Recueils
de textes

Vers les sommets du droit

Liber amicorum pour Henry Peter

Édité par
Rita Trigo Trindade
Rashid Bahar
Giulia Neri-Castracane

UNIVERSITÉ DE GENÈVE
FACULTÉ DE DROIT

Schulthess
ÉDITIONS ROMANDES

Collection Genevoise

Vers les sommets du droit

Liber amicorum pour Henry Peter

Édité par
Rita Trigo Trindade
Rashid Bahar
Giulia Neri-Castracane

UNIVERSITÉ DE GENÈVE
FACULTÉ DE DROIT

Schulthess § 2019
ÉDITIONS ROMANDES

Citation suggérée de l'ouvrage : Trigo Trindade / Bahar / Neri-Castracane (éds), Vers les sommets du droit : *liber amicorum* pour Henry Peter, Genève / Zurich 2019, Schulthess Éditions Romandes

ISBN 978-3-7255-8749-0

© Schulthess Médias Juridiques SA, Genève · Zurich · Bâle 2019
www.schulthess.com

Diffusion en France : Lextenso Éditions, 70, rue du Gouverneur Général Éboué,
92131 Issy-les-Moulineaux Cedex
www.lextenso-editions.com

Diffusion en Belgique et au Luxembourg Patrimoine, 119, avenue Milcamps, 1030 Bruxelles

Tous droits réservés. Toute traduction, reproduction, représentation ou adaptation intégrale ou partielle de cette publication, par quelque procédé que ce soit (graphique, électronique ou mécanique, y compris photocopie et microfilm), et toutes formes d'enregistrement sont strictement interdites sans l'autorisation expresse et écrite de l'éditeur.

Information bibliographique de la Deutsche Nationalbibliothek : la Deutsche Nationalbibliothek a répertorié cette publication dans la Deutsche Nationalbibliografie ; les données bibliographiques détaillées peuvent être consultées sur Internet à l'adresse http://dnb.d-nb.de.

Table des matières

Avant-propos V

I. Droit commercial, exécution forcée, arbitrage

Athletes & Social Media : What constitutes Ambush Marketing in the Digital Age ? The Case of Rule 40 of the Olympic Charter 3
DE WERRA, JACQUES

Assainissement des particuliers : état des lieux et perspectives 25
JEANDIN, NICOLAS / RAMELET-TELQIU, ALISA

Atteintes à la santé, prescription des créances et fonds d'indemnisation 47
JUNOD, VALÉRIE

La mise en gage d'actions représentées par des jetons numériques (*tokens*) 67
LEIBENSON, JOËL / BÉTRISEY, FRÉDÉRIC

Le trust et les huissiers 85
MARCHAND, SYLVAIN

A Wig for Arbitrators: What Does It Add? 105
SCHULTZ, THOMAS / BACHMANN, CLÉMENT

II. Droit des sociétés

La diffusion de la notion d'ayant droit économique en droit suisse des sociétés 123
BERISHA, ELMA

Suspendierung von Mitgliedern des Verwaltungsrates und der Revisionsstelle 143
BERTSCHINGER, URS

Prix d'émission et exercice mesuré des droits 161
CHENAUX, JEAN-LUC / BEROUD, GUY

Shaping Takeover Law : Die personelle Zusammensetzung der UEK und ihrer Vorgängerorganisation 177
EMMENEGGER, SUSAN / BIGLER, ANDREA

Conflit d'intérêts et carence dans l'organisation 191
MUSTAKI, GUY

Le dommage, talon d'Achille de l'action en responsabilité des administrateurs de sociétés en faillite ? 207
SAUERWEIN, NINA

Le dommage direct du créancier dans la responsabilité des organes : un cadeau empoisonné ? 223
STOFFEL, WALTER A. / CONSTANTIN, ARNAUD

La transmission d'entreprise au moyen d'un trust suisse 239
THÉVENOZ, LUC

Quand l'annulation est une sanction excessive 251
TRIGO TRINDADE, RITA

Die Kommunikation der Aktiengesellschaft mit den Aktionären............265
VON DER CRONE, HANS CASPAR / BAUMGARTNER, FLEUR

