Pensions governance: The control of occupational pension schemes in the UK and Germany

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Ralf Nöcker

studied law in Cologne and Paris and obtained a Master of Law at the London School of Economics. Having worked in law firms and public institutions in Germany, France and England, he is now a Visiting Research Fellow at the Centre for Pensions and Social Insurance and a guest lecturer at Birkbeck College, University of London. His PhD thesis (scheduled for completion in May 2001) will investigate if and to what extent UK pension funds can serve as a template for pension reform in Germany.

Abstract In this paper, pensions governance is developed as the conceptual basis of a comparative study of occupational pension schemes in the UK and Germany. An in-depth analysis of the pensions governance in the UK and Germany will show that in practice the substantive similarities prevail over the existing differences. To some extent, member-nominated trustees and dedicated consultation procedures in the UK resemble co-management and co-determination of the 'pension vehicles' used in Germany.

Introduction

Who controls pension funds in the UK and Germany? Clichés of aggressive fund managers in the UK and cosy industrial relations in Germany spring into mind. However, reality is never black and white and there are even more shades of grey to technical areas such as pensions. For example, who is aware that the famously strong participation rights of German workers do not extend to the level of funding of occupational pension schemes? And who on the continent would imagine that employees in the UK have a right to appoint member-nominated trustees?

Usually, such issues are approached from specialist areas of law; especially labour law and industrial relations,[1] or, in the UK, trust law.[2] Although such approaches provide valuable findings from their specialist point of view, they are too narrow for a comparative study. This paper tries to overcome the restrictions intrinsic to specialist and national law approaches by analysing occupational pension funds under the umbrella concept of 'pensions governance'.

Pensions governance is derived from corporate governance and consists of applying elements of corporate governance to occupational pension schemes. In this sense, pensions governance does not mean (corporate) governance by pension funds, but governance of pension funds. Keeping in mind that the corporate governance 'movement' was originally spearheaded by US pension funds, pensions governance is to a certain extent a recursive concept: it re-applies the principles and ideals of corporate governance to its own originators.

The first part of this paper will further elaborate on the concept of pensions

Ralf Nöcker
Centre for Pensions and Social Insurance, 7–15 Gresse Street, London W1 1LL

Tel: +44 (0)20 7631 6430;
e-mail: r.nocker@gmx.net

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governance; and the second part will outline the framework in which occupational pension schemes operate in the UK and Germany. Although the comparative conclusion in the last part will finally show that in practice, the substantive similarities in pensions governance prevail over the existing differences, the structures of occupational pension schemes vary to such an extent that an integrated analysis is impossible. For example, discretionary trusts are the only legal form of pension funds in the UK, whereas in Germany there is a choice of four 'pensions vehicles'. Consequently, the governance of occupational pension schemes will be analysed separately for the UK and Germany.

Introducing pensions governance

There is no generally recognised definition of corporate governance, but the description given by the OECD is a useful starting point: Corporate governance is '... the set of relationships between a company's management, its board, its shareholders and other stakeholders'.[3] In this first sense, corporate governance deals with the institutional issues relating to the 'government of a company' and focuses on board structures, executive and non-executive directors, and their remuneration. In other words corporate governance concentrates on the formal and procedural rules of how a company is run.

However, corporate governance also has a substantial dimension, consisting of the promotion of shareholder value as the overriding objective of a company. Placing the shareholders in the centre of a company's *raison d'être* requires management to change its traditional attitude. It is no longer possible for management to claim to be acting 'in the best interests of the company', while in reality acting in its own interests.

As to companies, governance problems are rooted in the separation of ownership and control, a tension also described as the principal–agent conflict between the shareholders and the management. Corporate governance tries to resolve this conflict in favour of the shareholders and puts other constituencies (employees, customers and suppliers) in the role of 'stakeholders'.

Pensions governance shares the formal approach of corporate governance. Accordingly, pensions governance is primarily concerned with consultation procedures and voting rights, rather than with material issues such as the exercise of a trustee's discretionary power or the impeachability of a German employer's decision to switch from one 'pension vehicle' to another.

However, the antagonism between ownership and control which fuels the corporate governance debate does not apply to occupational pension schemes in the same way. Neither the 'owner' nor the 'controller' of a pension fund can be clearly identified. This conceptual difficulty is exacerbated by the use of trust law in the UK, where the ownership rights are split by vesting the legal title in the trustees and the beneficial interest in the members.[4] However, it is the employees who ultimately receive the benefits, while the trustees only hold the property in order to secure and fund the benefits. This implies that the members of a scheme can be associated with the 'shareholders' of a company. This is even more so in Germany, where — even if a separate independent pension vehicle is used — employees have a legal claim against the employer. Moreover, occupational pension benefits enter the contractual employment relationship as 'deferred pay' and can be covered by collective

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bargaining agreements under the astonishingly similar provisions of s. 178 (2) (a) TULRA 1992 and s. 1 (1) Tarifvertragsgesetz (Collective Agreement Act 1969). Although much greater use of this has been made in Germany where collective bargaining agreements are legally binding for the employer,[5] the conclusion is the same for both countries: it is the members of a pension scheme who correspond most closely to the shareholders of a company.

Reaching out for the controllers of an occupational pension fund, one is tempted to point straight away to the trustees. However, the employer usually exercises significant control over the pension trust by retaining powers to amend the trust deed, replace trustees and veto certain matters. In fact, this relationship between the trustees and the employer can even be analysed as a 'balance of powers'.[6] In the UK, control of occupational pension schemes is therefore jointly exercised by the trustees and the employer; taken together they can be compared to the management of a company. In Germany, the employer retains even more influence in Germany, where the pension vehicle itself plays almost no independent role.

If pensions governance is to look at a relationship of contested control, it is to oppose the trustees and the employer together to the employees. This is the particularity of the concept of pensions governance and distinguishes it from other analysis of occupational pension schemes which focus on the relationship between the employer and the trustees.

Occupational pensions in the UK and Germany: *Beveridge v. Bismarck*

In both countries, occupational pensions are embedded in the general pension system of provision. However, the Beveridge system of social security in the UK and the German Bismarck system differ in the role attributed to occupational and private provision and this directly affects the relative importance of occupational pension.

