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Commentary

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INTERNATIONAL PENSION REFORM PROBLEMS AND SOLUTIONS *

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Thank you Professor Norton. You have raised one of the most crucial dilemmas from a lawyer's perspective, which is that we are in a situation where there is no one model. How viable is it, therefore, to have international regulation and international standards across the board?

Seeing the problems first, which I guess is a practitioner's kind of way, there is no doubt that there are international problems. We have been hearing about some of these this morning; we will hear more about them this afternoon. What are they? One of these problems is the supervision of providers. It is an international problem–in Latin America, England, I understand also in the United States and the Netherlands. Supervision of products is a problem area, particularly with the growth of defined contribution arrangements.

We also have investment risk. Who takes the investment risk? Who is responsible for the investment risk? Who actually retains the duty of care over an investment decision? These are again questions that are appearing in the United States, in the United Kingdom and in Europe as a whole.

 The following discussion is presented in its original transcript format, with minor editorial changes by the Author.

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Then there is the struggle between paternalism with respect to pension arrangements, which Professor Joseph Norton referred to, and individual responsibility for the pension arrangement. And finally, something which I feel very strongly about, the consumer education side of pension provision.

As we shift to privatized or partly privatized arrangements, we are putting a high burden on people who are not financially literate or sophisticated and asking them for their long-term pension provision. For that not to go hand in hand with some form of consumer protection or consumer education leads one to think that there must be a potential international issue there waiting to happen.

Therefore, I can see that there are a number of international problems. Are there any international solutions? I want to draw attention to some of the debates we have in Europe where, on a mini-scale, the European Commission and European governments try to reach multi-national solutions, although limited to European countries.

If you look for an example in the area of investment, which we mentioned earlier, the Commission has struggled for a long time to try and establish some European investment standard across the EC countries. It has actually failed, to date, quite miserably. There was a proposed directive which failed. The European Commission then issued a Communication to members to liberalize their investment standards. This too failed.

Thus, the European Commission is presently trying to impose a type of prudent man standard on all the European countries, a bit like the ERISA prudent man standard, but possibly more restrictive than that. I am hoping this will be expanded upon tomorrow, but it is very likely that there will be a prudent man standard introduced. If it is, that is an example of an international standard being imposed across countries with very, very different investment backgrounds.

If you then look at it the other way around, at the liability side, and the benefit side, has Europe managed to find an international solution to pensions in terms of benefit and liability structures? Is there anything close to a European pension fund lurking around?

The problem that we come up against in Europe when we try to find a Pan European solution is taxation–the separate taxation of countries and the protection of their tax systems. Until you have real tax harmonisation in Europe, it is very difficult to see how you can actually have an international pension solution across Europe. However, while you cannot currently achieve tax harmonization, for pension funds, you can take a step closer if you expand upon the double-tax treaty network so that it covers comprehensively every single European country. Unfortunately, that would mean getting involved with about 180 double-tax treaties agreed to between all the European countries.

Aside from that, the concept of tax harmonisation for pensions will need to be driven through the courts, through constant testing by insurance companies, beneficiaries, and providers of their Treats of Rome freedoms under the European court system. That may have started to happen with the recent *Satir* case.

So, my comment on your proposal is, yes, there are international problems, and yes, in some areas you can even have quasi-international solutions. However, as long as you continue to have separate tax environments, true international solutions are going to be very, very difficult to find.

Just a final comment, if I may, on corporate governance because I think that is a very interesting area of pension funds.

Over the past summer, the large European corporates got together to see whether there was any room for a corporate governance standard amongst these companies. Basically, the message that came out was no, there is not, because the disclosure requirement, the company law requirements, and various other issues are all too difficult at the moment. The one thing that conceivably might push these corporate governance standards together is actually some push from trustees of pension funds, people who hold those votes not as shareholders in companies, in the normal sense, but as institutional investors through the pension funds. I think this is an area where we will see a lot of development in the future.