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Pensions regulation is moving under the umbrella of general financial regulation at EU level. What is the impact of this on the Irish pensions industry now and in the future?

Hazel Bergin

Introduction

The European occupational pensions industry is undergoing something of a regulatory revolution across two fronts. The first front is in the area of non-specialist regulation, that is, regulatory instruments addressing financial products and markets generally. These non-specialist instruments increasingly have express application to pension products and schemes. This is a relatively novel development: as recently as 2014, occupational pension products, by virtue of their unique 'particularities and objectives', were *excluded* from the scope of MiFID II.[1] The second revolutionary front is taking place among pension-specialist regulatory instruments, which are beginning to contain regulatory principles once more commonly seen only in general financial regulation. One interesting means of measuring the increasing prevalence of non-specialist regulation and non-specialist regulatory principles in the occupational pensions industry is that, in April 2021, PensionsEurope, the representative body for national associations of pension funds in the EU, joined the Financial Data Exchange Templates ('FinDatEx') structure for the first time.[2]

The merging of pensions regulation with non-specialist financial regulation and non-specialist regulatory principles represents a marked departure from the EU's once-firmly institutional model of financial regulation.[3] This essay assesses the likely impact on the Irish pensions industry of this departure from institutionalism. Part 1 analyses the extent to which principles of general financial regulation are now manifesting in (i), pension-relevant non-specialist ('PRNS') instruments, with a focus on environmental, social and governance ('ESG') factors, and in (ii), pension-specialist EU instruments, with a focus on the professionalisation of pension trusteeship. Part 2 analyses the effect of the principles identified in Part 1 on the Irish occupational pensions sector. It identifies two likely consequences of the subsumption of pensions into general financial regulation: (i), a 'Europeanisation' of the Irish pensions industry, in particular a reduction in the number of occupational pension funds and schemes in operation in Ireland, and (ii), a change in Ireland's paternalistic/socialist conception of pensions, from being viewed as a form of social partnership to a solely financial product.

The Applicability of Regulatory Principles to Pensions in Non-Specialist and Specialist Regulatory Instruments

i. ESG Factors in Non-Specialist Regulatory Instruments with Relevance to Pensions

[1] **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 [2014] OJ L173/349, preamble, art 2(i).**

[2] **'About FinDatEx' (***FinDatEx***) <https://findatex.eu/about> accessed 23 July 2021.**

[3] **See further, John Armour and Daniel Awrey,** *Principles of Financial Regulation* **(Oxford University Press 2016) 87.**

While the wholesale incorporation of ESG factors into the occupational pensions sector is relatively novel,[4] ESG has played some role in pensions in various jurisdictions, including, to a very limited extent, Ireland, for a number of years.[5] The recent increase in the implementation of ESG factors into pensions regulation is largely consonant with the level of interest in society generally.[6] What is noteworthy about ESG's incorporation into the EU's regulation of pensions is the extent to which this is occurring through PRNS regulatory instruments.

An example of this non-specialist incorporation is the Sustainable Financial Disclosures Regulation ('SFDR').[7] The SFDR imposes disclosure obligations on the integration of ESG factors, at both an entity and a product level, on financial market participants. 'Financial product' in both the SFDR and its sister instrument, the Taxonomy Regulation, is expansively defined to include both 'pension product' and 'pension scheme'.[8] A 'financial market participant' includes 'an institution for occupational retirement provision', 'a manufacturer of a pension product' and 'a pan-European personal pension product'.[9] This harmonisation means that the (still, at the time of writing, draft) Regulatory Technical Standards governing disclosures under the SFDR have been developed jointly by the three European Supervisory Authorities.[10]

An additional example of ESG within PRNS instruments is the Shareholder Rights Directive II ('SRD2').[11] Occupational pension schemes are expressly contemplated as coming within the scope of the SRD2 through its Article 1(2)(e)(ii) definition of 'institutional investor'. This includes institutions 'for occupational retirement provision falling within the scope of [IORP II]'. The SRD2 has been transposed into Irish law by the European Union (Shareholders' Rights) Regulations 2020 ('the 2020 Regulations').[12] The 2020 Regulations amend the Companies Act 2014 by, *inter alia*, inserting a new Chapter 8B setting out the transparency requirements of institutional investors, asset managers and proxy advisors. While Ireland's transposition of the SRD2 has been less express in its application to pensions than the text of the SRD2 itself, it is generally believed that pension schemes come within the scope of the 2020 Regulations, and by extension into the