Proxy Advisors – wie weiter?..283
VON PLANTA, ANDREAS

III. Responsabilité sociétale des entreprises

Les valeurs communes au cœur d'un écheveau pluri-actoriel....................297
BOISSON DE CHAZOURNES, LAURENCE

Responsabilité sociale des entreprises : responsabilité de la société mère ou de son conseil d'administration ?..309
CHABLOZ, ISABELLE / PERRIARD, JULIE

Les standards internationaux en matière de finance durable: interactions entre démarches volontaires et exigences légales...................329
DARBELLAY, ALINE / STOYANOVA, HRISTINA

Réflexions sur l'usage stratégique du droit des sociétés et les quotas de genre dans les organes dirigeants..345
DE ROSSA GISIMUNDO, FEDERICA / CAVADINI-BIRCHLER, FRANCESCA

The Role of Pension Funds in the Low-carbon Transition 365
KARAMETAXAS, XENIA

The Place of Non-Trade Concerns in International Trade 379
MARCEAU, GABRIELLE / MARQUET, CLÉMENT

Finance for society : The rise of social impact investing……………………391
MAXIMILIAN MARTIN

La diligence en matière de droits de l'homme des principes Ruggie en Suisse..411
NERI-CASTRACANE, GIULIA

La gestion sociale et environnementale, un devoir des dirigeants sociaux 427
PETITPIERRE SAUVAIN, ANNE

How High can the Bird Fly – Human Rights Compliance in Businesses 443
WEBER, ROLF

IV. Philanthropie

Philanthropie et but lucratif : la quadrature du cercle ? 459
BAHAR, RASHID

La philanthropie : une affaire genevoise ? 481
DERMANGE, FRANÇOIS

Businessmen ou philanthropes ? Réflexions sur la rémunération des membres de l'organe supérieur de direction d'organisations à but non lucratif 493
JACQUEMET, GUILLAUME

Philanthropie et sport : l'incohérence de la lutte contre le dopage 515
KUHN, ANDRÉ / SERRANO, SOPHIE

An Act of Love? Tax Aspects of Corporate Philanthropy 529
LIEDEIKYTE HUBER, GIEDRE

P comme Peter et...Philanthropie À propos de quelques précurseurs de la philanthropie du droit international 541
MBENGUE, MAKANE MOÏSE

L'imposition des prestations philanthropiques transfrontalières - L'apport potentiel des normes de droit fiscal international, notamment des conventions de double imposition 557
OBERSON, XAVIER

XENIA KARAMETAXAS *

The Role of Pension Funds in the Low-carbon Transition

Table of Contents

Page

Introduction **366**

I. The crossroads of sustainability and financial markets **367**

II. Institutional investors and climate change **369**
- A. The leverage of pension funds in the low-carbon transition 369
- B. Responsible investment in the context of fiduciary duties 370
  - 1. The dynamic nature of fiduciary duties 370
  - 2. The duties of pension fund providers in the EU 372

III. Shifting from vision to regulation: the EU Commission's approach to responsible investment **373**

Conclusion and outlook **374**

Bibliography **376**

* PhD (University of Geneva) ; Postdoctoral Researcher and Lecturer (University of Zurich, Chair for Law & Finance).

Introduction

Creating a more sustainable development of the world requires urgent and multisectorial efforts. There is no doubt that the global financial markets and its actors have a crucial role to play in the transition to a low-carbon and resource-efficient global economy, after all they are funding providers for economic activities and growth. As a matter of fact, current levels of investment are insufficient to finance an environmentally-sustainable economic system. According to the Organization for Economic Co-operation and Development (OECD), US $ 6.3 trillion of investment in infrastructure is needed by 2030 to limit global warming below 2°C.[1] The EU Commission estimates that the EU needs to reduce its greenhouse gas (GHG) emissions by 40% and to fill a yearly investment gap of almost EUR 180 billion in order to achieve its climate and energy goals by 2030.[2] Such enormous sums cannot be borne by public finance alone. Reorienting private capital flows towards sustainable investments is an essential component of the transition towards a system that respects the planetary boundaries.[3]

In order to address effectively these challenges, we need a more profound understanding of the incentives of the key private finance actors, as well as a thorough revision of the regulatory system that governs them. The present essay addresses the position of pension funds in the low-carbon transition, with a particular focus on European pension funds. It analyses the duties of those who manage pension funds, as those duties relate to investment decision-making. There is a growing recognition that pension fund trustees are not only allowed, but obliged to consider relevant environmental, social and governance (ESG) factors in the investment policies and decision-making process, knowing that such issues must be seen as being material to financial returns and risks.[4] Without dwelling on the specific investment practices, the paper aims essentially at exploring ways of reducing hurdles that investors face in the selection and integration of ESG issues and on tools allowing them to better asses ESG performances of portfolio companies.

