Working Party on Private Pensions

PENSION FUND GOVERNANCE

(Note by the Secretariat)

19-20 June 2001

This document is circulated for consideration under item 3 of the agenda of the meeting to be held on 19-20 June 2001.
PENSION FUND GOVERNANCE

1. Introduction

1. This report looks at governance issues raised by the structure and operations of pension funds in OECD countries. Pension funds are here defined as pools of assets consisting exclusively of the contributions to a pension plan and the interest earned on them. The fund's assets are legally separated from the plan sponsor (in the case of occupational pension plans) as well as from the other assets of the fund manager (if there is one). Pension funds as defined in this way exist in all OECD countries except France, Greece, the Slovak Republic, and Turkey, where the law does not recognise such entities.

2. Pension funds hold the vast portion of pension plan assets in OECD countries. They have also experienced significant growth in recent years in the OECD. In Hungary, Mexico, and Poland, pension funds have been established to support mandatory pension plans that replace partly the PAYG-run public pension systems. In other countries such as the Czech Republic and Italy, pension funds have been introduced as voluntary instruments for retirement provision.

3. The operation of pension funds creates a fiduciary role for governments to ensure that the consumers and beneficiaries from these funds are adequately protected. This is particularly relevant in the pension fund industry because the retirement income of the members is at stake. Regulations may be designed to control the functions and the decision-making process of pension funds directly or they may give members certain rights to discipline and monitor those responsible for the management of pension funds. The ultimate goal of these regulations is to reduce the impact of conflicts of interest that can arise between the plan sponsors and the pension fund managers on the one hand, and the beneficiaries on the other.

4. Governance regulations have not always been present in all countries. Most often, they have been introduced as a response to cases of fraud or misappropriation of pension assets. In the United Kingdom, for example, the decision to enhance the responsibility of trustees over pension fund management and to increase their independence vis-à-vis employers was mainly a response to the Maxwell scandal, in which the Maxwell companies’ main pension fund lost a large part of its assets as a result of lending to and investment in insolvent companies linked to the late Robert Maxwell. Similarly, the fiduciary standards introduced by the 1974 ERISA law in the United States were largely in response to various unhappy episodes of fraud in pension fund management and of plan insolvency caused by the bankruptcy of the plan sponsor.

5. This document first provides an assessment of pension fund governance and consumer protection regulation, and then describes in some detail the actual regulatory structures present in OECD countries.

-- Delegates are invited to verify the country information provided in the annex and to contact the Secretariat in case of comments before 31 July 2001.
2. Corporate governance and pension plan management

6. Pension plans function on the basis of agency relationships between the plan beneficiary and the persons or entities involved in the administration or financing of the pension plan, such as the plan sponsor and the plan administrator. The plan statutes or contract specifies the schedule of contributions and possibly benefits which will be received as part of this plan.

7. The governance of these plans consists of all the relationships between the different entities and persons involved in the functioning of the pension plan. Governance also provides the structure through which the objectives of a pension plan are set, and the means of attaining those objectives and monitoring performance. It is the mirror image of the corporate governance of a public limited company, which consists of the set of relationships between the company’s management, its board, its shareholders, and other stakeholders.

8. The governance structure of a private, funded pension plan depends primarily on whether the plan is a defined contribution (DC), defined benefit (DB), or a hybrid plan, and on whether it is an occupational or a personal plan. The governance implications of such pension plans also vary depending on the level of compulsion of participation in these plans.

9. In most OECD countries, DB plans are (still) typical, in particular in the case of occupational pension plans. However, the importance of DC plans is increasing in many countries, while reforms to social security systems in several countries have led to the introduction of DC plans (see DAFFE/AS/PEN/WD(2001)1).

10. In DC plans, pension plan sponsors or/and administrators do not underwrite any of the financial or biometric risks that are concomitant to funded pension plans. Instead, the plan’s benefits are determined purely on the basis of the interest earned on invested assets. Hence, the only governance issues that arise are over the timely payment of contributions and benefits, the management of the plan’s assets (including performance measures and assessment), reporting to the supervisory authorities, and disclosure of relevant information to plan members.

11. In DB and hybrid plans, on the other hand, either the pension plan sponsor or the administrator insures beneficiaries against some form of financial or biometric risk. The plan may offer a guaranteed minimum rate of return on investments, or it may specify the formula through which benefits will be calculated, based on some measure of the employee’s past earnings.

12. The presence of some form of guarantee raises additional governance issues. In particular, it creates an additional responsibility on the plan sponsor or/and the plan administrator to honour that promise. This added responsibility requires additional internal controls and monitoring to ensure that an adequate level of funding is kept at all times to ensure that these promises can be met.

13. In order to ensure that pension plan sponsors and administrators introduce such controls, regulations are put in place which specify various aspects of pension plan governance, such as the extent to which pension assets should be separated from the plan sponsor, the appointment of experts to evaluate the future liabilities of the pension plan and the schedule of contributions required to finance them, or the types of institutions that are permitted to manage pension assets.

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1 See DAFFE/AS/PEN/WD(2001)5 for a definition of these terms and the use of these classifications.
14. The OECD Principles for the Regulation of Private Occupational Pensions Schemes (see DAFFE/AS/PEN/WD(99)18/Rev3) cover various aspects of pension plan governance, based on the premise that the security of private pension plans is best served via funding. These regulatory guidelines have as their main aim the protection of beneficiaries’ rights and ensuring the financial security of the schemes. The prohibition of unfunded or PAYG private pension plans is a basic pillar of this goal. Moreover, the principles acknowledge that wherever funding of a pension plan does not take place via a separate legal entity, the liabilities of the pension plan should be properly insured.

15. In the case of personal pension plans, these governance issues take slightly different overtones. The plan provider and administrator is now an entity different from the employer (typically a financial company), and the only role of the employer may be to channel part of the worker's salary to these plans. Hence, regulations focus on the governance of those financial companies and the pension plans they provide.

16. To the extent that such plans are offered by insurance companies and other financial companies already subject to existing regulations, there is little justification for introducing additional governance requirements. Existing regulations for insurance companies and collective investment scheme providers, for example, should ensure that these companies are solvent and that they honour their pension promises. On the other hand, regulators may still require from these companies an adherence to specific pension plan governance rules. For example, if an employer in the United States offers 401(k) plans to its employees with a choice of at least three mutual funds that have different risk-return characteristics, it is free of all ERISA-related fiduciary duties, unless it advises its employees on their investment choice. The regulation and supervision of the mutual fund manager where the employees and employers contributions are invested is the responsibility of the Securities and Exchange Commission.

17. Some regulations may nonetheless be stricter for financial institutions when they provide personal pension plans. For example, disclosure requirements may be more demanding. They may require more transparency in fee structures and net of fees performance than may be the case for collective investment schemes. Regulations in some countries such as Sweden and the United Kingdom go even further, actually limiting the level of fees that personal plan providers can charge under the new personal pension systems (the premium insurance system in Sweden and the stakeholder schemes in the United Kingdom).

18. The situation is completely different in the case of occupational and personal pension plans that are financed via pension funds. Pension funds, as defined in DAFFE/AS/PEN/WD(2001)5 are pools of assets made up exclusively with the contributions to a pension plan and the income earned on them. The fund's assets are legally separated from the plan sponsor (in the case of occupational pension plans) as well as from the other assets of the fund manager (if there is one). Because of their nature, pension funds require specific governance regulations that may not always be equivalent to those applied to other institutions involved in pension provision, such as insurance companies.

19. Finally, governance regulations of pension plans may vary depending on whether participation in these plans is mandatory or not. To the extent that participation is mandatory, the fiduciary responsibility of the state to ensure an adequate management of the pension plans and funds increases. Consequently, governance regulations of mandatory plans can be expected to be more onerous than those of voluntary plans.
3. The legal structure and types of pension funds

20. The type of pension plan supported is a key determinant of the choice of legal form of the pension fund and its governance structure. In the case of occupational plans, there are two parties involved in the administration of the pension fund, the employer or plan sponsor and the pension fund governing body. In the case of personal pension plans, on the other hand, there is only the governing body of the fund. Employer’s responsibilities are limited to transferring contributions to the pension plan chosen by the employee. This distinction leads to a classification for pension funds:

- **Closed pension funds**: funds that support occupational plans
- **Open pension funds**: funds that support personal plans

21. Closed and open funds differ also in the extent of portability and individual choice. Portability between closed funds is normally only limited to the case where an employer changes jobs and switches to the new company’s pension plan. However, employers may establish several closed funds with different risk-return characteristics and permit their employees to choose between these. In open funds, individuals normally can switch funds as frequently as they wish, though sometimes regulators may impose limits on the switching frequency in order to mitigate the adverse impact of fees on pension savings.

22. There are four main legal forms for both closed and open pension funds, which differ according to whether they have or not legal personality and capacity, and the nature of the legal title to ownership of assets and to rights to benefits. Funds with legal personality and capacity have internal governing bodies, which control the administration of the pension fund. Funds that do not have legal personality and capacity are administered by external governing bodies. The four basic legal structures for pension funds in OECD countries are:

- **In the corporate form**, the pension fund is a separate corporate entity with legal personality and capacity where the plan members have property rights over the fund’s capital. The governing body is internal, usually a board of directors. Some entities that fall under this category include the co-operative and the mutual association. Examples of the corporate form include the mutual assurance associations in Austria and Germany (pensionskassen), the pension funds in Hungary (mutual savings associations) that operate in both the mandatory and voluntary pension systems, the closed pension funds in Belgium (mutual assurance association) and Italy (associations), and the pension funds in Switzerland set up as co-operative societies.

- **In the foundation form**, the pension fund is also a separate corporate entity with legal personality and capacity, but plan members do not have property rights over the assets, except, possibly, in some cases, such as bankruptcy of the plan sponsor or unwinding of the plan. Plan members are on the other hand, the beneficiaries from the investment of those assets, and may hold legal rights over the plan benefits that the pension fund supports. The governing body is internal, usually a board of directors. Examples of pension funds operating as foundations include some close pension funds in Belgium, Italy and Switzerland, and closed pension funds in Denmark, Finland, the Netherlands, Norway, and Sweden.

- **In the trust form**, the pension fund does not have legal personality or capacity. Plan members do not have property rights over the assets, except, possibly, in some cases, such as bankruptcy of the plan sponsor or unwinding of the plan. Instead, the legal title to the pension fund assets in a trust are vested on trustees, who are the governing body of the fund. Trustees must administer the trust assets in the sole interest of the plan participants, who are the beneficiaries from the investment of those assets according to the trust deed. The basic principle of trust law is that the assets of each trust must be
segregated from the assets of all other trusts administered by it and from its own assets. All Anglo-Saxon countries recognise the trust as the main or only legal form for pension funds.

- In the **contractual form**, the pension fund does not have legal personality or capacity, and the plan members may or may not have property rights over the assets, depending on whether the contracting party is an employer or a plan affiliate. In the **collective contractual form**, the contracting party is an employer who holds the legal title to the assets. In the **individual contractual form**, the contracting party is a plan affiliate who holds the legal title to the assets. The pension fund assets are held in an account managed by a financial company for either employers or plan affiliates, where the account is legally separated from the balance sheet of the managing entity. This entity is the governing body of the fund. The separate accounts of insurance companies in the United States are of the **collective contractual form**. The pension funds of Mexico, Poland, Portugal, and Spain, and the Italian pension funds are of the **individual contractual form**. In Mexico, Poland, and Portugal, the funds are managed by pension fund managing companies, which are entities dedicated exclusively to the management of pension funds. In Italy and Spain, the pension fund managing entity is an existing financial company, such as a bank or insurance company.