In the UK, the state pension scheme provides a basic, flat-rate pension just below the official poverty level. It is complemented by the State Earnings-Related Pension Scheme ('SERPS'), aimed at an income replacement ratio of 20 per cent. SERPS will soon be replaced by the State Second Pension ('S2P'), designed to tackle age-related poverty persisting in the current system.[7] Contracting-out permits to substitute the second layer of public pension provision (SERPS/S2P) by an occupational scheme. Occupational pensions are governed by a complicated tax regime, but as a rule of thumb it can be said that benefits (including entitlements from previous employment) are not to exceed two thirds of a members' final gross remuneration, unless they are accrued at a constant pace of up to 1/30th of final remuneration for each year of service. Currently, the mean amount of occupational pensions is £94 per week, but a median amount of £55 indicates a wide spread between relatively few high entitlements and many low pensions.[8] Benefits for recently retired pensioners are considerably higher (£126 and £80 respectively) but this is due to a temporary 'cohort effect' which will peak in 2007.[9] Currently, 10.3m employees accrue occupational pensions (down from 11.6m in 1979) and there are around 7m deferred pensioners. Of all pensioners, 57 per cent receive occupational pension benefits, but this percentage is expected to fall after having reached its peak in 2007.[10]

Personal pensions were introduced in 1986 as a 'third pillar' of old age provision. Since then, a total of 10m

policies were taken out by 3.2m people.[11] Personal pensions were subsidised over the years by about £10.5bn, but this has contributed to the 'mis-selling' scandal, which is currently being 'cleaned up'.[12]

In the Beveridge-based pensions system of the UK, the role of the State is essentially limited to keeping pensioners out of poverty. However, the current pension system proves insufficient for 35 per cent of pensioners, who have to rely on means-tested benefits.[13] The S2P and the stakeholder pensions are trying to improve this, but both constitute technical improvements which are not intended to change the fundamental principle of the UK pensions system that securing the pre-retirement living standard is left to the initiative of the individual.

In contrast, in Germany's Bismarck system the un-funded public pension scheme (Gesetzliche Rentenversicherung) alone still aims at providing a comfortable income. Public pension benefits are indexed to earnings and can be accrued to up to 72 per cent of last income, capped at about £2,800 per month. The public scheme is based on the contributory principle, and a 'full' pension can only be drawn after 44 years of contributions. However, numerous 'social exceptions' deem contributions to be made during periods of illness, unemployment, care-provision and military service. Benefits are quite unevenly distributed, averaging £622 a month for a West German man, as opposed to £291 for an East German woman.[14] Contribution rates to the public pension scheme have been rising steadily since 1954 and have recently topped 40 per cent, before reforms put a halt to this. At the moment, Germany is in the middle of a 'structural' pensions reform at the outcome of which the replacement ratio is expected to drop to 64 per cent, while people might be asked to pay up to 4 per cent of their gross earnings into complimentary pension schemes.

Against this background, occupational pensions in Germany are confined to closing the gaps left by the public pension scheme. Shortfalls mainly exist for high earners with substantial incomes above the earnings cap and for people who are excluded from the public system because they are self-employed or work abroad. This gap-filling role heavily reduces the scope of occupational pensions.

Occupational pensions average £200 per month, but there are important disparities in coverage with large banks on the one extreme end of the scale and small trading companies on the other.[15] Provision by occupational pension schemes has been in steady decline since 1972, although recently there seems to be some recovery.[16]

Life insurance forms the third pillar of pension provision in Germany. Coverage is high (about 50 per cent in West Germany and a stunning 64 per cent in the East, the result of intensive selling activities after reunification), but so are surrender rates. Life insurance is still an immature pillar of the pension system, and average benefits are not expected to exceed £60 per month.[17]

As a consequence of the different structures of the Beveridge and the Bismarck model, the financial balance of the pension systems varies considerably. According to OECD statistics,[18] public pensions represent only 5.4 per cent of the GDP of the UK, whereas in Germany they account for 28.6 per cent of the GDP. Pension funds have a very different dimension, too, corresponding to 74.7 per cent of the GDP of the UK, compared to only 5.8 per cent in Germany. This difference is exacerbated by the fact that the OECD statistics

classify personal pensions in the UK as pension funds, but not the life insurance assets of the German third pillar. The figure for pension funds therefore covers the entire second and third pillar of the UK system, but only part of the second pillar in Germany, as 'book reserve' assets are not taken into account.

Pensions governance in the UK

As developed earlier in this paper, pensions governance focuses on the perspective of the members of an occupational pension scheme. In the UK, there is no homogenous set of rules, but a patchwork of procedures and regimes. These can be categorised as indirect participation via consultation procedures on the one hand and direct representation by member-nominated trustees on the other. In addition, actuaries and investment advisers are heavily involved in the day-to-day management of an occupational pension scheme. However, 91.3 per cent of all schemes are insured,[19] meaning that investment is reduced to the choice of the insurance policy. Moreover, there is strong suspicion that investment managers follow a 'herd instinct' rather taking independent investment decisions.[20] However, prior to the outcome of the Myners Review, it seems inappropriate to speculate on this question. We will therefore focus on the role of the actuary as a potential agent of pensions governance.

Employee consultation procedures

By definition, consultation procedures create only procedural rights and the outcome does not bind the employer. However, it renders issues public and raises the awareness of employees and trade unions in general. This governance potential must be kept in mind while assessing the impact of consultation procedures on contracting out and on payments of surpluses.

Contracting-out

If a pension scheme[21] provides certain kinds of benefits at a prescribed level, it can be contracted out of SERPS and, as a consequence, only reduced National Insurance Contributions are payable. Today, contracting-out can now result in lower benefits for the employees, a fact that lets appear the consultation procedure in a different light.

Matching SERPS?

When contracting-out was originally introduced in 1959, occupational pension schemes had to match or exceed the benefits of the graduated pension scheme in all circumstances. The principle that a contracted-out occupational pension could never fall short of the public pension it substituted was maintained when SERPS was introduced in 1975.[22] However, it has been given up since then.

A first inroad was made in 1988 when money purchase occupational and personal pensions were allowed to contract-out.[23] Although such schemes have to provide for 'protected rights', it is inherent to the defined contribution principle that they do not guarantee the level of annuities payable.

Originally, defined benefit schemes had to match SERPS benefits by meeting both the qualitative 'requisite benefit test' and the quantitative test of providing Guaranteed Minimum Pensions (GMP). The requisite benefit test was abolished in 1986. Later on, GMPs were held to be sexually discriminative in the *Barber* decision and the government concluded that it had to break the link with SERPS by abolishing GMPs altogether.[24] As a

result, defined benefit schemes no longer had to match the level of SERPS benefits they substituted. Since April 1997, it is sufficient for final salary schemes to provide benefits which for at least 90 per cent of the members and their spouses match the benefits of a fictional 'reference scheme'.[25] This minimum benchmark is loosely based on the pre-1986 regime, but as it is only a qualitative test, it does not guarantee that SERPS benefits are matched in all circumstances.[26]

The notice procedure

While the material aspects of the contracting out regime have changed several times, the consultation procedure has remained mainly the same. Every time the employer wants to modify the contracting-out status of his pension scheme, he must give a 'notice of intention' to the members, which describes the contributions and benefits of both SERPS and the occupational scheme. Although the notice still has to explain the effects and financial consequences of the proposed 'election', it no longer confirms that contracting out will not make the employee worse off — a logical consequence of the material changes described above.[27]

Consultation covers all members, ie, those to be contracted out, and those falling under one of the exemptions.[28] Recognised trade unions must also be given a copy of the notice, and the unions can require the notice period to be extended.[29] This last possibility somewhat reverses the position prior to the Pensions Act 1995, where trade unions had to consent to the abridging of the notice period.[30] During the notice period, members are invited to raise objections with the Contracted-Out Employment Group of the DSS or the employer. The second alternative is a substantial change to the previous regime, under which representations could only be made to the Occupational Pensions Board.[31]

In addition, there is also a more general obligation for the employer to consult with trade unions on the issues relating to the proposed contracting-out.[32] It is remarkable that the industrial tribunal is competent for any arising litigation. This puts the consultation of trade unions into a distinctive collective labour law context.