---

1 Organization for Economic Co-operation and Development (OECD) / The World Bank / UN Environment, Financing Climate Futures : Rethinking infrastructure, 2018, p. 6.

2 European Commission, Action Plan : Financing Sustainable Growth, COM 2018 97 final, p. 2.

3 SJÅFJELL, BEATE / NILSEN RAPP, HEIDI / RICHARDSON, BENJAMIN, p. 950.

4 MAATMAN, RENÉ / HUIJZER, ESTHER, P. 285; BARKER, SARAH / BAKER-JONES, MARK / BARTON, EMILIE / FAGAN, EMMA, p. 214; URWIN, p. 278; HAWLEY, JAMES, Setting the scene, p. 20.

I. The crossroads of sustainability and financial markets

Although not new, the public debate on sustainable investment in the financial sector has intensified since 2015, when two major global initiatives introduced a paradigm shift : first, by launching the 2030 Agenda for Sustainable Development Goals (SDGs) in September 2015, the United Nations (UN) committed to mobilizing efforts to fight poverty, inequality and climate change by calling upon not only states, but also the private sector to contribute to take action towards a more sustainable future for our planet and our economy.[5] Second, by adopting the Paris Agreement on climate change, 195 nations agreed on uniting their efforts to limit global warming below a 2°C increase.[6]

These initiatives were preceded by the United Nations Environment Programme – Finance Initiative (UNEP-FI), a partnership between United Nations Environment and the global financial sector. Created in 1992, in the wake of the Rio Earth Summit and evolving ever since into a group of over 200 financial institutions from over 40 countries, UNEP-FI contributes substantially to the understanding of how the environmental, social and governance challenges relate to finance.[7] Signatories to the UNEP-FI recognize in their Statement of Commitment that "economic development needs to be compatible with human welfare and a healthy environment".[8]

Institutional investors also increasingly commit to high-level initiatives issued directly by the market participants themselves. On the investors' side, the most important framework is the United Nation's Principles for Responsible Investment (UN-PRI), created in 2006.[9] This set of six broad principles have been complemented by the rise of regional climate-aware investor groups, such as the European Institutional Investors Group on Climate Change representing assets of

---

5 United Nations, Sustainable Development Goals, https://www.un.org/sustainabledevelopment/sustainable-development-goals/, accessed 9 May 2019.

6 United Framework Convention on Climate Change (UNFCCC), Adoption of the Paris Agreement (signed 12 December 2015, in force 4 November 2016) Decision 1/CP.21 UN Doc FCCC/CP/2015/10/Add.1, Annex (Paris Agreement), art. 2 a Paris Agreement.

7 BUSCH, DANNY / FERRARINNI, GUIDO / VAN DEN HURK, ARTHUR, p. 38.

8 UNEP-FI, 'Statement of Commitment by Financial Institutions on Sustainable Development', https://www.unepfi.org/fileadmin/statements/UNEPFI_Statement.pdf, accessed 12 April 2019.

9 https://www.unpri.org/pri/what-are-the-principles-for-responsible-investment, accessed 12 April 2019.

around 7.5 trillion Euro, as well as their Asian, Australian and American counterparts. These groups have joined forces and founded the Global Investor Coalition on Climate Change, in order to "improve investor practices, corporate actions and international policy responses to climate change".[10] Other international initiatives that reflect an increasing recognition of the impact of the financial markets and the behaviour of its actors on sustainable development are the Montreal Carbon Pledge and the Taskforce on climate-related Disclosures (TCFD), which was set up in 2015 by the Financial Stability Board (FSB) in order to improve the amount of reliable information on financial institutions' exposure to climate-related risks and opportunities, strengthening stability of the financial system and facilitating financing the transition to a more sustainable economy.[11] The TCFD published its final report in 2017, establishing recommendations that are applicable to organizations across sectors and jurisdictions and focusing on governance, strategy, risk management, metrics and targets.[12]

