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In Trusts We Trust: Pension Funds Between Social Protection and Financial Speculation

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Recent reforms of European pension schemes have largely taken the American system as a reference. The principle of partial financing by private pension funds came to be privileged during the stock market's euphoric phase in the 1990s. Since the plunge of the market in 2001, however, the suitability of that model in Europe has not really been called into question, in spite of a succession of social and economic letdowns in the United States. The remarks which follow are aimed at understanding the origins of such a persistent belief in the virtues of the pension funds. The analysis brings out the role played by their legal structure, the trust, in the legitimisation of the 'pension industry'.¹

The Key Element of Legitimation: The Trust

The thesis developed here is that the unwavering support for the pension funds is based on a forceful but largely unconscious belief, according to which these funds would be capable of encompassing and reconciling two antagonistic logics, that of social protection and that of financial speculation. It is easy to understand the political interest of such a belief, which would make pension funds one of the solutions to the contradictions of European integration, acting as the main players in economic growth based on the financial market, characteristic of US finance-led capitalism, and, at the same time, potential candidates for the creation of a European social model more in keeping with the aspirations of the Social Democratic tradition.

The pension funds come under social protection to the extent that they are intended to supplement employee pension schemes. They are also essential participants on the financial markets and are permeated by the financial logic. But these two logics are contradictory in terms of ends and means alike. Social protection was developed in the 19th century to offer wage-earners security in face of the economic uncertainties proper to their situation. It is aimed at isolating them from economic fluctuations by

creating social rights, which are different from property rights (Castel 1995). Finance, on the contrary, is party to economic fluctuations: its objective is systematic risk-taking through wagers on the future which are largely internal to the financial community.² It functions on the basis of the circulation of property rights.

The pension funds would supposedly achieve a synthesis of these opposites: their administrators lay claim to long-term management adapted to the purpose of retirement funding. Their discourse gives a central role to the presumed virtues of the fiduciary responsibility which they are required to assume, and the trust's investment rules.

In fact, analysis shows that the trust is not limited to a rhetorical stand but, in accordance with the requirements of justification (Boltanski/ Thévenot 2006), actually contributes to organising the 'pension industry' sector. Distinct from contract and corporation alike, it initially depended on a particular legal system, equity, which is different from common law. Over time, case law engendered its own corpus of rules and constituted a veritable model of financial behaviour which is imposed on all the actors in the investment chain.³ It impregnated the workings of the financial world, which has made considerable use of it. And reciprocally, it has become the receptacle for the transformations of finance. In this sense, contemporary finance is 'determined' by the trust's legal categories.

The pension funds have inherited a certain form of economic organisation and behavioural guarantees from the trust. The underlying message conveyed by their promoters is that, because the trust, in its generic, ancestral form, was intended to ensure the management of the wealth of a minor placed under supervision, it is capable today, in its financial form, of efficiently protecting the group of uninformed savers constituted by employees. The legitimisation of the pension funds hinges on finance's appropriation of this protective heritage.

We shall thus examine the nature of the protection offered by the trust. Adopting an analytical approach, we shall first identify its constituent principles and their legal interpreta-

tion and then measure their impact on financial behaviours.⁴

The Nature of Protection in the Trust

The trust is protective first of all in the sense that it is a mechanism of supervision. It began as a medieval arrangement which permitted the knight setting out on a crusade to place his fief in the hands of a peer, who was then bound to look after the family's upkeep. It gradually became the instrument of English law which organises the transmission of inheritance within wealthy families and most recently, has been adopted by employers to structure pension funds. Whatever the kind of situation involved, the trust always reveals the same need: transmitting wealth to legatees considered incapable of managing it themselves. It meets this need through the introduction of a third party, the trustee, who is responsible for administering the holdings for the beneficiary. But this mechanism is ambivalent. On the one hand, it is eminently protective since it protects the beneficiaries, even against themselves. But on the other hand, it is a source of danger because it grants considerable powers to the trustee, notably that of disposing of the property.

When the trust is created, there is a transfer of the ownership of the goods towards the trustee, who then has a legal right over them. This is the major difference from the French legal system, which also organises management for third parties, but without the transfer of property. The trustee's appropriation permits a very broad delegation of management. The beneficiaries' subjection is total: they must rely on the trustees and generally have neither the power to dismiss them nor the means to monitor them or influence their decisions.

