

# Between stakeholders and shareholders: Pension funds and labour solidarity in the age of sustainability

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## Abstract

This article investigates the contribution of pension funds in harnessing the power of finance to achieve social and environmental objectives. After reviewing and discussing the potential and main hurdles to pension fund engagement in Socially Responsible Investment (SRI), the common law approach to shareholder activism is contrasted with the EU law on pension funds and on sustainability-related disclosures and taxonomies. Unlike the US and other common law jurisdictions, where the duties regarding retirement institutions are derived from trust law, EU rules on pension funds governance and investment policies are generally grounded on the more relaxed duties of corporate and financial law. On the one hand, this makes it easier for pension funds to consider the potential impact of environmental, social and governance factors (ESG) on investment decisions. On the other, social and environmental concerns are functionalised for economic purposes, thus reducing the possibilities for a more critical and strategic use of pension funds' financial power by activists. This also explains why, despite being often participated in by trade unions, the existing governance of pension funds in Europe tends to outsource the management of investment policies to financial operators. While this takes responsibility away from the governing boards of pension funds in terms of their legal duties, the combination of decentralisation and the outsourcing of investment management undermines the possibility for unions to engage in shareholder activism, and to strike a balance between the position of workers as stakeholders and the position of workers as shareholders.

## Keywords

pension funds, shareholder activism, socially responsible investments, ESG, trade unions

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## I. Introduction

In his popular monograph of 1976,<sup>1</sup> Peter Drucker predicted the rise of pension funds as the new ‘owner’ of capital in contemporary market economies. Without overthrowing capitalism, workers would come to ‘own’ the means of production through the stocks held by their pension funds, leaving capital and labour both mobile and free. As workers were no longer merely wage-earners, they became — at least indirectly — ‘owners’ of capital. The emergence of pension fund socialism, he argued, would represent ‘... a unique opportunity to restore the legitimacy of management. This is an “ownership” interest which society will accept as legitimate. At the same time, the interest of these owners and the interest of the enterprise are identical, which is not necessarily always the case for the two other constituencies, those of present workers and of consumers.’<sup>2</sup>

Arguably, Drucker’s conclusions were exaggerated. The assumption that workers ‘own’ firms through the stocks held by their pension funds was legally inaccurate.<sup>3</sup> Ownership implies the owner’s right and responsibility to organise the means of production efficiently, to allocate resources and investments productively, to decide how profit should be pursued and redistributed, as well as to exercise the power of direction, control and sanction over the workforce. What workers as shareholders own, instead, ‘is not the company as such (in itself, almost a meaningless proportion) but their shares, and this, among other things, gives them the right, exclusively of all the stakeholder groups, to hold directors and managers accountable’.<sup>4</sup>

But Drucker was persuasive in drawing attention to significant aspects of the labour-capital (and environmental) nexus in contemporary societies, conceptualising the financial power that pension funds could exercise over firms to steer the market economy and society towards more sustainable pathways. In parallel with the uncertain shift from shareholder primacy to the stakeholder model of corporate governance,<sup>5</sup> and the growing relevance of social and environmental concerns in traditional business operations, pension funds have come to nominally own massive shares in firms.<sup>6</sup> Invested in corporations, hedge funds, and private equity funds, they ‘can become one of labour’s most powerful mechanisms for advancing the interests of twenty-first-century workers’.<sup>7</sup> As labour’s capital, it is reasonable that pension funds are invested according to the criteria of societal needs, with the goal of balancing returns for their members and ensuring that the

1. P. F. Drucker, *The Unseen Revolution: How Pension Fund Socialism Came to America* (Harper & Row 1976).

2. P. F. Drucker, *The Unseen Revolution*, *cit.*, pp. 83–84.

3. Cf. R.M. Buxbaum, ‘Juridification and Legitimation Problems in American Enterprise Law’, in G. Teubner (ed.), *Juridification of Social Spheres. A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law*, Walter de Gruyter, 1987, at p. 258. See the critical review of R. Hillman, ‘Book review of *The Unseen Revolution: How Pension Fund Socialism Came to America* (Harper & Row, New York, 1976)’ (1978) 3 *Southern California Law Review* 593–610 at p. 594.

4. S. Deakin, ‘Workers, finance and democracy’, in C. Barnard, S. Deakin, G.S. Morris (eds.), *The Future of Labour Law: Liber Amicorum Sir Bob Hepple* (Hart 2004) p. 82.

5. This shift has been given extensive treatment in S. Deakin, ‘The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise’ (2012) 37 *Queen’s Law Journal* 339–381 and, more recently, in G. M. Haiden, M. T. Bodie, *Reconstructing the Corporation. From Shareholder Primacy to Shared Governance*, Cambridge University Press, 2020.

6. Recent analysis reports that a small sample of pension funds alone manages at least EUR79 billion in liquid fossil fuel assets, suggesting that OECD pension funds may jointly manage between EUR238–828 billion: A. Rempel, J. Gupta, ‘Conflicting commitments? Examining pension funds, fossil fuel assets and climate policy in the organisation for economic co-operation and development (OECD)’ (2020) 69 *Energy Research & Social Science* 1–9.

7. D. Webber, *The Rise of the Working-Class Shareholder. Labor’s Last Best Weapon*, Harvard University Press, 2018, at 212.

business activities in which they invest are environmentally and socially sustainable. Rephrasing Wolfgang Streeck's argument on workers as consumers,<sup>8</sup> workers as shareholders may become the foremost drivers of market innovation and sustainability, imposing on firms and industries an unprecedented rate of 'creative destruction'.<sup>9</sup>

In contrast to the US and other common law jurisdictions, where the concept of shareholder activism to hold companies to good governance is hardly new in legal and non-legal literature,<sup>10</sup> the contribution of pension funds in harnessing the power of finance to achieve social and environmental objectives is overlooked in the continental Europe labour law tradition. This article considers two sets of intertwined reasons to explain why the potential of the 'unseen revolution' in social ownership has not been much considered in labour policy and the industrial relations agenda in Europe.

Firstly, the engagement of European pension funds in sustainable finance is legally grounded in corporate and financial law. Although these normative domains have gradually internalised considerations on the importance to promote environmental, social and governance (ESG) goals, they have at the same time legitimised the status quo, marginalising the possibility for a more critical and strategic use of pension funds' financial power.<sup>11</sup> Compared to Socially Responsible Investments (SRI), under which ethical concerns are given primacy in investment policy, ESG goals are mainly driven by financial considerations.<sup>12</sup>

Secondly, shareholder activism through pension funds developed in the US and other common law jurisdictions as a part of a broader revitalisation strategy for the labour movement. Faced with aggressive anti-union tactics by employers and the threat of moving jobs away from the US, American unions have tried to counter their membership decline by organising workers as shareholders, shifting the focus of collective action from the bargaining table to the boardroom.<sup>13</sup> In contrast to labour's traditional conflict with capital and ownership, this shift has created a potential channel for union engagement in shareholder activism, involving a reconsideration of the worker-management relationship.