23. There is no a priori reason to prefer one legal form over another, the decision being based normally on the type of pension plan (occupational or personal), the legal tradition of the country, and tax considerations. However, the form chosen by a pension fund must be legally recognised in the home jurisdiction of the country where the pension fund is licensed or registered. In general, closed pension funds are established either in the corporate, foundation, or trust form, while open funds usually operate in the contractual form. There are exceptions, however. In Hungary, for example, both open and closed funds are established in the corporate form.

### 4. Pension fund governance

24. To the extent that pension plans are financed through a pension fund, the question arises of what role governance mechanisms can play to ensure that the funds are used for their rightful purpose, which is to provide income for retirement purposes. Good governance in pension fund administration is about identifying responsibilities, and those responsible for the various functions of a pension fund, so that these professionals act in the best interest of the owners or beneficiaries of the pension fund.

25. Agency problems, or conflicts of interest, can arise because those who own the pension fund assets or benefit from their investment (the pension plan members and their beneficiaries) are not the same as those who exert control over the operation of the pension fund (the governing body of the pension fund and, in some cases, the plan sponsor). These conflicts of interest can be detrimental to the security of pension savings and benefit promises. Conflicts of interest are determined in the first instance by two main factors:

- whether the pension fund is closed or open
- the legal form of the pension fund

26. One risk in pension fund administration common to all pension funds is outright fraud and misappropriation of pension fund assets by the pension fund governing body or the plan sponsor. It could

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2 This is a special case in OECD countries. Whenever the contractual form is mentioned in this document, it should be understood as the individual contractual form unless otherwise mentioned.

3 In Portugal, however, insurance companies have been allowed since 1995 to manage directly pension funds.
occur, for example, that a member of the governing body or the plan sponsor abuses its power to borrow money from the pension fund or simply appropriates some of its assets. In the Maxwell case in the United Kingdom, for example, the closed pension fund of the holding companies linked to the late Robert Maxwell was used to prop up the share price of insolvent companies that were part of this holding. Cases of fraud can equally arise in open funds: the members of the governing body may for example misrepresent the assets in the pension fund or the value of the individual accounts and misappropriate part of the pension fund. They may also use the pension fund assets to prop up the shares of the parent company that owns the pension fund managing entity.

27. In addition to fraud and misrepresentation, conflicts of interest can take other forms in closed and open pension funds. In closed pension funds, employers may have an interest in using the pension fund as a source of internal financing or as a productivity-enhancing incentive mechanism for its employees (in the case of defined contribution plans). In open funds, and when the management of closed pension fund assets is delegated to a financial company, the abuse of agency relationships could occur in many ways. The pension fund manager could use the fund to support issues of securities underwritten by the parent organisation. In extreme cases, these funds could be used to purchase assets that could not be placed in a public offering. Affiliated market intermediaries may be offered priority in trade execution, and the pension fund may trade excessively in order to increase the commission income of these intermediaries or the parent company (churning of portfolios).

28. Additional conflicts of interest can arise in the distribution and marketing side of open pension funds, because the personal pension plans that they support are sold in the retail sector. The remuneration structure for sales personnel, for example, may create incentives in these to convince individual consumers to join personal plans when it may not be in their best interest to do so. The United Kingdom’s experience with the misselling of personal pension plans shows that uninformed consumers can suffer from personal plan providers that care only about their own interest.

29. The legal form of the pension fund also determines other types of conflict of interest that can arise between the governing body and plan sponsor of a pension fund, on the one hand, and the plan member on the other. In the case of pension funds established in the corporate or in the individual contractual form, ownership rights are clearly established. The plan members have legal title to some part of the pension fund and its underlying assets or capital.

30. In pension funds set up as foundations, trusts, or in the collective contractual form, on the other hand, plan members are the beneficiaries, not the owners of the pension fund's assets. Except in some special cases, such as termination of the plan, or bankruptcy of the plan sponsor, pension plan members may not be able to claim legal title to the fund's assets. This relationship can be the source of conflicts of interest. Employers may have incentives to terminate a defined benefit plan in order to appropriate the fund's surplus, or they may take excessively long contribution holidays that may endanger the long-term solvency of the plan. When these funds support defined contribution plans, meanwhile, plan members always have right to ownership of the fund's assets originating from their own contributions, but their right to the employer's contributions will depend on vesting rules.
5. Governance regulation

31. In the broadest sense, the task of governance of a pension fund can be conceived as a set of arrangements, including a well-defined legal and regulatory framework for the protection of plan members’ interest. While plan sponsors and providers may recognise themselves the need for effective governance structures, which may be incorporated in some Codes of Conduct for the industry, there are some aspects of pension fund governance that are best not left to self-regulation. One necessary regulation is the requirement for pension funds to be established under a legally recognised form in the home jurisdiction of the country where the pension fund is licensed or registered. Another key regulation is for pension fund assets to be legally separate from those of the plan sponsor (in the case of occupational pension plans) as well as from the assets of the fund manager.

32. There are two main approaches to regulation of the governance structure per se. Regulations can aim at containing conflicts of interest by specifying certain requirements on the plan sponsor, the governing body, the legal structure of the pension fund and the relationship between all these entities. Second, there are those regulations aiming at empowering individuals with monitoring, oversight, and disciplining powers over the plan sponsor and the governing body.

33. The regulations that emerge from these two approaches can be split into the following three groups:

− The governance structure of the pension fund, including (i) the extent of representation of plan beneficiaries in the governing body of the pension fund, and (ii) the relationship between the employer or plan sponsor, the pension fund, and its governing body;

− The responsibilities and functional duties of the governing body and the plan sponsor, including (i) the extent to which these bodies hold liability for their duties and can be prosecuted by plan members (redress mechanisms), and (ii) the degree of information disclosure to employees;

− The suitability of the parties in the governing body of the pension fund.

34. The legislative and regulatory framework for pension fund governance must first of all distinguish between those entities that are already subject to an appropriate regulatory and supervisory framework and those that require regulations specific to institutions involved in the administration of pension funds.

35. Where pension funds are set up in the contractual form, the governing body may be a financial company that is engaged in another financial sector (such as insurance companies in Portugal and Spain). It is then clearly up to the respective regulatory bodies to impose adequate regulations on these institutions to ensure that pension funds are adequately managed. Similar regulations must be imposed on all financial companies that can offer asset management services to pension funds, irrespective of their legal form.

36. Where the governing body of a pension fund set up in the contractual form is a pension fund managing company exclusively dedicated to managing pension funds, one important question is whether the pension fund managing company should be subject to specific governance regulations or whether existing regulations applying to related institutions, such as insurance companies and collective investment instruments could be applied to them also.
37. The answer to this question depends partly on whether the pension plan that the pension fund supports is of a defined contribution or a defined benefit/hybrid nature. In the former case, it can be argued that the functions of the pension fund managing company are very similar to those of a collective investment scheme provider. In the case of defined benefit/hybrid schemes, where the pension fund managing company itself underwrites some risks, the functions of the entity are closer to those of an insurance company.

38. In the case of pension funds set up as trusts, trust law dictates some basic governance requirements, such as the separation of the assets of each trust and from the assets of the trustee. However, governance regulations need still specify certain aspects of the relationship of the plan sponsor vis-à-vis the trustees as well as the general responsibilities and duties of the trustees when they manage pension funds.

39. Specific pension fund governance regulations must also be designed for pension funds that have legal personality and capacity, such as co-operatives, mutual assurance and savings associations, and foundations. Regulations must also distinguish between pension funds that have only asset management responsibilities and those that have additional responsibilities, such as contribution collection, payment of benefits. In some cases (e.g. Hungary), the pension fund may also underwrite itself directly biometric or/and financial risks, without any backing from the plan sponsor. In such cases, they function like insurance companies and should be in principle subject to similar regulations.

(1) The governance structure of the pension fund

40. As described above, pension funds are controlled by their governing body, though employers may also play an administrative role in closed pension funds. This body might be internal or external to the fund, depending on the legal form of the fund. The governing body is internal to the pension fund in the case of pension funds set up in the corporate form or as foundations. Pension funds set up as trusts or in the contractual form, on the other hand, do not have any internal governance structures. All functions relating to the management of the pension fund are carried out by entities that are legally separate from the pension fund.

41. The structure and functional duties of the governing body must be defined in detail in one of the founding documents of the pension plan, the pension fund, or its managing entity (e.g. the plan statutes, the pension fund by-laws, the trust deed, or the internal rules of the pension fund managing entity). Governance regulations must define at least the framework for the structure and the functional duties of the governing body.

42. Despite the differences in pension funds across OECD countries, there is one feature of their governance system that is common to most funds: the separation of managerial and monitoring or oversight responsibilities in the governance structure of the pension fund. Such division of responsibilities has parallels with the corporate governance structure of corporations in many OECD countries.

43. The purpose of this separation of responsibilities in the governing body is to ensure that the decision taken by the pension fund administrators are in the best interest of the owners or beneficiaries of the pension fund. Oversight of the pension fund administration may be carried out by representatives of the pension plan members or by independent experts. Member representation is most suitable for closed funds, since employees cannot normally "vote with their feet" and choose a different pension fund (except if they leave their employer). It provides a mechanism for direct control or surveillance by plan members over the activities and decisions of the governing body. Governance regulations should therefore envisage the possibility of appointing representatives of the plan members to the pension fund governing body.
44. There are several countries where representation of employees in the governing bodies of closed pension funds is required by the regulations. In Italy, the general assembly, the board of directors, and the board of auditors of closed pension funds must each have an equal number of employer and employee representatives. A requirement for equal members of employee and employer representatives is also in place for the board of directors of the Employee Pension Funds (closed) in Japan and the closed pension funds in the Netherlands, Norway, Sweden, and Switzerland.

45. Member representation is also required in the two OECD countries where pension funds are set up as mutual assurance associations. In Hungary, both closed and open pension funds have the same governance structure, which includes a general assembly (which represents all plan members with equal voting and representation rights) or a delegate assembly (with representatives elected by the plan members), and a board of directors (chosen also by the assembly). In Germany, representation of plan members in the pension fund governing bodies is ensured through a regulatory feature of labour law called co-determination. This requires representation of the employees in the governing body of the fund. In general, member representatives do not have to account for 50% of the votes, but there must be institutional safeguards which prevent them from being overruled.

46. Direct participation by plan members is also required in some countries where pension funds are organised as trusts. In the United Kingdom the law requires funds to have at least one third of its trustees to be member-nominated, though employers can opt out of this requirement by submitting a proposal to the plan members. In Australia there is a legal requirement for closed pension funds to have an equal number of representatives of employees and employers in the trustee board. In Ireland, members of some occupational pension plans have a right to participate in the selection of a number of trustees of their plan. Finally, in the United States, the trustees of multi-employer plans must be appointed jointly by participating employers and employee organisations.

47. In the case of closed pension funds set up in the contractual form, employees may still carry out oversight through independent monitoring bodies. In Spain, for example, all closed pension funds are subject to the scrutiny of the so-called Control Commission, which must have a majority of representatives of the plan contributors. Representatives to the Control Commission are chosen by majority voting.

48. In open pension funds set up in the contractual form, member representation in the governing body is not normally feasible. Independent experts may nonetheless be called to oversee the operation of the pension fund administrators. These experts may form part of a separate governing body, such as a board of supervisors. This is the case of the open pension funds of the Czech Republic and Poland, where the supervisory board plays various monitoring functions, such as the evaluation of the investment strategy followed by the executive body and their choice of asset manager.