This asymmetry of power has been a source of major conflicts. At the outset, the Church's social power permitted disputes to be settled. In the 14th century, the English sovereign created a specific equity court, which proposed remedies absent from common law in cases where moral doctrine required it, essentially when what was involved was forcing the strong party (the trustee) to honour commitments with regard to the weak one (the beneficiary who was a minor). While common law arbitrated between parties of the same social rank who were equally capable of asserting their rights, equity took into account the weakness of one of them. It dispensed justice in the name of a higher principle, justness, with the sovereign held to

be its legitimate bearer. It was thus opposed to common law according to the Aristotelian distinction between universal justice of a divine or political nature and individual justice (Duggan 1998).

The protective dimension of the trust is thus guaranteed by this legal exteriority which superimposes its own supervision over that of the trustee and acts in the name of moral doctrine and later, public order. This political origin re-emerges in the United States with the 1974 Employment Retirement Income Security Act (ERISA) on the pension funds. This federal intervention in the form of a statute, atypical in a country of common law which generally prefers an elaboration of standards through case law, reaffirmed that the protection of rights to a pension scheme in the pension funds depends on the political order as well as the market order. The origin of the trust thus demonstrates that it is a private, tutelary mechanism regulated by legal intervention and political logic, which, from an analytical, historical standpoint,⁵ makes it a valid institutional candidate for organising a form of social protection.

The Metamorphoses of the Investment Standard

The specific protection provided by the trust may also be measured in terms of the way the holdings are managed. History shows the extent to which the investment standard has changed in function of the social uses of the trust and the markets on which the assets are invested.

Given that the main objective is to avoid the alienation of the holdings by a disloyal trustee, the earliest investment rules were aimed at limiting transfers. The earmarking of holdings placed in trust was thus intended to inform any buyer of their fiduciary value, in order to make that person assume the fiduciary responsibility (Bogert 1987). The tracing procedure permitted the successive exchanges and transformations of the holdings to be re-established so that these could be restored to the beneficiary in case of abusive transfer. Since these rules reduced the speed of the circulation of the assets and thus their liquidity, they limited their market interest, and many financial intermediaries refused to get involved in holding such assets. By restricting liquidity, these original provisions did not encourage speculation, but they created a separate market. The financial players thus sought to get around them and in the United States, they were gradually abandoned in the early 20th century.

The second objective of the trust is to channel the trustee towards a kind of management which is in keeping with the transmission of holdings. Consequently, trustees are subject to a duty of prudence which should guide their investment choices. As defined by the courts in the 19th century, prudence of investment consisted of safeguarding the capital and seeking regular income. In addition, some states restricted the spectrum of authorised securities to government loans and mortgages, through legislation or regulations. They were thus responding to the concern for protecting beneficiaries from speculators as well as that for guaranteeing their own financing in the process. This policy was passed on by the courts, which explicitly prohibited speculation, although they had a hard time defining exactly what that entailed and limited themselves to excluding certain kinds of securities from the trusts. This conservative interpretation of prudence was maintained by the trust code, known as the Restatement of Trusts, until 1992 (Halbach 1992). A conceptual breakthrough was marked, however, with the 1974 ERISA, which privileges the concepts of diversification and portfolio risk borrowed from the modern portfolio theory. Developed by the academic community and promoted by the Securities and Exchange Commission (SEC) and the Department of Labour (DOL, responsible for enforcing ERISA), this theory slowly made its way among financiers during the 1970s (Bernstein 1995).

Its watchword, portfolio diversification extended to the entire constellation of disposable assets, opened the pension funds up to financial innovations. It took the opposite path from that of trust law, which, on the contrary, encouraged the individualised selection of investments on the basis of their substance (Langbein 1996). But the courts were slow in adopting this new vision of investment (Gordon 1987). Thus, until the 1980s, the standard of prudence in use was hardly favourable to financial innovations and constituted an obstacle to the forms of speculation derived from them.