European trade unions are still stuck to classical labour law and industrial relations frames of reference. These pluralistic frames of reference construe workers as capital stakeholders and tend to ignore the interests of workers as shareholders.<sup>14</sup> As noted by Webber, 'these interests are rarely considered together. They are studied in different parts of the academy, covered by different

8. W. Streeck, 'Industrial Relations Today: Reining in Flexibility' (2008) MPIfG Working Paper no. 08/3, 14–15.

9. J. A. Shumpeter, *Capitalism, socialism and democracy*, Allen and Unwin, 1943.

10. In addition to P. F. Drucker, *The Unseen Revolution*, cit. and D. Webber, *The Rise of the Working-Class Shareholder*, cit., see S. M. Jacoby, *Labor in the Age of Finance. Pension, Politics, and Corporations from Deindustrialization to Dodd-Frank*, Princeton University Press, 2021, *passim*. Cf. also J. Rifkin, R. Barber, *The North Will Rise Again: Pensions, Politics and Power in the 1980's*, Beacon Press, 1978, at 10 and *passim*, and T. Ghilarducci, *Labour's Capital: The Economics and Politics of Private Pensions*, MIT Press, 1992, especially chapters 5 and 6.

11. For broader discussion about this seeming paradox, see J. Sandberg, 'Socially Responsible Investment and Fiduciary Duty: Putting the Freshfields Report into Perspective' (2011) 101 *Journal of Business Ethics* 143–162. See also B. J. Richardson, *Socially responsible investment law: regulating the unseen polluters*, Oxford University Press, 2008, at 212–220.

12. Extensive analysis on the conceptual and legal differences between SRI and ESG is developed by L. Daniels, Y. Stevens, D. Pratt, 'Environmentally friendly and socially responsible investment in and by occupational pension funds in the USA and in the EU' (2021) 23 *European Journal of Social Security* 247–263, at 248–250.

13. S. M. Jacoby, *Labor in the Age of Finance*, cit., at 1.

14. P. Bridgen, M. Naczyk, 'Shareholders of the World United? Organized Labour's Preferences on Corporate Governance under Pension Fund Capitalism in the United States, United Kingdom and France' (2019) 57 *British Journal of Industrial Relations* 651–675.

bodies of law (...). On the rare occasion when these interests are discussed together, they are portrayed as being in conflict.<sup>15</sup> This is unfortunate, since the power of workers as stakeholders might be influenced by the power of workers as shareholders. With their pension funds, workers and unions can find 'a source of power outside the labour market to augment their power within it.'<sup>16</sup> Unions' engagement with shareholders can influence business strategies and management in a way that increases the democratic exercise of an employer's power within a given firm. In their position as shareholders in a firm's pension fund, for example, workers can use their financial power to demand change directly from their employer. Externally, pension funds can channel solidarity among different groups of workers. By promoting and incentivising sustainable managerial practices, labour financial activism can ultimately result in improved and more sustainable working and living conditions.

After reviewing and discussing the potential and main hurdles to pension fund engagement in SRI, this article contrasts the common law approach to shareholder activism with the EU law on pension funds and on sustainability-related disclosures and taxonomies as a progressive example of regulation in this field, which alongside notable opportunities, presents several risks. The following sections critically discuss the rise of union engagement in shareholder activism. The contribution that organised labour is making towards achieving sustainability through pension funds is emphasised, along with the shortcomings that this approach involves for workers in their capacity as both stakeholders and shareholders. The last section concludes by drawing on this discussion.

## 2. Socially responsible investments: Possibilities and limits for pension funds

Many pension funds in core countries are advocating Socially Responsible Investments (SRI) to meet sustainability goals. Billions of workers' money are currently invested to advance social and environmental sustainability. From the US to Japan, the UK to Australia, and Europe to South America, the idea that pension funds should not only maximise financial benefits for their members but also use their economic power to foster sustainability has gained much ground in the last two decades. The UN Paris Agreement was a booster for sustainable finance. Article 2(1)(c) of the Paris Agreement provides for 'making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.'<sup>17</sup>

In many countries, pension funds have joined initiatives such as the Principles for Responsible Investments, the Carbon Disclosure Project and the Montreal Carbon Pledge. They are promoting engagement, advocacy and active ownership to control and potentially impede environmentally- and socially – harmful behaviours either by direct investments in sustainable businesses (as an active approach)<sup>18</sup> or divesting from firms with, for example, big carbon footprints (a

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15. D. Webber, *The Rise of the Working-Class Shareholder*, cit., xii–xiii.

16. S. M. Jacoby, *Labor in the Age of Finance*, cit., at 5.

17. United Nations, Paris Agreement, 12 Dec. 2015, in force 4 Nov. 2016.

18. In the case of the so-called active approach, shareholder dialogue with companies 'is pursued in order to steer their behaviour in a desired direction. By exercising voting rights based on shareholdings, this pressure can be increased. In this area significant progress has been made in recent decades. Institutional investors join forces for the purpose of concerted engagement or vote on the basis of recommendations' (G. Klec, D. Mum, 'Trade union influence on companies via pension fund investment', in S. Vitols (ed.), *Long-term investment and the Sustainable Company: a stakeholder perspective*, Vol. III, ETUI, 2015, p. 123).

passive approach).<sup>19</sup> Sustainability reports reveal that – whether they are firm-based or multi-employer, public or private – pension funds engage in five actions to implement social and climate policies: divestment; direct engagement; carbon footprint calculations; investing in ‘green’ alternatives; and engaging in climate-oriented coalitions.<sup>20</sup>

Scandinavian pension funds, for example, are leading the global race to zero by pulling fossil fuel investments from their portfolios. The Norwegian Government Pension Fund Global (GPF), as the world’s largest sovereign wealth fund, is a pioneering example of ethical investment decisions, based on active ownership and the exclusion of firms from its portfolio. Two major reasons for excluding a company are severe environmental damage and coal production, leading to a slew of expulsions from the fund’s holdings. In the same ethical vein, the UK’s biggest pension fund, the government-backed National Employment Savings Trust (NEST) scheme, with nine million members, has begun divesting from fossil fuels. NEST’s ethical fund invests in companies with positive records on human rights and fair trade policies. It also avoids investing in tobacco, arms or corrupt states and claims not to go near companies that damage the environment. At a local level, the Greater Manchester Pension Fund (GMPF) invested GBP10 million in a renewable energy developer focusing on community-scale projects in the UK. Similar developments are reported in EU countries.<sup>21</sup> In Italy, for example, the sectoral pension fund for workers in the metalworking industry (Cometa) adopted a resolution to use the right to vote in shareholders’ meetings of companies falling within its investment portfolio, to reinforce the engagement on ESG aspects. The voting policy is based on the social model and the labour standards laid down in the national collective labour agreement for metalworkers in Italy, which Cometa uses as a benchmark to decide how to vote on shareholders’ resolutions in invested companies.

In some cases, multi-employer pension funds promote strategic litigation to achieve sustainability goals. US pension funds are particularly active in the courts. In December 2018, for example, New York City pension funds<sup>22</sup> filed a lawsuit against the TransDigm Group,<sup>23</sup> alleging that the aerospace company intended to unlawfully exclude from its proxy statement their shareholder proposal to adopt a management plan for greenhouse gas emissions, taking into account the objectives of the Paris Climate Agreement, and to report on its plans to achieve these targets at a reasonable cost and omitting proprietary information. The company subsequently withdrew its request to the Securities and Exchange Commission (SEC) for a no-action determination. The company further advised the SEC that it would include the proposal in its 2019 proxy statement. In January 2019, the federal lawsuit was resolved with the stipulation of a settlement and dismissal filed by the parties.<sup>24</sup>

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19. In the so-called passive approach, the focus is on the selection of pension fund securities portfolios: ‘the exertion of influence over companies with whose social, ethical or environmental performance one does not agree takes place via the securities markets. Principle-based investors sell and no longer invest in the shares of companies with whose behaviour they do not agree’ (G. Klec, D. Mum, ‘Trade union influence on companies via pension fund investment’, cit., p. 122).