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[4] **As noted by Esko Kivisaari, 'Sustainable Finance and Prudential Regulation of Financial Institutions' in** *Making the Financial System Sustainable* **(Cambridge University Press 2020) 87 and International Organisation of Pension Supervisors,** *Supervisory Guidelines on the Integration of ESG Factors in the Investment and Risk Management of Pension Funds* **(IOPS 2019) 4.**

[5] **See the examples in OECD,** *Investment Governance and the Integration of Environmental, Social and Governance Factors* **(OECD 2017) 15. In particular, Ireland prohibits the investment of public moneys in cluster munitions through the Cluster Munitions and Anti-Personnel Mines Act 2008, s 12.**

[6] **OECD, ibid, 9.**

[7] **Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector [2019] OJ L317/1.**

[8] **SFDR, art 2(12); Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 [2020] OJ L198/13, art 2(3).**

[9] **SFDR, art. 1. See also Taxonomy Regulation, art 2(2).**

[10] **European Insurance and Occupational Pensions Authority, European Securities and Markets Authority, European Banking Authority: 'Joint Regulatory Technical Standards on ESG Disclosure Standards for Financial Market Participants' (***EBA***) <https://www.eba.europa.eu/regulation-and-policy/transparency-and-pillar-3/joint-rts-esg-disclosure-standards-financial-market-participants> last accessed 26 July 2021.**

[11] **Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJ L132/1.**

[12] **SI 2020/81.**

Ireland's company law regime, insofar as they amount to investments made by a 'relevant institutional investor'—that is, an investor which 'invests, whether directly or through an asset manager, in shares traded on a[n EU] regulated market' and which has its registered office in Ireland.[13]

The effect on pensions of SRD2's transposition into Irish law is that Irish pension schemes are now required to develop and publicly disclose an engagement policy describing how shareholder engagement is integrated into the scheme's investment strategy.[14] This policy must describe how the investor fulfils its obligations to engage with shareholders in seven key areas, including how it integrates shareholder engagement into its investment strategy[15] and how it manages actual and potential conflicts of interest in relation to its engagement.[16]

ii. 'Fit and Proper' Trustees in Pension-Specialist Regulatory Instruments

As far as pension-specialist EU regulation is concerned, the most prominent is the IORP II Directive.[17] The IORP II Directive has been transposed into Irish law via the European Union (Occupational Pension Schemes) Regulations 2021 ('the 2021 Regulations'), which amend the Pensions Act 1990 ('the 1990 Act').[18]

The amendments effected by the 2021 Regulations have a number of significant implications for the Irish pensions industry, including introducing greater powers of oversight and intervention for the Pensions Authority, removing some obstacles to the cross-border provision of pension services and facilitating the cross-border transfer of pension schemes. Of particular relevance in the regulatory revolution, however, are the provisions of the 2021 Regulations which seek to professionalise and regularise pension trusteeship in Ireland.

Regulation 27 of the 2021 Regulations inserts, *inter alia*, section 59A into the 1990 Act. This contributes to the transposition of Article 22 of the IORP II Directive, which provides that 'persons who effectively run' the pension fund or who carry out key functions must be both fit (possessing appropriate qualifications, knowledge and experience) and proper (of good repute and integrity). The requirement that pension trustees undergo *training* is not new;[19] however, the requirement for actual 'qualifications', now contained in section 59A(1)(b) of the 1990 Act, represents a significant step up in the requirements for administering pensions. 'Fit and proper' provisions are common throughout much non-specialist financial regulation, but, up to the coming into force of the 2021 Regulation, had not been a significant feature of EU pensions regulation.[20]

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[13] Companies Act 2014, s 1110F(a), as inserted by the 2020 Regulations, reg 7.