Despite its total opposition to the substantive prudence of the Restatement of Trust, the modern portfolio theory was able to draw on another tradition of interpretation based on the Prudent Man standard laid down by the Massachusetts Court decision in *Harvard College v. Amory* (1830). This decision was pronounced in the context of the emerging industry of Boston professional trustees who were administering the financial assets portfolios of wealthy East Coast foundations and industrial dynasties (Friedman 1985). Capable of assuming greater risks than the other

trustees, they developed specific knowledge which could not be recognised by the substantive standard in force (Langbein 1995). The prudent man rule met this need by defining the quality of an investment in a procedural rather than a substantive way, relative to the behaviour of a prudent man handling his own affairs. It thus added to the existing substantive standard (no speculation, permanent availability of funds) a procedural standard aimed at describing the “way” of handling.

The prudent man rule is a means of defining fiduciary responsibility in a procedural way, i.e., by insisting on the compliance of the decision-making process more than on the result obtained. However, the nature of this fictitious being created by the courts still limited his decision-making to a moral universe. In fact, the prudent man is a being attached to a community and he acts in accordance with the latter’s values. This rule thus permits the referent of the investment decision to be rooted in a typical behaviour, the logic of which is financial but which is also a socially accepted and morally just behaviour.

The community of trustees came to replace the political and legal authorities in the regulation of trust investments. But it still did not permit a diversity of behaviours. By defining the good investment standard for all trustees, it tended to make their behaviours converge. It was thus the source of the mimetic behaviours which were to be identified much later among the trustees. Today, such mimicking is considered a source of speculation. For a long time, however, the prudent man rule avoided excessive risk-taking to the extent that it favoured the owner’s ‘reasonable’ behaviour.

Finance's Take-over within the Trust

The 1974 ERISA marked a turning point insofar as it replaced the figure of the prudent man by that of the prudent expert. The distinction is essential: the prudent expert is a professional, not a good father. Concretely, this new legal being was constituted at the time of the transformation of the money-management industry in the late 1960s. The widespread break-up of financial institutions thus went hand in hand with the increased delegation of investment to money management firms.⁶ The pension funds were part of this development. To organise this delegation, investment management consulting firms offered to assist the pension funds in selecting their investment managers. A community of professionals thus emerged and

became aware of its collective identity under the term “money-management community”.⁷ And in fact, what this community proposed was consistent with the earlier procedural framework of trust law which required a community of reference in order to be able to judge the trustees’ practices. Finance thus became the new community of reference, a legitimate source for setting out the ‘good’ practices.

This transfer of power to the investment managers was politically desirable for the United States government, which saw it as a means of protecting employees, the beneficiaries of the pension funds, against the arbitrariness of the employer-trustee. It was also a means of developing the autonomy of the financial industry. The 1974 ERISA thus accomplished what was then the necessary revision of the trust’s legal categories. Three definitions were essential for prying beneficiaries loose from the supervision of the employer-trustee and attaching them to the financial intermediaries: the beneficiary’s interest, the attribution of responsibilities and the prudence of investment standard.

The exclusive benefit rule defined the participant’s interest in the pension fund on the model of a shareholder’s strictly financial interest. This interest is doubly isolated: on the one hand, from those of the other parties, be they employer, trade union or trustee, and on the other, from the employees’ interests other than that of seeking the optimal financial return.

Before this rule, the trust’s investment decision-making was still situated in a legal context where several levels of arguments could be invoked.⁸ The courts accepted a holistic conception of investment within which obtaining a short-term financial return was not the trustees’ sole preoccupation. The definition of the beneficiaries’ interest could encompass their status as wage-earners and citizens. The management policy for the funds could be oriented by social considerations such as the granting of low-interest loans to employees, the funding of social housing, or economic considerations such as transactions aimed at developing the local economy or ensuring an outlet downstream for the firm concerned. These transactions could even be made at the price of a lower return than that of the market. These different uses of the assets held in the pension funds were economic but were not entirely controlled by the financial markets.

In the name of the protection of the beneficiaries and against the vicissitudes of such management, ERISA limited

the beneficiary’s interest to the financial return procured by the financial market (Fischel/ Langbein 1988). This meant that there was no other possible place for the investment of the pension funds’ assets because the return on the investment had to be equal to that of a comparable investment, i.e., with the same risk, available on the market at the time of the investment.⁹ The return, which was initially only the result of various investment techniques, thus became a goal to be attained. With the privileging of this criterion, the decision-making process for investment was in some ways reversed: the return became a pure category applied to all the pension funds.