20. A. Rempel, J. Gupta, ‘Conflicting commitments?...’, cit.

21. P. Bridgen, M. Naczyk, ‘Shareholders of the World United? Organized Labour’s Preferences on Corporate Governance under Pension Fund Capitalism in the United States, United Kingdom and France’ (2019) 57 *British Journal of Industrial Relations* 651–675 and R. Vianello, ‘Previdenza complementare e transizione ecologica’ (2022) 32 *Diritto delle Relazioni Industriali* 737–764.

22. The plaintiffs include the following funds: New York City Employees’ Retirement System (NYCERS), Teachers’ Retirement System of the City of New York (TRS), the New York City Police Pension Fund (PPF), the New York City Fire Department Pension Fund (FPF), and the New York City Board of Education Retirement System (BERS).

23. *New York City Employees’ Retirement System v. TransDigm Group, Inc.*, 6<sup>th</sup> December 2018.

24. Stipulation of settlement and dismissal, 18<sup>th</sup> January 2019.

Despite positive developments, successful cases remain infrequent and good practices can hardly be generalised. Neither commercial nor ethical compulsions have so far proved adequate to make SRI dominant in the financial market.<sup>25</sup> Beyond the meagre quantitative incidence, evidence suggests that commitments made by pension funds do not necessarily result in making their financial flows truly consistent with social goals and with the need to address the climate emergency.<sup>26</sup> Most importantly, much of the finance masquerading as SRI hardly contributes to sustainable development.<sup>27</sup> Ironically, hedge funds and private equity funds tend to invest retirement money against workers' interests.<sup>28</sup> Although empirical evidence reveals that pension funds are apparently increasingly willing to take action in addressing social and environmental issues, these institutions have been so far ineffective and even counterproductive,<sup>29</sup> which *de facto* renders them barely functional in meeting the ambitious UN, ILO and EU social and climate goals.

### 2.1 The limit of fiduciary duty in common law jurisdictions

In common law jurisdictions, such limits are intrinsically linked to the structural dilemma of how financial institutions can uphold their fiduciary duty and the correlated legal restraints while addressing environmental and social concerns. As a product of financial capitalism, the primary concern of fiduciary rules is to restrict the risk pension funds carry to safeguard retirement income.<sup>30</sup>

Consider the US Employee Retirement Income Security Act of 1974 (ERISA), for example. Plan fiduciaries are obligated to act 'solely in the interest of participants and beneficiaries' for the 'exclusive purpose of providing benefits' to them. The so-called sole purpose test, which is outlined in section 62 of the Australian Superannuation Industry (Supervision) Act of 1993, also provides narrow fund-manager discretion in investment decisions. It requires that the superannuation fund is maintained only for the purpose of providing benefits to its members upon their retirement, or for beneficiaries, if a member dies.

Grounded on trust law, a narrow definition of fiduciary duty suggests that pension funds' investment logic must first be driven by returns, not ethics. Fiduciary duty is therefore construed as a mandate to pursue short-term maximum returns on investments, disregarding considerations unrelated to profit maximisation. Although the argument on fiduciary duty has long been used as a political expedient to exclude social and environmental objectives from investment policies, considerable legal scholarship contests this narrow interpretation.<sup>31</sup> Accordingly, promoting non-financial criteria in pension fund investments does not necessarily lead to a breach of fiduciary duties.

25. B. J. Richardson, *Socially responsible investment law...*, cit., at 121.

26. A. Rempel, J. Gupta, *Conflicting commitments?*, cit., at 6–7.

27. B. J. Richardson, *Socially responsible investment law...*, cit., at, note 1, p. 2–3.

28. D. Webber, *The Rise of the Working-Class Shareholder*, cit., p. xii.

29. A. Rempel, J. Gupta, *Conflicting commitments?*, cit., 1–9.

30. M. A. O'Connor, 'Organized Labor as Shareholder Activist: Building Coalitions to Promote Worker Capitalism' (1997) 37 *University of Richmond Law Review* 1345–1398, at 1357. See also S. M. Bainbridge, 'Director Primacy and Shareholder Disempowerment' (2006) 119 *Harvard Law Review* 1735, specifically at 1755.

31. In addition to B. J. Richardson, *Socially responsible investment law: regulating the unseen polluters*, cit. and J. Sandberg, 'Socially Responsible Investment and Fiduciary Duty', cit., see the recent discussion in D. Webber, *The Rise of the Working-Class Shareholder*, cit., 181–183. See also L. Daniels, Y. Stevens, D. Pratt, 'Environmentally friendly and socially responsible investment in and by occupational pension funds in the USA and in the EU', cit., at 253.

Further to ethical considerations, there is a business case approach to SRI.<sup>32</sup> The language of climate change and global warming, for example, may seem detached from the return interest of pension fund members. Limiting the environmental impacts of investment decisions, by directing financial choices towards companies with low greenhouse gas emissions, apparently goes against fiduciary duties. On the contrary, considering climate and environmental risks in investment decisions could prevent shareholders from suffering the negative impacts that they would experience in the event, for example, of future disputes over environmental scandals caused by fossil fuel companies. Also, the effects of decarbonisation policies on fossil fuel companies might have negative implications for investors, including pension funds. As the transition away from fossil fuels is now a reality, lowering prices, financial instability and likely bankruptcies could cause huge losses for current and future generations of retired workers. In principle, therefore, divestment from fossil fuels and sustainable investment are not in opposition with shareholder interests and trustee duties.

Once the respect of fiduciary duties is secured, the divide between the business case approach and the ethical approach to SRI becomes more nuanced. For activists, the business case approach to SRI could be used as an expedient to circumvent fiduciary duties, and then pursue broader societal and ethical goals. *McVeigh v. Retail Employees Superannuation Trust (REST)* is an exemplary case in this respect.<sup>33</sup>

Mark McVeigh, then a 23-year-old ecology student from Brisbane and pension fund member, filed suit against REST before the Federal Court of Australia, alleging that the fund violated the 2001 Corporations Act by failing to disclose information relating to the business risks resulting from climate change and any plans to address such risks.<sup>34</sup> On 2 November 2020, the parties reached a settlement in which the Australian organisational pension fund committed to aligning its portfolio with the Paris Agreement, by incorporating 'climate change financial risks' into its investments and implementing a 'net-zero by 2050 carbon footprint goal'.<sup>35</sup> REST also agreed to implement a number of climate-change initiatives, including requiring its investment managers to take active steps to consider climate change, to measure and manage financial risks posed by climate change and other ESG-related risks, as well as to improve its climate change and ESG-related disclosures. Although the case never reached court, the settlement highlights the potential liability which pension funds might face if they do not adequately address the risks that climate change poses to their investments. This is also a landmark precedent that shows how the contraposition between the business case approach and the ethical approach to SRI might be strategically deconstructed.

