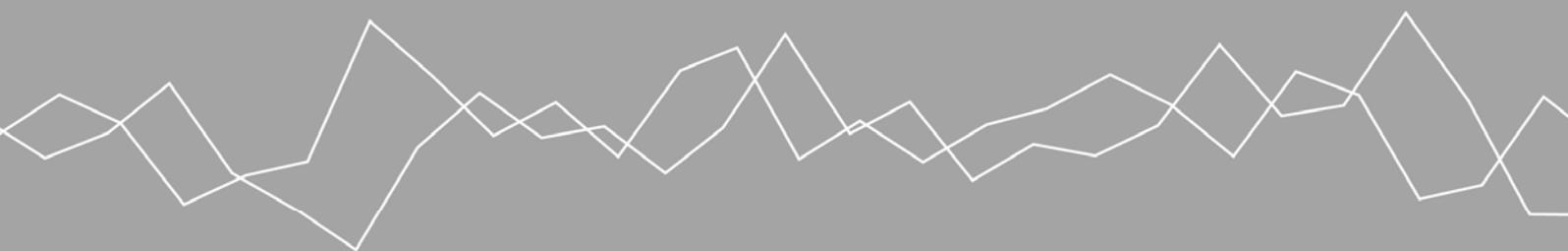


# Evaluatie Wet verevening pensioenrechten bij scheiding



**seo** economisch onderzoek



Amsterdam, juni 2007  
In opdracht van het WODC

## Evaluatie Wet verevening pensioenrechten bij scheiding

Lucy Kok  
Justin van der Sluis  
David Hollanders  
Ivor Witte (Montae advies)

Met medewerking van  
Louis Zonnenberg (Banning Advocaten)  
Daan Zult (SEO Economisch Onderzoek)



seo economisch onderzoek

*“De wetenschap dat het goed is”*

*SEO Economisch Onderzoek doet onafhankelijke toegepast onderzoek in opdracht van overheid en bedrijfsleven. Ons onderzoek helpt onze opdrachtgevers bij het nemen van beslissingen. SEO Economisch Onderzoek is gelieerd aan de Universiteit van Amsterdam. Dat geeft ons zicht op de nieuwste wetenschappelijke methoden. We hebben geen winstoogmerk en investeren continu in het intellectueel kapitaal van de medewerkers via promotietrajecten, het uitbrengen van wetenschappelijke publicaties, kennisnetwerken en congresbezoek.*

SEO-rapport nr. 969

ISBN 978-90-6733-394-8

Copyright © 2007 WODC. Alle rechten voorbehouden. Het is geoorloofd gegevens uit dit rapport te gebruiken in artikelen en dergelijke, mits daarbij de bron duidelijk en nauwkeurig wordt vermeld.

## Summary

The Dutch Pension Sharing in the Event of a Divorce Act (Wet verevening pensioenrechten bij scheiding, WVPS) came into effect on 1 May 1995. According to the WVPS, both former partners are entitled to half of the old-age pension. This regards the old-age pension that has been accrued in the period between the time of the wedding or official partnership registration and the time of divorce. The pension provider pays out their share of the pension to each of the former partners individually. No judicial decision on this is necessary. The act denotes the one who has built up the pension as the 'person liable for pension sharing' and the one who hasn't personally accrued the pension as the 'person entitled to pension sharing'.

The main question that we answer in this research is if the act has served its purpose. What was the legislator's goal at the time? Did and does the act meet that goal? A second question is if there are new societal developments that give cause to adjust the act. A third question is how the act works in practice and whether or not there are any practical problems. The fourth question is what solution approaches there are to the observed bottlenecks.

The answers are answered by means of desk research, interviews, a survey among ex-partners and a survey among lawyers and notaries. The results were tested in an expert-meeting.

