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Czech Republic  
Greece  
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The Netherlands

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# Private Partners in Social Insurance



in co-operation with ING Insurance Belgium

<sup>9</sup> Unemployment benefit and travel cost reimbursement for job seekers.

<sup>10</sup> Job assistance, career and employment counselling, payment of unemployment insurance benefits and the administrative costs of operating the active programmes.

<sup>11</sup> According to the Act IV of 1991, employment offers may be viewed as such, if:

- it is adequate, as far as the training and health of the worker are concerned,
- the expected income is as much as the amount of the benefit, and
- round trip travel time to work on public transportation is not more than three hours (in case of parents of small children two hours).

<sup>12</sup> Para. 31 of the Act IV of 1991

<sup>13</sup> According to the health status of the insured there are three invalidity categories:

- persons who are disabled but have a measure of working abilities belong to the third group,
- persons who have lost their working abilities but do not need to be taken care of by a third person belong to the second group,
- persons who have lost their working abilities and need to be taken care of by a third person belong to the first group.

<sup>14</sup> The qualifying period for persons younger than 22 years of age is two years, for those having turned 55, 20 years of service is required for a full pension and 15 years of service for a partial pension.

<sup>15</sup> Significant co-payments are made for certain

- \* dental treatments,
- \* specialist services sought without a referral,
- \* services additional to those ordered by the specialist,
- \* extra hotel costs of hospital services.

Co-payments are also paid for

- \* chronic care and treatment at sanatorium
- \* the cost of materials used in a tooth filling
- \* some dental treatments

<sup>16</sup> Additionally, concerning the beneficiaries of health insurance services, the personal scope of Act LXXXIII of 1997 on the provisions of mandatory health insurance services covers:

- \* the persons insured by virtue of Act LXXX of 1997 on persons eligible for social insurance benefits and private pensions and the coverage of these benefits as well as eligibility for health care services and accident benefit and, under a contract, to certain health insurance benefits;
- \* the persons and organisations paying social insurance contribution by virtue of Act LXXX of 1997;
- \* the providers participating, under a contract, in the provision of health insurance benefits.

<sup>17</sup> Free of charge health care services: preventive medical examination; family doctor care (primary health care services); basic dental care; out-patient care; in-patient care; delivery care; medical rehabilitation; patient transportation; accident health supply.

<sup>18</sup> Cost allowances: drug cost allowance; medical device cost allowance; travel cost reimbursement; international medical cost reimbursement.

<sup>19</sup> Services where patient is partially charged: tooth-straightening under the age of 18; tooth-keeping and replacement above the age of 18; extra meal and special hotel services in in-patient care; accommodation to hospital treatment; sanatorium care.

# GERMANY

by  
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## Chapter 1. General Overview

### A. Conceptual Aspects

The German system of social security has traditionally been divided into three separate areas<sup>92</sup>, viz. social insurance (*Sozialversicherung*), social assistance (*Sozialhilfe / soziale Fürsorge*) and the category of "social provision" (*Sozialversorgung*) – comprising tax-financed schemes which are not covered by the term social assistance. Evidently, the existence of the third category depends upon the breadth of the second. In particular, if "social assistance" is not conceptually linked to any specific purpose such as guaranteeing the basic means of subsistence, there is no need for a third category. In any event, the third category might be useful to cover a peculiarity of the German system, i.e. that it maintains a separate tax-financed system of social security for its civil servants in the public administration, the judiciary and the armed forces. Moreover, the three categories reflect the structure implicit in the section<sup>93</sup> of the German constitution (the *Grundgesetz* or "Basic Law") which determines the division of competencies between the federal unit (*Bund*) and the states (*Länder*).

### B. Constitutional Foundations

Apart from the competency aspect, there are relatively few provisions on social security in the *Basic Law*. Especially, it hardly contains any explicit guarantee of fundamental social rights<sup>94</sup>. The same seems to be true for those provisions of the *Basic Law* which do not confer individual rights, but lay down the structure and fundamental aims of the state. The system of social security is hardly<sup>95</sup> dealt with in these provisions. But despite this apparent silence of the *Basic Law*, it has been interpreted so widely in the jurisprudence of the German Constitutional Court (*Bundesverfassungsgericht*) that, in fact, constitutional law has had a substantial impact on the system of social security.<sup>96</sup>

<sup>92</sup> For details on the following and for alternative categorizations see Schulin / Igl, *Sozialrecht*, 6<sup>th</sup> edition 1999, p. 43 seq.