### 3. The EU model for pension fund engagement in sustainable finance

While in the US and other common law jurisdictions the possibility for pension fund engagement in sustainable investment is still a matter of interpretation and political consensus, a range of organisation and regulation of occupational pension schemes exists among the EU Member States. Although the term fiduciary duty is not embedded in EU law, equivalent statutory provisions

32. This is the approach taken by the Freshfields Report: UNEP, *A legal framework for the integration of environmental, social and governance issues into institutional investment*, 2005. For critical discussion of this report, see J. Sandberg, 'Socially Responsible Investment and Fiduciary Duty', cit., *passim*.

33. *McVeigh v. Retail Employees Superannuation Trust*, Federal Court of Australia.

34. For broader discussion on this case, see E. Colombo, 'From Bushfires to Misfires: Climate-related Financial Risk after *McVeigh v. Retail Employees Superannuation Trust*' (2022) 11 *Transnational Environmental Law* 173–199.

35. Statement from REST, 2 November 2020.

regulating the conduct of investment decision – such as the notion of professionalism and the prudent person rule – are part of the foundation of existing EU finance policy.<sup>36</sup> Unlike common law jurisdictions, where the duties regarding retirement institutions are generally derived from trust law, EU rules on pension fund governance and investment policies are grounded on the more relaxed duties of corporate and financial law.<sup>37</sup> On the one hand, this makes it easier for pension funds to take into account the potential impact of environmental, social and governance factors on investment decisions and outcomes. On the other, social and environmental concerns are functionalised for economic purposes, thus reducing the possibilities for a more critical and strategic use of pension funds' financial power. This is the approach taken by the European Union. In the wake of the Paris Agreement and the UN 2030 Agenda, the EU is rapidly building a legal framework to reorient capital flows towards sustainable investments. This legal framework includes specific provisions targeting the investment policies of institutions for occupational retirement, as well as the rules applicable to financial services in general, which are indirectly relevant for pension funds. The following two sections analyse both provisions.

### 3.1 Rules on institutions for occupational retirement provision: The ESG approach

In December 2016, the EU adopted a recast version of the IORP (Institutions for Occupational Retirement Provision) Directive<sup>38</sup> to encourage long-term investment through occupational pension funds.<sup>39</sup> Among other goals, the recast Directive aims to encourage occupational pension funds to invest in long-term economic activities that enhance growth, environmental sustainability and employment. In this connection, IORPs are exhorted to take into account environmental, social and governance (ESG) risks in their investment decisions and to document these risks in their three-yearly statement of investment policy principles. If environmental, social and governance risks are considered, this should be disclosed.<sup>40</sup>

Article 19 of the recast Directive states that Member States shall require IORPs registered or authorised in their jurisdictions to invest in line with the 'prudent person' rule, according to which the assets shall be invested in the best long-term interests of members and beneficiaries as a whole. Within the 'prudent person' standard of fiduciary conduct, Member States shall allow IORPs to take into account the potential long-term impact of investment decisions on ESG factors. Although the question of what precisely lies in the interests of beneficiaries remains unclear and should be assessed on a case-by-case basis, this provision is significant given that the 'prudent person' rule should now be interpreted in the sense that, in principle, taking into account non-financial criteria (such as environmental, social, and governance factors) in investment decisions does not constitute an infringement of fiduciary duty. Apparently, shareholder activism for social and environmental purposes now has greater and clearer legitimation when it comes to deciding on the financial investments of pension funds in the European Union. Yet, this may not necessarily be the case.

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36. For comparative analysis of existing legislation in EU Member States and beyond, see UNEP, *Fiduciary duty in 21<sup>st</sup> century. Final report*, 2021 and UNEP, *A legal framework for the integration of environmental, social and governance issues into institutional investment*, 2005.

37. For discussion on such differences, see D. Webber, *The Rise of the Working-Class Shareholder*, cit., at 184.

38. Directive 2003/41/EC of the European Parliament and of the Council of 3<sup>rd</sup> June 2003 on the activities and supervision of institutions for occupational retirement provision.

39. 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 (IORPs) (recast).

40. See recital 58 of the Preamble.



The interpretation of the European Insurance and Occupational Pensions Authority (EIOPA) is ambivalent in this respect.<sup>41</sup> On the one hand, it provides that national competent authorities should encourage IORPs to take into account the potential impact of investment decisions on ESG factors ‘in order to support society’s sustainability goals’ (section 3.18). Some commentators have noted how this stance in EIOPA’s opinion apparently endorses the ethical approach to SRI.<sup>42</sup> However, the core rationale of the recast Directive still lies in financial rather than ethical considerations. This is evidenced by the fact that – as the EIOPA correctly underlines – environmental, social and governance risks should be considered as ‘traditional prudential risks’, such as market risks, counterparty default and liability risks, as well as operational, reputational and strategic risks (section 3.2). As such, ESG risks ‘may not only affect companies included in the investment portfolio but also IORPs themselves as well as counterparties of IORPs, including the sponsoring company’ (section 3.4).

The IORPs’ risk management systems, and the supervisory activities of competent authorities, should coherently adjust to the underpinning business case approach to ESG goals. As part of their risk management system, IORPs are expected to produce a risk assessment for their activities relating to pensions. This risk assessment should also be made available to the competent authorities and should, where relevant, include risks related to climate change, the use of resources, the environment, social risks and risks related to the depreciation of assets due to regulatory changes (‘stranded assets’). Furthermore, consideration of social and environmental factors is not mandatory – they become relevant in potential terms, providing that they have an impact on members’ and beneficiaries’ interests. In other words, social and environmental concerns are relevant as long as they make sense financially, which means that the returns on investment are reasonable for current and future retirees to maintain an adequate retirement income and a good standard of living.

So long as environmental, social and governance factors are considered in investment decisions, Article 28 sets out that Member States shall ensure that the risk assessment includes new or emerging risks related to climate change, the use of resources and the environment. If IORPs complete their own risk assessments, it can allow them to be more aware of their commitments to their members and beneficiaries and thus make better informed decisions about investments in long-term, sustainable assets. According to Article 41, Member States shall require IORPs to ensure that prospective members are informed about whether and how environmental, climate, social and corporate governance factors are considered in the investment approach (§ 1 (c) and § 3 (c)). More broadly, the EIOPA recommends IORPs to publicly disclose a description of their management of ESG risks, in a transparent and comprehensible manner that allows members and beneficiaries, sponsors, other stakeholders and the public to assess the approach taken.<sup>43</sup>

While the ethical approach to sustainable finance is too controversial for most investment institutions, the business case for making financial investments consistent with environmental, social and governance goals cannot work broadly because many of these targets defy easy measurement in financial terms.<sup>44</sup> Rempel and Gupta note, for example, that methodological shortfalls in sustainability reports undermine the credibility and efficacy of pension funds’ commitments. On closer inspection, carbon footprint calculations in corporate reporting are incomplete and exclude significant types of polluting emissions. They are also incomparable with one other due to a lack of transparency and

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41. EIOPA, *Opinion on the supervision of the management of environmental, social and governance risks faced by IORPs*, EIOPA-BoS-19-248, 10 July 2019.

42. L. Daniels, Y. Stevens, D. Pratt, ‘Environmentally friendly ...’, cit., p. 258.

43. See section 3.20 of the EIOPA’s opinion.

44. B. J. Richardson, *Socially responsible investment law...*, cit., p. 121.

standardised criteria for their calculation. Likewise, ‘green investments’ are loosely defined, suggesting that they could even be contributing to (rather than mitigating) climate change.<sup>45</sup> Arguably, the same would hold true if one looked at the social pillar of sustainability.