49. Managerial responsibilities lie with the governing body in all OECD countries examined, be it the trustee, the board of directors, or the board of the foundation. In some countries, this body may have limited functions, such as asset management, while in others it may have responsibility over all aspects of plan administration, including contribution collection and benefit payment.

50. The governance structure of the pension funds is completed in the case of closed pension funds with the employer or plan sponsor. The employer may also play some role in the administration of the pension fund. It may for example supply some of the members of the governing body. In some countries, the plan sponsor may also appoint professionals to carry out some of the specialist functions for the pension fund, such as auditing, actuarial analysis, and asset management.
51. Governance regulations must aim at controlling the potential conflicts of interest that can arise between the plan sponsor and the governing body of the pension fund, on the one hand, and the plan beneficiaries on the other. Examples of such regulations are those that prohibit or limit certain transactions (including investment) between the pension fund and the plan sponsor (in the case of closed funds) and between the pension fund and the pension fund manager or its parent company. Most OECD countries, for example, limit investment in the sponsoring employer or in companies related to the pension fund manager to less than 10% of the pension fund assets. The use of brokers and other market intermediaries associated to the pension fund manager or its parent company is also restricted in OECD countries.

52. Governance regulations may extend to other types of conflict of interest arising in the distribution and marketing of personal pension plans, since pension savings and retirement income can be significantly reduced from excessive charges and commissions. In the case of open pension funds, for example, distribution methods can cause much consumer detriment, especially when intermediary remuneration is not based on a flat structure. The governing body of the pension fund may be assigned responsibility to endeavour that the remuneration structure for sales personnel does not create incentives in them that lead these to convince individual consumers to join personal plans when it may not be in their best interest to do so.

53. The internal processes of the governing body, such as the remuneration of its members, is not normally covered by governance regulations, and is usually left to the fund’s statutes and plan rules. However, in some countries, such as the United Kingdom, regulators have been worried by the demands of the duties performed by trustees, which do not seem to be fairly compensated. Regulations normally also include a requirement for the governing body to meet periodically (e.g. minimum, once a year), and for decisions to be taken on a majority voting basis.

54. Governance regulations must also specify the general functions of the governing body and the plan sponsor with respect to the pension fund. In all OECD countries, for example, the governing body or the plan sponsor is required to appoint relevant professionals to carry out specific duties. Regulations must clearly identify whether the plan sponsor or the governing body has responsibility for the appointment of such professionals.

55. Governance regulations should require certain functions to be carried out exclusively by individuals or entities with the relevant qualification and experience. These specialist functions include:

- Actuarial analysis
- Investment management
- Auditing
- Custody

56. In all OECD countries, solvency and funding evaluation and control must be left to actuaries and pensions consultants. The role of actuaries and pension consultants is to evaluate future pension liabilities and to estimate the financial solvency of the pension plan, according to both the on-going and winding-up approach. They set out a funding strategy for the pension plan, estimating the level of contributions required to ensure the sustainability of pension promises in both the short term and the longer term. Clearly, actuaries and pension consultants only play a role in the case of pension plans that offer some form of insurance against financial or biometric risks. Pension funds or pension fund managing companies that themselves underwrite financial or biometric risks should be required to appointment an actuary.
Where the insurance is provided by the plan sponsor, as is the case in most occupational defined benefit plans, this will normally be required to appoint the actuary.

57. Most OECD countries also require investment management to be carried out only by persons or entities authorised to act as investment or asset managers. In countries where pension funds are set up in the contractual form, investment management is always carried out by financial institutions. In most countries where pension funds are set up in the corporate form, as foundations or as trusts, the governing body is only permitted to carry out investment management if it has the relevant authorisation, but it can normally delegate this function to external investment managers. There are some special cases, however. In the United States, the plan sponsor may carry out the investment management function in-house (by the treasury department). In Italy, outsourcing of the tactical asset allocation function of closed pension funds to financial institutions is actually required by the law.

58. Delegation of investment management to financial companies can ensure that investment decisions are taken by persons with the relevant expertise and may also heighten protection from the influence of plan sponsors. At the same time, however, delegation can create new agency problems, since the financial company may run the pension fund in its own interest.

59. Two other functions that should be provided externally are auditing and custody. The financial activities of the pension fund and the pension fund managing entity (if there is one) are audited with at least an annual frequency in most OECD countries. The auditor may also be required to verify whether the pension fund complies with all the rules set out in the pension plans statutes concerning its structure and operation, as well as with all regulations emanating from the regulatory authorities. Auditors may be appointed by the pension fund governing body or the plan sponsor, depending on the type of fund.

60. The main function of the custodian is to carry out securities movement and control. They often provide additional services such as securities lending, cash management, investment accounting and reporting, and performance measurement. Swift, efficient clearance and settlement of transactions is vital since any delays in receipt of interest and dividends reduce the effectiveness of investment management decisions. The assignment of custody responsibility to a different entity from the asset manager can also be an efficient way to ensure the physical and legal integrity of the assets of a pension fund, and to oversee the transactions of the asset manager.

61. Given the lack of representation of pension plan members in the governing bodies of open pension funds set up in the contractual form, custodians can play a key role to ensure that all transactions carried out by the asset manager are in accordance with financial legislation as well as the plan and fund rules. Custodians in countries such as Italy, Mexico, Poland, Portugal, and Spain have such monitoring responsibilities over the pension fund managing company.

(2) The responsibilities and duties of the governing body

62. The overriding responsibility of the governing body of a pension fund must be to serve exclusively the interests of the members of the pension plan, which the fund supports. The definition of the best interest of beneficiaries is normally identified with their best financial interest. However, in the past plan members have voiced concerns that their interests extend to other objectives, which may not always coincide with the attainment of optimal financial results in the investments of the pension fund. Most recently, member’s demands have focused in some countries such as the United Kingdom or the United States over the need to pay attention to ethical and environmental criteria in the investment of pension fund assets. Such demands have not materialised in regulations redefining beneficiaries’ interest and it is unlikely that they will do so, especially in defined benefit plans where it is impossible to cater for each
individual’s special interests. However, it may be argued that plan members have at least a right to be informed of the extent to which their pension fund invests in a way that is consistent with their ultimate enjoyment of the income they will receive in old age.

63. The United Kingdom has set an example in this respect. With effect from 3 July 2000, private pension funds in this country have a statutory duty to disclose the extent to which they take ethical and social considerations into account in their investment policy. Similar regulations concerning public pension funds are being prepared.

64. In order to be effective in protecting the interests of plan members as beneficiaries or owners, governance regulations must identify clearly those responsible for the administration of the pension fund with this exclusive aim and hold them accountable for their actions. Accountability over governance functions is particularly important in order to allow plan members, either directly or indirectly, through their elected or appointed representatives in the governing body, to sanction or discipline the governing body in case of bad management. One form of accountability that can give plan members significant sanctioning power is personal liability. Compulsory insurance of this liability can further ensure the ability of the pension fund to recover losses in case of mismanagement. Compulsory insurance is rare among OECD countries, the United States being one special case. Most OECD countries, however, do hold the members of the governing body accountable under the law for their actions and decisions as pension fund administrators.

65. Where sanctioning is possible this may be channelled through various redress mechanisms. Such mechanisms are particularly important in the case of open pension funds established in the contractual form, since plan members have no representation in the governing or supervisory bodies of the pension fund. They may be exposed to unscrupulous plan providers or their sales forces who may mislead led with inaccurate or distorted information. Complaints handling and dispute resolution is clearly also necessary in closed pension funds and in externally-governed, open funds, though alternative devices, such as member representation in the governing or supervisory bodies or, in the case of collectively bargained schemes, the right to industrial action, can be sufficient to provide the right incentives to the fund administrators.

66. Consumer redress may take place through informal, independent arbitration, regulatory/supervisory bodies, or through the courts. The first two channels offer many advantages, in particular the cheaper cost to consumers. Independent arbitration also provides a route to self-regulation by pension fund administrators. An arbitrator may be set up by the industry itself in order to encourage public confidence and maintain efficient business practice. Litigation, while potentially highly effective in sanctioning bad management, can be excessively costly for individual consumers, though it may appropriate in the case where a common group (e.g. an employment association) is affected.

67. The specific duties of the pension fund governing bodies may be stated in the legislation, the plan rules, and the fund statutes. The governing body must therefore act both within the framework of the law, and in accordance with the pension plan and the fund rules and statutes. The oversight or monitoring body of the pension fund, auditors, custodians, as well as the supervisory authority may be required to verify that these functional duties are adequately executed.

68. As to the legal framework, governance regulations typically include two basic duties for the governing body in the exercise of their functions:

- Accurate, and timely disclosure of relevant information for pension fund members.

- Exercise of their functions with due regard to the principles of security, profitability, liquidity, and diversification of the pension fund.
69. The governing body should be required to inform plan members of all relevant aspects related to the operation of the pension fund when the individual joins a scheme. Relevant aspects include the level of fees charged in personal pension plans, the investment strategy followed by the pension fund, the type of plan supported, and the contribution rates and benefits scheduled. Plan members and their representatives should also have access to accurate and timely information on the operation of the pension fund. The duty of disclosure should be therefore a basic responsibility of the governing body, irrespective of the type of fund. This duty is also part of the regulatory policies in DAFFE/AS/PEN/WD(99)18/Rev3.

70. In defined benefit and hybrid plans, plan members should be able to demand information on the level of funding backing pension promises and other relevant aspects of the financial accounts of the pension fund. Most OECD countries conform with this requirement, though most pension plan members are not aware of this right.

71. Disclosure requirements should be even more exigent in defined contribution plans, where plan members may exert some degree of individual choice over the investment of the pension fund. Such individual choice may be in the form of choice of investment portfolios in defined contribution schemes of closed funds, or in the form of actual choice over fund manager and asset allocation, in the case of open pension funds. Participants in these schemes should receive periodic statements, at least annually, showing their account balances, and the investment regime and performance of the pension fund.

72. Governing duties also face a duty in most OECD countries to exercise their functions in accordance with some basic principles, such as the security, profitability, liquidity, and diversification of the pension fund. This requirement is justified by the fact that investment management is the one key function of pension fund administration that the governing body may carry out on its own, without needing to delegate it to professional asset managers. It is equivalent to similar duties that are imposed by financial regulations on the management of assets of insurance companies and collective investment schemes.

73. In some countries these principles must be enshrined in a statement of investment policy that the governing body or the pension fund manager must disclose to the supervisory authorities, and which may also demanded by the plan members. Countries that require the adoption and disclosure of a statement of investment policy (SIP) include Mexico, the Netherlands, and the United Kingdom. The provinces of Ontario and Quebec in Canada also require trustees to adopt a statement of investment policies and goals. In the United States, meanwhile, regulations do not require a SIP, but most pension funds, especially the larger ones, have developed them.

74. In Anglo-Saxon countries, trustees and other pension fund fiduciaries have a further duty to act prudently in the exercise of their functions (the so-called prudent person rule). The definition of the term prudence has been subject to some controversy and has evolved as a result of court rulings and decrees published by the relevant regulatory and supervisory bodies. Nowadays, prudence is identified in countries such as the United Kingdom or the United States with decision making processes that take into consideration all relevant information at their disposal, including the advice from professionals in the relevant function.