In addition, there are also joint-efforts by industry associations and the civil society, such as the 2014 Global Investor Statement on Climate Change and the Climate Action 100+ initiative launched at the One Planet Summit.[13]

On the European level, the Commission appointed a High-Level Expert Group (HLEG) in 2016, with the mandate to prepare the ground for a sustainable finance strategy for the European Union (EU) across the entire investment chain. In its final report, published in 2018, the HLEG provides eight key recommendations, and several cross-cutting recommendations targeted at specific sectors of the financial system.[14] Later that year, the Commission deepened these recommendations in an Action Plan,[15] setting finally out a concrete EU strategy to link sustainability and finance. [16]

---

10 Global Investor Coalition on Climate Change, https://globalinvestorcoalition.org/, accessed 9 May 2019.

11 See UNEP-FI, https://www.unepfi.org/climate-change/tcfd/, accessed 9 May 2019.

12 Task Force on Climate-Related Disclosures (TCFD), Recommendations of the TCFD (Final Report), 2017, https://www.fsb-tcfd.org/wp-content/uploads/2017/06/FINAL-TCFD-Report-062817.pdf, accessed 5 May 2019, 13.

13 OECD Background Paper, 2018, p. 14.

14 EU High-Level Expert Group on Sustainable Finance, Financing a Sustainable European Economy, Final Report, 2018.

15 Action Plan n° 2.

16 Some of these proposals will be discussed in part IV.

II. Institutional investors and climate change

A. The leverage of pension funds in the low-carbon transition

Given the long-term investment impact, climate change is particularly relevant for investors with a large investment horizon, such as pension funds.[17] At the same time, pension funds, as well as other institutional investors, are in an ideal position to pool their resources for sustainable development. First, as important capital providers they are able to reallocate funding from GHG intense towards clean technology projects. Second, by pricing assets and risks they predict company profitability and investment preferences. Finally, in their role as shareholders they exercise an influence on corporate management.[18]

All of these arguments are essentially based on the enormous amount of assets that pension funds accumulate and their status, allowing them to indirectly influence their investee corporations to encourage GHG mitigation strategies.[19] Due to their sheer size, pension funds own and manage broadly diversified assets, which gives them the status of "universal owners", and thus, leading them to adopt a global perspective and reach.[20]

Another aspect that should not to be forgotten is the advisory and advocacy role pension funds have vis-à-vis climate related governance frameworks that goes beyond their individual fiduciary duties.[21] Soft law initiatives taken by institutional investors themselves have given impetus to significant regulatory change, both on a domestic and an international level. Through industry associations, institutional investors influence the public opinion by encouraging disclosure, integrating climate change risks or advocating policy makers to adopt more coherent climate change policies (e.g. on carbon taxes or reforming fossil-fuel subsidies).[22]

---

17 BOWMAN, MEGAN, p. 33 ; LYDENBERG, STEVEN, p. 471.

18 RICHARDSON, BENJAMIN, Sustainable Finance, p. 309; BOWMAN, MEGAN, p.15.

19 BOWMAN, MEGAN, p. 36. On the universal owner theory : HAWLEY, JAMES / WILLIAMS, ANDREW, xvii ; HAWLEY, JAMES P., Setting the scene, p. 19 ; LYDENBERG, STEVEN, p. 470 ; RICHARDSON, BENJAMIN, Socially Responsible Investing, p. 323.