Transparency is an essential condition in enabling workers and other shareholders to assess the long-term value creation of pension funds and their management of sustainability risks. More transparency is also needed because, in their position as non-professional investors, workers are often investing contrary to their own beliefs and values. Since this attitude-behaviour gap is largely due to a lack of communication and information by financial service providers,<sup>46</sup> designing effective obligations regarding transparency is required, as if forming a common understanding of language on sustainability, given that meanings are often disputed and subject to manipulation. Although the recast IORP directive remains silent on criteria for assessing and disclosing ESG risks, pension fund investment policies are subject to the rules applicable to financial services as a whole.

### 3.2 EU Regulations on sustainability-related disclosures and taxonomies

To increase transparency regarding sustainable investments by pension funds and other financial institutions, many jurisdictions are making it mandatory for investors to disclose the criteria used to define sustainability goals. EU law introduced transparency-related obligations in two EU Regulations applicable to financial services. Regulation 2019/2088<sup>47</sup> establishes the rules on sustainability-related disclosures in the financial services sector (the Disclosure Regulation). Regulation 2020/852 establishes a framework to facilitate sustainable investment (the Taxonomy Regulation).<sup>48</sup>

The Disclosure Regulation seeks to achieve more transparency regarding how financial market participants – including pension funds<sup>49</sup> – integrate sustainability risks into their investment decisions along with investment or insurance advice.<sup>50</sup> The Taxonomy Regulation is intended to shape the criteria for determining whether an economic activity qualifies as environmentally sustainable for the purposes of establishing the degree to which an investment is environmentally sustainable.<sup>51</sup> Both Regulations are expected to encourage investors to understand and mitigate the potential adverse impacts of their investment on society and the environment.

45. A. Rempel, J. Gupta, ‘Conflicting commitments?...’, at 7.

46. C.H.A. Oostrum, ‘Sustainability Through Transparency and Definitions: A Few Thoughts on Regulation (EU) 2019/2088 and Regulation (EU) 2020/852’ (2021) 18 *European Company Law Journal* 15–18, here at 15–16.

47. Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27<sup>th</sup> November 2019 on sustainability-related disclosures in the financial services sector.

48. Regulation (EU) 2020/852 of the European Parliament and of the Council of 18<sup>th</sup> June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088.

49. See Article 2, § 1, letters c), d), f).

50. The guiding principle of this Regulation is clarified in Paragraph 15 of the preamble: ‘Where the sustainability risk assessment leads to the conclusion that there are no sustainability risks deemed to be relevant to the financial product, the reasons therefore should be explained. Where the assessment leads to the conclusion that those risks are relevant, the extent to which those sustainability risks might impact the performance of the financial product should be disclosed either in qualitative or quantitative terms.’

51. The proposition behind this regulation is expressed in Paragraph 11 of its preamble: ‘Making available financial products which pursue environmentally-sustainable objectives is an effective way of channelling private investments into sustainable activities.’ Paragraph 12 of the same preamble, instead, sets the overall rationale of the regulation: harmonisation at Union level, ‘in order to remove barriers to the functioning of the internal market with regard to raising funds for sustainability projects, and to prevent the future emergence of barriers to such projects.’

In contrast to the recast IORP Directive, these Regulations show a better integration between the financial and the ethical approach to sustainable investments. Article 6 of the Disclosure Regulation is clear that financial market participants shall include descriptions of the manner in which sustainability risks are integrated into their investment decisions along with the results of the assessment of the likely impacts of sustainability risks on the returns of the financial products they make available. According to Article 8 and Article 9 of the Regulation, the sustainability risk assessments and relative pre-contractual disclosures by financial market participants should feed into pre-contractual disclosures by financial advisers. In turn, financial advisers should disclose how they take sustainability risks into account in the process of selecting the financial product presented to end investors before providing their advice, regardless of the preferences for sustainability. Precisely, paragraph 3 of Article 9 states that ‘where a financial product has a reduction in carbon emissions as its objective, the information to be disclosed pursuant to Article 6(1) and (3) shall include the objective of low carbon emission exposure in view of achieving the long-term global warming objectives of the Paris Agreement’.

While the social and governance aspects of sustainability have not yet been defined in the Taxonomy Regulation,<sup>52</sup> economic activity is understood as being environmentally sustainable where it contributes substantially to one or more of the environmental objectives set out in the Regulation, namely, when it does not significantly harm any of the environmental objectives set out in the Regulation; it is carried out in compliance with the minimum safeguards laid down in the Regulation; and it complies with the technical screening criteria that the Commission establishes in accordance with the Regulation.<sup>53</sup> Article 9 of the Taxonomy Regulation identifies the following environmental objectives: (a) climate change mitigation; (b) climate change adaptation; (c) the sustainable use and protection of water and marine resources; (d) the transition to a circular economy; (e) pollution prevention and control; and (f) the protection and restoration of biodiversity and ecosystems. Each of these objectives is further specified in the following Articles of the regulation, which provide extensive details on how sustainability goals and taxonomies should be articulated.<sup>54</sup>

Despite the lack of a definition of social sustainability, paragraph 35 of the Taxonomy Regulation’s preamble sets a clear principle of integration between social and environmental sustainability, clarifying that compliance with minimum labour standards and safeguards – including those established by the European Pillar of Social Rights – ‘should be a condition for economic activities to qualify as environmentally sustainable’. For this reason, the Regulation states that economic activities should only qualify as environmentally sustainable to the extent that:

‘... they are carried out in alignment with the OECD Guidelines for Multinational Enterprises and UN Guiding Principles on Business and Human Rights, including the declaration on Fundamental Principles and Rights at Work of the International Labour Organisation (ILO), the eight fundamental conventions of the ILO and the International Bill of Human Rights. The fundamental conventions of the ILO define human and labour rights that undertakings should respect. Several of those international standards are enshrined in the Charter of Fundamental Rights of the European Union, in particular the prohibition of slavery and forced labour and the principle of non-discrimination. Those minimum safeguards are

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52. For discussion about this exclusion, see C.H.A. Oostrum, ‘Sustainability Through Transparency and Definitions...’, cit.

53. See Article 3.

54. See Articles 10–17.

without prejudice to the application of more stringent requirements related to the environment, health, safety and social sustainability set out in Union law, where applicable.’

Despite the integration between social and environmental sustainability being formally declaimed, the substantive part of the Regulation only partially reflects the general principles set in the preamble. Reference to the European Pillar of Social Rights and to the Charter of Fundamental Rights of the European Union, for example, has not been reproduced in the mandatory part of the Taxonomy Regulation. Indeed, Article 18 declares that the minimum safeguards are to be procedures implemented by an undertaking that is carrying out an economic activity to ensure alignment with the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights, including the principles and rights set out in the eight fundamental conventions identified in the Declaration of the International Labour Organisation on Fundamental Principles and Rights at Work and the International Bill of Human Rights.

Although the social and governance aspects of sustainability remain undefined and thus references to these dimensions are incomplete in the substantive part of the Regulation, such shortcomings could potentially be solved in the future. On the one hand, market entities and governments could develop their own framework for the definition of social and governance aspects of sustainability, although this might lead to fragmentation and even undermine transparency and comparability of financial products.<sup>55</sup> On the other, the Taxonomy Regulation includes mechanisms to further define sustainability criteria at an EU level. This could happen in two contexts.