75. In the United Kingdom, for example, trustees are required to seek professional advice for some of the duties they carry out, such as the choice of investment manager. The need for external advice is critical in this country, since trustees have overall responsibility for the administration of all aspects of the pension plan. In the United States, on the other hand, the responsibility of trustees is limited to investment management, which greatly simplifies the decision-making process.
76. In the United States, the duty of prudence carries additional responsibilities for trustees. In the mid-80s, bulletins published by the Department of Labor urged trustees to exercise their voting rights attached to the equity investment of pension funds on "issues that may affect the value of the plans’ investment". In 1994, the Department of Labor formalised this recommendation into a requirement, and confirmed that it applied to foreign as well as US equity holdings.

(3) The suitability of the members of the governing body

77. All the parties involved in the administration of the pension fund must have the necessary skills to carry out their tasks properly. To the extent that pension funds are externally managed by specialised managing companies, regulations may resemble those of other financial companies.

78. The suitability criteria for the governing body itself are difficult to determine because their activities vary significantly depending on the degree of outsourcing. However, some basic criteria may be identified, which are found in most OECD countries:

- they must have no convictions or received any major civil penalties;
- they must not have been insolvent under administration;
- they must have suitable qualifications and professional experience.

79. The first two requirements can be justified as a way to exclude persons who cannot be labelled as trustworthy in the exercise of their basic duty, the protect the interest of the owners or beneficiaries of the pension fund. The third requirement aims to ensure that the members of the governing body have the relevant competence in the functions that they carry out. For example, if the trustees or the board directors of a pension fund can manage the pension fund assets, they should be required to have the relevant qualifications or certificates authorising them to act as investment managers. To the extent that their responsibility is limited to setting out the investment strategy for the fund or the selection of investment managers, they may be exonerated from this requirement.

6. Future work

80. Future work in the area of pension fund governance should focus on specific policy issues that were not tackled in depth in this report. A relevant issue could be the role of governance regulations on the design of the decision-making processes of a pension fund, with specific focus on investment decisions. Another relevant issue is the design of pension fund governance structures and how responsibilities should be split between the different monitoring bodies (supervisory board, custodian, auditor).

-- Delegates are invited to comment on the priorities for future analysis on governance issues.
<table>
<thead>
<tr>
<th>Type</th>
<th>Legal form</th>
<th>Governing bodies</th>
<th>Representation of participants/beneficiaries</th>
<th>Suitability requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Australia</strong></td>
<td>Open, closed</td>
<td>Trust form</td>
<td>Trustee</td>
<td>Standard employer-sponsor funds are required to have equal numbers of employers and employees on the trustee board</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Contractual form (only Retirement Saving Accounts)</td>
<td></td>
<td>Trustees: - must not have been convicted of dishonest conduct, - must not have been subject to a civil penalty order under SIS, - must not be insolvent or under administration</td>
</tr>
<tr>
<td><strong>Canada</strong></td>
<td>Closed</td>
<td>Trust form</td>
<td>Trustees (at least three) Pension plan administrator (must be a pension committee in Quebec)</td>
<td>In Quebec the pension committee must include participants</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>At least three of trustees must be resident in Canada, one of whom is independent of the sponsoring company.</td>
</tr>
<tr>
<td><strong>Czech Republic</strong></td>
<td>Open</td>
<td>Contractual form</td>
<td>Meeting of shareholders Board of Directors Supervisory Board</td>
<td>Not relevant</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Minimum age of 18 Legal capacity Professional qualification Lack of criminal antecedents + several “conflicts of interest” rules</td>
</tr>
<tr>
<td><strong>Germany</strong></td>
<td>Closed</td>
<td>Corporate form (mutual assurance association)</td>
<td>Board of directors</td>
<td>Member representatives do not have to account for 50% of the votes, but there must be institutional safeguards which prevent them from being overruled.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Only qualified insurance professionals may be managing directors of pensionskassen.</td>
</tr>
<tr>
<td>Type</td>
<td>Legal form</td>
<td>Governing bodies</td>
<td>Representation of participants/beneficiaries</td>
<td>Suitability requirements</td>
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</tr>
<tr>
<td><strong>Hungary</strong></td>
<td>Open, closed</td>
<td>Corporate form (mutual saving association)</td>
<td>General assembly / General delegate assembly</td>
<td>Voluntary funds: only members</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Board of directors (BD)</td>
<td>Mandatory funds: in the BD participants must be represented, in the SB more than 50%</td>
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<tr>
<td></td>
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<td></td>
<td>Supervisory board (SB)</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td>Consultants/experts (in MF):</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>• executive director</td>
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<td></td>
<td></td>
<td></td>
<td>• investment consultant</td>
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<td></td>
<td></td>
<td></td>
<td>• lawyer</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• actuary</td>
<td></td>
</tr>
<tr>
<td><strong>Ireland</strong></td>
<td>Closed</td>
<td>Trust form</td>
<td>Trustee (individual or corporate)</td>
<td>Members of occupational pension plans have the right to elect an equivalent number of trustees as the employer</td>
</tr>
<tr>
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</tr>
<tr>
<td><strong>Italy</strong></td>
<td>Open, closed</td>
<td>Contractual form (open funds) Foundation or corporate (association) form (closed funds)</td>
<td>Closed funds: General assembly Board of directors Board of auditors Open funds: Financial institution that manages the pension fund General manager/supervisor (“responsabile del fondo”)</td>
<td>Closed funds: The general assembly, the board of directors and the board of auditors must each have an equal number of employer and employee representatives</td>
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<td></td>
<td>The members of the general assembly and the boards (of closed funds) and the “responsabile del fondo” (of open funds) must possess the necessary requisites of professional standing and experience as laid down by a special-purpose statutory provision.</td>
</tr>
<tr>
<td><strong>Japan</strong></td>
<td>Closed, Employee pension funds (EPF) Tax qualified pension plans (TQP)</td>
<td>Foundation (EPF) Contractual (TQP)</td>
<td>EPF: Foundation board</td>
<td>EPF: The board is composed of delegates who are elected among the sponsoring employers and the plan’s participants in equal numbers.</td>
</tr>
</tbody>
</table>

**Suitability requirements**

- **Hungary**: Unblemished professional and civil antecedents for the members of the Boards
- **Ireland**: There are no specific suitability requirements
- **Italy**: The members of the general assembly and the boards (of closed funds) and the “responsabile del fondo” (of open funds) must possess the necessary requisites of professional standing and experience as laid down by a special-purpose statutory provision.
<table>
<thead>
<tr>
<th>Type</th>
<th>Legal form</th>
<th>Governing bodies</th>
<th>Representation of participants/beneficiaries</th>
<th>Suitability requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Korea</td>
<td>Closed</td>
<td>Trust form (Retirement trust)</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td>Contractual form (Retirement insurance)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mexico</td>
<td>Open</td>
<td>Contractual form (Retirement insurance)</td>
<td>Pension fund administrators (Afores):</td>
<td>Not relevant</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>General assembly</td>
<td></td>
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<tr>
<td></td>
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<td></td>
<td>Independent advisors (2)</td>
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<td></td>
<td></td>
<td></td>
<td>Compliance officer</td>
<td></td>
</tr>
<tr>
<td>Netherlands</td>
<td>Closed</td>
<td>Foundation form</td>
<td>Foundation board</td>
<td>Boards must be composed of an equal number of employee and</td>
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<tr>
<td></td>
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<td></td>
<td></td>
<td>employer representatives</td>
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<td></td>
<td>There is no suitability requirement, however, the supervisor</td>
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<td>is able to test the qualification of the members and</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td>disqualify people.</td>
</tr>
<tr>
<td>Norway</td>
<td>Closed</td>
<td>Foundation form</td>
<td>Board of directors</td>
<td>The board must have at least 4 members, at least 2 of</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Chief executive (appointed by the board)</td>
<td>whom must be elected by the employees.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>No specific requirements</td>
</tr>
<tr>
<td>Poland</td>
<td>Open, closed</td>
<td>Contractual form (Retirement insurance)</td>
<td>Universal pension society:</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- General meeting of the shareholders</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>- Board of management</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td>- Supervisory board</td>
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<td></td>
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<td></td>
<td>- Board of auditors (optional)</td>
<td></td>
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<tr>
<td></td>
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<td></td>
<td></td>
<td>• full legal capacities</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>• no convictions for offences against property, document</td>
</tr>
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<td></td>
<td></td>
<td>credibility, economic trading in money and securities</td>
</tr>
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<td></td>
<td></td>
<td></td>
<td></td>
<td>• professional certificate (economics, law: 1/3) and work</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>experience (minimum of 7 years: 2/3 of the members) )</td>
</tr>
<tr>
<td>Country</td>
<td>Type</td>
<td>Legal form</td>
<td>Governing bodies</td>
<td>Representation of participants/beneficiaries</td>
</tr>
<tr>
<td>-----------</td>
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<td>----------------------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Portugal</td>
<td>Closed, open</td>
<td>Contractual form</td>
<td>Pension fund management companies:</td>
<td>In the control commissions, the majority of the participants and beneficiaries is necessary</td>
</tr>
<tr>
<td>Spain</td>
<td>Closed, open</td>
<td>Contractual form</td>
<td>Pension plan control commission Pension fund control commission Pension fund management company</td>
<td></td>
</tr>
<tr>
<td>Sweden</td>
<td>Closed</td>
<td>Foundation form</td>
<td>Board of foundation Supervisor</td>
<td>Equal representation of employees and employers is required</td>
</tr>
<tr>
<td>Switzerland</td>
<td>Open, closed</td>
<td>Foundation form (most of them) Corporate form (co-operative society)</td>
<td>Supreme council (foundation board) Board of directors Supervisory board Experts: pension and investment expert</td>
<td>50-50% of the council represent the employer and the employees</td>
</tr>
<tr>
<td>UK</td>
<td>Closed</td>
<td>Trust form</td>
<td>Trustee</td>
<td>Minimum 33% member-nominated trustees</td>
</tr>
<tr>
<td>US</td>
<td>Closed</td>
<td>Trust form</td>
<td>Trustee</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Actuary</td>
<td>Investment manager</td>
<td>Auditor</td>
<td>Custodian</td>
</tr>
<tr>
<td>---------------</td>
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</tr>
<tr>
<td><strong>Australia</strong></td>
<td>Obligatory (in case of DB plans)</td>
<td>Optional</td>
<td>Obligatory</td>
<td>Obligatory</td>
</tr>
<tr>
<td><strong>Canada</strong></td>
<td>Obligatory</td>
<td>Optional: internal or external</td>
<td>Obligatory</td>
<td>Obligatory</td>
</tr>
<tr>
<td><strong>Czech Republic</strong></td>
<td>Optional</td>
<td>Optional: internal or external</td>
<td>Obligatory</td>
<td>Obligatory</td>
</tr>
<tr>
<td><strong>Germany</strong></td>
<td>Obligatory</td>
<td>Optional</td>
<td>Obligatory</td>
<td>Obligatory</td>
</tr>
<tr>
<td><strong>Hungary</strong></td>
<td>Obligatory in mandatory funds, but may be replaced by external expert</td>
<td>Optional: internal or external</td>
<td>Obligatory</td>
<td>Obligatory</td>
</tr>
<tr>
<td><strong>Ireland</strong></td>
<td>Obligatory</td>
<td>Optional</td>
<td>Obligatory</td>
<td>Optional</td>
</tr>
<tr>
<td><strong>Italy</strong></td>
<td>Optional</td>
<td>Obligatory (closed funds)</td>
<td>Optional (closed funds)</td>
<td>Obligatory</td>
</tr>
<tr>
<td><strong>Japan</strong></td>
<td>Optional</td>
<td>Optional</td>
<td>EPF: obligatory</td>
<td>EPF: Optional</td>
</tr>
<tr>
<td><strong>Korea</strong></td>
<td>External</td>
<td></td>
<td>Obligatory</td>
<td></td>
</tr>
<tr>
<td><strong>Mexico</strong></td>
<td>Not required</td>
<td>Obligatory: Pension fund administrators</td>
<td>Obligatory</td>
<td>Obligatory: insurance companies</td>
</tr>
<tr>
<td><strong>Netherlands</strong></td>
<td>Obligatory</td>
<td>Optional</td>
<td>Obligatory</td>
<td></td>
</tr>
<tr>
<td><strong>Norway</strong></td>
<td>Obligatory</td>
<td>Optional</td>
<td>Obligatory</td>
<td>Optional</td>
</tr>
<tr>
<td><strong>Poland</strong></td>
<td>Not required</td>
<td>Obligatory: Universal pension society</td>
<td>Not required</td>
<td>Obligatory</td>
</tr>
<tr>
<td>Country</td>
<td>Actuary</td>
<td>Investment manager</td>
<td>Auditor</td>
<td>Custodian</td>
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</tr>
<tr>
<td>Portugal</td>
<td>Obligatory</td>
<td>Obligatory: Pension fund management company, but this may delegate to professional asset-managers</td>
<td>Obligatory</td>
<td>Obligatory</td>
</tr>
<tr>
<td>Spain</td>
<td>Obligatory</td>
<td>Obligatory: Management entity, but it may further delegate</td>
<td>Obligatory</td>
<td>Obligatory</td>
</tr>
<tr>
<td>Sweden</td>
<td>Not required</td>
<td>Optional</td>
<td>Obligatory</td>
<td>Not required</td>
</tr>
<tr>
<td>Switzerland</td>
<td>Internal expert is obligatory</td>
<td>Optional: internal or external</td>
<td>Obligatory</td>
<td>No obligation for independent custodian</td>
</tr>
<tr>
<td>UK</td>
<td>Obligatory (may be internal)</td>
<td>Optional: internal and external</td>
<td>Obligatory</td>
<td>No obligation for independent custodian</td>
</tr>
<tr>
<td>US</td>
<td>Obligatory for DB plans (may be internal)</td>
<td>Optional: the trustee may delegate this function</td>
<td>Obligatory (for plans with over 100 employees)</td>
<td>Obligatory</td>
</tr>
</tbody>
</table>
ANNEX: PENSION FUND GOVERNANCE IN OECD COUNTRIES

