ARTICLE

Pensions and the PEPP: The Necessity of an EU Approach

H. VAN MEERTEN: CHAIR EU PENSION LAW UTRECHT UNIVERSITY*
J. J VAN ZANDEN: POLICY ADVISOR EUROPEAN PARLIAMENT (WRITES IN PERSONAL CAPACITY).**

1. INTRODUCTION: WHY IS THE EU NECESSARY?

A few years ago, this magazine addressed some pension issues.[1] It seems time for an update on these matters. What is anno 2018 the state of affairs in the EU regarding pensions? In this article, we will explore the European pension landscape further and highlight developments that in our view form the basics of what we refer to an 'EU Pension Union'.

We will also discuss the 'Pan European Pension Product' (PEPP), the latest of the European developments of the internal pension market, which could be an improvement for undertakings and individuals, who are faced with many different pension schemes and pension funds in several jurisdictions.

1.1. EU Financial Legislation

Over the recent years, there has been an increase of European legislation concerning the different prudential requirements of financial service providers through Europe, as well as harmonization of information requirements to protect the customer from intransparency of different (retail) finance products.[2] The financial Regulations and Directives concerning EU investment funds, banks, insurers and pension funds, e.g. UCITS,[3] MIFIDII,[4] Solvency II,[5] IORPII[6] and CRD[7] all intend to improve the 'financial climate' of the EU and of its consumers, thereby levelling the playing field and creating new opportunities for companies and customers throughout the EU.

A wide variety of areas is becoming increasingly internationalized, including the area of old-age pensions. Social security, on the other hand, the area to which pensions in a large number of countries belong, seems to insist on remaining a national matter. A statement heard in many circles is that ''Europe' should not interfere with our pensions.' This is usually followed by a phrase often heard in national parliaments: 'we can manage very well on our own, we don't need Europe for that.'

The majority of the political representatives and many of certain EU pension funds seem to share this attitude. The question arises whether it is possible to by-pass Europe when designing a national pension system.

Besides the enormous increase in financial legislation, which also to a great extent apply to IORPs, a few other examples follow.

First, the problem of setting the pension age in a given country: is it not strange that in one country this can be set at 55, for example, and in another EU country at 67? This disparity is particularly troublesome given that in many countries with a lower pension age a large part of the population is rapidly reaching retirement-age.[8] As a result of these different trends among age-groups, the demographic old-age dependency ratio (people aged 65 or above relative to those aged 15–64) is projected to increase from 27.8% to 50.1% in the EU as a whole over the projection period.[9] This implies that the EU would move from having four working-age people for every person aged over 65 years to about two working-age persons.[10]

* Email: j.j.vanzanden@students.uu.nl.
** Email: H.vanMeerten@uu.nl.

1 H. van Meerten & B. Starink, *Impediments to an Internal Market for Institutions for Occupational Retirement Provision*, 7(6) Eur. Co. L. (2010).

2 *See* for an overview: H. van Meerten & S. N. Hooghiemstra, *PEPP – Towards a Harmonized European Legislative Framework for Personal Pensions* 94–95, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2993991.

3 Council Directive 85/611/EEC of 20 Dec. 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), has been significantly revised a number of times. In the fourth revision the directive was restructured: *see* Directive 2009/65/EG of the European Parliament and Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities.

4 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

5 Directive 2009/138/EC, of the European Parliament and Council of 25 Nov. 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II). This directive replaced the current insurance directive (Solvency I) and was to enter into force in 2016.

6 Directive 2016/2341/EU of the European Parliament and of the Council of 14 Dec. 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs).

7 Originally: Directive 2006/48/EC of the European Parliament and the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions.

8 'The demographic old-age dependency ratio set to nearly double over the long-term,' according to the European Commission in 'The 2015 Ageing report', http://ec.europa.eu/economy_finance/publications/european_economy/2015/pdf/ee3_en.pdf.