The current regime reinforces employee consultation at company level. This is a relatively recent tendency in British labour law,[33] and brings it more into line with continental European practices. However, the fact that members can be made worse off has deeply affected the governance dimension of contracting-out. Before 1988, there was no reason to object as members could only gain from contracting out, and consultation was a rather formal exercise. Nowadays, consultation warns employees that they might lose out on their pension benefits if they are transferred into a rebate-only defined contribution scheme. This is likely to lead to higher demands by the employees and unions.

In short, the erosion of the link between the public pension given up and the occupational pension promised has therefore transformed the formalistic consultation 'ritual' into a veritable pensions governance issue.

Employee consultation on payments of surplus

The Pensions Act 1995 makes formal consultation of employees a condition for surpluses to be paid back to sponsoring employers. Such payments may happen upon the winding-up of a scheme or as a way of reducing tax-defined over-funding of ongoing schemes. The

governance dimension of the applicable consultation procedure can only be fully assessed if the main arguments for and against such payouts are understood.

The playing field for bargaining the surplus

Pay-outs of surpluses to employers have triggered a series of high-profile litigation which has had a strong influence on English trust law in general.[34] Large surpluses were accumulated in the 1970s and 1980s when the restructuring of entire industries caused high redundancies, while weak preservation legislation meant that deferred pensioners and early leavers were economically beneficial to the pension scheme. Over the last five years or so, this has changed fundamentally and surpluses have become less frequent, but the main arguments are still the same.

Employees claim that the surplus is part of their 'deferred pay' and argue that the employer had promised to pay to the fund 'such amounts as the actuary shall determine.' Employers retort that their 'pension promise' relates only to the benefits, not to the fund itself. Accordingly, surpluses are the result of an 'over-payment', and the funds are held on 'resulting trust' for the employer. Moreover, employers argue that as they take the risk of meeting deficits in balance of cost schemes, they should also be entitled to benefit if there is a surplus.

Today, the respective roles of the trustees and the employers regarding the repayment of a surplus are mainly determined by statute. According to this, it is ultimately in the responsibility of the administrator (ie, the trustees) to make proposals[35] for the reduction of the surplus, and it is for the Inland Revenue to approve them.[36] This seems to give a lot of power to the trustees, but it must be kept in mind that benefit improvements and contribution holidays for employees usually require the consent of the employer[37] — a consent which he is unlikely to give unless he also receives a share of the surplus. However, only the trustees can allow a payment to the employer,[38] and before that, all benefits have to be increased by at least LPI. This is the 'playing field' on which negotiations take place that have been compared to 'horse trading' or 'poker playing',[39] notwithstanding the material duties developed by the courts. However, the balance now further tilts against the employer as tax advantages are only withdrawn in so far as the scheme is over-funded, whereas before the entire fund was affected. This comparatively mild sanction must be balanced against the tax charge of 40 per cent on pay-outs.

The consultation procedures

Employee consultation always follows the same rules, no matter if the scheme is ongoing, wound-up, or amended by Opra to sanction pay-outs. After tax approval has been obtained, members must be given a first notice stating on the proposed payment and on compliance with the Pensions Act 1995.[40] Trustees must also make a formal resolution and they must confirm their conviction that the payment to the employer is in the best interest of the employees. Within the following two months, members can make written representations to the trustees. A second notice with identical content follows, inviting members to make written representations to Opra within three months.[41] Finally, Opra has to clear the pay-out.[42]

Both notices cover the same issues that have already been sanctioned by the Inland Revenue. Although the second notice may contain some amendments, trustees have to re-apply for taxation approval if they wish to make substantial changes, triggering a new consultation

procedure. This ponderous 'deviation' demonstrates that members are not really expected to object successfully. The consultation procedure also operates as a double check on compliance with the Pensions Act 1995 and obliges trustees to make an embarrassing declaration. In fact, they have to tell their members that they could not think of any one else to whom to pay the surplus, and that even if 40 per cent of it are lost on taxation, they still think that this is in the best interest of the members. This self-contradictory, not to say absurd, statement is a good example of how pensions governance in the UK operates indirectly and through procedural rights. It may, however, provoke situations like in the *National Grid* case where the employer successfully managed to circumvent the strict payment regime by making a set-off.

Member-nominated trustees

Member-nominated trustees ('MNT') are the second limb of employee participation in the governance of occupational pension schemes. However, one might wonder why it makes such a difference who appoints a trustee. After all, all trustees share the same powers and duties, especially the one to act impartially between the beneficiaries, and all personal preferences are to disappear when the fiduciary relationship takes effect. However, it has been suggested that member-nominated trustees recognise the tension that exists between this ideal and the reality of many schemes.[43] Moreover, common sense implies that it is not so important who *nominates* a trustee but who she or he is, especially if she or he *is* an employee or an employer. Cannot it be assumed that each constituency will nominate one of theirs, ie, employees will nominate employees and employers will nominate an employer-related person? However, MNTs are bound by fiduciary duties, and even if these are relative standards and enforcement only draws the bottom line, MNT are more than employee representatives.

Member-nominated trustees are a direct and permanent regime of membership participation, but they only constitute a minority of the Trustees Board. Therefore, it is not so much their voting power, but their sheer existence that forces the employer and 'his' trustees to justify their actions and increase transparency. It has even been suggested that MNT act as an 'internal police force'[44] and it should be remembered that trustees were the first to report cases of pensions mis-selling.[45] In this light, MNT are very much in the usual line of indirect pensions governance in the UK.

This explains why the current possibility to opt out of MNT has been used extensively, although changes are imminent.

