Book Review

Dutch pension funds: Fiduciary duties and investing

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Alone among the nations, the Dutch seem to have solved the problems of second-tier pensions most satisfactorily. They are funded, resilient to demographic pressures, well managed, a source of capital markets funding and a crystal on the Dutch capitalist crown. Not all the Dutch agree; recent regulatory changes have added to the burden of the managers, and there are continual complaints about over-regulation; but there is no doubt that for the moment at least the occupational sector, usually managed as an industry-wide operation, is flourishing despite increasing longevity and the markets being under pressure.

In the midst of this Utopian structure comes this study of the legal framework of pension funds in the Netherlands, which comes out of a former doctoral dissertation at the University of Nijmegen. It explores the legal relationships between the pension fund and all its economic stakeholders. For UK readers its attraction is that it describes the fiduciary relationships that in the Netherlands operate under Roman Dutch law rather than Anglo-American trust law, which bears striking resemblances.

And like the English, the Dutch have a problem with what it is that the pension fund is protecting. The nature of the pension promise is much better dealt with in the Netherlands where the former benefits of the flexibility of pension fund obligations has been largely preserved,

although regulation is making this increasingly difficult. The Dutch system is to offer basic protection on only the core benefits — but the expensive benefits (such as indexation) are reserved for the discretion of what in England would be called the trustees, depending on the ability of the pension fund and its sponsors to be able to cope.

The study is a comprehensive one, and its translation from Dutch is never an intrusive one. Chapters cover the pension fund (rather than the trustees) as a fiduciary, the nature of the mandate (whether contractual or that of agency), the implication of the Dutch Civil Code, whether foundations (as opposed to the corporate structure) is better adjusted to the needs of pensions, the application of securities laws and governance and finally the ‘prudent man’ rule, as adopted from the common law system by the EU Pensions Directive and applies under Dutch law.

The book is in translation and there are occasional infelicities and confusions for the English-born reader, and it is a cut-down version from a thesis, so that also on occasion it seems a little cumbersome; but the topic is an engaging one, has become of increasing importance since the rise of fiduciary arrangements in continental Europe and the decline of discretionary trustee power in the UK and the US. It discusses in philosophical form many of the issues that our regulators would do well to contemplate before

initiating further compliance requirements and in particular concentrates on that great trio of major concerns: what is the pension deal, the fairness of the pensions deal and the way in which the pensions deal can be underpinned by funding. It also continues the rather hitherto passé discussion (in English circles) of the difference between occupational and insured schemes (returning now following the introduction of personal accounts and group personal pension schemes).

One minor criticism of this deeply thoughtful book is the misunderstanding it contains of the structure of the tax relief available to pre-funded pension arrangements. Jurisdictions that maintain the EET system (ie tax relief on the contributions, tax relief on the growth of investments and tax on the benefits) follow a system endorsed by the World Bank, the EU and the OECD. It works because it operates a form of fiscal neutrality; without it, it would be inefficient to pre-fund pension arrangements and the security of pensions would be even worse than it is already. But the book suggests,

disappointingly, that pension arrangements are fiscally privileged, which makes it hard to take the debate further on the way in which members' rights should be better enhanced.

This book is a wonderful tour of the legal ramifications of the nature of fiduciary obligations in pension arrangements in several jurisdictions and fills an enormous hole in the thinking of the policymakers involved in the way in which second-tier pension structures should operate. It should be a required reading for officials in the Treasury and Department of Work and Pensions, who are charged with responsibility for pensions; with this book and the more like it we might be able to find our way to a workable, proportionate and balanced system for regulation pensions, and make better and expanded use of the fiduciary principles that for 70 years and more served both the Netherlands and the UK without the need for untold pages of regulatory control.

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