Australia

1. In Australia closed - private or public sector employer sponsor - pension funds must be set up in the trust form, and industry-wide schemes are common. Open funds operate in both the mandatory and voluntary pension system (superannuation). They may operate also in the trust form, where the trustees are a financial company, however, they make take also the contractual form (Retirement Saving Accounts).

2. All superannuation funds regulated under the SIS must be managed by a trustee that can be a committee of natural persons or a corporate body with its own board of directors. There is a legal requirement for standard employer-sponsored funds to have equal representation of employees and employers on the trustee board. Trustees may outsource functions to third parties, however the responsibility for the management of a fund remains with the trustee. They must also appoint an external auditor and an independent custodian. Defined benefit funds are also required to have an actuary.

3. Pension fund trustees have responsibility over all aspects of the operation of the pension plan, including the collection of contributions, the investment of the fund assets, the engagement of the custodian, asset managers, and consultants and the provision of benefits. Trustees are the single responsible entity in terms of fiduciary obligations to members and regulatory responsibilities more generally. They bear personal liability for all these functions.

4. With respect to the asset management function, trustees are charged with managing members’ moneys with competence, diligence, prudence, and honesty, and always acting in the members’ best interest.

5. Once a superannuation fund is regulated under the SIS Act the trustee must comply with a range of standards designed to ensure that the fund’s assets are managed with suitable care (the prudential aspect) and are used for genuine retirement income purposes (the sole purpose test). The standards also cover issues such as reporting requirements (to members and to the regulator), payment requirements, and other operational issues.

6. These include:
   - the trustee developing and implementing an investment strategy having regard to risk, diversity, liquidity and return, which must be appropriate given the membership of the fund;
   - members being fully informed about the fund and its performance;
   - the keeping of accurate accounts and proper record keeping;
   - extensive member reporting rules when members join the fund, annually and on exit;
   - corporate funds having equal employer and member representation on the trustee board;
− approval processes for professional trustees of public offer (retail) superannuation funds;

− the lodgement of annual returns with APRA including certification that the fund’s accounts have been audited by an external ‘approved auditor’;

− internal inquiry and complaints handling mechanisms and compliance with any determination of the external, statutory-based Superannuation Complaints Tribunal; and

− restrictions on in-house investments. (Part 8 of the SIS Act).

7. Trustees are also subject to extensive reporting rules towards members (when members join the fund, annually and on exit, and when the fund encounters adverse conditions which could potentially threaten member interests). Disclosure towards the supervisory authorities includes Risk Management Statements (RMS) since 1995, which contain the risk management practices and controls adopted for investment in derivative instruments.

8. Suitability requirements for superannuation trustees include the following rules:

− they must not have been convicted of dishonest conduct;

− they must not have been subject to a civil penalty order under the SIS Act; and

− they must not be insolvent or under administration.

9. Further, recent legislative amendments provide APRA with the power to disqualify certain persons from acting as Trustees where those persons:

− have contravened the SIS Act on one or more occasions and APRA is satisfied that the seriousness or frequency, or both, of the contraventions warrants the making of a disqualification order; or

− are otherwise not a fit and proper person to be a trustee.

10. Regarding the right to redress, Australia has a statutory disputes authority, the Superannuation Complaints Tribunal. It is one of two free redress avenues available to those with a complaint. The other is the Life Insurance Complaints Service (LICS) which serves those with a complaint on open pension funds managed by life insurance companies. LICS are bound by terms of reference guidelines which state that common law damages cannot be awarded, only the loss on a policy can be recovered and that commercial decisions, such as fees, charges, premiums or risk loading cannot be examined unless they relate to an issue such as deceptive conduct.

**Austria**

11. In Austria, the legal structure for a pension fund *(Pensionskassen)* is a mutual insurance association that may be identified with the corporate form. Pension funds are not regarded as a special kind of financial institution but rather are treated as an insurance company, and subject to the same regulatory and supervisory framework, including the same governance regulations.
12. Pension funds are required to employ two actuaries. The Ministry of Finance has the power to refuse their appointment if there are any concerns over the actuaries’ professional qualifications or experience. Once the actuaries draw up a business plan for the pension fund, it has to be confirmed by an auditing actuary, documented in an auditing report and authorised by the Ministry of Finance.

**Belgium**

13. In Belgium, closed pension funds may operate either in the form of a foundation or a mutual insurance association (corporate form).

14. An actuary must be appointed. The actuary’s duties include reporting to the Insurance Supervisory Body on the operating reserves and advising the pension fund managers in relation to financing, operating reserves and reinsurance.

15. An agreed auditor is *inter alia* responsible for reporting to the Supervisory Body on the financial and managerial situation of the pension fund. Pension funds are subject to specific accounting rules.

**Canada**

16. In Canada, closed pension funds must be set up in the trust form and are typically established at the employer level.

17. Pension plan fiduciary administrators decide whether to establish and operate a pension fund. However, it is usual for the administrator to delegate the investment management to a trust company, an insurance company, or investment counsel. Ontario and Quebec have recently moved to require the administrator to adopt a Statement of Investment Policies and Goals, setting out in considerable detail how the pension fund will be managed. The statement must be reviewed annually and any changes reported to the pension authorities.

18. Special rules apply in the case in which corporate trustees or individual trustees are called upon to hold and manage the funds. There must be at least three trustees resident in Canada, one of whom is independent of the company. The trustees are required to exercise prudence in dealing with the investments. They are also required to appoint an external auditor, a custodian and an actuary.

19. Pension fund trustees are subject to the same fiduciary rules as pension plan administrators.

20. The law does not envisage limits on fees or commissions paid by employees for the management of a pension plan.

**Czech Republic**

21. Open pension funds work as joint-stock companies.

22. The board of directors and the supervisory board must have at least five members and must meet at least four times a year. Special suitability regulation is applied for the directors and supervisors of the pension funds. Only individuals over 18 years of age, professionally qualified and unimpeachable are eligible to serve on the board of directors and supervisory board. These are also completed with detailed conflicts-of-interest rules excluding further individuals from the eligibility, e.g., members of boards of another pension fund, an insurance company, or an investment fund, persons involved in securities trading.
and members of the custodian (depository) institution. Employees of the pension fund are also excluded from being members of the supervisory board.

23. Pension funds must have a Statute and a Pension Plan, which must be accessible to the participants. The statutes contain the scope of the activities, the aim and objectives of the pension fund’s investment policy, the method of distribution of profit, information on the depository bank and the method of disclosure. The pension plan specifies the internal regulation on benefits and contribution.

24. Pension funds must be contracted with a depository bank that has to be approved by the Ministry of Finance in agreement with the Securities Commission. The appointment of an external actuary is optional, but pension funds are obliged to have an independent external auditor. Pension funds may delegate investment management to an external asset manager. However, only the pension funds are allowed to provide retirement income.

25. The pension fund manager must manage the assets expertly and carefully with the aim of securing dependable revenues, and in accordance to the interests of the beneficiaries. They hold personal liability for the management of the pension fund, but they are not required to insure themselves against this liability.

26. Pension funds are obliged to publish a report on their financial results semi-annually containing also an overview of placement, the deposit and the amount of the pension fund’s assets. Pension funds, which exist for more than three years must also include the financial results for the past three years. In addition, funds are obliged to provide the Ministry of Finance (MOF) and the Security Commission annually and in case of changing with the list of shareholders and the required relating data, which information are kept by the MOF and available for the public. Funds are further obliged to provide annually their participants with a statement containing the accumulated balances and investment earnings.

Denmark

27. In Denmark, closed pension funds operate as foundations. Collective bargaining at the industry level is common, hence pension funds are tied to a specific collectively bargained scheme.

28. Pension funds are submitted to management requirements and fit and proper conditions. The conditions for appointing an administrator or trustees and the roles and powers of these are set in the articles of association of the pension fund.

29. Pension funds of all kinds are required to employ an actuary approved by the Financial Supervisory Authority. The role of the actuary is to ensure that the pension fund establishes appropriate technical provisions, review the actuarial content of the pension fund’s activities and secure that the technical provisions are at all times in accordance with the requirements laid down by the law. Furthermore, the actuary is responsible for any contact to the Financial Supervisory Authority including annual reports and requests of information from the Authority. The actuary is entitled to request from the board of management all such information necessary for the performance of his functions.

30. From 1 July 1995 large companies/funds have been under an obligation to introduce internal auditors who are directly accountable to the board. The auditors of pension funds have the same role and powers as auditors of insurance companies
Finland

31. In Finland closed pension funds operate as foundations and most pension funds are actually established at the employer level, as in Anglo-Saxon countries.

32. A pension insurance company must have a supervisory board which is responsible for the plan administration, including drafting an investment plan for the company assets.

33. No specific fees and commissions are charged to plan members, hence the legislation does not contemplate any limits.

Germany

34. In Germany, the legal form for a pension fund is a mutual insurance association (pensionskassen) and is based in the corporate form. Pension funds are treated as an insurance company, and subject to the same regulatory and supervisory framework, including the same governance regulations. However, the fact that they support occupational pension plans means they are subject to co-determination, which requires representation of the employees in the governing body of the fund. In general, member representatives do not have to account for 50% of the votes, but there must be institutional safeguards which prevent them from being overruled. Since 1994, only qualified insurance professionals may be managing directors of Pensionskassen.

