those situations, there are no possibilities for continuing a Dutch pension scheme.

In summary, we can conclude that foreign pension schemes of non-mobile workers are required to meet domestic tax rules, effectively cancelling out any tax relief. Mobile workers are also granted only limited cross-border tax relief in practice because host countries can always impose the requirement that pension schemes need to stay within the substantive limits of their domestic tax rules. They hardly ever do, especially from a Dutch perspective, so that tax relief for contributions to a Dutch pension scheme that is continued in a foreign country is a near impossibility. This impossibility, which is due to the principle of fiscal autonomy, forms an impediment to a European market for cross-border pension accrual. Our argument is that, based on the 'safeguarding' Directive and the 'Posting' Regulation, the host country should always, in a posting situation, grant tax relief for the full contributions paid into a pension scheme originating in a worker's home country. Only then will a worker not experience barriers in accruing pension in posting situations. Contributions paid into foreign pension schemes by non-mobile workers should ideally also qualify for tax relief irrespective of whether the relief is broader than that offered under their own domestic regime. This will long be a utopian thought, however; it would be a departure from the principle of fiscal autonomy.

There is a perhaps somewhat more realistic alternative. The EU could adopt a basic pension scheme that would qualify for tax relief in *every* EU Member State. This idea is also referred to as the '28th regime'. The European Financial Services Round Table (EFR) has proposed such a regime for top-up pension products in the third pillar.[79] Second-pillar pensions could be governed by a 28th regime as well, according to us. The goal remains, after all, to allow every EU citizen to create an adequate, tax-efficient retirement provision. It is irrelevant, in principle, whether the pension is accrued in the second or third pillar, or whether the citizen in question is employed, self-employed or a business owner.

Another suggestion would be to devise a pension scheme that meets the domestic tax laws of several Member States. In order to achieve this, tax rules would have to be mapped out systematically on a country-by-country basis. Any corresponding elements should be incorporated into the scheme, disregarding elements that are at variance, for instance with regard to tax relief. The figure below illustrates the idea. The horizontal bars demonstrate the tax aspects of the pension systems in the countries in question. Any overlaps between the countries are incorporated into the pension scheme (the vertical bar). The result is a pension scheme whose tax aspects are acceptable in several Member States.



The feasibility of such a pension scheme has already been explored for the Netherlands and Belgium and for the Netherlands and the UK.[80] The conclusion is that, under circumstances, a fully employer-funded collective DC scheme would qualify for tax relief in Belgium, the UK and the Netherlands (see paragraph 4).

3.3.3. The Multi-pillar Pension Model with a Compensating Layer

As mentioned at the start of this article, an adequate retirement provision is crucial to the well-being of pensioners in Europe. We also argued that cross-border pension accrual has so far hardly come off the ground. An adequate retirement provision stands or falls with the tax relief associated with the accrual. In this regard, we would refer to the Green Paper as well as this Journal that mentions the so-called multi-pillar pension model with a compensating layer ('the multi-pillar model').[81]

The multi-pillar model is based on the idea that the level of tax relief offered in the second pillar and/or the third pillar is dependent on the level of benefits accrued in the other pillars. It can be left up to the individual Member States to determine an adequate level for the retirement provision (e.g., 70% of a beneficiary's last-earned salary or of their average pay). In concrete terms, this means that every EU citizen will be allowed to accrue an adequate retirement provision under tax-efficient conditions, regardless of whether they are an employed or a self-employed person. The multi-pillar model is 'labour form-neutral' in that sense. What follows is an illustrative example. A worker is paid a salary EUR 50,000; they are entitled to a state pension of EUR 10,000 upon reaching the age of 65. The standard has been set at 70% of a worker's last-earned salary, that is, 70% of EUR 50,000 = EUR 35,000. This worker will have the option to accrue EUR 25,000 in pension in the second pillar and/or the third pillar under tax-efficient conditions. If the worker

[78] Convention between the Kingdom of the Netherlands and the Kingdom of Belgium for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital, *Bulletin of Acts and Decrees*, 2002, 596.

[79] See <www.efr.be>.

[80] See (in Dutch) F. Janse, 'Een Nederlands-Belgische pensioenregeling: niet langer een fiscale illusie', *Tijdschrift voor Pensioenvraagstukken* 3 (2009): 93–99.

[81] The Green Paper again refers to the person who developed this model: G.J.B. Dietvorst, 'Proposal for a Pension Model with a Compensating Layer', *EC Tax Review* 3 (2007): 142–145.

has the prospect of accruing EUR 15,000 in pension benefits in the second pillar, they are still eligible for tax relief on EUR 10,000 in the third pillar. And if this person does not accrue any second pillar pension (for instance because they came to be self-employed), their tax relief will be EUR 25,000 in the third pillar. This effectively makes the three pension pillars communicating vessels. The Dutch model partly takes this form. Tax relief is granted in the third pillar if minimal or no pension benefits are being accrued in the second pillar. The scale of the tax relief is not such, however, that a retirement provision can always be supplemented to 70% of a person's income.