Opting-out by lack of objection

Currently, there is only a general principle that one-third of the trustees of exempt-approved pension schemes must be nominated by the members.[46] Rules governing the selection, removal, and replacement protect the MNTs and establish a principle of equality among trustees. However, the employer can avoid all employee representation by opting out of the MNT regime. The exiting trustees can also opt out, but it can be assumed that they will only do so in order to avoid falling back on the default rules if an employer-driven opt-out fails.[47]

Two procedures of employee consultation can be followed. Under the objection procedure, a detailed notice is issued to the members.[48] If, within a notice period of not less than one

month, not more than 10 per cent of the members (or 10,000 in absolute numbers, if less) object, the proposals are automatically approved. Otherwise, the consultation procedure can be taken to the ballot procedure, but the employer or the trustees can also choose to amend their proposals, and to re-submit them, or to drop them altogether. Under the ballot procedure, a simple majority of voting members is sufficient to approve the opt-out.

Generally speaking, the opt-out has to be repeated every six years, but more often if the trustees consider it detrimental to the members' interests to continue with the present arrangements. It has been suggested that this requires a curious self-criticism of the trustees, which have to admit that they are likely to act contrary to the interests of the members.[49] However, the trigger for re-consultation will probably be a fundamental change in the identity and/or activity of the employer, which makes it more understandable to implement a new employee representation arrangement.

Practical impact of the MNT regime and future changes

It is a well-known fact even recognised by the Government that many schemes still do not have MNTs.[50] However, due to a lack of statistical data, it is difficult to ascertain the practical impact of the MNT regime. Currently, the only reliable data is a survey among the members of the National Association of Pension Funds ('NAPF').[51] This shows that 73 per cent of the schemes had adopted rules endorsed by the employer. Fifty three per cent of the trustees were employer representatives, while 45 per cent could be identified with the members (37 per cent employee representatives, 7 per cent pensioner members, and 1 per cent trade union representatives). The number of employee-members is surprisingly high as one might have expected the employer to use the opt-out to get rid of MNTs.

The reason why employer-tailored arrangements dominate in practice, is that the current regime allows to opt-out of the MNT regime if there is a 'lack of significant objection'.[52] In addition, the existing trustees, who — at least for the first opt-out — can be expected to be linked to the employer, can include deferred members in the quorum.[53] This makes successful objection more difficult as the 10 per cent threshold rises in absolute numbers. The Government also shows concern about clear cases of abuse, for example by the employers which require employees to give reasons for their objection and a general lack of secrecy of the ballot.[54]

The current regime has been criticised for a 'complexity bordering on the Byzantine'[55] and employers complain about its administrative burden and cost. This is contradictory in itself, because most of the administrative burden and cost is caused by the employers' wish to opt out. Scheme members find it difficult to understand that in a first step they have to decide the rules of *how* the trustee board is composed and then in a second step *who* actually is going to be the trustee.

During the recent consultations on plans to abolish the employer's opt-out, the government's original proposals have been revised so as to allow employers to keep their existing arrangements till the end of the usual mandate.[56] Employers will also be able to use the existing procedures to have scheme-specific selection procedures approved by the employees. This demonstrates that employers are willing to pay a certain price to retain a maximum of control over the selection of trustees. It proves

once more that despite their weak voting power, MNTs play an important role and that broader coverage will be an important element of pensions governance.

Pensions governance by the actuary?

In the UK, defined benefit schemes are obliged to appoint a scheme actuary. In 'balance of cost schemes' changes in the overall contribution rate only affect the employer's share. Therefore, employers have a keen interest in this issue. Strictly legally speaking, it is the scheme documentation that decides who sets the contribution rate. Although this will usually be either the employer, the trustees or both together, it has been suggested that in reality it is the actuary who is in control of the funding level.[57] Apparently this has not changed under the Pensions Act 1995, because — whatever the formal rules are — 'the advice of an actuary will be sought and generally be followed.'[58] In terms of pensions governance, it will be shown that although the MFR and the taxation regime restrict the scope of the actuary's discretion, he still has a considerable freedom. However, he cannot use it autonomously from the employer.

The scope of actuarial freedom

Contribution rates are calculated on the basis of 'ongoing valuations'.[59] According to the relevant actuarial practice standard, ongoing valuations should 'enable the expected future course of the scheme contributions rates and funding levels to be understood', but this is 'not intended to restrict the actuary's freedom of judgement in choosing the method of valuation and the underlying assumptions.'[60] Obviously, these choices have an important impact on the level of funding of a scheme and the required contribution rate. It has been shown that perfectly reasonable technical changes of the underlying methods and assumptions can raise the value of the liability created by an identical benefit from £5,758 to £10,667 on an ongoing basis and up to £42,667 on a discontinuance basis.[61] As both methods can be used for ongoing valuations, virtually every contribution rate can be justified.

However, statute defines upper and lower limits of solvency. The upper limit is drawn by Inland Revenue rules relating to surpluses.[62] Special 'Schedule 22 valuations' must be prepared according to precisely described assumptions and methods. If a surplus occurs, action to reduce it must be taken within six months. The lower limit is set by the Minimum Funding Requirement ('MFR'). Broadly speaking, the MFR must be met either throughout or at the end of a certification period of three to five years. However, long transitional periods mean that the MFR will not become fully effective before 2007. The current MFR framework is based on a 'rigid, precise and completely artificial model'[63] that leaves, like schedule 22, almost no discretion to the actuary.

It can, therefore, be said that the solvency of the scheme can fluctuate between the absolute boundaries of funding at 90 per cent in MFR terms and 105 per cent in Schedule 22 terms. However, this band is likely to be larger than a nominal 15 per cent. On the one hand, the MFR sets a volatile, and — despite its reliance on bonds and gilts — relatively optimistic benchmark.[64] Its claim to require 'assets to be not less than the liabilities' of the scheme[65] is a source of 'misunderstanding and frustration' because the MFR does not provide absolute security that all pension entitlements will be honoured.[66] Moreover, the MFR is accused of regulatory distortion while not achieving

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its objectives and is, partly for this reason, currently under double review.[67] On the other hand, Schedule 22 valuations rely on a conservative standard and systematically under-value assets and maximise liabilities. Schedule 22 valuations are therefore likely to show an even smaller surplus than MFR valuations.[68] As a result, there still is a considerable bandwidth in which contribution rates can be actuarially justified.

Who controls the actuary?

So, who determines the actuary's choice of the valuation methods? One feels tempted to expect the actuarial profession to set the guidelines for this, but although it systematically stresses the high level the competence expected of its members, it only draws the bottom line of professional practice. In particular, the actuarial profession refuses to assume the role of the 'policeman'[69] and was even opposed to the introduction of the obligation to 'blow the whistle' in cases of misadministration.