Hungary

35. In Hungary, closed and open pension funds are a form of mutual saving association that are identified with the corporate form, where the plan members are the owners of the institution operating the plan, but the entities are subject to specific regulation, separate from that of insurance companies. The members of the fund are also owners of the mutual, but all persons have the same voting and representation rights, independent of their level of ownership of the mutual.

36. Workers can transfer their balance from closed funds to open funds. Members, however, can only switch between mandatory closed and open funds once every six months. Further, in the case of mandatory pension funds workers need to buy an annuity from the mandatory closed pension fund but may contract directly with an insurance company. There are no portability restrictions or annuity conversion regulations for voluntary pension funds.

37. The main decision-making body is the assembly of all the members, or the general delegate assembly of their representatives. The funds must be operated by members of a board of directors, who are chosen by the assembly and audited by an elected auditing committee. In mandatory pension funds, the Board must appoint certain experts, such as an executive director, actuary, accountant, and lawyer. It is also required (in MPF and VPF) to appoint an external custodian. Similarly to other countries, the board may engage third party companies and outsource the investment of the fund’s assets to financial institutions, the administration and record keeping, and – in case of mandatory funds – the annuity service (to insurance companies only). Only pension funds with assets above HUF 100 million may manage their own assets or provide benefits.

38. The board of directors has responsibility over all functions related to the pension plan, which are set up on a defined contribution basis, but must still attain a minimum return relative to a market benchmark. The board of directors, however, does not have personal liability for ensuring that returns do not fall below this level. Individual members have responsibility to determine whether to transform the
accumulated balance at retirement into an annuity, and whether to buy the annuity from an insurance company of their own choice. In VPF only the funds themselves are allowed to provide annuities, however, in this case members may also choose lump-sum. In the case where pension funds offer annuities, it is the pension fund itself that is responsible for ensuring that adequate reserves are maintained to ensure that the liabilities can be met. Plan sponsors bear no liability.

39. The main responsibility of the board of directors is the adequate management of the fund according to the respective regulation, the statue of the fund and the decisions of the general assembly. In this framework, the board must prepare the main documents of the fund such as the by-law, the financial plan and once the general assembly passed, take care of their execution. In addition, the board is required to prepare and approve the internal regulation of the asset management and asset valuation as well as the regulation on the service of the benefits.

40. The board is also responsible for the reporting and disclosure towards the supervisory agency as well as the members. The pension funds must publish the annual financial report and the balance sheet in at least one countrywide newspaper. In addition, the following information must be disclosed – in case of mandatory funds - annually: the starting date of the fund, the names and titles of the fund officials, the number of the members, revenues from contributions and other sources and their division among reserves, the value of benefits provided by the fund, the operational costs, the main indicators of the investment performance, the name of the asset manager (in case of contracting out), the penalties imposed by the supervisory agency and the use of the Guarantee fund. The members of the fund has to be informed once a year and at any time on request about the balance of their individual account.

41. There are no professional and special legal requirements for the board of directors partly related to the fact that they are elected by the members of the general assembly. However, several rules are imposed requiring unblemished professional and civil antecedents. At the same time, the regulation impose professional requirement – in additional to the rules describe above – for the management of the fund, such as the adequate specialised qualification and work experience for the executive director, the manager in charge with the investments or the actuary.

42. The governance structure, the responsibilities of the governing body and the suitability standards for the managers of open funds are exactly the same as those of the closed funds.

**Iceland**

43. In Iceland closed pension funds operate as foundations. Collective bargaining at the industry level is common. Hence pension funds are tied to a specific collectively bargained scheme.

**Ireland**

44. In Ireland closed (occupational) pension funds must be set up in the trust form. Members of certain occupational pension plans have a right to participate in the selection of a number of trustees of their plan. In order to have this right, a person must be a qualified member of a plan which has 50 or more qualified members. Arrangements for member participation will usually be made following discussions between the employer and representatives of members. The discussions will cover such matters as the overall number of trustees and the arrangements for the selection of a proportion of this number by members. Specific rules on all these matters are set down in the Act and its underlying Regulations.
Trustee arrangements can vary from scheme to scheme but generally come under the category of either individual trusteeship, corporate trusteeship or a combination of individual and corporate trustees acting together. Individual trusteeship includes trustees selected and appointed directly by the employer from the company’s management, outside professionals (such as solicitors, accountants, actuaries) and those selected for appointment by scheme members or after consultation with scheme members (could include current employees, retired employees and/or trade union officials). Corporate trusteeship means that a company acts as the trustee and could include the following:

- where the employer as a corporate body acts as trustee (this is fairly common in small schemes),
- where a corporate body other than an employer acts as trustee (e.g. a specialist firm providing trusteeship services),
- where a separate trustee company is set up in lieu of individual trustees, the directors of which could include those selected by the employer and by the scheme members.

Individual and corporate trustees would usually involve a combination of individual and corporate trustees acting together.

Pension plan trustees have duties under trust law. These have been reinforced and added to by the Pensions Act, and include the following:

- to be familiar with the trust document;
- to carry out the terms of the trust document to the letter;
- to see that the contributions due to the plan are received;
- to see that the trust fund is properly invested;
- to keep the fund separate from their own property and from the property and assets of the employer;
- to make arrangements to pay the beneficiaries in accordance with the rules;
- to ensure that accounts and records are kept;
- not to make a profit from the office of trusteeship;
- to be prudent and diligent, to exercise care and to act in the utmost good faith in carrying out their duties;
- to seek professional advice as necessary; and
- to supervise those to whom functions have been properly delegated.

Investment of the pension fund assets is probably the most important trustee duty. The Pensions Act requires trustees to provide for the proper investment of the assets in accordance with the “prudent man principle”.
48. A trustee who is negligent, does not act in good faith or does something which is contrary to the rules of the trust, can be sued by the beneficiaries. The trustee can be held to be personally liable for the whole amount of any loss which occurs. In addition, criminal penalties apply to trustees who are in breach of the Pensions Act.

49. The trustee is required to appoint an actuary and an auditor, however, it is not a legal obligation that pension funds have an appointed custodian. Many of the administrative functions may be undertaken on behalf of the trustee by the scheme administrator, however the ultimate responsibility remains with the trustee.

Italy

50. In Italy closed pension funds can be set up only as foundations or associations, but the board of directors must enter into a contract with an external, professional asset manager, who becomes responsible for the management of the pension fund assets. Open pension funds operate in the contractual form. Banks, insurance companies, and collective investment scheme providers are authorised to manage pension fund assets.

51. Closed pension funds are endowed with corporate governing bodies such as the general assembly, the board of directors and the board of auditors. All of these governing bodies must include employee and employer representatives in equal number. The managing company of an open pension fund is required to appoint a “responsabile del fondo” who is usually a manager or director of this company. He or she acts as a general manager/supervisor of all activities of the managing company related to the pension fund.

52. The members of the boards and the general assembly of closed pension funds as well as the “responsabile del fondo” of open pension funds must meet specific requirements regarding professional qualification, work experience, lack of criminal antecedents and lack of history of insolvency.

53. In closed pension funds, the board of directors’ main responsibilities include the selection of a financial institution for the management of the pension fund assets, as well as the selection of a life insurance company for the administration of pension benefits.

54. The appointment of an independent custodian is obligatory for both closed and open pension funds. Only open pension funds are required to appoint external, independent auditors. Pension funds also must appoint an insurance company for the administration of annuities.

55. There are limitations on the fees that asset managers can be paid for acting as pension fund managers.

Japan

56. The two main types of pension plan (EPF and TQP) are subject to very different administrative requirements. The EPF must be administered via a pension fund, while TQPs are directly administered by trust banks and life insurance companies.

57. Closed pension funds of the Employees Pension Funds system operate as foundations. Each EPF is a public juridical entity as provided for under the EPIA, and is legally independent from the sponsoring employer or employers. Administration and record-keeping services of EPFs can be sub-contracted to the Pension Funds Association, a non-profit, private-sector organisation that is also in charge of providing
benefit insurance and ensuring portability of pension benefits the system (see below). An EPF is operated by a board composed of delegates who are elected among the sponsoring employers and the plan’s participants in equal numbers.

58. TQPs are the only form of group insurance plans that exist in Japan, though they can also be administered by trust banks. Hence, pension funds of Tax Qualified Plans in Japan can be set up only in the contractual form. They are eligible contracts between employers and outside financial institutions, based upon the retirement pension provision rules, which in turn are based on collective agreements by the employer and employees. The financial institution becomes responsible for the management of the pension fund. All governance requirements must therefore be applied on the fund managers. These agreements designate employees as the beneficiaries, and entrust the management and operation of the plans to the financial institutions as a fiduciary.

Korea

59. In Korea, both closed and open pension funds must cover at least 5 plan members. They must be set up either in the trust form (Retirement Trust) or in the contractual form (Retirement Insurance). Funds are required to appoint a custodian, however only banks are allowed to provide this service, as well as external auditors. Pension fund assets may be managed by banks, insurance companies and investment management companies. There is no specific regulation applied to these contracts.

Luxembourg

60. In Luxembourg, closed pension funds may operate either in the form of a foundation or a mutual association and also co-operative societies (corporate form).

61. The pension funds managers must meet certain conditions with regard to competence and integrity. Appointment of an actuary is mandatory. The actuary must certify the operating reserves.

62. The auditors are not subject to any particular rules, and special requirements only apply to pension funds with limited liability company status.

Mexico

63. In Mexico, open pension funds that operate as part of the mandatory defined contribution pension system are based in the contractual form. Pension fund managing companies (called Afores) must be specialised financial institutions dedicated exclusively to the management of pension funds (called Siefores) and voluntary savings that can be withdrawn every six months. These companies manage pension assets and maintain account management. However, they are not allowed themselves to pay benefits in the form of annuities. There is no minimum number of members per fund.

64. The governing body of pension funds is the pension fund managing company (Afores). The General Assembly of the Afores must appoint two independent advisors, as well as a compliance officer. The independent advisors must be experts in the financial, economic, legal and/or social security areas and they should not have any business or working relation with the Afores’s shareholders or employees. Exclusively Afores are allowed to manage pension fund assets.

65. Workers can choose freely between the different open pension funds available, but in mandatory pension system they can only switch every six months.
On joining a pension fund, a member must receive an information package, including the statement of investment policy and details of commissions that will be charged. All pension fund managing companies must also send an annual statement to the fund member showing his/her account balance, the contributions and yield earned over the course of the year, as well as the fees charged.

66. Affiliates can present a complaint to the Financial Services Users Defense Commission (CONDUSEF). This institution conducts any legal action against the Afore.

Netherlands

67. In the Netherlands, closed pension funds operate as foundations. Collective bargaining at the industry level is common. Hence pension funds are tied to a specific collectively bargained scheme.

68. Closed pension fund boards must be composed of an equal number of employee and employer representatives. Pensioners are not directly represented in the board, although recommendations have been made to permit also their representation. Asset management can be carried out in house or it may be delegated to third parties. The board is also required to appoint an actuary and an independent auditor.

69. The pension fund board is responsible for all aspects of the operation of the pension plan. Their specific responsibilities depend on the terms of the mandate given by the board of directors. With respect to asset management, the members of the board are subject to a "duty of prudence". They must manage the portfolio in a careful and prudent manner. The pension fund board has various responsibilities over disclosure. It is required to inform participants of any changes to the plan and to provide them with a yearly statement of accrued rights. The board is also responsible for ensuring that the fund submits annually supervisory returns, including a balance sheet, a profit and loss account, details of investments and returns on these, and an actuarial report. The board is also required to prepare a statement of investment policies and disclose it to the supervisory body.