20 HAWLEY, JAMES P., Setting the scene, p. 17.

21 BOWMAN, MEGAN, p. 37.

22 OECD Background Paper 2018, p. 14.

B. Responsible investment in the context of fiduciary duties

As institutional investors, pension fund trustees have a fiduciary duty to act in good faith (duty of loyalty) and with due care, skill and diligence (duty of prudence) in the best interest of their beneficiaries. Translated into concrete terms, this means that pension fund trustees must invest the beneficiaries' assets in order to secure future benefits in terms of financial returns. It also means that trustees are obliged to put beneficiaries' interests above their own interests or those of a third party.[23]

1. The dynamic nature of fiduciary duties

The concept of fiduciary duties extends to all spheres of activity of pension funds, but when it comes to sustainable investment it is particularly relevant in relation to shareholder decision-making. Since pension funds invest a significant proportion of their assets in shares of listed companies, they have the power to influence, to a certain extent, the decisions made by the management of these companies and, thus, their climate-related corporate governance. To this effect, decisions taken by pension fund trustees such as the exercise of voting rights attached to the shares of stock they are holding help to mitigate the risks of climate change.

The implementation of fiduciary duties is dynamic and constantly evolving in response to broader social and economic circumstances.[24] Moreover, the exact understanding of fiduciary duties varies between jurisdictions and different types of institutions. At its core, however, the concept of fiduciary imposes a similar set of principles to institutional investors.[25] It is always based on a relationship of dependency, leaving beneficiaries vulnerable to potential abuse by their fiduciaries. After all, beneficiaries not only lack the information and knowledge necessary to control the actions and decision of the fiduciaries, but also the incentives to effectively control them.

While the imbalance of power between institutional investors and beneficiaries is related to the system of asset management itself, the duties of loyalty and prudence call for an in-depth reflection of the scope of the beneficiaries' best

---

23 Freshfields Report 2005, p. 19.

24 COOTER, ROBERT / FREEDMAN, BRADLEY J., p. 1045 ; JOHNSON, KEITH, p. 7 ; YOUNGDAHL, JAY, p. 21 ; SANDBERG, JOAKIM, p. 145 ; SANDERS, WILLIAM, p. 546.

25 SANDBERG, JOAKIM, p. 145.

interests. Over the last fifteen years, the understanding of beneficiaries' best interests has evolved from a narrow interpretation focusing solely on maximizing the financial return through short- and medium-term investments to a broader view that implies the pursue of a responsible investment strategy, with the integration of relevant ESG issues being the most common and effective one.[26] Pension funds additionally derive their responsible investment strategy from the concept of intergenerational equity, given that the duty of loyalty includes a duty of impartiality, which requires fiduciaries to treat the interests of different beneficiary groups with equal respect. In the light of demographic ageing and the depletion of non-renewable resources, this intergenerational dimension of the principle of loyalty and the long-term perspective of pension funds trustee's investment decisions will further gain importance.

Institutional investors adopt responsible investment strategies for a variety of reasons, but financial motives, such as higher returns and lower risks, are the most tangible ones. Over the last years they have emerged as key factors, in particular with regards to environmental risks.[27] In a nutshell, climate risks and opportunities have effects on corporations, transmitting those risks to their investors, and thus, on the investment outcomes for their beneficiaries.[28] Opportunities arise from climate-related products and services such as carbon trading, renewable energy and clean-tech markets, as well as from positive impacts on business such as higher resource efficiency and cost savings.[29] At the same time, pension funds are vulnerable to at least three types of climate related risks that could impact on financial stability.[30] First, they may face physical risks, due to the damages to assets arising from climate-related events. Second, they may have to bear the risks of litigation from parties who have suffered climate-related damages, seeking compensation from corporations they hold responsible. Finally, they are confronted to transition risks, which are mostly related to changes in the legal landscape that may impact on asset valuation and, hence, on financial stability, through the disruption of business models or the repricing of whole sectors. Therefore, since financial performance and stability is sensitive to climate-related factors, pension fund trustees must take them into consideration in their investment policies and decisions.[31]