This normative vision found a way of imposing itself with the wave of hostile takeover bids in the 1980s. It allowed the sanctioning of employer practices which consisted of using the assets held in the funds to counter the takeover bids faced by American firms. The employees got something out of it because the failure of a hostile bid often meant that their jobs were saved (Roe 1994). In the name of ERISA, however, the DOL prosecuted the players using this strategy.

The second legal transformation consisted of authorising and encouraging the delegation of the investment function to investment managers. This delegation imposed a new definition of fiduciary responsibility. Traditionally, the trustee’s responsibility was far-reaching: it bore on all the tasks carried out, and in case of disputes, its assessment was left up to the courts. ERISA broke this overall responsibility into separate ones transmitted to the proxies. It thus increased the number of potential trustees but limited their responsibility to the strict function assumed in the name of the delegation. The result was a functional clarification which met the criticism levelled at traditional responsibility as a “catch-all”. But the network organised by the functional division of responsibility sometimes left holes. Thus, a whole group of players escaped an attribution of responsibility and this situation could lead to legal interpretations offering less protection to the beneficiaries than the provisions of trust law prior to ERISA.

The third modification bears on the definition of the standard of prudence. The text of the law, and the DOL’s subsequent interpretations, actively introduced the modern portfolio theory, in spite of the resistance of the main players, employers, financiers and judges (Longstreth 1986; Gordon 1987). Concretely, this conceptual displacement permitted the justification of investments previously prohibited because they were judged too risky: junk bonds,

stripped bonds, foreign stocks, derivatives and so on. It thus constituted a factor of increased risk-taking. But at the same time, it justified the spread of a second style of investment management, passive portfolio management. This approach is aimed at replicating the performance of a financial index and for the trustees, constitutes a good placement: obtaining a return in line with that of the market confirms that they have acted as “prudent men”, in accordance with their fiduciary duties. Thus, the new concept of prudence justified two management behaviours at the same time: so-called active management can legitimately undertake investments riskier than those previously permitted, while passive portfolio management, on the contrary, reduces the risk on the portfolio return. Today, trustees use a mix of these two management styles.

A System of Justification, “Procedural Delegation”

The law has thus reconfigured its conception of the protection of the beneficiary with the arrival of investment managers in the pension funds. The transformation set off by ERISA is system-wide: it does not just do away with the prohibitions established by a few specific rules, which prevented a financial logic from dominating investment decisions. Rather, it directly establishes this logic by providing a legal rationalisation for the pension industry's system of social organisation. And it contributes to that system's legitimacy by making it consistent with the bases of the trust.

Given the metamorphoses which ERISA has imposed on the rules of trust law, we might well ask ourselves what actually remains of the trust's essence. In our view, its heritage lies in the fact that the present organisation of the pension industry relies on a principle which is at the basis of trust regulation: the obligation for the strong parties (trustees) to justify themselves with regard to the weak ones (beneficiaries) under the control of the judge. This requirement of justification was already expressed in the 1830 procedural definition of prudence of investment. It re-emerges today, among investment managers and trustees alike, in the form of obligations to document the decisions made, to have an investment process which can be explained to a third party. Accountability has become the watchword with regard to the results obtained as well as the procedures used.

A disclosure concept already existed in trust law and it was updated by ERISA in order to monitor and co-ordinate the delegation chain by requiring each link to provide information about its procedures.¹⁰ But rather than adopting the traditional obligation which encouraged players to disclose any anomaly detected, the law limits disclosure to those anomalies stemming from the task accepted. No one is encouraged to reveal problems concerning another part of the delegation chain. Our analysis of ERISA case law from 1980 to 2000 shows that the detection of a substantive anomaly, even if it seemed disturbing in the eyes of the person discovering it, did not in itself constitute a warning sign except to prejudice the procedures leading to it (Montagne 2006). ERISA has thus helped to establish a system of organisation which I would term “procedural delegation”. This consists of extensive delegation to investment managers, whom the trustees oversee by verifying the means implemented, without imposing a performance bond but by multiplying the number of providers placed in competition.