This reluctance draws attention to the employers' influence over the actuary. Under the pre-1995 regime, the reason for the dependence of the actuary was that he was only a 'service provider' to the employer.[70] Nowadays the trustees have to appoint the scheme actuary,[71] and it has been concluded that in the case of a conflict of interests, the actuary must act for the trustees, not for the employer.[72] However, in most cases the scheme actuary still is the general actuary or accountant of the employer and the majority of trustees are associated with the employer. As a result, it can be inferred that no decision will be taken which is not acceptable for the employer. Of course, it will always depend on the actual circumstances of a scheme if the employer is willing and able to directly or indirectly impose his will on the actuary, but there are no statutory safeguards against this. The restricted role of the actuary was highlighted in the *Stannard* case as trustees were held to violate their fiduciary duties if 'they follow blindly the actuary's advice.'[73] Given these facts, the actuary cannot be supposed to play an autonomous role in the governance of a pension scheme.

Germany: 'Co-determined' and 'co-managed' pension vehicles

As already mentioned above, occupational pensions in Germany are always embedded in the contractual employment relationship. Consequently the employee has a legal claim against the employer. This contractual entitlement is either explicitly contained in the employment contract or construed from the surrounding circumstances, the principle of equal treatment or other unwritten sources of law. As a result, occupational pensions in Germany are entirely governed by labour law. In fact the employment relationship is more important than the other relationships in the triangle employer-employee-pension vehicle.[74]

A special labour law statute, the 'Act aiming at the improvement of occupational pension schemes' (Gesetz zur Verbesserung der betrieblichen Altersversorgung, hereafter referred to as 'Occupational Pension Schemes Act 1972') governs occupational pensions. The employer is obliged to vest the pension entitlements irrevocably in the employee after not more than 12 years of service and the retirement age has to correspond to the state pension scheme. The Occupational Pension Schemes Act 1972 provides for generous early leaver protection and prescribes pensions to be indexed to the cost of living of an average household. The impact of this employee-friendly legislation and the

erosion of the associated tax relief has almost doubled the cost of pension provision over the last 20 years.

Another particularity is that currently all schemes are defined benefit schemes. This is mainly based by the prevailing interpretation of the Occupational Pension Schemes Act 1972,[75] but the better view suggests that it is the tax and accounting regime which renders defined contribution schemes too unattractive at the moment. However, steps towards defined contribution schemes have been made and hybrid schemes are now becoming more and more frequent. Nevertheless, all pensions must be payable on the basis of an absolute entitlement to be tax efficient. Discretionary benefits are only accepted in exceptional cases, such as self-inflicted invalidity and suicide. As a result, benefits are taken for granted, but there is no prospect of surpluses, too. This restricts the scope of pensions governance in general.

A further analysis will show that the legal and fiscal framework of the main 'pension vehicles' used to finance and deliver occupational pensions in Germany predetermines many funding and investment decisions. Therefore, pensions governance is mainly exercised through particular adoptions of collective employee participation regimes, namely co-management and co-determination.

'Pension vehicles' — variety of form over substance

Four different 'pensions vehicles' ('Durchführungswege', literally translated as 'ways of implementation') are defined in section 1 of the Occupational Pension Schemes Act 1972. The particularities of the four main vehicles will be analysed in the following, ignoring hybrid and re-insured schemes for the moment. A statistical overview will illustrate the relative importance of each pension vehicle.

'Direct pension promises' (Direktzusagen) and 'Book reserves' (Pensionsrückstellungen)

The most original vehicle to provide occupational pension benefits is a 'direct pension promise' (Pensionsdirektzusage), backed by a 'pension book reserve' (Pensionsrückstellung). In making a direct pension promise, the employer contractually engages himself to pay a defined amount of pension benefits to the employee or his dependants. This creates a 'future liability' (zukünftige Verbindlichkeit) for which the employer can make a pension book reserve (Pensionsrckstellung) in his financial accounts.[76] This book reserve can be increased every fiscal year by a fictional 'pension payment' (Pensionszuführung) which reduces the employer's income tax liability within certain limits.[77] In fact, the taxation regime prescribes the build-up of the pension reserve needed to cover the entire liability to be spread over the prospective employment period. In addition, the fictional investment return is not to exceed 6 per cent per year and, until 1999, the taxation regime did not allow to accommodate for the financial burden created by mandatory indexation of benefits. Consequently, most pension book reserves are insufficient to cover the entitlements accrued. Moreover, generous early leaver protection means that further top-up payments are needed if the employer ceases service before the normal retirement date. It can therefore be said that direct promises are systematically 'under-funded'. To protect employees from the insecurity arising from this, but also to overcome the systematic weaknesses inherent to un-funded pensions, a mandatory insurance scheme was created by the Occupational Pension Schemes Act 1972.[78] It resembles the Pensions Compensation regime in the UK, but employees are protected against

all cases of insolvency, not only against acts of dishonesty or fraudulence.

Direct pensions promises are easy to set up, relatively tax-efficient and have the advantage that no commissions or fees are payable to financial service providers. Although direct pension promises might appear 'exotic' to the eyes of the Anglo-Saxon accountant, they are a traditional technique of German corporate finance and well accepted by banks and investors. A direct pension promise does not reduce the employer's liquidity during the service of the employee. This feature of direct pension promises played an important role for the economic recovery of Germany after the war, and still is decisive for many companies. The lack of external funding does not disadvantage the employee as he is comprehensively protected by mandatory insurance.

Recently, German multinationals have begun to use a technique known as 'asset backing'[79] in order to attract a more favourable treatment under Anglo-Saxon accounting rules. Liquid assets corresponding to the value of the pension reserve are transferred to a separate legal entity which in most cases re-invests the funds into the sponsoring employer. As a result, direct pension promises become 'funded liabilities' under US and UK GAAP, which makes the employer's financial position more attractive to foreign investors.[80] There is an obvious governance issue inherent to asset backing, but for instance, too little is known to comment.

'Direct insurance' (Direktversicherung)

'Direct insurance' (Direktversicherung) is a pension vehicle by which the employer takes out life insurance in his own name, but on the life of the employee. All benefit entitlements arising from the insurance policy are then vested in the employee. This ponderous construction is prescribed by the Occupational Pension Schemes Act 1972. It reflects that employer contributions to life insurance taken out by employees themselves would be categorised as 'private', ie, third pillar pension provision and accordingly receive a less favourable tax treatment.

Occupational pensions in the form of direct insurance are usually based on with-profit insurance policies. The employer can avoid top-up payments to early leavers and the burden of statutory indexation if he vests all bonuses in the employees.[81] As this limits his financial risk to the payment of insurance premiums, such schemes were the precursors for hybrid defined-benefit/ defined-contribution schemes. Moreover, surpluses are not contested between the employer and the employees, and the governance of such schemes is almost reduced to the choice of the insurance company and the underlying tariff.