---

26 GARY, SUSAN, p. 6.

27 KRÜGER, PHILIPP / SAUTNER, ZACHARIAS / STARKS, LAURA T., p. 18-58 ; OECD Background Paper 2018, p. 12.

28 KRÜGER, PHILIPP / SAUTNER, ZACHARIAS / STARKS, LAURA T., p. 1.

29 BOWMAN, MEGAN, p. 2 ; OECD Background Paper 2018, p. 12.

30 OECD Background Paper 2018, p. 12 ; MAATMAN, RENÉ / HUIJZER, ESTHER, p. 268.

31 UNPRI, Reporting Framework module FAQs for investors,

2. The duties of pension fund providers in the EU

EU Pension funds are required to adopt an investment policy in accordance with the prudent person rule. The first EU Pensions Directive (IORP I) offered little guidance on the fulfilment of the prudent person rule.[32] IORP I required basically that financial assets must be invested in such a way as to guarantee the security, quality, liquidity and return of the portfolio as a whole (total portfolio approach).[33] Whereas the concept of sustainability was not included in IORP I, the revised version of the Pension Directive from 2016 (IORP II) states that under the prudent person rule, pension funds are permitted to take account of the possible long-term effects of investment decisions on ESG issues.[34] Important as this has been, the approach to ESG factors set out in IORP II has a limited scope, leading some authors to qualify it as "somewhat half-hearted".[35] Indeed, under IORP II, the integration of sustainability issues does not necessarily mean that the outcome of the decision-making process is sustainable. The proportionality criterion allows pension fund providers to conclude that the costs involved in considering ESG factors are disproportionate to "the nature, scale and complexity of its activities".[36] Yet, if ESG factors have an influence on financial returns and risks, then this is an observation that must also apply to small pension providers. In this regard, Maatman, René and Huijzer, Esther correctly point out that small pension funds may have to organize their risk management more efficiently, notably by outsourcing the task of ESG performance assessment, and conclude that "ignoring such factors should not be an option". [37]

This arguably indicates that current EU rules on the duties of pension fund providers regarding sustainability factors and risks in the investment decision-making process still lack clarity and consistency.[38] The consequence is, as the EU Commission indicates, that some "institutional investors and asset managers still do not systematically consider sustainability factors and risks in the investment

<https://www.unpri.org/signatories/reporting-framework-module-faqs-for-investors/3714.article>, accessed 5 May 2019.

32 MAATMAN, RENÉ / HUIJZER, ESTHER, p. 259 ; Directive 2003/41/EC of the European Parliament and the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision.

33 Article 18(1) (b) IORP I.

34 Art. 19(1) (b) de la 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 (IORP II).

35 MAATMAN, RENÉ / HUIJZER, ESTHER, p. 267.

36 IORP II, recital (58) and arts. 21(2) and 28(1).

37 MAATMAN, RENÉ / HUIJZER, ESTHER, p. 267.

38 Action Plan n° 2, p. 8.

process”[39] or do not sufficiently disclose to their beneficiaries if and how they consider such factors.[40]

III. Shifting from vision to regulation: the EU Commission’s approach to responsible investment

The insight that sustainability issues have an impact on financial performance of financial institutions, and ultimately threaten financial stability, raises the question whether and how regulatory bodies must address this challenge and how to translate it into concrete policies. If the focus of the debate has so far been on the compatibility of ESG integration with the principles of fiduciary duties,[41] it can nowadays be assumed that that ESG factors are not only permissible but also highly material to financial returns and risks. This means that adopting responsible investment strategies must be seen as prudent, both from a financial and legal perspective, even by mainstream investors.[42]

The EU has taken a leading role by integrating the principles of sustainable finance into the core of its policies. In order to achieve the climate objectives set out in the Paris Agreement, the EU Commission has launched an action plan in March 2018, suggesting ten concrete initiatives to promote the transition to a low-carbon and resource-efficient economy.[43] A few months later, this action plan has led to a concrete Proposal for a regulation on disclosures relating to sustainable investments and sustainability risks and an amendment of Directive (EU) 2016/2341.[44]

One of the proposed provisions requires pension fund providers to publicly disclose on their websites their sustainability risk policies.[45] The proposal further indicates that such disclosure should contain descriptions of procedures and conditions, the extent to which sustainability risks are expected to have a relevant

---

39 *Ibid.*

40 *Ibid.*

41 Sandberg, Joakim, p. 143.

42 HAWLEY, James P., Setting the scene, p. 20 ; SJÅFJELL, BEATE / NILSEN RAPP, HEIDI / RICHARDSON, BENJAMIN, p. 954.

43 Action Plan n° 2.

44 European Commission, Proposal for a Regulation of the European Parliament and of the Council on disclosures relating to sustainable investments and sustainability risks and amending Directive (EU) 2016/2341 (Commission Proposal) COM(2018) 354 final.