[14] Ibid, s 1110G(1).

[15] Ibid, s. 1110G(3)(a).

[16] Ibid, s. 1110G(3)(g).

[17] Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision [2016] OJ L354/37.

[18] SI 2021/128.

[19] See 1990 Act, s 59AA, as inserted by the Social Welfare and Pensions Act 2008, s 28.

[20] For example, Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L337/35, art 19(1)(c).

Consequences for the Irish Pensions Industry

i. The Europeanisation of Irish Pensions: Fewer Small Pensions

The most obvious consequence for pensions of the regulatory features identified in Part I is a 'Europeanisation' of the Irish occupational pensions industry. This essay suggests that the Irish pensions industry will begin to more closely resemble the model prevalent throughout most of the rest of the EU, that is, a small number of large pension schemes and few very small pension schemes. In other words, it will mean a substantial reduction in the number of occupational pension schemes in Ireland. Indeed, Ireland is the only EU Member State in which the share of occupational pension schemes in the overall pension system is expected to drop by 2046.[21]

In 2019, Ireland's Pensions Authority recorded 75,567 occupational schemes in Ireland.[22] Given that there are estimated to be about 125,000 occupational pension funds in the EU as a whole and that Ireland makes up just 1% of the EU population, this means that Ireland registers a disproportionate number of occupational pensions.[23] Particularly noteworthy and, on a European level, unusual, about the Irish pensions industry is the prevalence of small pension schemes.[24] A small scheme, according to Ireland's Pensions Authority, is one with less than 100 active and deferred members.[25] As of 2019, Ireland's Pensions Authority reported at least 74,902 small pension schemes.[26]

The predicted drop in the number of occupational pension schemes in Ireland is likely to arise, at least partly, as a result of the additional regulatory and administrative burdens and costs placed on the administrators of occupational pension schemes by the instruments set out in Part I. While large funds are already highly professionalised and will probably be in a position to take on additional regulatory responsibilities, the compliance burden may well become too heavy for many of what the Revenue Commissioners term Small Self-Administered Pensions, that is, self-administered pension schemes with less than 12 members.[27] This compliance burden is likely only to increase in the future if the proposed Corporate Sustainable Reporting Directive is enacted and transposed with application to pension schemes.[28]

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[21] **'Revision of the Occupational Funds Directive—Frequently Asked Questions' (***European Commission***, 1 July 2016) <https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/160701-faq-iorp-directive-revision_en.pdf> last accessed 23 July 2021.**

[22] **Pensions Authority,** *Annual Report and Accounts 2019* **(Pensions Authority 2020) 37, 38. The** *Pensions Roadmap* **records nearly double this amount (160,000) ibid, 14. In the absence of a source for the** *Roadmap***'s figure, this essay prefers the Pension Authority's data.**

[23] **Commission, 'Revision of the Occupational Pension Funds Directive—Frequently Asked Questions' COM MEMO/14/239.**

[24] **Though Cyprus has a similar structure to the Irish pensions industry.**

[25] **'Glossary of Terms' (***Pensions Authority***) <https://www.pensionsauthority.ie/en/lifecycle/glossary/?index=S> last accessed 23 July 2021.**

[26] **Pensions Authority (n 26).**

[27] **Revenue Commissioners,** *Small Self-Administered Pension Schemes* **(Revenue Commissioners 2020) 2.**

[28] **Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting' COM (2021) 189 final.**

The reduction in Ireland's number of small occupational pension schemes is one of the goals of the Irish Government's *Pensions Roadmap*.[29] The *Pensions Roadmap* anticipates that regulatory changes will mean that 'future pension provision by smaller employers will increasingly be by means of membership of large multi-employer structures or through pension contracts'.[30] Although it does not set this out expressly as part of the *Pensions Roadmap*, this essay suggests that death by regulatory strangulation is one of the mechanisms impliedly selected to reduce the number of smaller schemes.

ii. The End of Paternalism in the Irish Pensions Industry? Changing Irish Conceptions of Pensions