9 *Ibid.*

10 *Ibid.*

Van Meerten, H. & Van Zanden, J. J . 'Pensions and the PEPP: The Necessity of an EU Approach'. *European Company Law Journal* 15, no. 3 (2018): 66–72.
© 2018 Kluwer Law International BV, The Netherlands

Second, (huge) deficits in pension funds put severe pressure on our common currency, the Euro.[11] The EU Court of Justice held in the *Hogan* case[12] in 2013 that a Member State can be held liable for malfunctioning pension funds.[13] The Bankruptcy Directive provides employee protection where the employing enterprise files for bankruptcy.[14] But how has the *Hogan* decision been interpreted by EU Member States? The United Kingdom and Ireland take a different position than the Netherlands.[15] The governments of the United Kingdom and Ireland recognize that the effect of this decision will be great.[16] The government of the Netherlands, on the contrary, believes that this decision will have very little effect.[17] Does the Dutch government see things correctly? The situation in the *Hogan* case, namely that the state was treated as guarantor for the pensions, would not arise in the Netherlands, according to the Dutch government. Because pension funds are in the position of being able to reduce their liability, it is argued that 49% would not be reached. Even though the *Hogan* judgment leaves considerable room for interpretation, the fact that funds can limit liability is not the point. What matters is whether the original 49% obligation can be met. In Hogan, it can be argued, a de facto European guarantee fund is created.[18]

A third example is the compulsory membership to a pension fund. An in-depth study in 2017 shows that this requirement might be contrary to EU law.[19] Having in place a system that is ultimately liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State by implicitly or explicitly making affiliation to a provider from another Member State is forbidden.[20] Exceptions to this prohibition are allowed only under strict conditions: they must be justified by overriding requirements relating to the public interest, be non-discriminatory and must be necessary and appropriate to attain the pursued objective. In the case of direct discrimination, only the grounds enumerated in Article 52 TFEU provide reasons to justify such measures.

Fourth, another important general development that must be mentioned is the following. Since entry into force of the EU Charter of Fundamental Rights in 2009,[21] it can be argued that all of the European Union's general principles of law are essentially 'covered.' The Charter codifies, directly or indirectly, all existing EU fundamental rights and legal principles.[22] With *Barents/Brinkhorst* it can even be stated that, including by national courts and the ECJ, the Charter must always be applied.[23] This seems to follow the reasoning set out in *Faber*,[24] in which the ECJ held that when an EU legal norm is used as a rule of public order in an internal legal system and is of the same order as a national rule, the national courts are required to test each provision which is transposed into national law against the EU norm.

Since the case law of the ECJ, i.e. the *AMS*[25] and the *Google*[26] cases, is seems undisputed that the Charter can have a direct horizontal effect, and might therefore be successfully invoked by an individual or a company against for example a relevant pension fund. A fortiori, in national proceeding Article 17 of the Charter is invoked.

Article 17(1) of the Charter reads:

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

In the case of *Skorkiewicz v. Poland*, the Court of Human Rights in Strasbourg, the ECtHR,[27] held that:

11 Having a well-developed pension system is part of the EU Stability and Growth Pact.

12 C-398/11 (Hogan).

13 H. van Meerten, *European Ruling on Pensions: Second Warning for the Netherlands*, in *Democracy and Rule of Law in the European Union. Essays in Honour of Jaap W. de Zwaan* 146–154 (F.A.N.J Goudappel, Flora A.N.J. & E.M.H. Hirsch Ballin eds, The Hague: Asser Press 2016).

14 Directive 2008/94/EC of the European Parliament and of the Council of 22 Oct. 2008 on the protection of employees in the event of the insolvency of their employer (Codified version).

15 van Meerten, *supra* n. 13.

16 Presentation at the 5th World Pension Summit, 5–6 Nov. 2014, The Hague, by Irishman Jamie McConville.

17 Lower Chamber of the Dutch Parliament: Tweede Kamer, 32 043, nr. 187, 2013–2014.

18 *Ibid.*; at the time of writing, a preliminary ruling was requested at the ECJ on the question if Art. 8 of Directive 80/987/EEC requires Member States to ensure that every individual employee receives at least 50% of the value accrued entitlement to old-age benefits in the event that his employer becomes insolvent. C-17/17 (*Grenville Hampshire v. The Board of the Pension Protection Fund*).

19 H. van Meerten & E. S. Schmidt, *Compulsory Membership of Pension Schemes and the Free Movement of Services in the EU*, 1 Eur. J. Soc. Sec. 118–140 (2017).

20 *Ibid.*

21 Charter of Fundamental Rights of the European Union (2012) OJ C326.

22 It can be argued that the Charter can be read to 'include' even all 'national' principles of law.

23 R. Barents & L. J. Brinkhorst, *Grondlijnen van Europees Recht* 131 (Deventer: Kluwer 2012).

24 C-479/13 (Faber).

25 C-176/12 (AMS).

26 C-131/12 (*Google*). That can be concluded by the following, at [97] the ECJ held in connection with the application of Directive 95/46/EC on the data protection of individuals: 'As the data subject (an individual, *HvM, JvZ*) may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public by its inclusion.'