45 Art. 3 Commission Proposal.

impact on the returns, as well as on the remuneration policies financial market participants.[46]

In addition, the Commission Proposal includes an amendment of IORP II, according to which the EU Commission would be empowered to adopt, by means of delegated acts, measures ensuring that the prudent person rule with respect to the consideration of ESG risks is taken into account and ESG factors are included in internal investment decisions and risk management processes.[47] The Commission Proposal gives a sharper outline to the duties of pension fund trustees regarding sustainable investment and is therefore a positive step forward. Should it enter into force, it would bring an end to the vague approach to ESG factors of IORP II.[48]

Transparency of sustainability risk policies and a more consistent regime of the prudent person rule with respect to ESG factors are not the only specific actions that the Commission suggests. The Commission further intents to develop a gradual process for a unified EU classification system regarding sustainable economic activities.[49] Building on such a taxonomy, the Commission aims at creating EU-wide standards and labels for sustainable financial products, in order to "protect the integrity of and trust in the sustainable financial market".[50] Through low-carbon benchmarks, which are basically adaptations of existing market indices, investors (and their beneficiaries) would be able to compare the carbon footprint of their investment portfolio with the benchmarks,[51] and therefore be able to make better investment decisions. By establishing a set of clear EU-standards for sustainable investments, the proposed revision is expected to bring some clarity to investors about which projects have a positive impact on climate change and, hence, mitigate the risks of greenwashing.

Conclusion and outlook

The transition to a more sustainable global economy requires a legal dialogue in all spheres, with the financial sector being no exception. As key private finance actors, owing fiduciary duties to current and future beneficiaries, pension fund

---

46 Art 4 (1) Commission Proposal.
47 Art. 10 (1) Commission Proposal.
48 MAATMAN, RENÉ / HUIJZER, ESTHER, p. 267.
49 Action Plan n° 2, p. 4.
50 *Ibid.*
51 MAATMAN, RENÉ / HUIJZER, ESTHER, p. 269.

providers must embrace their role in the low-carbon shift by adopting long-term investment decisions that ensure sustainable and inclusive growth in the long run.

Looking ahead, in view of the climate objectives and a growing public awareness, but also in the light of demographic ageing, the need for long-term investment decisions will further gain importance. In this regard, the issues to be addressed mainly concern means of reducing hurdles that pension fund trustees face in the selection and integration of ESG strategies and on tools to better assess the ESG performance of portfolio companies.

In order to mitigate the systemic risks of climate change, the financial sector is in the midst of a fundamental paradigm shift to long-termism. Regulators have a fundamental role to play by establishing clear and effective normative frameworks that provide stability and transparency to market participants.

Once entred into force, the legislative measures proposed by the Commission to implement the actions set out in its action plan will improve the scope of sustainable investment and increase the information available to pension funds on relevant ESG issues. Moving from rhetoric to action and eventually to proper regulation, the EU is integrating a sustainable finance into the core of its policies.

Bibliography

AHLSTRÖM, HANNA, Policy Hotspots for Sustainability : Changes in the E Regulation of Sustainable Business and Finance, Sustainability 2019/11, p. 49 ff

BARKER, SARAH / BAKER-JONES, MARK / BARTON, EMILIE / FAGAN, EMMA, Climate change and the fiduciary duties of pension fund trustees – lessons from the Australian law, Journal of Sustainable Finance & Investment 2016 6/3, p. 211 ff

BOWMAN, MEGAN, Banking on Climate Change – How Finance Actors and Transnational Regulatory Regimes Are Responding, 2015

BUSCH, DANNY / FERRARINNI, GUIDO / VAN DEN HURK, ARTHUR, The European Commission's Sustainable Finance Action Plan in Sustainability and Financial Markets, 2019

COOTER, ROBERT / FREEDMAN, BRADLEY J., The Fiduciary Relationship : Its Economic Character and Legal Consequences, New York University Law Review 1991 1/66, p. 1045 ff

European Commission, Communication from the Commission to the European Parliament, the European Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions - Action Plan : Financing Sustainable Growth, 8 March 2018, COM(2018) 97 final