Firstly, when complying with the minimum social and governance safeguards laid down in the Taxonomy Regulation, undertakings should adhere to the principle of ‘Do No Significant Harm’ referred to in Regulation (EU) 2019/2088 and take into account the regulatory technical standards adopted pursuant to that Regulation in further specifying this principle. To this aim, paragraph 36 of the Taxonomy Regulation’s preamble states that Regulation (EU) 2019/2088 should be amended to mandate the European Supervisory Authorities<sup>56</sup> (ESAs):

‘...to jointly develop regulatory technical standards to further specify the details of the content and presentation of the information in relation to the principle of ‘Do No Significant Harm’. Those regulatory technical standards should be consistent with the content, methodologies, and presentation of the sustainability indicators in relation to adverse impacts as referred to in Regulation (EU) 2019/2088. They should also be consistent with the principles enshrined in the European Pillar of Social Rights, the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights, including the ILO Declaration on Fundamental Principles and Rights at Work, the eight fundamental conventions of the ILO and the International Bill of Human Rights.’

Secondly, in addition to establishing a set of minimum standards that should be respected,<sup>57</sup> the Taxonomy Regulation expects the European Commission to establish a Platform on Sustainable Finance (the Platform), composed in a balanced manner of various groups, including representatives of EU agencies (such as the European Environment Agency) together with experts

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55. C.H.A. Oostrum, ‘Sustainability Through Transparency and Definitions...’, cit., p. 21.

56. Established by Regulations (EU) no. 1093/2010 (52), (EU) no. 1094/2010 (53) and (EU) no. 1095/2010 (54) of the European Parliament and of the Council.

57. Article 19.

representing private stakeholders, civil society and academia.<sup>58</sup> The Platform has advisory, technical assistance and monitoring functions to support the Commission in further establishing and updating the technical screening criteria.

#### 4. The engagement of unions in shareholder activism

Beginning in the US in the 1970s, a historical shift has occurred since unions actually appeared in the shareholder arena,<sup>59</sup> stimulating the orientation of other shareholders into holding managers more accountable.<sup>60</sup> Before the advent of this phenomenon, retirement was funded by the direct contributions of employers and employees. Statutorily, these funds were invested in the same governmental fiscal system. As the population stabilised and aged, the insolvency risk of this system of investment in ‘unproductive resources’ justified the political decision to privatise major social welfare obligations, including pension funds.<sup>61</sup> As a part of a broader revitalisation strategy, American unions have used their position in the governance of pension funds to fight employers’ anti-union tactics and the threat of delocalisation by deploying novel organisational strategies focused on workers as shareholders: ‘by exercising their shareholder rights, union investors affected the governance of the nation’s largest corporations even as labor faded from within’.<sup>62</sup>

As noted by Drucker, workers ‘are now increasingly both “employees” and “owners”’. Increasingly, they have an interest both in their job and its wage or salary, and an interest both in the performance and the profitability of enterprise. And increasingly, they stand in two relationships to the “system”, which, according to union logic and union rhetoric, are mutually exclusive.<sup>63</sup> Indeed, managers were traditionally thought to represent shareholders, whilst unions were thought to represent workers as stakeholders. Drucker predicted that disaster would ensue if unions either ignored ‘pension fund socialism’ or, on the contrary, attempted to represent employees in their new capacities as ‘owners.’<sup>64</sup> While this latter condition would place unions in the impossible position of representing the side of management against the employees,<sup>65</sup> ignoring ‘pension fund socialism’ would create a ‘risk no trade union can possibly afford: the risk of a competing organisation’s claiming to represent the employees.’<sup>66</sup>

In principle, union shareholder activism can be informed by two logics of collective action. On the one side, unions can utilise their shareholder power to advance traditional organising and collective bargaining goals. This logic of collective action could come at the expense of other shareholders when unions, for example, target issues that concern uniquely labour-related interests. Accordingly, unions are expected to justify themselves before the other shareholders and, at the same time, to reconsider their strategies when it comes to representations to pension fund members, whether they are unionised or not. In fact, while unions have to persuade other

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58. Article 20.

59. For historical discussion about the rise of unions in the shareholder arena in the US, see S. M. Jacoby, *Labor in the Age of Finance*, cit., at 21–37.

60. S.J. Schwab, R.S. Thomas, ‘Realigning Corporate Governance: Shareholder Activism by Labor Unions’ (1998) 96 *Michigan Law Review* 1018–1090, at 1021.

61. R.M. Buxbaum, ‘Juridification and Legitimation Problems in American Enterprise Law’, cit., at 258.

62. S. M. Jacoby, *Labor in the Age of Finance*, cit., at 1.

63. P. F. Drucker, *The Unseen Revolution*, cit., at 141.

64. *Ibid.*, at 141–142.

65. *Ibid.*, at 144.

66. *Ibid.*

shareholders that their financial activism is not informed by opportunistic actions – that is, to advance group interests only – they also have to convince pension fund members that pursuing general interests through SRI is not antithetical to their fiduciary duties nor it is detrimental to the collective interest of workers. Unsurprisingly, union shareholder activism tends to reject short-termism as a method for establishing both labour interests and corporate value, framing consideration of social and environmental concerns as a goal to pursue long-term performance and returns.<sup>67</sup> American pension funds, for example, justify their concern for sustainability issues ‘as means to measure firms’ long-term economic performance’, basing their decisions on ‘research suggesting that human resource policies improve corporate performance’.<sup>68</sup>

On the other side, just like any other investor, unions can seek to improve the financial performance of pension funds and to increase firm value by participating in strategic corporate decision-making. In embracing this second logic of collective action – it is argued – unions transform themselves, shifting from an antagonistic role to ‘a strategically cooperative player in corporate governance’.<sup>69</sup>

On closer inspection, however, both logics of collective action are not necessarily mutually exclusive. On the contrary, they can also be compatible and mutually reinforcing, where ‘neither interest can be understood properly without reference to the other’.<sup>70</sup> While advancing working conditions could increase firm value and performance, by taking the high road in respect of competitiveness and high-performance workplaces,<sup>71</sup> the opposite is also true. Instead of undermining their traditional stakeholder agenda, evidence suggests that shareholder activism via pension funds should be seen as a strategy for unions to advance their goals by other means.<sup>72</sup> In this construction, as Jacoby has noted, the labour movement relies on pension capital ‘to boost its organising and bargaining power, something that Drucker failed to anticipate’.<sup>73</sup>

It is precisely to maintain and promote their traditional stakeholder agenda that unions have engaged in shareholder activism, by developing a three-pronged programme. Firstly, they have tried to improve their position in the governance of pension funds at both a firm level (in firm-based pension systems) and a sectoral level (in multi-employer pension systems). Secondly, they have engaged in strategic alliances with other shareholder groups to achieve Socially Responsible Investments. Thirdly, they have attempted to reconcile workers’ potentially conflicting interests in achieving high investment returns while securing decent standards of work and sustainability.<sup>74</sup>

#### 4.1 Organisational and institutional hurdles: Governance, outsourcing, decentralisation and stranded assets

The glass, however, is only half full. In contrast to Drucker’s romanticised idea of pension fund socialism, employees do not control corporations, and trade unions can hardly influence the