27 ECtHR *Skorkiewicz v. Poland* (1999) Application No. 34610/97.

> s*The Court recalls that the making of contributions to a pension fund may, in certain circumstances, create a property right and such a right may be affected by the manner in which the fund is distributed*

The Supreme Court of Cyprus stipulated in 2014:

> *In this case we observe that neither the law made provision for fair compensation for the loss suffered by the applicants, nor was there any arrangement made for payment to them of fair compensation in due course. Consequently Article 17 of the Charter may not legitimise the provision under consideration, as complying with the Acquis Communautaire*[28]

The 'property issue' raises the question of the nature of the relationship of the Charter to other EU and European and international law.[29] The 'Opinion 2/13' (issued by the ECJ) – concerning accession of the EU to the ECHR – may provide an answer. There it was stated – in brief – that EU law has priority over the Charter of Human Rights, the ECHR.

The possible consequences of Opinion 2/13 for the ECHR have already been discussed,[30] and in the *Kadi* decision the relationship between EU law and UN law was addressed,[31] but the consequences of Opinion 2/13 are also *mutatis mutandis* applicable to the relationship between primary EU law, that is the EU Treaty and the Charter. In other words, Opinion 2/13 might contain an indication that the Charter has priority over the EU treaty itself. It is certainly arguable that this is indeed the case.[32]

In other words, fundamental rights, such as the property rights over pensions, can be directly invoked by an individual against a Member State and/or an IORP.

To summarize this chapter, More EU cooperation is not only needed given the reality of EU law,[33] more importantly it is in the interest of pension participants. We should not forget that this is the reason for having a pension scheme in the first place. And the tide may be turning – more and more people are seeing that national organization of pension systems seems to have at least a number of significant deficiencies, not the least the impossibility to have a portable pension.

Having said this, it is now necessary to make some general comments about the pillar systems (section 2). In section 3 we will focus on the IORPs and the PEPPs. In section 4 some conclusions will follow.

2. PENSIONS: A THREE WAY STREET

2.1. The Three Pillars

To understand the issues of pensions throughout Europe, a brief description of the pension layout will be provided.

Pensions are commonly (and roughly) divided into three pillars, all regulated by different principles and legislation. The first pillar is State sponsored, generally funded via a pay-as-you-go-system, or directly from taxes. The first pillar is generally considered a pure social matter, and available to individuals without prejudice to any history of employment. The second pillar is linked to the status of employment. Workers enrol in a collective pension scheme via their employers, either mandatory or voluntarily. The second pillar pension usually makes up for the biggest part of the retirement income of the retiree. The third pillar consists of a pension savings plan that was purchased on an individual level. These are not linked to any employment status and governed by the principle of the market. It must be noted that these pillars are not strictly separated from each other, but act as a general divide between the different sources of retirement income. Some 'borderline' cases are imaginable, such as a group personal pension in which the social partners choose a pension, which the employer voluntarily offers.[34] On a European level, EIOPA[35] leaves it to the Member States to determine if a pension is considered a second or third pillar product.[36]

However, the divide between second and third pillar products is relevant when considering the applicable legislation. For example: if an employer offers to pay for a third pillar product, it may be argued that this third pillar product became a second pillar product.

Since the publication 'Averting the old age crisis: policies to protect the old and promote growth' by the World Bank in 1994, the use of the three-pillars to divide different pension schemes has become well known and broadly used concept.[37] These three pillars are often described as the public, occupational and voluntary individual pension pillar.[38] But this distinction does not stand alone,

28 Cyprus/Supreme Court, Review Jurisdiction/Joined Cases 740/11, 891/11, 892/11 and other. Full case, http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_3/2014/3-201410-740-11etc_major1.htm&qstring=%EA%EF%F5%F4%F3%E5%EB%E9%ED%2A.

29 *See* in detail: P. Borsjé & H. van Meerten, *Pension Rights and Entitlement Conversion ('Invaren'): Lessons from a Dutch Perspective with Regard to the Implications of the EU Charter*, 18 Eur. J. Soc. Sec. 46–73 (2016).