### Background WVPS

Division of labour within a family increases the welfare of both spouses during the marriage. However, in the case of a divorce the partner who is participating in the labour market to a lesser extent or not at all has a disadvantageous position with respect to the partner who has been holding a full-time paid job. To prevent the creation of such a disadvantageous position one can enter into a prenuptial agreement. This agreement should then (1) determine that the assets accrued during the marriage are the result of a combined effort by both partners, and (2) take into consideration the loss in earning capacity of the partner who did not or did to a lesser degree participate in the labour market. Since the pension is also an asset which is the result of the efforts of both partners, it is reasonable to divide it. This can't be done in the same manner as other assets, because it is not freely available at the time of divorce.

### Goal WVPS

The primary reason behind the WVPS was realizing the goal of the Boon-Van Loon judgment of 27 November 1981. The purpose of the Boon-Van Loon decree was to come to a pension settlement upon divorce by taking as a point of departure that the pension build-up is the result of the joint efforts of both partners and that the pension build-up is being financed by the community as a whole. A second principal purpose of the WVPS was to improve the workability of the judgment and to unburden the legal practice.

In order to achieve these goals the following choices were made within the WVPS:

1. It was chosen to share only the pension that was built up during the marriage. After all, only the pension built up during the marriage is the result of the efforts of both spouses. The default rule for other marital property is universal community, under which all property is divided equally after divorce.
2. It was chosen to not include the survivor pension in the equalisation. All survivor rights build up until the divorce stay with the person entitled for pension sharing. Thus, the woman's loss in earning capacity due to the division of labour during the marriage is compensated for.
3. Earmarking was chosen as the basic rule, giving rise to a right to withdraw part of the ex-spouse's pension after retirement. The advantage of this is that it is simple to execute. The disadvantage is a lifelong dependency of the ex-spouses. Partners may also elect to convert the withdrawal right into an individual entitlement to a pension (pension-splitting). The advantage of this is that the financial ties between the ex-spouses are broken once and for all (clean break). The disadvantage is the necessity to calculate the net present value of the pension rights, which makes the administrative costs of this method higher and its outcome harder to understand for the partners.
4. It was chosen to apply pension sharing irrespective of the matrimonial property regime. This protects partners who are married under a separate property regime.
5. A procedure was chosen whereby the division is not subject to review by a judge. The act is always applied, irrespective of the individual circumstances, unless it was excluded in advance or in a divorce agreement. The advantage of this is the great legal certainty prior to the marriage (if the act is known). Another advantage is the higher efficiency: there is no need for intervention by a judge. The disadvantage is that the act might turn out to be unreasonable and unfair.

## Developments since 1995

In comparison to 1995, women do more paid work but they still build up less pension than men do. Therefore, the need for pension sharing has not diminished essentially since 1995. The number of marriages and divorces has not changed substantially. The number of so-called 'flash divorces', however, is on the rise. These take place without review by the court. Also the number of non-married couples rise. They often do not choose for marriage because of a less traditional division of labour within the family.

However, developments that have taken place within the sphere of pensions since the introduction of the WVPS do have an impact on the applicability of the WVPS:

- the rise of defined contribution schemes;
- the rise of risk based survivor pensions;
- the possibility of trading survivor pension for old age pension;
- the increase in value transfers between pension funds;
- the equal treatment of private annuities and pensions.

To some degree, all of these developments lead to problems in applying the WVPS. The defined contribution scheme and the value transfer of pensions in particular do not suit the equalisation system very well. With the defined contribution schemes, the problem is that there is no pension claim that can be earmarked. With value transfers the problem is that the person entitled to

pension sharing cannot influence the choice for value transfer although the value transfer has consequences for the pension claim to be divided. The risk based survivor pensions are disadvantageous for the person entitled for pension sharing, because no capital is build-up.