70. There used to be no suitability requirements for the members of the board of a pension fund. From 1999 on, the law makes it possible for the supervisor to test the qualifications of the members. The supervisor is able to disqualify people.

71. The Netherlands introduced a pension ombudsman in 1995. No legislation was needed and decisions are enforced by goodwill and industry ethics.

New Zealand

72. In New Zealand, closed pension funds must be set up in the trust form. Trustees are the legal custodians of superannuation schemes. Even when trustees employ an agent to administer their scheme or to manage its investments, they cannot delegate their responsibilities to these administrators. Trustees may be groups of individuals, or a corporate body which acts as sole trustee. In the latter case, it is usually the board of directors of the company who are appointed trustees, with the company secretary and/or a senior executive undertaking day-to-day administrative duties. Individual trustees are almost always appointed by the sponsoring company for the task. However a handful of schemes allow trustees to be elected by contributing members and beneficiaries. Because appointment rather than election is the norm, trustees are often executives of the sponsoring company but rarely union delegates or other employee representatives except in a union-sponsored scheme. A few schemes do have "worker trustees".
73. General trustee duties include the drawing up of a trust deed, keeping membership records, providing information and advice to members and potential members and preparing an annual report. In addition, there are financial duties including the maintenance of accounts, the arrangement of group life cover, actuarial review, development of a long-term investment policy and short-term investment strategies, and portfolio management. The Trustee Amendment Act 1988 and the Superannuation Schemes Act 1989 gave trustees more freedom to administer schemes and wider powers of investment, but these new powers were accompanied by improved incentives towards the responsible management of schemes. The thrust of the legislation was to encourage trustees to be fully accountable for both the administration of schemes and the investment of funds. While trustees were supposed to be fully accountable under the previous legislation, many were not aware of the full extent of their responsibilities. Accountability is encouraged through requirements governing the provision of information to the Government Actuary and to scheme members.

Norway

74. In Norway, closed pension funds operate as foundations. Most pension funds are actually established at the employer level. Independent pension funds must be administered separately from both the employer and the unions, in an institution separated as an independent judicial entity. There is no requirement for a minimum number of members. Enrolment is automatic as part of the employment contract.

75. The governing body of a pension fund is the board of directors. The board of directors must have at least 4 members, at least 2 of whom must be elected by and among the pension plan members (employees). The remaining board members are appointed by the employer. The funds must also have a chief executive, appointed by the board of directors. The board of directors must meet at least four times a year.

76. The governing body must appoint an actuary and an external auditor, but, on the other hand, they are not required to appoint an external custodian. The board of directors may also engage an external asset manager and an external benefit administrator, but it is not required to do so. Only life insurance companies that are licensed for the management of group pension funds and specialised companies licensed for carrying out so-called “active capital management” are allowed to manage pension funds’ assets.

77. The board of directors has responsibility over all aspects of pension fund administration, including the establishment of the by-laws of the pension fund.

78. There are no specific suitability requirements for the members of the board and the chief executive.

Poland

79. The employee (closed) pension funds and the open pension funds that operate in Poland as part of the mandatory defined contribution pension system are based in the contractual form. The governing body of the pension fund is the employee or universal pension society (pension fund managing company) that must be a specialised financial institution dedicated exclusively to this purpose. These companies manage pension assets and maintain account management. However, they are not allowed themselves to pay benefits in the form of annuities. Annuity payment must be contracted with an insurance company.
80. The governing bodies of the pension fund management companies are the board of management, the supervisory board and the general meeting of the shareholders. The company may also set up a board of auditors.

81. The investment of the pension fund’s assets is determined by the pension fund management company. Investment management should ensure the maximum security of the assets and maximise the overall return on investment. These companies are obliged to inform both the supervisory agency and the participants of the fund about their activities. All participants have the right to have a prospectus containing the internal regulations of the fund and the rights of fund participants. They have to be informed also of the changes in the prospectus and the financial results of the fund. Annually and at any time on request participants must be given a statement of account containing the number of credited units and their total value.

82. Ethical and conflict-of-interest requirements are imposed to individual shareholders and individuals serving on the supervisory boards of legal entity shareholders of pension fund companies. The members of the board of management and the supervisory board are appointed by the general meeting of the shareholders. Members of the board of management of a pension fund manager company shall be a person who:

- has legal capacity,
- has not been convicted for offences against property, document credibility, economic trading in money and securities,
- has professional certificate (economist, lawyer: minimum of 1/3 of the members) and work experience (7 years for a minimum of 2/3 of the members).

83. The appointment of an independent custodian is obligatory. Only pension fund management companies are allowed to manage the assets of a pension fund.

84. Participants of open pension funds can choose freely between the different pension funds available.

85. An open pension fund is obliged to publish its information prospectus once a year in a daily newspaper circulating generally in Poland. A fund is also obliged to make its information prospectus available for inspection by any person who applies for membership and shall provide it also upon request to any member.

86. A pension fund shall at regular intervals, and at least every year, provide each member with written information containing details of its operations, and detailed information on each member’s account, including contribution, yield on investment, and fees paid. Upon request, a member can also demand a statement of its account value.

Portugal

87. In Portugal, pension funds can be set up only in the contractual form. Pension funds must be managed by a pension fund management company dedicated exclusively to that purpose or by insurance undertakings which legally pursue the business of life assurance in Portugal. Therefore, the governing body of the pension fund is the governing body of the pension fund management company or the insurance company. Pension fund managing companies must have two basic governing bodies: a general assembly and a board of directors. Members and beneficiaries can elect representatives to these bodies. The general
assembly must meet at least once a year, while the board of directors must meet at least once a month. Decisions are taken by majority voting, though in some cases (e.g. transformation and dissolution of the fund) they must be taken by qualified majority voting. The members of the board of directors need to meet the following suitability criteria:

- suitable education or qualification,
- work experience,
- lack of criminal antecedents,
- lack of history of insolvency.

88. The pension fund manager shall perform all its acts in the name of and on behalf of the sponsors, members, contributors and beneficiaries. As the fund’s administrator and legal representative, the pension fund manager may deal with assets and real estate, make bank deposits in the fund’s name and exercise all rights or perform all acts directly or indirectly related to the fund’s assets. Pension fund managers may not transfer, in whole or in part, the pension fund management powers granted them by the law to third parties, although they may employ the services of third parties where it is convenient to the exercise of their duties, namely the provision of specialist advice on actuarial and investment matters and the execution, under the pension fund managers’ supervision and responsibility, of acts and operations with which they are charged. Notwithstanding their liability towards the pension funds, sponsors, members and beneficiaries, pension fund managers may only delegate management of part or all of a pension fund’s assets to credit institutions and investment companies legally authorised to manage assets in OECD member countries. A written contract shall be signed between the pension fund manager and the pension fund asset manager. The contract shall ensure the assets are employed to the fund’s ends under the terms to be defined by Instituto de Seguros de Portugal regulations. There are not any constraints on commission and duration of mandate of the pension fund asset managers.

89. The financial instruments and other documents representing the assets making up a pension fund shall be deposited with one or more credit institutions, external to the pension fund, established in Portugal, referred to as asset custodians. The pension fund manager appoints the asset custodian and the relationship between them shall be the subject to a written contract, which shall include commission payable to the asset custodian. A copy of the aforesaid contract, as well as of any subsequent amendments, shall be sent to the ISP. There are not any constraints on commission and duration of mandate of the asset custodian.

90. The pension fund manager shall appoint a responsible actuary for each defined benefit or mixed pension scheme funded by a pension fund it manages. This appointment shall be submitted to Instituto de Seguros de Portugal at the same time as submitting an application to incorporate a closed pension fund or sending a collective membership to an open pension fund. In addition to preparing the annual actuarial report the responsible actuary is required to verify the actuarial valuations, the pension fund’s funding level, the suitability of the technical and actuarial plan, the present value of the total liabilities for the purpose of determining whether there is surplus funding and the suitability of the nature of the assets making up the pension fund in the light of its liabilities, from the time and under the terms laid down for that purpose in the Instituto de Seguros de Portugal regulations. There are no constraints on commission and duration of mandate of the responsible actuary.
91. Pension fund managers shall provide the Instituto de Seguros de Portugal with the year-end documents relating to the pension funds duly certified by an official auditor or audited by an external auditor. Also, pension fund management companies shall provide the Instituto de Seguros de Portugal with copies of the management report, balance sheet, profit and loss account, and other financial statements certified by an official auditor or audited by an external auditor.

92. Pension fund managers have the liability for the management of the pension fund, and they are not required to insurance themselves against this liability. Pension fund investments shall take into account the type of liabilities the fund assumes so as to guarantee safety, profitability, and liquidity. Such investments shall be suitably different and spread, and investments in assets that by their value or by the quality of the issuer carry a high risk premium shall be kept within prudent limits.

93. Pension fund members have access, upon request, to the incorporation contract (in the case of closed pension funds), or to the management regulations, in the case of open pension funds. The sponsor must also inform the members about the pension scheme and any subsequent changes to it.

94. In the case of open funds, the value of each unit, the composition of fund investments and the number of units in circulation shall be calculated and published in "Boletim da Bolsa de Valores" at least once a month.

95. In the case of pension funds that finance contributory pension schemes, contributors and members have the right to receive, at least once a year, from the pension fund managers, information about the amount of contributions made by them or on their behalf by their employer, and about the value of their share of the fund.

Spain

96. In Spain, pension funds can be set up only in the contractual form. Pension funds must be managed by pension fund management entities. Banks, insurance companies, and other financial companies can act as managing entities, but employers can also set up companies exclusively dedicated to this purpose. One of the largest pension fund managing companies was actually established by the largest telecoms operator in the country.

97. The pension fund managing company is appointed by a Pension Plan Control Commission, which must meet at least once a year. Participation of employers in this Commission is permitted, but not required. There must be a minimum of 5 and a maximum of 9 members, where a majority of the members of the Commission must be plan members, and not the plan sponsor or the beneficiaries (retired people, widows, and the disabled). Persons who own over 5% of the capital of a pension fund managing entity are not eligible to become members of the control commission. Meanwhile, members of the Control Commission will be disqualified in their role if they acquire rights or shares of the entity that manages their pension fund.

98. The aim of the Control Commission is to ensure that occupational pension plans operate correctly. Among other functions, it supervises the application of the plan’s rules, selects the actuaries who must certify the situation of the plan, nominates the representatives of the plan’s Control Commission in the Fund’s Control Commission, represents the interests of participants vis-à-vis the management company, approves the financial statements of the fund presented by the management company, and makes recommendations with regards to the contributions, benefits and other plan variables. The Control Commission must also appoint the fund manager, the auditor, the custodian, and the plan actuary (for defined benefit and hybrid plans). However, the Commission can delegate the responsibility of appointing the actuary to the pension fund managing company.
99. The pension fund managing company acts as the governing body of the pension fund. It keeps the books of the fund, determines the amount of the different pension plan assets, and controls the depository of the fund. Investment policy is determined directly by the managing company in personal plans. In occupational plans, on the other hand, it is dictated by the Pension Plan’s Control Commission. Only when instructed by the Control Commission will the managing company determine the investment policy. The managing company also has disclosure responsibilities towards the supervisory agency, beneficiaries, the Pension Fund Control Commission, and, in the case of occupational plans, towards the Pension Plan Control Commission. Fees charged by pension fund managing companies are limited to 2% of the pension fund assets.