Direct insurance pensions can be immediately established and pose only a low administrative burden on the employer. Although premiums are taxed 'up-front' through the PAYE system, a favourable compound rate of 20 per cent[82] makes direct insurance premiums tax efficient for high earners.[83] Traditionally, direct insurance pensions were used by managing directors of small and medium companies, but it has become more widespread in the form of deferred compensation arrangements.[84]

However, as with every life insurance contract, direct insurance pensions is only efficient if it is kept over a long period. Recently, life insurance companies in Germany have been heavily criticised for poor investment returns and high penalty charges,[85] and this has also affected the reputation of direct insurance pensions. Another disadvantage is that neither the employer nor the employee can

influence investment decisions, and that tight insurance regulation is suspected to lead to lower investment returns than those generated by unregulated investment funds.

'Pension assurance associations' (Pensionskassen)

'Pensionskassen' (literally translated as 'pensions kitties') are separate legal entities which provide occupational pensions in the form of regulated insurance business. They are structured as mutual assurance associations (Versicherungsvereine auf Gegenseitigkeit) and will therefore be referred to as 'Pension Assurance Associations'. Traditionally, Pension Assurance Associations are funded by contributions of the employer and the employee. Nowadays, they mainly operate with-profit policies with fixed premiums, but balance of cost schemes similar to the UK still exist.

Most Pensions Assurance Associations fall under a simplified regime of insurance regulation. While this means that they are exempted from most of the solvency standards, they still have to submit their documentation and calculations to the insurance regulator for approval.[86] If a Pensions Assurance Association gains a certain size[87] and meets some other requirements, it becomes a 'deregulated' pensions provider and is allowed to operate in the harmonised European insurance market. In this case, it also must appoint an Anglo-Saxon-style actuary. However, tight insurance regulation means that the actuary has hardly any choice as to the methods and assumptions used to calculate the insurance tariff.[88] As with any insurance business in Germany, investment is restricted by a detailed catalogue of suitable investments, fixed thresholds and layers of secondary legislation.[89] Accordingly, investment is not really an problem of pensions governance, but rather a matter of regulatory compliance. There is much lobbying going on for more liberal regulation, but recently the book keeping 'imparity principle'[90] has been identified as the major obstacle to greater liberalisation. Pension assurance associations need a critical size to be economically efficient; therefore they only exist at very large companies and as industry wide schemes, some of them having been established in the 1880s. Employers usually regard Pensions Assurance Associations as a matter of social prestige and as a device for maintaining good industrial relations. However, the regulatory framework means that they operate quite autonomously from the employer.

Support funds (Unterstützungskassen)

Support funds (Unterstützungskassen) are also separate legal entities, usually in the form of associations or 'foundations'. Their particularity is that employees do not have a legal claim against the support fund, but only against the employer.[91] However, employees are protected against the employer's insolvency by the same mandatory insurance scheme that covers direct pension promises. The absence of a legal obligation to pay the benefits allows support funds to escape life insurance regulation, but they are not regulated as financial services either. Curiously, support funds do not make use of their resulting freedom, but re-invest most of their assets into the sponsoring employer. The background is that on the one hand, there is no chance of ever generating a surplus, as tax-efficient contributions are limited to about 20 per cent of the liabilities.[92] On the other hand, the existence of the mandatory insurance scheme means that high levels of self-investment are no

danger for the employees. Therefore, the governance of support funds is unlikely to be contested.
Support funds have the advantage of flexible contributions and unregulated investment, while being recognised as 'pension funds' under Anglo-Saxon accounting rules. This explains why they are frequently used as a template to introduce 'proper' pension funds in Germany.[93] Support funds have a long tradition and were used in the past to defend sponsoring employers against hostile take-overs. However, their limited tax efficiency has led to a sharp decline in numbers.

Statistical overview

According to 1997 figures,[94] direct promises, backed by book reserves, still account for more than half (DM 300.3bn or 56.7 per cent) of the assets of occupational pension schemes and a corresponding number of beneficiaries (56 per cent). Although there are less than 200 pension assurance associations, they contain 22.4 per cent (or DM 119.1bn) of the assets and cover 19 per cent of the beneficiaries. Direct insurance pensions represent 13.0 per cent of the assets (DM 69.3bn) and cover 14 per cent of the pensioners. Support funds pay 13 per cent of the occupational pensions but — as a result of the unfavourable tax treatment — contain only 8.1 per cent of the assets of occupational pension schemes (DM 43.1bn). These figures suggest that only 43 per cent of occupational pension liabilities are funded. However, book reserves worth DM 70bn are contained in asset backing structures. This raises the percentage of funding of occupational pensions to about 57 per cent,[95] and it can be assumed that this figure has been raising since then.

In a nutshell, the 'pensions landscape' of Germany is characterised by the co-existence of four different vehicles which all have their own particularities. However, all vehicles achieve to provide total security for the benefits while surpluses are more or less excluded from been accumulated. For pensions governance, this highly affects the issues at stake and explains, why collective employee participation regimes play such an important role.

Co-management

Co-management is one of the two modes of employee representation under German collective labour law. In order to familiarise the foreign reader with this original feature of industrial relations in Germany, a short outline of the continental two-tier board structure and employee representation on the supervisory board will be provided. We will then analyse in detail how co-management operates with regard to occupational pension schemes.

Co-managed supervisory boards of the employer

'Co-management' (Mitbestimmung in Unternehmensorganen) is a generic expression to describe employee representation in the supervisory board of the employer. The supervisory board (Aufsichtsrat) monitors and controls the board of Managing Directors (Vorstand), but it may not interfere with the management's responsibility in the day-to-day running of the company.[96] However, the supervisory board appoints the managing directors, and there is usually a quite long list of matters on which its consent is required.[97] Like MNTs, employee representatives on the supervisory board of a co-managed company have identical powers and duties as the other members. This theoretical position is sometimes

perverted in practice by preferential treatment given to shareholder representatives. To retort, trade unions used to systematically indemnify employee representatives for liabilities arising from breaches of duty, especially infringements of the confidentiality requirements. However, improved industrial relations have made this cat-and-mouse-game quite rare.

Broadly speaking, there are two different regimes of co-management. The first regime applies to companies employing more than 2,000 people and requires employee and union representatives to account for half of the supervisory board.[98] Employee representatives reflect the proportion of blue and white collar workers and executives in the company, and trade unions can nominate at least two members.[99] Although employee representatives represent half of the votes, an original procedure makes sure that shareholders can still impose their will on the company. If a vote of the supervisory board leads to a draw, a second ballot is held in which the chairman has a casting vote. As a majority of two-thirds of votes of the general meeting is needed for his appointment; he is usually nominated by the shareholders.[100] However, it is against the spirit of German industrial relations for a vote of a co-managed supervisory board to proceed to a second ballot. Rather the 'social partners' (employer and employees) will try to find a compromise.

