

## Towards a clear definition of property of pensions

J.R.C. Tangelder LL.M<sup>1</sup>

The definition of property can cause confusion. In the legal field there are several definitions of property, which differ when compared. In this research I will be discussing the legal definition of property as included in the Dutch Civil Code (1), The Convention for the Protection of Human Rights and Fundamental Freedoms (2)<sup>2</sup>, the Charter of Fundamental Rights of the EU (3)<sup>3</sup>, and economic property (4)<sup>4</sup>. Beside the different legal definitions of property, economists use the term property as well. The use of property in economic research differs greatly from the legal term. The economic definition of property will be included in the paper as well.

In the debate concerning the (transition to) a new pension system, *property of pensions* is a term widely used. It is not completely clear what is meant by *property of pensions*. This adds a blur to the debate. The blurs shows most prominent when the debate focusses on *clear and hard property of pensions* or *strengthening of property*. Economists, lawyers and policymakers tend to have a different view on the definition of *property of pensions*. At the same time, they all agree that the current pension systems lacks clear *property rights*. A transition to a new pension system should make these *property rights* more clear. Trying to achieve this goal without a clear definition of *property of pensions*, usable by economists, lawyers and policymakers alike, is complicating the transition. Therefore a clear definition of *property of pensions* is a necessity.

In this paper I will be discussing four legal definitions of property and the economic term property. The goal of the paper is to research whether or not –and how- legal definitions of property can be used to define *property of pensions* and how the economic view on property rights relates to those legal definitions. The legal qualification is of importance. Every legal definition of property has its own set of rules attached. An example lies in protection of the property against involuntary changes of the property. The ECHR only offers protection against government interference, but not against (other) private parties. The Charter on the other hand possibly does offer protection against private parties. The definition of property in the Dutch Civil Code offers a more universal level of protection: *‘The owner is free to use the thing to the exclusion of everyone else (...).’* Economic property is –in most cases- a bundle of claims. The level of protection

---

<sup>1</sup> J.R.C. Tangelder is a Phd-student connected to the business and law research centre of the Radboud University. His research is in the field of legal and economic property rights in pensions.

<sup>2</sup> Hereafter: the ECHR.

<sup>3</sup> Hereafter: the Charter.

<sup>4</sup> The term economic property is meant here as a legal term. This has to be distinguished from the definition of property used in the field of economic research.

the law offers can be different from claim to claim, depending on the nature of the specific claim.

This research will address transition-issues and try to formulate an unambiguous definition of *property of pensions*. The subjects that will be specifically addressed in the paper are the following:

- The paper starts off with a stocktaking of the use of *property of pensions* in legal and economic literature to date. Goal of this analysis is to formulate a hypothesis on how *property of pensions* relates to the legal definitions of property. It connects this paper to the earlier Netspar-paper: '*Heldere en harde pensioenrechten onder een PPR.*'
- After this first analysis I will look more closely into the different legal definitions of property. Conclusion is that the definitions from the ECHR, the Charter and economic property are highly relevant.
- Regarding the ECHR. Article 1 of the first protocol of the ECHR protects property. In pension (law) literature, article 1 of the first protocol of the ECHR is extensively researched over the last 5 years, focused on the question if the ECHR could possibly block a transition of existing pension rights into a new system. The research done has mostly aimed for the question whether or not a breach of property under the ECHR is justified and therefore permitted. I will build on the research that has already been done and shift the focus to two other aspects of article 1 of the first protocol of the ECHR: what is the scope of *property* as defined in the ECHR (1) and; when there is a breach of said property (2). Especially the second question proved to offer some interesting insights. Some things seem to be a breach of property, but in many cases are not (example: cutting of pension rights). On the other hand, some things are a breach of property, when a first sight suggests otherwise (example: renewing the FTK).
- Regarding the Charter. The Charter has a provision similar to article 1 of the first protocol of the ECHR. The question I will be answering: does the Charter have added value over the ECHR? The prevailing doctrine is that the provisions are substantively the same. Therefore I will focus on the procedural advantages the Charter has over the ECHR.
- Regarding economic property. Economic property is not a legally defined term. Nevertheless: it is a term widely used in literature and case law. A common characteristic shared by all forms of economic property is that the economic value is

accrued to someone else than the legal owner. I will be discussing if scheme members can be considered economic owners of their pensions under DB- and DC-contracts. In addition, I will also discuss the legal consequences of being economic owner. An example of such a consequences is that the legislator tends to offer protection to the economic owner against the legal owner. Think of a tenant. Dutch law offers a tenant protection against the rights the legal owner (landlord) has regarding the property, for example his right to revendicate (revindicatievordering). The level of economic ownership can prove to be an persuasive argument for more protective legislation.

- Regarding the use *property* in economic literature. Among others, Netspar initiated some research to the *property*-problem from an economic viewpoint.<sup>5</sup> An important part of this economic theory seems to lie within the distribution of risks. More specific: the *ex ante* allocation of risks within a pension scheme. I will discuss how the economic theory fits into the legal analysis, trying to ‘juridify’ the economist’s use of *property of pensions*.

---

<sup>5</sup> L. Bovenberg, C. Van Ewijk, Naar een nieuw pensioencontract, Netspar Design papers, nr. 1.