30 *Ibid.*

31 Court of Justice EU, 3 Sept. 2008, nr. C-402/05 (Kadi), para. 316: 'As noted above in paragraphs 281 to 284, the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement.'

32 H. van Meerten, *Directe horizontale werking van het vrije dienstenverkeer*, in *Ondernemend met pensioen: opstellen aangeboden aan Prof. G.J.B Dietvorst* (B. Starink & M. Visser eds, Deventer: Kluwer).

33 P. Borsjé & H. van Meerten, *A EU Pensions Union*, in *Research Handbook on European Social Security Law* 385–412 (F. Pennings et al. eds, Cheltenham: Edward Elgar publishing Limited 2015).

34 J. J. van Zanden, *Het PEPP: is er nog een pijler op te trekken?*, 34 Pensioenmagazine 4 (2017).

35 European Insurance and Occupational Pensions Authority.

36 'Towards an EU *Single Market* for *Personal Pensions*' EIOPA-BoS-14/029, at 25.

37 Directorate-General for internal policies, 'Pension Schemes, *Study* for the EMPL *Committee*', PE 536.281, at 15.

38 R. Davies, *Occupational Pensions: Second Pillar Provision in the EU Policy Context* 2, European Parliament Library Briefing, European Parliament, Brussels (2013).

some differentiate in the objectives of the pillar; insuring against old age poverty (1), insuring against inadequate replacement of income during retirement (2) and voluntary pension savings (3).[39]

The distinction between the pillars is often made using (1) the mechanism of funding and (2) the mandatory or individual participation of the fund.[40]

2.2. The First Pillar

Even within this pillar, the differences between the schemes are enormous. For example, between the different Member States of the EU the goals within the first pillars are not completely uniform. The OECD makes a distinction between three different subtypes of the first pillar. Firstly, a 'basic' first pillar pension scheme uses a flat rate of benefits, or benefits linked to labour market participation.[41] The Dutch state pension, the AOW-system, for example, is linked to the years of domicile within the Kingdom of the Netherlands. Every year of residence within the Netherlands grants the right of 2% of the total AOW benefit, which means that the full right to the Dutch first pillar pension is reached after fifty years of residence, not linked to any requirements of labour market participation.[42] Secondly, 'minimum' pension schemes have the goal of ensuring that a minimum of pension benefits is guaranteed. If the income from the other pillars is insufficient, the first pillar will contribute to the retirees' income, until the minimum is reached.[43] Thirdly, targeted distribution may be used for specific individuals, taking into account their specific needs.

All three subversions of the first pillar may be used in the same system, which can feature both a targeted and a minimum system, like in Belgium or even all three, like in Luxembourg and Malta.[44]

2.3. The Second Pillar

The second pillar is aimed at an adequate replacement of income after retirement.[45] In a sense, this pillar is an insurance against the inability to be employed after retirement. The amount for which an employee is insured differs in both the different systems throughout the EU and the individual saver. The second pillar is linked to occupational schemes, that often have a *defined benefit* (DB), or a *defined contribution* (DC) *mechanism.* The DB schemes often have a redistribution element, depending on the design.[46] In the Netherlands, a norm of 70% of the medial income after retirement was thought to be the DB. However, like the pay-as-you-go-system, DB systems are vulnerable to changing demographics and economic environments, which may lead to a lower return. In some countries, the DB scheme is linked with a mandatory participation of the employee. In contrast to the first pillar pension schemes, this participation (mandatory or voluntary) is linked to *privately* managed pension schemes.

As mentioned before, a distinction within the second pillar may be made to (1) the use of DB and (2) DC schemes. In the latter, the investment risk is put at the saver, while a DB guarantees a certain amount in the pay-out phase, leaving any investment risks at the provider.[47] A DB is closely linked to the actual participation in the labour market, while a DC scheme has a closer link to the actual earnings.

2.4. The Third Pillar

The three main characteristics of the third pillar are pension schemes that are (1) private (2) voluntary and (3) funded.[48] Most of these schemes are based on DC, complementing the individual character of the third pillar. However, providers are not bound to offer DC-schemes, so pensions in the third pillar may be quite diverse. This is also a reason why third pillar pension products may be nearly indistinguishable from some second pillar products.