## Functioning of the WVPS

In about half of all divorces, pension sharing takes place. In most cases, the people involved in the settlement thought the pension sharing was fair, with men finding it less fair than women. An often-mentioned circumstance in which pension sharing is experienced as being unfair by men is the situation in which the woman is seeking a divorce and sometimes has a new partner as well. Also the situation in which one's partner had assets of their own that were not divided up, whereas one's own pension had to be shared, led to a feeling of injustice. Some people find pension sharing not fair in any case. In many cases the feeling of injustice experienced by the person liable for pension sharing is understandable. The lifelong dependency on one another in particular, where you still have to give up part of your pension years after the divorce, is problematic from the point of view of the person liable for pension sharing. There are few situations, however, in which the effect of the act turns out to be really unreasonable and unjust in view of the act's purpose. It is our impression that the surprise concerning the division plays a particularly great part in the feeling of unfairness. People are not informed in advance with regard to their obligation of pension sharing and only find out about it at the time of divorce. And that is a moment at which the relationship between both partners is already disturbed.

If no pension sharing occurs, this is a conscious decision in almost 75% of the cases whereas it's an unconscious one a little over 25% of the time. In the former situation, a need for the other person's pension often doesn't exist and in the latter instance people frequently didn't know that pension sharing was a possibility, think that they are too late to make a claim for pension sharing or have an ex-partner who sabotaged the sharing. Apparently, divorcing partners are insufficiently informed with regard to the existence and functioning of the WVPS. In the cases in which no equalisation has taken place, 30% of the women think this is unfair. This corresponds to the number of divorces in which no equalisation took place because of unawareness of the fact that this was possible. Apparently in those cases the law unjustly was not applied. It concerns about 10% of the divorces.

Standard earmarking is by far the most popular form of equalisation. In summary, there are three reasons for the current division of sharing methods:

1. Unfamiliarity with/complexity of other methods of sharing than standard earmarking
2. Conversion (pension-splitting) is considered "disadvantageous to the person liable for pension sharing", because the pension of the person liable for pension sharing does not accrue if the person entitled for pension sharing dies.
3. A lack of interest amongst ex-spouses / the sooner the divorce is finalised, the better. The information supply by pension providers, which is often considered slow, is partly to blame for this.

The first reason indicates a lack of information, not only in the case of ex-spouses but also when it concerns lawyers and notaries. Lawyers and notaries consider conversion to be complex and have difficulties with properly assessing the results of the pension providers' calculations. The fact that people don't opt for conversion very often because this would be disadvantageous to

the person liable for pension sharing indicates a lack of conformity with regard to the calculation method to be used for conversion. If an actuarially neutral conversion calculation is applied, unfairness towards either one of the ex-partners is not the case. The person liable for equalisation should receive a higher old-age pension in the case of conversion, to compensate for the fact that the passing away of the person entitled to pension sharing does not lead to an increase in the old-age pension of the person liable for pension sharing. In practice the person liable for pension sharing is often not compensated for the lost chance his pension accrues when his ex-partner passes away. The third reason given is, amongst others, a lack of interest of the ex-spouses. This reason is partly detached from whether or not the WVPS is functioning correctly, but is related more so to a general lack of understanding of the value of a pension. It also has to do with "*the sooner divorced, the better*". Since conversion in particular requires a more extensive calculation than the other methods, the settlement takes more time. The poor communication between pension provider and lawyer doesn't make things any better either. The desire for a fast divorce then frustrates a choice for conversion.

### Conclusion: the act's purpose has largely been achieved

The primary goal of the WVPS was to divide the pension upon a divorce from the viewpoint that the pension build-up is the result of the joint effort of both partners and that the pension build-up is being financed by the community as a whole. This aim has largely been achieved. In half of the divorces, the pension is divided. In the other half of all cases it is not, but three out of four times this is a conscious decision. In 25% of the divorce instances where no sharing takes place, this is due to a lack of knowledge of the act on the part of the ex-spouses. In these cases, the purpose of the act was not achieved.

The second goal of the WVPS was to unburden the legal practice. By definition, this goal has been achieved since there is no need for review of the settlement by a judge. Jurisprudence regarding the act is limited, which indicates that it rarely happens that a judge is called in after all. The survey amongst ex-spouses doesn't show that the current procedure gives rise to unfair and unreasonable application of the law. Application of the act has an unfair outcome only if the person liable for pension sharing has to share the pension with the other while the person entitled to pension sharing possesses other forms of assets that have been excluded from division by a marriage settlement. In practice, this very rarely happens.