The multi-pillar model can contribute to lifting barriers to cross-border pension accrual in Europe. Member States currently use different definitions of the scope and substance of second-pillar and third-pillar pensions. What is more, access to these pillars in the Member States is not open to the same group of citizens. In the Netherlands, for instance, self-employed persons do not qualify as 'undertaking an occupational activity', which bars them from accruing pension under the second pillar. Member States that have implemented the 'broader' IORP definition of Article 6 do consider self-employed persons as undertaking occupational activity.[82] In order to prevent such qualification differences, a suggestion might be to open up the second and third pillars to all so that no citizen experiences any obstacles in accruing an adequate retirement provision. Whether a citizen is a worker, a business owner or a self-employed person, they should have access to the second and third pillars, *and* qualify for tax relief to allow them to retire on a decent pension.

4. The Feasibility of a UK/Dutch Tax Qualifying Pension Scheme

Commissioned by Holland Financial Centre for Retirement Management,[83] PwC performed a feasibility study regarding a UK/Dutch tax qualifying DC pension scheme.[84] UK and Dutch tax pension systems show many similarities. The idea of this study is to develop one single pension scheme, that qualifies for tax relief in the UK as well as in the Netherlands. To this end, firstly all relevant UK and Dutch fiscal pension criteria were inventoried and differences and similarities were described. All the similarities were entered into the pension scheme so that finally a blue print was established. This feasibility study shows that a tax qualifying UK/Dutch pension scheme is indeed very well possible. The study is too extensive to discuss in this article in full. We therefore focus on a few noticeable issues.

4.1. First Pillar Pension Offset

A Dutch tax qualifying pension scheme should take the state pension into account. Effectively this means that the first part of a salary does not qualify for pension accrual. The reason for this is that the employee will already receive a first pillar state pension in the future. The salary that corresponds with this first pillar pension is not pensionable from a tax point of view. Therefore, an offset has to be taken into consideration.[85] In the UK, such a provision does not exist in tax law. However, it is not forbidden to have such an offset in the pension scheme. In order to have the pension scheme tax qualified in both countries, an offset of EUR 15,000 is suggested.

4.2. Maximum Annual Pension Contributions

In the Netherlands, DC pension contributions are regulated in such a way that a maximum percentage of the pensionable wage is tax deductible. This percentage rises during the age of the employee so that actuarial neutrality between ages is achieved.[86] In the UK the only applicable maximum to the premium is that the total employer and employee contribution is maximized to GBP 50,000. This difference between the UK and the Netherlands can be solved by using the Dutch applicable premium percentages. By maximizing the pensionable salary to a level that once you multiply this pensionable salary by the applicable maximum Dutch premium percentage, the outcome is never higher that GBP 50,000, the pension scheme is tax favourable in both countries. Hence, the Dutch as well as the UK restrictions are taken into consideration at the same time.

4.3. Maximum Pension

Besides the maximum allowable pension premium, a maximum pension payment is also applicable from a Dutch point of view. A pension annuity cannot be higher than 100% of the final salary.[87] Such a wage related maximum does not exist in the UK. However, if the total pension capital exceeds GBP 1,500,000, an extra tax penalty is applicable to the employee. Both limitations can easily be combined in a UK/Dutch pension scheme.

4.4. Further Research Pending

As said, a UK/Dutch tax qualifying pension scheme seems possible. However, before such a scheme can be operational, other elements than tax have to be taken into consideration. Therefore, further research is pending, for instance with regard to social and labour law, communication requirements, currency issues and supervisory requirements. Certainly, barriers and obstacles will arise but our estimation is that they will prove to be no 'show stoppers'. Since an unrestricted tax acceptance of foreign pension tax systems is not likely to arise anywhere in the near future, a tax-efficient multi-country pension scheme is the only way of really creating a market for pan-European pension schemes.

82 We do not know of a review showing how the Member States have implemented this article of the IORP Directive.
83 <www.hollandfinancialcentre.nl>.
84 Once the final study is finished in 2011, it is downloadable at <www.hollandfinancialcentre.com>.
85 Article 18a, para. 8, Dutch Wage Tax Act 1964.
86 Article 18a, para. 3, Dutch Wage Tax Act 1964 and order by the Dutch Under-secretary of Finance, 21 Dec. 2009, No. CPP2009/1487M, *Government Gazette*, No. 20523.
87 Article 18a, para. 7, Dutch Wage Tax Act 1964.

5. Conclusion

The cross-border activities of IORPs are slow in coming off the ground. As the Commission states in the Green Paper, they prevent the full realization of efficiency gains arising from scale economies and competition, thereby raising the cost of pensions and restricting consumer choice.[88] In this article, we hope to have demonstrated that the obstacles to a well-functioning internal market for IORPs are due mostly to differences in national and European laws. At European level, there is no clear definition of the concept of cross-border activity, nor are there any harmonized supervision rules. There are substantial differences at national level due to the complex interaction between EU and domestic laws. In addition, tax laws form a considerable obstacle to achieving a fully fledged internal market for pensions.

What is needed to overcome these obstacles is a revision of the IORP Directive, better convergence of supervision and more clarity about national differences. A tailor-made European supervision regime for IORPs would be progress. It would also be useful from an internal market perspective if the Commission were to indicate – even in the broadest of outlines – what provisions of national law do and do not come under the concept of social and labour legislation.[89] Finally, it would be a step in the right direction if the Member States were to accept the tax aspects of each other's pension schemes at European level (applying the principle of mutual recognition) and allow full tax relief for pension contributions, at least in the hands of mobile workers. Until then, initiatives in establishing a multi-country tax-efficient pension scheme are more than welcome and should be encouraged.

88 Quoted from the Green Paper.
89 Having regard to the sovereignty of the Member States.

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