67. P. Bridgen, M. Naczyk, ‘Shareholders of the World United?...’, cit., at 665.

68. M. A. O’Connor, ‘Organized Labor as Shareholder Activist’, cit., p. 1360.

69. S.J. Schwab, R.S. Thomas, ‘Realigning Corporate Governance...’, cit., p. 1090.

70. D. Webber, *The Rise of the Working-Class Shareholder*, cit., p. xiii.

71. M. A. O’Connor, ‘Organized Labor as Shareholder Activist’, cit., *passim*.

72. P. Bridgen, M. Naczyk, ‘Shareholders of the World United?...’, cit., p. 652.

73. S. M. Jacoby, *Labor in the Age of Finance*, cit., p. 59.

74. P. Bridgen, M. Naczyk, ‘Shareholders of the World United?...’, cit., p. 656.

management of pension funds. In some jurisdictions, such as the US, the exclusive control of pension funds by trade unions is unlawful. Although unions created some of the earliest pension plans for blue-collar workers, and the Supreme Court in 1949 made pensions a mandatory topic for collective bargaining, the Taft-Hartley Act of 1947 prohibits employers from contributing to a pension fund established by a union, with the exception of jointly administered funds.<sup>75</sup> As a result, when company-based pension funds foresee employee representation, unions mainly comprise a minority on executive boards, at most making up half of the members. This explains why, in many circumstances, ‘union-influenced pension plans had the will but not always the way to become shareholder activists’.<sup>76</sup>

This is also the case with multi-employer pension funds usually found in public administration in the US and the UK, or in EU Member States at both sectoral and cross-industry levels. While these institutions include workers’ representatives in the governing boards, agreement on financial decisions and investment policies must always be reached with the employers, thus forcing unions, in exercising their shareholders’ rights, towards a consensus and compromise approach.<sup>77</sup> Except for in countries with company-based pension systems, sectoral or cross-sectoral occupational pension funds barely avail of the right to vote to ensure good corporate governance and to promote SRI for strategic purposes. The exercise of the right to vote to influence corporate strategic decisions is generally considered as a last resort. And when the exercise of voting rights is cultivated in Europe, it is done in a less conflict-oriented manner than in common law jurisdictions.<sup>78</sup>

Although the ownership structure of listed companies has shifted strongly in favour of institutional investors, this has not been paralleled by any shift in workers’ capital control.<sup>79</sup> In this context, most pension plans give workers some option to choose where and what to invest in, but choices are limited, as are the explanations of the funds themselves. Advancing information, disclosure and transparency in social and environmental investments is an area of activity for unions in their position as shareholders.<sup>80</sup> For example, the implementation of transparency and disclosure rules such as those set out at an EU level could potentially benefit from the co-operation and monitoring of unions. Nonetheless, evidence suggests that even when pension funds are co-managed by unions, there is a tendency to delegate such activities to financial experts,<sup>81</sup> and participation or involvement in the reporting of non-financial issues remains uncommon.<sup>82</sup>

Sectoral pension funds jointly established by trade unions and employers’ associations in core European countries (e.g., France, Germany and Italy) are instructive in this respect. Governing bodies of bilateral pension funds consist of both workers’ and employers’ representatives: to make fully informed decisions and to fulfil their legal responsibilities, social partners delegate the financial management of pension assets to external experts, who also exercise the voting

75. For critical assessment of this provision, see S. Fogdall, ‘Exclusive Union Control of Pensions Fund: Taft-Hartley’s Ill-Considered Prohibition’ (2001) 4 *The Journal of Business Law* 215–236. See also S. M. Jacoby, *Labor in the Age of Finance*, cit., at 21–22.

76. S. M. Jacoby, *Labor in the Age of Finance*, cit., p. 87.

77. G. Klec, D. Mum, ‘Trade union influence on companies via pension fund investment’, cit., p. 131. On the critical issue of consensus, see also J. Sandberg, ‘Socially Responsible Investment and Fiduciary Duty’, cit., at 153.

78. G. Klec, D. Mum, ‘Trade union influence on companies via pension fund investment’, cit., p. 131.

79. G. Klec, D. Mum, ‘Trade union influence on companies via pension fund investment’, cit., p. 121.

80. M. A. O’Connor, ‘Organized Labor as Shareholder Activist’, cit., p. 1388.

81. G. Klec, D. Mum, ‘Trade union influence on companies via pension fund investment’, cit., p. 128.

82. P. Bridgen, M. Naczyk, ‘Shareholders of the World United?...’, cit., p. 666.

rights attached to shares.<sup>83</sup> While they can still be vocal about the responsible use of this mandate, by providing guidance or recommendations on how investments must be shaped, for example, this ‘division of labour’ in the management of pension funds reduces the opportunities for unions to engage in shareholder activism and, if any, renders them far less effective. This problem intensifies when, to achieve a higher return and reduce investment risks, asset managers diversify pension fund portfolios and investments. As the number of shares held by the pension funds for each company decreases, their sway over companies in their investment portfolio also reduces.

In short, despite the good practices in the spread of shareholder activism amongst unions, the ability of organised labour to build a ‘capital stewardship agenda’ that incorporates a vision of what investment strategies should do remains a complex matter for trade unions combining the roles of trustee and advancing broader societal goals.<sup>84</sup> Union leadership continues to focus more on vesting rules rather than on the investment policy of pension funds, while the non-critical use of the criteria regarding the market rate of return leads to investments that are profitable in the short term but could endanger future employment and sustainability.<sup>85</sup> Most importantly, if shareholder activism is a means to an end and not an end itself, it has the potential to be in conflict with the interests of workers as shareholders and those of workers as stakeholders.<sup>86</sup> Shareholder activism to pursue climate and environmental goals, is once again exemplificative in this respect.

Consider divestment or other shareholder activities for reducing the carbon footprint of pension funds’ financial portfolios, for example. On the one hand, such activities risk transferring assets to climate-indifferent investors or investors from poorer and more vulnerable countries.<sup>87</sup> Divestment, in fact, is a one-off act, which means that influence can no longer be exerted over the company to bring about a change in behaviour.<sup>88</sup> At an aggregate level, therefore, the unexpected outcomes of pension fund engagement in the transition away from fossil fuels could jeopardise the non-financial value of sustainable investment policies, preventing trade unions from being vocal on unsustainable and unfair corporate operations. On the other hand, shareholder activism to combat climate change can expose multi-employer or company-based pension funds to the so-called stranded assets risk, which occurs when the number of retired members increases as investments and contributions diminish. The US miners’ pension fund, for example, is facing precisely this risk of financial unviability. International unions are therefore claiming that if the coal industry were to shut down entirely, there would be no contributions to the sectoral pension fund and its collapse would only be a matter of time.<sup>89</sup>

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83. This practice is consistent with Article 2 of the OECD Guidelines on Pension Fund Asset Management, according to which the investment of pension assets shall be undertaken: ‘[with] care, the skill of an expert, prudence and due diligence. Where they lack sufficient expertise to make fully informed decisions and fulfil their responsibilities, the governing body and other appropriate parties should be required to seek the external assistance of an expert.’

84. L. W. Beeferman, ‘Capital stewardship in the United States: worker voice and the union role in the management of pension fund assets’ (2011) 17 *Transfer* 43–57.