These 'borderline cases' combine the voluntary nature of the third pillar with an element of employment.[49] Some of these are even sold as both occupational and personal, such as the British 'group personal pension'.[50] Furthermore, occupational pension schemes with an opt-out option can be considered voluntary, as well as closely linked to employment. Individual contractual agreements between an employer and employee in which the first pays a contribution to a pension scheme of the choosing of the latter are both voluntary and closely linked to the employment.

2.5. The Different Pension Pillars of Europe

As stated above, it is not always possible to create a clear distinction between the different products and pension pillars. While it is argued in The Netherlands that a pension product/scheme is 'second pillar' as soon as any form or involvement of employment is involved,[51] other jurisdictions have completely voluntary individual

39 OECD, *Pensions at a Glance: Public Policies Across OECD* (Paris: OECD Publishing 2005).
40 Directorate-General for internal policies, 'Pension Schemes, study for the EMPL committee', PE 536.281, at 16.
41 Directorate-General for internal policies, 'Pension Schemes, study for the EMPL committee', PE 536.281, at 17.
42 https://www.svb.nl/int/nl/aow/hoogte_aow/hoeveel_aow_later.
43 Directorate-General for internal policies, 'Pension Schemes, study for the EMPL committee', PE 536.281, at 18.
44 Directorate-General for internal policies, 'Pension Schemes, study for the EMPL committee', PE 536.281, at 18.
45 Directorate-General for internal policies, 'Pension Schemes, study for the EMPL committee', PE 536.281, at 20.
46 Directorate-General for internal policies, 'Pension Schemes, study for the EMPL committee', PE 536.281, at 17.
47 Directorate-General for internal policies, 'Pension Schemes, study for the EMPL committee', PE 536.281, at 20.
48 Directorate-General for internal policies, 'Pension Schemes, study for the EMPL committee', PE 536.281, at 21.
49 van Zanden, *supra* n. 34.
50 'Towards an EU *Single Market* for *Personal Pensions*' EIOPA-BoS-14/029, at 17.
51 van Zanden, *supra* n. 34.

second pillar schemes, such as Belgium,[52] which The Netherlands might classify as 'third pillar'. As a consequence, in cross border situations uncertainty about applicable legislation may occur.[53] This might be a problem when creating European legislation.

A 'pension' aims to offer a saver an income after retirement and/or a certain age. This broad aim is governed by numerous sectors of law, such as social, labour, financial and tax legislation. However, once the cross border element is added, an even wider scope of legislation becomes applicable,[54] not in the last place the different freedoms under the EU Treaty (TFEU) and the EU Charter of fundamental rights (see below).

Most importantly, if a pension scheme can be qualified as 'occupational' Article 45 TFEU in principle applies, granting the pension participant additional rights under the freedom of workers.

After all, if an EU-citizen qualifies as a 'worker', Article 45 TFEU grants him the right to work in another Member State than his home Member State. The ECJ has ruled that under Article 45 TFEU workers must be able to retain their pension rights when migrating (see below).[55] Workers who have worked in multiple Member States should not be disadvantaged in comparison with those who have lived in the same Member State.[56]

3. IORPS AND PEPPS AND PENSION PORTABILITY

3.1. Institutions

Portability of pension rights has been an issue for several years. The EU legislator tried to enhance portability for providers and consumers.[57]

First of all via portability, on a collective basis, where the scheme can be transferred cross-border. This is arranged for in the IORP II Directive, the directive concerning Institutions for Occupational Retirement Provision. This Directive relates to the 'second pillar' of the pension system: the work-related pension that supplements the state pension. IORP II Directive intends to achieve a high degree of transparency and to clarify the terms under which a pension fund can operate in more than one Member State. An IORP, regardless of its national institutional form, can benefit from the principles of free movement of capital and free provision of services in the EU.[58] The institution can obtain an 'European passport', which means that 'pension funds in one EU country can manage occupational pension schemes for companies established in another EU country and pan-EU companies can have a single pension fund for all their subsidiaries throughout the EU'.[59] Furthermore, an IORP must make it clear when and how it may reduce pension payments to ensure the saver will not face unforeseen pension cuts.