This sub-part suggests that another consequence of the subsumption of pensions into non-specialist financial regulation will be a shift in the Irish conception of pensions. The traditional Irish conception of occupational pensions is paternalistic, bordering, perhaps, on socialistic. Occupational pensions in Ireland are often not viewed as financial products, but as part of a protective bond owed by employer to employee. This attitude is captured in an insightful 2014 submission to the Department of Social Protection from the Irish Association of Pension Funds ('IAPF').[31] While not opposing the then-draft IORP II Directive in its entirety, the IAPF argued that Irish pensions should not be regulated in the same way as other financial products because:

> [p]ension schemes, as they operate in Ireland, are established by employers for the benefit of their employees. *They are not financial institutions and involve more of a social partnership element with trade unions often involved in negotiating their establishment and the benefits provided*. Members of the schemes are often trustees involved in the governance of the scheme.[32]

Ireland's conception of occupational pensions as social products, rather than financial, is what one commentator, Carl James, in a Fabian Tract published in 1984, would consider the traditional, view of pensions, 'run with archaic assumptions about employment' and unsuitable for the twenty-first century economy.[33] This shift away from a socialist/social partnership conception of pensions, and towards one which acknowledges the true nature of pensions as financial products is also visible in the increasing dominance of defined contribution schemes over defined benefit schemes in Ireland,[34] as well as in the professionalisation of pension trustees through transposition of the IORP II Directive. The member trustee, for so long a prominent feature of the Irish pensions landscape, may be something of an endangered species. The dominance of member trustees provided for by regulation 5 of the Occupational Pension

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[29] Department of Social Protection, *A Roadmap for Pensions Reform 2018–2023* **(Government of Ireland 2019).**

[30] Ibid 25.

[31] 'Department of Social Protection Consultation and Invitation for Submissions' (*Irish Association of Pension Funds***, 18 July 2014) <https://www.iapf.ie/_files/list/IORPS%20II%20CONSULTATION%20and%20INVITATION%20FOR%20SUBMISSIONS.pdf> last accessed 23 July 2021.**

[32] Ibid, 6. Emphasis author's own.

[33] Carl James, *Occupational Pensions: The Failure of Private Welfare* **(Fabian Society 1984) 13.**

[34] On the socialist preference for defined benefit schemes, see William Simon, 'The Prospects of Pension Fund Socialism' (1993) 254, 255.

Schemes (Member Participation in the Selection of Persons for Appointment as Trustees) (No. 3) Regulations 1996 may not survive the post-revolutionary world.[35]

The socialistic idea of pensions as a social partnership between employer and employee, and not merely a financial product, is somewhat belied by the sheer financial mass of pensions at a European level. Pensions represent one of the most important products on the EU financial market. Institutional occupational pension products hold assets worth €2.5 trillion on behalf of around 75 million members and beneficiaries in the EU.[36] Occupational pensions hold a significant proportion of the outstanding equity of the EU Member States (about 18%), and have the clear potential to affect share prices.[37] Pensions *are* financial products, and the regulation of pensions serves *additional* objectives to general financial regulation, not alternative ones: bringing pensions under the umbrella of general financial regulation, to a far greater degree than previously, reflects the modern European reality of pensions, but not—yet—Irish thought on or attitude towards pensions. It is anticipated that, as pensions become more embedded within general financial regulation, this thought will evolve.

Conclusion

This essay has examined the increasing subsumption of occupational pensions regulation into general financial regulation through the lens, first, of PRNS regulatory instruments and, second, through the appearance of general regulatory principles in pension-specialist instruments. It has identified two likely consequences of this regulatory shift as being a Europeanisation of Ireland's pension industry and a new conception in Irish pension thought. The upheaval in the Irish occupational pensions sector will be momentous but, with the greater degree of transparency and professionalism likely to be applied throughout the industry as a result, not necessarily unwelcome.

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[35] **SI 1996/376.**

[36] **IORP II Directive, preamble point 8.**

[37] **Adrien Amzallag and others,** *The Impact of Regulating Occupational Pensions in Europe on Investment and Financial Stability* **(European Central Bank 2014) para 6.1.**