100. All pension funds must be supervised by a Control Commission. Only in the case where the pension fund finances a single pension plan, can the Pension Plan Control Commission exercise the functions of Pension Fund Control Commission. Otherwise, the Pension Fund Control Commission is formed with representatives from all the Pension Plan Commissions.

101. The functions of the Pension Fund Control Commission include choosing the managing and the depository entities, ensuring the adequate functioning of the fund according to its prescribed rules, examination and approval of the managing entity’s activities, and demanding retribution for the damage caused by any failure to fulfil its obligations.

102. The custodian, in addition to being the depositor of the fund’s assets, plays a monitoring role over the pension fund managing entity, in that it is required to ensure the funds are managed in an adequate way, and adequate disclosure is made to the supervisory authorities. It can charge a maximum of 0.6% of the pension fund assets. The custodian must be different from the pension fund managing entity.

103. Both the pension fund and the pension fund management entity must be audited on a yearly basis.

104. Specific regulations are established on the suitability of the board of directors of the pension fund managing entities. These are similar to those of other financial companies, such as the requirement for adequate qualifications and professional experience, and the lack of criminal or insolvency antecedents.

105. Pension funds can support defined contribution schemes, but the funds are collectively managed by a financial institution chosen by the employer and the worker cannot transfer its funds unless it leaves the company.

Sweden

106. In Sweden, closed pension funds operate as foundations. A pension fund is founded by one or more employers, and it has its own board of directors with equal representation of employers and employees. The board members choose the chairman of the board. If the board members cannot agree, the chairman is appointed by the supervisor. There is no fixed limit on the number of board members. Board members must receive fair compensation in addition to costs incurred. There are no suitability criteria for board membership.

107. No general objectives are set out for the board, except the purpose of securing the pension commitments of the employer. The articles of association and changes of them must be approved by the supervisor, who also receives the annual accounts and may react on them. The board of the fund monitors the administration, mainly the investments, and the compliance with the articles of association.
108. The employer must appoint an external auditor. The auditors perform the auditing tasks and are responsible for checking the evaluation of the pension provisions and the sufficiency of assets. The employer is responsible for valuing the pension liabilities and keeping the fund at a corresponding level. There is no requirement to appoint an external actuary. The evaluation of the technical provisions of the pension foundations are performed by Finansinspektionen (the Swedish Financial Supervisory Authority).

109. There is no regulation on delegation of investment management functions, on the liability of the governing body, or on disclosure to plan members.

Switzerland

110. In Switzerland, closed pension funds may operate either in the form of a foundation or a mutual association, and also co-operative societies (corporate form).

111. The governing bodies of the pension fund are the board of directors and the investment committee. The board of directors of closed pension funds must be composed of an equal number of employee and employer representatives. The law further stipulates also that employer representatives should not include any senior managers. The board of directors must meet at least once a year. Investment management can also be carried out in-house (by the board and the investment committee) or delegated to third parties. Pension funds can in particular delegate asset management to collective investment trusts, which are established to cater exclusively for these institutions.

112. The board of directors makes decisions on the main activities such as the benefits and the funding of the plan, the strategic asset allocation of the fund’s assets, it supervises the whole functioning of the fund, and provides information to the supervisory agency and the participants. The investment committee executes the investment policy dictated by the board of directors (carries out the tactical asset allocation).

113. The board of directors is required to appoint independent auditors, and pension experts or actuaries, but, on the other hand, it is not required to appoint an external custodian. Each pension fund must be audited at least once every three years. The role of the actuary can be substituted by so-called pension experts, who can be lawyers, accountants and others with a federal diploma of experts in pension insurance. The board of directors may also appoint investment consultants who may be internal or external to the pension fund. The appointment of such experts is mandatory when the pension fund surpasses investment limits set out by the regulation.

114. Persons involved in the management and auditing of the foundation are personally responsible for any losses or damages caused wilfully. Investment must be carried out according to basic principles such as security, diversification, and liquidity. Pension funds are required to carry out an asset liability modelling exercise when they surpass investment limits.

115. Fund members must receive on at least an annual basis the pension fund report, which includes information on:

- the amount insured
- the amount and the formula for calculating employee contributions
- the amount of benefits in case of invalidity or death of the insured employee
Additional information may be obtained on request, such as the legal form and governance structure of the pension fund, the risks underwritten by the pension fund, and the annual financial accounts of the pension fund.

There are no specific managerial requirements of the board members. Pension experts, on the other hand, must have a federal diploma of experts in pension insurance.

**United Kingdom**

In the United Kingdom, closed pension funds must be set up in the trust form. There is no requirement for a minimum number of members.

Trustees hold the title to the pension fund assets for the exclusive benefit of plan members and their beneficiaries. The Act introduced the possibility of appointing member-nominated trustees. Trustees normally include representatives of the employer, members and beneficiaries. The Pension Act of 1995 provides that 1/3 of trustees should be nominated by employee representatives. Schemes with over 100 members must have a minimum of two employee trustees, under 100 they must have one. A person convicted of an offence of dishonesty and deception, who has been bankrupt, or disqualified as a director, may not be a trustee. Actuaries and auditors of the scheme in question may not be trustees of it.

Trustees have responsibility for all the functions of the pension plan. They have responsibility over the investment strategy, but investment management must be executed by an authorised investment manager. Trustees may seek authorisation to act as investment managers, but most trustees delegate the work to an authorised investment manager. Trustees must ensure that the manager is a suitable person to carry out the investment business of the scheme on their behalf. Trustees must also appoint the auditor and actuary to the scheme (in the case of DB and hybrid plans). The appointment of a custodian is not obligatory, but most pension funds in fact conform to this requirement, via industry standards set by the National Association of Pension Funds.

The 1995 Pensions Act assigned various additional responsibilities to trustees, including:

- the right benefits are paid at the right name,
- accurate records of past and present members are maintained,
- full and proper accounts are kept,
- proper actuarial advice is taken,
- the level of contribution is sufficient to meet the liabilities,
- suitable professional advisers are appointed,
- members and others are told about the scheme and about their personal benefits.

Among the various reports that trustees must submit to the supervisory body (and to plan members on request) is a statement of investment principles. These statements constitute the basis of the investment activity and the composition of the portfolio. The statements can be submitted and passed by different governing bodies of the fund, must be revised over a certain frequency and published to the members in an adequate method. Trustees must also state in the investment of investment principles the
extent (if at all) to which social, environmental or ethical considerations are taken into account in the selection, retention and realisation of investments. They must also state their policy (if any) in relation to the exercise of the rights (including voting rights) attaching to investments.

123. Trustees must also send an annual report to members in the case of DC plans. This report must include the value of the DC account, the contributions made, and the yield earned over the year.

124. The specific responsibilities of auditors and actuaries are also defined in the 1995 Pensions Act. The duties of actuaries include the annual verification of compliance with the law and its implementing regulations and the legality of pension fund operations (including the receipt of contributions and payment of benefits as well as the management of assets). Auditors are also required to examine the annual accounts of the pension institution and to submit a written report to the board of trustees on the findings of their audit.

125. Actuaries are required to determine periodically that pension institutions are able to meet their obligations and that the terms and conditions of their pension plan comply with legal provisions.

126. Both auditors and pension experts are required to report to the competent supervisory authority any infractions of rules by pension funds as well as any problems that would require immediate intervention. They must also notify to the competent supervisory authority the termination of the contract.

127. Employees are able to leave a closed pension fund, but they are not guaranteed employer contributions, as they would if they contributed to the closed pension fund. Indeed, few employers choose to contribute to their employees’ personal pension plans.

128. Trustees hold personal liability for their decisions. They are not required to insure themselves against this liability, but often do so. They must act prudently, conscientiously, honestly, and with the utmost good faith.

129. Individuals may turn to the Pensions Ombudsman, a figure that was introduced by the 1995 Pensions Act, for infractions to plan rules and to regulations. Cases of fraud and misappropriation are dealt by the courts.

United States

130. In the United States, closed pension funds must be set up in the trust or contractual form. In the former, the plan assets are managed by a trustee in the interest of the (plan) beneficiaries. In the latter case, plan assets are kept in a separate account of an insurance company.

131. Member representation in the board of trustees is not required. In single employer plans, the sponsoring employer nearly always retains the authority to appoint the trustees of a pension fund. In multi-employer plans, on the other hand, trustees are jointly appointed by participating employers and employee organisations in equal proportion.

132. The trustees of pension funds have only responsibility over investment management. Trustees have exclusive authority and discretion to manage the assets of a pension fund unless (1) the plan document or trust instrument expressly provides that the trustee or trustees are subject to the direction of a named fiduciary or (2) the authority to manage, acquire, and dispose of assets of the plan is delegated to one or more asset managers. It is the responsibility of plan sponsors select asset managers.
133. Investment management can be carried out in-house (by the financial staff of the plan sponsor) or, at the discretion of the plan sponsor, this responsibility may be delegated to a collective investment trust, an investment adviser registered under the Investment Advisers Act of 1940, a bank, or an insurance company qualified under the laws of two or more states to provide investment management services. The trustee retains the title to these assets when the authority to manage the assets is delegated. To be qualified, an asset manager must acknowledge in writing that it is a plan fiduciary, as defined by ERISA.

134. All other professionals that provide services to the pension fund are appointed directly by the plan sponsor. ERISA require closed pension funds to have independent custodians, appointed by the plan sponsor. Sponsors of plans with over 100 employees must also appoint an independent auditor.

135. The plan sponsor bears responsibility for all aspects of the plans’ operation, including the management of the plans’ assets. Plan fiduciaries include also the trustees and the investment managers. The ERISA law of 1974 contains three basic duties for fiduciaries:

- Fiduciaries are required to make decisions for the exclusive purpose of providing benefits to participants in the plan, often described as a duty of loyalty. This is generally viewed as prohibiting consideration of factors such as stimulating demand for a sponsor’s products or even in enhancing the job security of the sponsor’s employees.

- Fiduciaries are required to undertake their activities in a “prudent” manner. In particular, fiduciary law requires the plan fiduciary to exercise “the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims”. This has come to be interpreted to require expertise in the matters for which the fiduciaries are responsible, skill in undertaking these actions and diligence appropriate to the circumstances relevant to the action. As a result of court rulings and of Department of Labour regulations, evidence of prudence requires evidencing that (i) there has been a thorough consideration of the issues; (ii) there has not been “blind” reliance on experts; (iii) the fiduciary did not ignore or fail to investigate any relevant facts that would be altered the decision taken.

- Investments are required to be diversified in order to minimise the chance of losses.

136. Since trustees bear personal liability for prudent asset management, they are generally obliged to secure a bond to ensure the ability of the pension fund to recover losses.

137. Other functional duties of trustees enshrined in the regulation are to ensure that the fund does not engage in any prohibited transactions and to disclose certain information to the supervisory authority and the fund members.

138. Prohibited transactions include a limit on self-investment of pension assets in the plan sponsor of 10% and a list of parties disqualified from engaging in transactions with the pension fund, including, among others, the sponsor of the plan, its employees, related entities that meet certain common ownership tests, relatives of fiduciaries and any of the beneficiaries of the plan. However, the law also provides several means to obtain exemptions from these prohibitions, specifically in the case where such prohibitions may impose significant disadvantages to pension funds.

139. Disclosure requirements include the submitting of the annual pension funds accounts to the supervisory authorities, and the provision of information to plan members about the investment allocation of the pension fund.
140. The right to redress can be exercised through individual action in the federal courts to enforce the right to benefits under the terms of the plan or by referring to the Department of Labour for any offence that affects the pension fund as a whole.