Portability of pensions in the IORP II remains difficult to achieve.[60] For example, in the new Directive, the Dutch and the Belgian supervisory authorities (DNB and FSMA) can block transfers. Local supervisors shall, according to their local law, judge if the assets to be transferred are sufficient and appropriate to cover the liabilities, technical provisions and other obligations or rights to be transferred.[61]

At the same time, in case of a transfer of a scheme, the technical provisions of the receiving IORP must be fully funded 'at the date of the transfer, where the transfer results in a cross-border activity'. When Belgium is the receiving IORP, Belgian law decides whether the IORP is fully funded. In our view, all pension schemes (including domestic) count for calculating the technical provisions. This would mean that the Dutch transferred scheme might be underfunded but, for example through a recovery plan, it can show that it will meet liabilities. The transfer cannot be blocked in this case.[62]

3.2. Consumers

Second, the EC tries to improve portability for individuals. Recently, the European Commission launched another initiative: the creation of a Pan-European Pension Product (PEPP).

One of the key differences of the PEPP in comparison to other pension initiatives such as the IORP Directive, is the fact it regulates the *product* and not the provider.

The PEPP will be a retail finance product, which will carry a European label, after approval of the EIOPA. This European label will make it, like the European passport for the IORP, eligible for distribution throughout the EU/EEA. Such a 'European' product is an ambitious project, worthy of consideration.

The PEPP is based on a 'second regime'. A second regime exists next to and independently from the twenty-eight EU Member States. Since the PEPP has the legal form of a Regulation that covers only the product, it does prima facie not touch upon any EU or national legislation concerning the legislation of its providers, such as for example the Solvency II framework.

The PEPP generally aims to provide an adequate pension for two distinct group of consumers: those who need the PEPP because they

52 Such as 'POZ', 'Pensioenovereenkomst voor zelfstandigen', Pensionschemes for the self-employed.
53 van Meerten & Starink, *supra* n. 1.
54 Although also in purely internal situations EU Law applies. *See* C-31/16.
55 C-379/09 (*Casteels v. British Airways).*
56 *Ibid.*
57 *See* in detail: H. van Meerten & L. van der Vaart, *De pensioen opPEPPer?*, 44 TPV (2017) (in Dutch).
58 https://ec.europa.eu/info/business-economy-euro/banking-and-finance/insurance-and-pensions/occupational-pension-funds_en.
59 *Ibid.*
60 van Meerten & van der Vaart, *supra* n. 57.
61 H. van Meerten, *A Dutch View on IORP II*, IPE (Sept. 2017).
62 *Ibid.*

are mobile within the EU and those who are unable to purchase a personal pension plan because of the lack of supply in their home Member State.

3.3. Pension Gap

The PEPP might also be a next step in reducing the pension (gender) gap. It was estimated that approximately EUR 2 trillion per year is needed to address the pensions savings shortfall across Europe.[63]

Furthermore, a British study shows that on average, men under 35 receive 217 pounds more in employer contributions than their female co-workers.[64] This pension gap could result in a difference of 47.000 pounds after retirement. Factors such as non-continues employment, maternity leaves and part time work lead to a wide discrepancy in mostly the occupational pillar, which depends on an active contribution on the labour market. A well-designed individual pension product may help enable women to save on an individual basis and maybe tighten the discrepancy between retirement income for men and women.

3.4. Further PEPP Characteristics

After having touched upon the *aim* of the product, now is briefly examined the characteristics of the product itself. The PEPP basically constitutes of a pension savings product, combined with cross border capabilities within the different Member States of the EU. The PEPP is a voluntary, individual pension product that offers savers a Pan-European option to save for a retirement income. The PEPP has an explicit retirement objective, but the consumer and provider are, to some degree, free to determine the details of the product.

Therefore, there is no such thing as 'the PEPP', but rather 'a PEPP'. In the proposal of the Commission, it is determined that savers will be able to choose one of five investment options, which are designed to offer a high level of consumer protection, due to the use of risk-mitigation techniques.[65] One of these options is the 'default', which offers capital protection. It remains (at the time of writing this article) however unclear if this capital protection constitutes a capital guarantee, or a capital protection mechanism, such as life-cycling.

A switching mechanism enables savers to change their investment option, which can be triggered every five years. The PEPP has to be kept in an individual account, which is directly funded by the saver. However, this does not necessarily exclude employers from contributing to the product on a voluntary basis, which leads to a certain degree of crossing the different pillars.