### Bottlenecks

We see the following bottlenecks:

1. The lack of knowledge regarding the WVPS amongst lawyers, notaries and ex-spouses. As a result of this, in about 10% of divorce instances pension sharing unjustly is not applied.
2. The default pension sharing method (earmarking) creates a lifelong dependency between ex-spouses. Therefore, the person liable for equalisation often perceives application of the act as being unreasonable and unfair. Furthermore, this lifelong dependency does not mesh with value transfer. The person entitled to pension sharing has no influence on transferring the value of the pension to another pension provider, whereas value transfer does have consequences for her pension claim.
3. The problem of lifelong dependency plays an even greater role in the case of a pension that is being accrued on his own account by the director/shareholder. In that case, the person

- liable for pension sharing himself manages the pension that is meant for the person entitled to pension sharing.
4. When it comes to conversion, the calculation method is not fixed and is not subject to conformity. In the case of conversion, the passing away of the person entitled to equalisation does not lead to an increase in the old-age pension of the person liable for pension sharing. In exchange for this disadvantage, the person liable for equalisation should receive a higher old-age pension in the case of conversion. In practice this is not always the case, as a result of which conversion is disadvantageous to the person liable for equalisation.
  5. The equalisation method does not mesh with defined contribution schemes. After all, with defined contribution schemes there is no set pension claim. The applicable method in the case of defined contribution schemes is not fixed and is not subject to conformity.
  6. Many pension schemes feature a survivor pension on risk basis. This means that no capital is built up for the survivor. On the pension date, those entitled to the old-age pension can still decide to trade in part of it for a survivor pension. In that case, however, on the date of divorce no survivor pension is reserved that should be exempt from the pension sharing. This is to the disadvantage of the person entitled to pension sharing.
  7. The separation between pension assets and other assets sometimes results in unfair outcomes of the act, i.e. when the other assets are excluded from division through a marriage agreement whereas the pension is divided up.

### Solution approaches

Different roads can be taken to solve the bottlenecks. One possible road is to solve the bottlenecks from within the WVPS. Another approach is to abolish the WVPS and solve the bottlenecks from within marital property law.

Solving the bottlenecks from within the WVPS could entail the following:

1. Make conversion (pension splitting) the basic rule. Set down clear calculation rules for conversion.;
2. Clearly establish how the survivor pension should be separated when there is no survivor pension on the basis of build-up;
3. Include private old age annuities in the WVPS.

If pension sharing is brought under the umbrella of marital property law, possibilities should be created within marital property law to convert the cash value that is transferred to the ex-partner into an independent pension entitlement. The part for the person entitled to pension sharing can be transferred to her own pension fund or left within the pension fund of the ex-husband on an individual policy.

In these ways, a contribution is made to the solution of the abovementioned bottlenecks. Both solutions differ with regard to their consequences:

1. Within the WVPS the pension accrued during the *period of marriage* is shared. Within marital property law the current rule is that in the case of a marriage in community of property, assets that have been accrued prior to the marriage are also divided.
2. Within the WVPS, the *survivor pension* is not included in the pension sharing. Within marital property law, both the old-age pension and the survivor pension are divided between both spouses.
3. The advantage of inclusion within the WVPS is that in the case of marriage under a 'separate property' regime, the dependent partner is not left out in the cold. The disadvantage is that not all *assets* are weighed against each other. If pension sharing is placed under marital property law, all assets are weighed against each other.
4. If pension sharing falls under the WVPS, no *judicial review* takes place. If it is included in marital property law, judicial review does take place. The advantage of judicial review is that the fairness and judiciousness of the division is assessed. The advantage of the absence of judicial review is an unburdening of the legal system.

These are the topics that were subject to discussion ten years ago as well. New developments within the sphere of pensions, especially concerning survivor pensions, justify that this debate is taken up again.

Whatever road one decides to take, the information supply to couples that are about to divorce must be improved. Equally important is the improvement of the information supplied to those who are getting married. They should be considerably better informed regarding the consequences of marriage settlement regimes and of (not) excluding the WVPS.