Under the second regime of co-management, employees represent one third of the supervisory board. This regime applies to all companies with a two-tier supervisory board structure, except family businesses with fewer than 500 employees.[101] Employee representation is somewhat weaker as smaller companies are usually private limited companies (GmbH) where managing directors are not appointed by the supervisory board, but by the shareholders directly.[102]

Co-management of occupational pensions

A co-managed supervisory board is involved in the governance of an occupational pension scheme in various ways. First, the decision to introduce, close or vary substantially an occupational pension scheme is invariably a 'consent matter', regardless of its financial impact. Secondly, amendments to pension schemes exceeding a certain financial dimension have to be approved by the supervisory board, even if they do not affect the members' rights. Thirdly, occupational pensions are 'strategic management and fundamental planning activities' of the company on which the management has to report to the supervisory board at least once a year.[103] Fourthly, actuarial statements and forecasts are usually included in the annual accounts which have to be approved by the supervisory board. It is a bit uncertain if the last two points are really mandatory, but information of the supervisory board on these measures is generally regarded as the standard of good industrial relations and corporate governance.[104]

Co-management provides employee representatives with authentic insight into the financial position of the employer. There are spectacular precedents where this has allowed employees to challenge biased data to justify cuts in the provision of occupational pensions. A structural problem of co-management is that employee representatives stand only for active members, but trade unions claim to fight off disadvantages for deferred members and pensioners as well.

Co-determination of occupational pension schemes

Co-determination provides for a 'constitution of the company' and aims at the democratisation of the employment relationship. The works council of a co-determined company is involved in nearly all decisions with relevance to the workforce. Employers and works councils are legally obliged to meet at least once a month and to act in trusting co-operation. Co-determination only applies where there is a works council. Works councils can be established in companies with at least five employees, if three of them are eligible.[105] The size of the works council depends on the number of employees of the Company; roughly speaking there is one representative for every 20 employees, but always an odd number.

The number of works councils has declined steadily and today only 40 per cent of employees are covered, as opposed to 50 per cent about ten years ago. While larger companies are almost always co-determined, this the case for only 28 per cent of companies with up to 100 employees, and only for 4 per cent of even smaller companies.[106]

In general, occupational pensions are subject to 'mandatory co-determination' (erzwingbare Mitbestimmung). This means that if a question falls within the scope of this type of co-determination, any measure taken by the employer without the consent of the works council is unenforceable. If co-determination rights are violated, the works council can apply to the employment tribunal for injunctions.[107] Litigation on co-determination is carried out at the local employment tribunal if the dispute concerns a point of law, (ie, whether co-determination applies to a particular decision)[108] while matters of substance (ie, the fairness of such a decision) are dealt with by a special ad-hoc mediation committee (Einigungsstelle).[109]

It is therefore important to determine the precise scope of mandatory co-determination. Occupational pension schemes can fall under two different provisions, section s. 87 (1) ('No. 10') Companies Constitution Act ('No. 10', part 1.) and s. 87 (1) ('No. 8') of the same Act. ('No. 8'.)

No. 10: Pensions as part of the 'remuneration principles'

First, section s. 87 (1) (No. 10) Companies Constitution Act requires co-determination of all 'questions regarding the principles of remuneration within the Company'. Occupational pensions are deferred pay and would therefore fall under this provision. However, co-determination does not restrict the employer's prerogative to decide on the strategic management of the company.[110] Consequently the wide wording of No. 10 has been interpreted in a narrow sense. It excludes any measure directly affecting the level of endowment (Dotierungsrahmen).[111] Fundamental decisions remain free from co-determination, such as the decision whether to introduce an occupational pension scheme at all, how much funding to provide for it and whom to make a beneficiary.[112] The choice of the pension vehicle, the insurance company or even the underlying tariff are all outside the scope of co-determination.[113] In short, co-determination under No. 10 applies to the 'equitable distribution' (Verteilungsgerechtigkeit) of the available funds earmarked for occupational pensions, not to the size of the employer's financial commitment.

This leads to strange asymmetry. On the one hand, amendments of the benefit structure require the consent of the works council because they affect the

balance between the beneficiaries. On the other hand, an outright closure of a pension scheme remains within the absolute power of the employer. The works council can only boycott changes to a scheme but it cannot prevent the employer from abolishing it altogether.

Co-determination under No. 8

Section 87 (1) (No. 8) Companies Constitution Act provides for co-determination of the 'legal form, structure and administration of social institutions the scope of which is restricted to an enterprise, company or group of companies.' Pension assurance associations and support funds fall under this provision if they are single-employer schemes. Co-determination under No. 8 has been held to supersede No. 10 as a *lex specialis*.[114] However, it can be argued that No. 8 does not provide for more, but for a different kind of co-determination, and that both rules should be applied simultaneously.[115]

Under No. 8, there are two different methods of implementing co-determination. Under the first method, the employer submits all co-determination issues to the works council. Once an agreement has been reached, he imposes the content of the agreement on the pension vehicle. This two-step procedure follows the letter of the law and has no immediate impact on the constitution of the pension vehicle.[116] However, an ability to implement the decision presupposes that the employer retains extensive control over the pension vehicle.

Under the second method, the works council itself is represented on the managing board of the pension vehicle. This way of implementation is known as 'organic' co-determination, because it affects the composition of the organs of the pensions vehicle. Works council representatives do not necessarily have to account for the absolute majority of the votes, but there must be other institutional safeguards which prevent the works council's position on these points from being overruled.[117] If no compromise can be reached, the employer and the works council regain control over the issue and the usual litigation and mediation procedure set out above apply.[118]

Organic co-determination is more flexible and usually faster than the two-step procedure. However, since 1994 only qualified insurance professionals may become managing directors of Pension Assurance Associations,[119] a requirement hardly ever met by employee representatives. Most Pension Assurance Associations have therefore established a co-determined supervisory board, but it is doubtful if this voluntary arrangement meets the legal requirements of co-determination.

Pensions governance in the UK and Germany — similarities of substance over differences of structure

At a first impression, the differences between occupational pensions in the UK and Germany are overwhelming. While constituting a veritable second pillar of pension provision in the Beveridge pension system of the UK, occupational pension schemes only 'fill the gaps' left by the German Bismarck model. Occupational pension schemes are part of distinct legal systems (Common and equity law on the one hand and civil law on the other) and are embedded in different specialist areas, namely trust law (partly overridden by pensions regulation) in the UK and labour law in Germany.

In addition, the approach to the financing of occupational pensions differs

largely. In the UK, funding is clearly an issue of pensions governance, as the ambiguous role of the actuary stresses. Securing the benefits and possibly generating surpluses are the main challenges of pension funds in the UK. Contrary to this, occupational pension schemes in Germany are 'black boxes.' Contributions are paid into the pensions vehicle, the appropriate benefits are guaranteed to come out, and only relatively little attention is paid to what happens in the meantime. This attitude is based on the contractual strength of the employer's pension promise and the existence of comprehensive mandatory insurance against the employer's insolvency.