Such regulation based on the compliance of the procedures reflects a metamorphosis of the trust's protective function. The traceability of the exchanges, which used to prevent management abuses by earmarking assets, has been replaced by the monitoring of individual behaviour. Justification through procedures is an organisational descendant of the old rules of protection which, although they have been changed or have disappeared, remain active by modelling economic organisation. The players have lost sight of the legal origin of their behaviour. Thus the sector-based organisation in a form of “procedural delegation” constitutes a kind of residue of trust law on finance.¹¹

The Real Nature of “Fiduciary Capitalism”

What are the results of this legal and socio-economic transformation? The principle of management under trusteeship has clearly been revised by ERISA with the aim of increasing the protection of pension-fund beneficiaries through the professionalisation of financial management. But by imposing the condition of due care rather than a performance bond, the law pushes the trust's “mission impossible” to the limit: ensuring the protection of the weak by requiring the strong to justify themselves. The display of procedures thus serves as the means of monitoring the powerful, who themselves remain individually sub-

ject to a higher power, the financial community. But the expected protection, a predefined retirement pension, is no longer ensured. The whole of the delegation system offers no guarantee: it does not ensure financial performance but simply provides a guarantee of compliance with commonly accepted procedures. This limitation of responsibility, characteristic of "procedural delegation", is a recurring component of the functioning of finance, which is based on intermediaries who provide "non-binding advice" and whose fiduciary responsibility has been attenuated.¹²

Ultimately, the legal transformation of the trust contributes to the legitimisation of finance. On the one hand, it makes employees' financial risk-taking acceptable by redefining fiduciary protection.¹³ On the other, it reinforces the position of the financial intermediaries: the blocking of employee savings in the trust gives them control over liquidity on the financial markets without any legal constraints to achieve a substantive performance. Fiduciary capitalism does not mark the advent of a new compromise between wage-earners and capital but rather, a renewed form of the seizure of fiduciary power by institutional investors and a new stage in the history of the expansion of finance.

Sabine Montagne, researcher at CNRS (Centre National de la Recherche Scientifique, France) is affiliated with an interdisciplinary unit in Sociology, Economics and Political Science at Paris-Dauphine University. Her Ph.D. dissertation about US pensions funds, completed in 2003, dealt with the legal impact of the Trust on organisation and investment behaviour of the pension industry. She published *Les fonds de pension, entre protection sociale et spéculation financière* (Odile Jacob, 2006) and articles about labor's power over pension funds (Annales, 2005). Currently, she is working on a project focused on what could be a long term investor position. Her main research topics include organisation of asset management industry and the process of European financial integration.

Endnotes

¹ This article has been drawn from a more extensive treatment of the subject in *Les fonds de pension entre protection sociale et spéculation financière* (Odile Jacob, 2006). Translation: Miriam Rosen.

² This vision of finance is the one developed by André Orléan in the tradition of Keynes and Kaldor. It closely links liquidity and speculation. Indeed, the main aim of the financial market is liquidity and the mechanisms sustaining it contribute to an overall

coherence described as the "financial logic". But considering the firm as a liquid asset means giving it a value in view of resale, and any operation motivated by the anticipation of an imminent price fluctuation is considered to be speculative.

³ Not only are the pension funds organised in trusts but also part of the mutual funds, according to a 1996 survey carried out by the Investment Company Institute (ICI 1996).

⁴ In the remarks which follow, I am adopting a conception of the relations between law and economics derived from the institutionalist tradition initiated by Commons, the economic sociology of Fligstein and the Regulation Theory (Boyer 2007 forthcoming).

⁵ The double nature of social protection, economic and political, is theorized by the structuralist approach of B. Théret (1996:451-459).

⁶ For an account of how the sector was set up, see Clowes (2000). The author was the editor-in-chief of *Pension & Investments*.

⁷ The founding of the magazine *Institutional Investors* in 1967 with the aim of informing institutional investing players is a sign of the recognition of this sector as such. The appearance of investment management consulting firms, performance measurement services and investment counselling departments also helped to define the sector's boundaries.

⁸ A plurality of worlds of justification as described by (Boltanski/ Thévenot 2006).

⁹ According to the DOL's 1994 provisions.

¹⁰ Cf. the duty to alert in (Zanglein/ Stabile 2005: 609).

¹¹ This is what Bernard Lepetit calls "an imperfect reinterpretation giving rise to a new meaning" (Lepetit 1995: 297).

¹² Cf. the functioning of auditing firms and rating agencies (Mutti 2004).

¹³ This risk-taking is proper to the new forms of defined contribution pension schemes known as 401k, which replaced the traditional funds in the 1980s.

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