85. Cf. T. Ghilarducci, *Labour’s Capital*, cit., Chapter 6.

86. P. Habbard, ‘The stewardship of European workers’ capital in times of crisis’ (2011) 17 *Transfer* 59–73.

87. See A. Rempel, J. Gupta, ‘Conflicting commitments?...’, cit.

88. G. Klec, D. Mum, ‘Trade union influence on companies via pension fund investment’, cit., p. 125.

89. See ITUC, *Just Transition - Where are we now and what’s next*, ITUC Climate Justice Frontline Briefing, 2017, at 12.



## 5. Conclusion

Despite pension funds offering great potential in terms of shareholder activism, the approach of trade unions to SRI has been traditionally passive, if not remissive in relation to the imperative of economic sustainability. Historically, the reason for this lies in the legal restraints and institutional hurdles concerning fiduciary duties that pension funds have towards their members, which traditionally have made it compulsory for retirement institutions to steer investments towards short-term economic sustainability goals. In the US, state and employer strategies on fiduciary duty have been used repeatedly by legislators and employers to question the role of unions in this area.<sup>90</sup> In Europe, instead, a fundamental legislative review of pension policy is observable, pointing towards the promotion of non-financial criteria in investment plans, especially when it comes to social and environmental sustainability. Recent EU Directives and Regulations on pension fund governance and on transparency rules for sustainable investments are important steps in this direction, which reflect the more lenient approach of the Member States towards fiduciary duties. If the rationale of the recast IORP Directive is still to accommodate ESG goals to financial purposes, both the Disclosure and Taxonomy Regulations show how the business case and the ethical approach to sustainable investments can be balanced. However, this normative development has not yet found a parallel shift in shareholder activism and, notably, in trade union policies in this area. This is unfortunate since industrial relations institutions can contribute to democratising pension fund investment policies, making them more transparent and authentically functional to advance sustainability goals in a way that does not put the social and environmental dimensions of sustainability in competition.

This delay is partially due to the existing governance of pension funds in Europe, which tend to outsource the management of investment policies to financial operators, in order to comply with the prudent person rule. While this takes responsibility away from pension fund governing boards in terms of their legal duties, the combination of decentralisation and outsourcing of investment management ‘could undermine, if not extinguish, activism’.<sup>91</sup> Rooted in corporate and financial law, EU legislation is potentially more favourable to promoting SRI than its common law equivalents. However, the business case approach evident in EU pension law makes both legislations vulnerable to the risk that workers’ savings become ‘hostages to a financial regime which systematically searches for the highest monetary rate of return regardless of the consequences for employment, the environment, or the state of the social infrastructure’.<sup>92</sup> Returning to Richard Minns’ research questions in *The Social Ownership of Capital*, should trade unions leave pension issues to the financial experts? Is there a third way that could use a new concept of property – neither public nor private – for socially and environmentally progressive ends?<sup>93</sup>

Regardless of existing legal and institutional constraints, the answers to these questions depend on the possibility to unravel the eternal tension in the identity of European unions as both social movements and institutionalised organisations, which has wider implications for understanding the possibilities and limitations of human emancipation in capitalism.<sup>94</sup> This would require, in turn, resolving the ‘dual agency dilemma’ that trade unions face in balancing the representation

90. Cf. P. Bridgen, M. Naczyk, ‘Shareholders of the World United?...', cit., P 660 and D. Webber, *The Rise of the Working-Class Shareholder*, cit., *passim*.

91. D. Webber, *The Rise of the Working-Class Shareholder*, cit., p. 213.

92. R. Minns, ‘The Social Ownership of Capital’ (1996) 219 *New Left Review* 42–61, at 48.

93. *Ibid.*, 42–61, at 44.

94. R. Hyman, *Understanding European Trade Unionism: Between Market, Class and Society*, Sage, 2001.

of workers as shareholders and the representation of workers as stakeholders. This dual agency problem is perhaps the most significant challenge that European organised labour faces when it comes to broader and more effective shareholder activism, but it is by no means unachievable. The uncertain effects that sustainable finance can have on the protection of workers' interests as stakeholders make the case for union engagement in shareholder activism even more urgent, in order to prevent these two logics of collective action from colliding. As the example of stranded assets linked to the fossil fuel sector shows, it would be ironic if the sustainable investment policies of pension funds ended up harming the interests of workers as stakeholders. On the contrary, greater activism and social control of trade unions and other social forces in the field of sustainable finance would enable targeted investment actions, such as those promoting community-scale projects, that are the result of the solidarity between the position of workers as stakeholders and the position of workers as shareholders, so that these two logics of collective action mutually strengthen each other instead of colliding.<sup>95</sup>

It is true that the scale of many pension funds may be too small to fundamentally change the core business model of giant corporations. Consider, for example, local authority pension funds or company-based pension funds. But the shares held by these institutions would still be sufficient to invest, for example, in community-scale projects that support sustainable development of local economies, incentivising local manufacturing and the welfare of workers and local communities. Investments in renewable energy communities, green infrastructure and good quality affordable housing are notable examples of how the financial power of pension funds can be harnessed to promote socially and environmentally regenerative ends that serve the interests of workers as stakeholders and shareholders.<sup>96</sup>

This is a truly epochal challenge for labour and the collective representation of workers' interests. Taking up the challenge would probably imply a significant adjustment of the internal governance of trade unions, especially in Europe, which in many cases do not have adequate structures, professionalism and resources that are fit for this purpose. But positive experiences in North America demonstrate that the century-old labour movement could adapt to adversarial legal conditions and changing economic circumstances. Even if this organisational shift may seem idealistic, not doing so could be hazardous for European unions, to the point of compromising the ability of organised labour to represent the collective interest of workers in a socio-economic context that is profoundly different from the one that justified the emergence of the labour movement in the industrial era. For centuries, organised labour has struggled to transform the market from the outside, using social dialogue, collective bargaining and litigation to advance working conditions and protect workers as stakeholders. While these channels are still critical, they eventually have become insufficient. Beyond the rules governing industrial relations and welfare systems, which vary from country to country, globalisation, deindustrialisation and the financialisation of industrial capitalism have led to an ever-diminishing capacity of trade unions to represent the interests of workers as stakeholders and, consequently, to expand the democratic enclave of the market economy.

If it is no longer possible to transform the market economy from the outside, then 'it must be transformed from within'.<sup>97</sup> The engagement of unions in shareholder activism through pension

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95. D. Webber, *The Rise of the Working-Class Shareholder*, cit., *passim*.

96. Ben Lennon et al., *Divesting to protect our pensions and the planet. An analysis of local government investments in coal, oil and gas*, UK Divest Report, 2021, at 61–62.

97. D. Webber, *The Rise of the Working-Class Shareholder*, cit., p. xiv.

funds could be a powerful example of how this transformation could happen, in parallel with the shift of capitalism from the shareholder primacy to the stakeholder model of corporate governance, which ironically requires workers and organised labour to act as shareholders, even if their power and legitimacy is hardly comparable with that of financial investors.<sup>98</sup> Labour's shareholder activism through pension funds would allow workers to fill this gap of power and legitimacy. For some, this is the 'last best weapon'<sup>99</sup> organised labour has to advance labour solidarity and sustainability in a post-industrial society, to better serve its historical mission to uphold the market space within socio-ecological boundaries.

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98. G. M. Haiden, M. T. Bodie, *Reconstructing the Corporation. From Shareholder Primacy to Shared Governance*, cit., *passim*.

99. D. Webber, *The Rise of the Working-Class Shareholder*, cit.