European Union High-Level Expert Group (EU-HLEG) on Sustainable Finance, Financing a Sustainable European Economy (Final Report) 2018, https://ec.europa.eu/info/publications/180131-sustainable-finance-report_en, 12 April 2019

GARY, SUSAN, Best Interests in the Long Term : Fiduciary Duty and ESG Integration, University of Colorado Law Review 1 2018 90, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3149856, accessed 12 April 2019

HAWLEY, JAMES P., Setting the scene : the basics and basis of responsible investment, in The Routledge Handbook of Responsible Investment, 2015, p. 16 ff (HAWLEY, JAMES P., Setting the scene)

HAWLEY, JAMES / WILLIAMS, ANDREW, The Rise of Fiduciary Capitalism – How Institutional Investors Can Make Corporate America More Democratic, 2000

JOHNSON, KEITH, Introduction to Institutional Investor Fiduciary Duties, International Institute for Sustainable Development Report, 2014

KRÜGER, PHILIPP / SAUTNER, ZACHARIAS / STARKS, LAURA T., The Importance of Climate Risks for Institutional Investors, Swiss Finance Institute Research Paper 2018 18-58, https://ssrn.com/abstract=3235190, accessed 22 January 2019.

LYDENBERG, STEVEN, Universal Investors and Socially Responsible Investors : a tale of emerging affinities, Corporate Governance : An International Review (2007) 15/3 , p. 467ff

MAATMAN, RENÉ / HUIJZER, ESTHER, 15 years of the prudent person rule : pension funds, ESG factors and sustainable investing, in Sustainability and Financial Markets, 2019, p. 255 ff

Organization for Economic Co-operation and Development (OECD), Integrating Climate Change-related Factors in Institutional Investment, Background Paper for the 36th Round Table on Sustainable Development 8-9 February 2018, https://www.oecd.org/sd-roundtable/papersandpublications /Integrating%20Climate%20Change-related%20Factors%20in%20 Institutional%20Investment.pdf, accessed 12 May 2019

Organization for Economic Co-operation and Development (OECD) / The World Bank / UN Environment, Financing Climate Futures : Rethinking infrastructure 2018, https://www.oecd.org/environment/cc/climate-futures/policy-highlights-financing-climate-futures.pdf, accessed 12 May 2019

RICHARDSON, BENJAMIN, Sustainable Finance : Environmental Law and Financial Institutions, in Environmental Law for Sustainability (Hart Publishing 2006), p. 309 ff (RICHARDSON, BENJAMIN, Sustainable Finance)

RICHARDSON, BENJAMIN, Socially Responsible Investing for Sustainability: Overcoming Incomplete and Conflicting Rationales, Transnational Environmental Law (2013) 2/2, p. 311 ff (RICHARDSON, BENJAMIN, Socially Responsible Investing)

SANDBERG, JOAKIM, Socially Responsible Investment and Fiduciary Duty : Putting the Freshfields Report into Perspective, Journal of Business Ethics 2011 101, p. 143 ff

SANDERS, WILLIAM, Resolving the Conflict Between Fiduciary Duties and Socially Responsible Investing, Pace Law Review 2014 35/2, p. 535 ff

SJÅFJELL, BEATE / NILSEN, RAPP HEIDI / RICHARDSON, BENJAMIN, Investing in Sustainability or Feeding on Stranded Assets ? The Norwegian Government Pension Fund Global Wake Forest Law Review 2017 52, p. 949 ff

Task Force on Climate-Related Disclosures (TCFD), Recommendations of the TCFD (Final Report) 2017, https://www.fsb-tcfd.org/wp-content/uploads/2017/06/FINAL-TCFD-Report-062817.pdf, accessed 5 May 2019

YOUNGDAHL, JAY, The basics of fiduciary duty in investment in the United States in Cambridge Handbook of Institutional Investment and Fiduciary Duty, Cambridge 2014, p. 20 ff

United Nations Environment Programme (UNEP-FI) / Freshfields Bruckhaus Deringer, A legal framework for the integration if environ-mental, social and governance issues into institutional investment, 2005 (Freshfields Report 2005)

URWIN, ROGER, Pension fund fiduciary duty and its impacts on sustainable investing, in Cambridge Handbook of Institutional Investment and Fiduciary Duty, Cambridge 2014, 277-286