Regarding employee participation, the patchwork of representation rules and consultation rights in the UK seems to have little in common with the homogenous system of co-management and co-determination in Germany. However, in the area of occupational pension schemes, these differences are mainly structural, rather than substantial.

True, consultation procedures do not confer veto rights to British employees. However, consultation raises the awareness of employees and unions and has the potential to constitute a strong element of pensions governance. This is highlighted in the case of contracting-out, where employees will be warned that a rebate-only scheme can make them worse off. On the other hand, the strong position of German employees in general and especially in co-managed companies only applies to a limited extent to occupational pensions. Most important, the crucial issue of how much funding is provided for the occupational pension scheme is exempted from co-determination.

Finally, there are considerable functional similarities between the two countries. For example, member-nominated trustees in the UK can be compared to employee representatives on the board of a German pension vehicle under 'organic' co-determination. One could even cynically remark that employee-representatives not only have similar functions, but that they are also under similar threats. After all, an employer-endorsed opt-out of the MNT regime has the same effect as the lack of co-determination in the absence of a works council. The fact that member-nominated trustees account only for a third of the trustee board, while some German works councils have a veto right should not conceal how the regimes operate in practice. In both cases, smooth and non-conflictual co-operation prevails over confrontation and insistence on legal positions. Today, technical issues such as occupational pensions foster an atmosphere of efficiency, not of class war.

In summary, the difference between the legalistic regime in Germany and the reliance on industrial relations and collective bargaining in the UK appears to be mostly of a 'cultural' nature. An in-depth analysis of some technical aspects of occupational pension schemes shows that most conceptual differences disappear behind the identical objective: to deliver the benefits to the members.

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81 S. 1 (2) and s. 16 (3) (2) Occupational Pension Schemes Act 1972.
82 S. 40b Income Tax Act; as opposed to regular income tax rates of up to 53 per cent.
83 Oberer, P. Gestaltung betrieblicher Versorgungsregelungen unter Beachtung der steuerlichen Auswirkung beim Begünstigten, BetrAV 1995, p. 15.
84 Cf. Hanau, P. and Arteaga, M. (1999) 'Gehaltsumwandlung zur betrieblichen Altersversorgung', Otto Schmidt Verlag, Köln.
85 There is currently a government review under way, cf. Schlechtriem, Zur Reform der Kapitallebensversicherung, BB 1999, 593 and Adams, Die Reform der Kapitallebensversicherung, Arbeitspapier No. 73 des Instutes für Handels-und Wirtschaftsrecht der Univerität Osnabrück, Osnabrück, 1998.
86 S. 1 (4) and schedule A No. 24, s. 53 and s. 156a of the Insurance Supervision Act (Versicherungsaufsichtsgesetz).
87 DM 500m balance and DM 25m gross annual premium income for company schemes and DM 100m and DM 5m respectively for multi-employer schemes.
88 See Bode, Der neugeregelte Aufgabenbereich des verantwortlichen Aktuars, BetrAV 1995, p. 20.
89 Cf. s 53c to s. 54d Insurance Supervision Act.
90 According to which losses appear immediately on the balance sheet, but profits only when they have been realised.
91 However, the courts have reduced this to a formal legal construct, cf. Blomeyer (1998) pt. 123.
92 S. 4d (1) (No. 1)(c) Income Tax Act. Ref. 1 above, cf. Pinkos, Steuerliche Probleme bei Zuwendungen an rückgedeckte Unterstützungskassen, BetrAV 1995, p. 11.
93 See for example Kolvenbach, Für eine Pensionsfonds-Unterstützungskasse, DB 1997, p. 290 and Bode/Grabner, Pensionsfonds in Deutschland, DB 1997, 928.
94 Urbitsch, BetrAV (1999) 73; Kortmann, BetrAV (1996) p. 30, based on Statistisches Bundesamt.

95 Estimations based on a survey amongst the largest German corporations, Rößler/Dötsch, Asset-backing von Pensionsverpflichtungen in Deutschland, DB 1998, p. 1773.
96 S. 76 (1) on the hand and s. 111 Stock Corporations Act on the other hand (Aktiengesetz), cf. s. 52 Limited Liablity Companies Act (GmbH-Gesetz).
97 In so far the supervisory board can be compared to a board of non-executive directors in the UK.
97 S. 7 Co-Mangement Act (Mitbestimmungsgesetz).
99 Three in the case of supervisory boards with more than 21 members, s 7 (2) Co-Management Act.
100 Except in the four largest companies in the steel and mining industry where 'montan representation' includes a neutral chairman approved by both sides.
101 S. 1 (6) Company Constitution Act 1953 (Betriebsverfassungsgesetz 1953).
102 S. 77 of the Private Limited Companies Act (GmbH-Gesetz).
103 S. 90 (1) (No. 1) and (2) of the Joint Stock Corporations Act (Aktien Gesetz).
104 Blomeyer, W. (note 1 above) Einl. pt. 495.
105 S. 1 of the Company Constitution Act (Betriebsverfassungsgesetz).
106 Hagelücken, A. (2000) 'Riester will Betriebsräte stärken', Süddeutsche Zeitung, 16th May, p. 5.
107 S. 23 Companies Constitution Act.
108 S. 2a of the Employment Tribunal Act (Arbeitsgerichtsgesetz)
109 Ss. 87 (2) and 76 (5) Companies Constitution Act.
110 Hanau, P. and Adomeit, M. (1997) Arbeitsrecht, Luchterhand, Neuwied, p. 116.
111 Federal employment tribunal 13th March, 1973, 1 ABR 16/72; AP No. 1 ad §87 BetrVG 1972 Werkmietwohnungen.
112 Blomeyer, W. (note 1 above), Einl. pt. 496.
113 Federal employment tribunal, 16th February, 1993, 3 ABR 29/92; AP No. 19, §87 BetrVG 1972, Altersversorgung.
114 Federal employment tribunal, 9th December, 1980, ABR 80/77 AP No. 5 ad §87 BetrVG 1972 Lohngestaltung.
115 Matthes in Münchner Handbuch des Arbeitsrechtes, Verlag C. H. Beck, Munich, 3rd ed. 1998, s. 331, pt. 5.
116 Federal employment tribunal, 13th July, 1978 — 3 AZR 108/77, AP No. 5 §87 BetrVG Altersversorgung.
117 Blomeyer, W. (note 1 above), Einl. pt. 871.
118 Dietz/Ricardi, Kommentar zum BetrVG, Verlag C. H. Beck, Munich, 1999, §87, pt. 427.
119 S. 7a Insurance Supervision Act.

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