The PEPP might be an improvement in the area of portability because the PEPP regime and applicable the ECJ jurisprudence with regards to the free movement of workers. For example, in the *Casteels* case the Court held:

> *Since the scheme at issue in the main proceedings in the present case constitutes an obstacle to the freedom of movement for workers which is, in principle, prohibited by Article 45 TFEU, that scheme can be allowed only on condition that it pursues a legitimate objective in the public interest, is appropriate to ensuring the attainment of that objective, and does not go beyond what is necessary to attain the objective pursued.*[66]

Although the ECJ applied the free movement of workers in the *Casteels* case to establishment periods of pension entitlements, this ruling can be drawn in a broader sense, which makes portability of pension entitlements possible in the sense that national (fiscal) requirements cannot form an obstacle to the free movement of workers ex 45 TFEU.[67]

Finally, it should be noted that, if the PEPP develops like its American equivalent, the '401 (K)', it can be said with caution that the PEPP can eventually lead to improvement for the pensioner. The 401 (K) showed a cost saving of 30% over a period of fourteen years.[68]

3.5. IORPs as PEPP Providers?

In the PEPP proposal of the Commission IORPs are eligible as PEPP providers.[69] However, IORPs have a diverging nature throughout the Member States.[70] Some Member States, such as the Netherlands (PPI) and Luxembourg (SEPCAV) have investment fund alike IORPs, or Defined Contribution IORPs (DC IORPs) whereas other Member States offer Defined Benefit pension funds (DB IORP, also The Netherlands and the United Kingdom) and insurance company type of IORPs (France for instance).

DC IORPs, such as the Dutch PPI and Luxembourg SEPCAV, seem very suitable for offering the PEPP, while IORPs specializing in offering DB-schemes might not.[71] Some differentiation between the IORP providers might be feasible. As a starting point, it seems logical to include IORPs in the PEPP initiative. IORPs have a European passport, which enables them to operate in different

63 *Can New EU-Wide Pension Help Savers Dodge Retirement Crisis?*, DW (8 Sept. 2017).
64 https://www.ft.com/content/c9b74996-b582-11e7-aa26-bb002965bce8.
65 Art. 34 PEPP Regulation.
66 C-379/09 (*Casteels v. British Airways*), at [50].
67 van Meerten & van der Vaart, *supra* n. 57.
68 401(k) Fees Continue To Drop, Forbes, Aug. 2015.
69 Art. 6 PEPP Regulation.
70 H. van Meerten, *The Scope of the IORP Directive*, in *Social Services of General Interest in the EU* (U. Neergaard, E. Szyszczak, J. W. van de Gronden & M. Krajewski eds, The Hague: TMC Asser Press).
71 van Meerten & Hooghiemstra, *supra* n. 2.

Member States and, needless to say, IORPs have thorough pension scheme knowledge.

A widely heard criticism on the PEPP proposal however is that IORPs offering a PEPP might ‘interfere’ with national pension systems, especially with the mandatory enrolment in the second pillar. Mandatory pension schemes are often carried out by DB IORPs. The possibility for this category of IORPs to offer a PEPP could have implications for the second pillar. Therefore, it might be an idea to limit the possibility of IORPs offering the PEPP. A good possibility to do so is the exclusion of IORPs that offer coverage against biometric risks. Biometrical risks means risks linked to death, disability and longevity.

This would mean that a DC IORP would still be able to offer a PEPP throughout the EU and that a DB IORP would retain their role as social institutions.

4. FINAL REMARKS

As of 2015 it was clear that a European internal market for pensions had not yet been sufficiently developed.[72] This was also noted in the Green Paper by the European Commission concerning capital market unification published earlier that year.[73] The differences among the national pension rules of the Member States form an obstacle to developing simple cross-border pension rules. This not only prevents, for example, a cost-efficient pension build-up of an employee working abroad, but the differences among national rule also restrict a local pension participant in choosing a pension fund established abroad.[74]

EU law can help break down these barriers and many initiatives hereto have been. These initiatives, of which some are highlighted in this article, form the contours of a European Pension Union. However, not only is new legislation needed to further the EU Pensions Union. Existing legislation concerning, for example, free movement of persons must actually be applied and enforced. Unfortunately, this happens too infrequently at the present. The Charter might help in this respect.

The original purpose of the EU is to simplify and not complicate the activities of service providers in promoting their services across borders and that individuals are active on several European Member States without all kinds a national obstacles.

The PEPP might just achieve that.

72 Market development report on occupational pensions and cross-border IORPs, EIOPA-BoS-15/144 (9 July 2015).

73 Green paper of the European Commission on ‘Building a capital markets union’, 18 Feb. 2015, COM/2015/063 final.

74 Borsjé & van Meerten, *supra* n. 33.