<sup>93</sup> Chapter VII, Artt. 70 seq. *Grundgesetz* (GG). For social security, the relevant norm is Art 74.

<sup>94</sup> An exception is Art. 6 section 4 GG which reads as follows: "Every mother shall be entitled to the protection and care of the community".

<sup>95</sup> The only exceptions are Art. 20 section 1 ("The Federal Republic of Germany is a democratic and social federal state.") and Art 28 section 1 ("The constitutional order in the Länder must conform to the principles of a republican, democratic, and social state...").

<sup>96</sup> For general overview see Schulin / Igl, note 92 p. 8 seq.

Above all, this jurisprudence rests on a structural norm, the so-called "Sozialstaatsgebot".<sup>97</sup> This is a fundamental aim of state policy which the court derives from two provisions in the constitution requiring the German state to be, i. a., a "social" state.<sup>98</sup> The *Sozialstaatsgebot* functions as a guiding principle for the exercise of all legislative, administrative and judicial power. Although it is not in itself actionable for the individual, it influences the construction of the fundamental rights conferred by the constitution. The leading example of this influence is that the very general (and thus vague) guarantee of human dignity<sup>99</sup> has been interpreted in the light of the "Sozialstaatsgebot" to contain an enforceable right of the individual to the minimum means of subsistence.<sup>100</sup>

Further, several of the more specific individual rights conferred by the *Basic Law* have also gained relevance for the social security system. One prominent example is the general principle of "equality before the law"<sup>101</sup> which has been the basis for numerous corrections of the legislature's activities in this area.<sup>102</sup> Another one is the norm that protects private property from state action.<sup>103</sup> It is settled that beyond genuine property rights, this clause further covers the expectation of the individual to receive benefits in return for his or her contributions to social insurance. The standard of protection, however, is generally lower than the one afforded to similar expectations under private law, let alone to proper property rights.<sup>104</sup>

### C. Statutory Material

Vague though the constitutional foundations might be, the opposite is true for the body of simple statutory regulation. Building on more than a century of regulative history, the law of social security in general and of social insurance in particular is highly complex, detailed and has for long been criticized as a primary example of over-regulation and obscurity.<sup>105</sup> In reaction to this, large efforts have been made since the seventies to gather and systematize this whole area of the law in one single codification. The result, the so-called "Sozialgesetzbuch" (SGB), is no doubt an improvement, although it has still not been fully completed and is constantly being changed.<sup>106</sup> In the area of social insurance, almost<sup>107</sup> all relevant norms have been integrated into the "Sozialgesetzbuch".

<sup>97</sup> For a systematic account of the effects of the "Sozialstaatsgebot" see Zacher, *Das soziale Staatsziel*, in Insened Kirchhof (ed.): *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Volume I, 1987, p. 1045 seq.

<sup>98</sup> See note 95.

<sup>99</sup> Art. 1 section 1 GG: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."

<sup>100</sup> BVerfGE 40, 121 (133)

<sup>101</sup> Art. 3 section 1 GG: "All persons shall be equal before the law." The subsequent sections and some other provisions of the *Basic Law* contain norms specifically addressed against certain types of discrimination.

<sup>102</sup> For an overview, see Schulin / Igl, note 92, p. 18 seq.

<sup>103</sup> Art. 14 section 1 GG: "Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws."

<sup>104</sup> For an overview, see Schulin / Igl, note 92, p. 22 seq.

<sup>105</sup> For details on this critique see Schulin / Igl, note 92, p. 32 seq.

<sup>106</sup> Somewhat confusingly, the Sozialgesetzbuch - ("social law book") is subdivided into several "books", which are assigned numbers. For an overview over the present structure of the SGB see Schulin / Igl, note 92, p. 36 seq.

<sup>107</sup> For an exception, see the rules on maternity benefits under the public health insurance scheme (below V.).

## D. Institutional Structure

Germany is a federal state. Accordingly, all state power is divided not only along horizontal, but also along vertical lines.

In the judicial sphere, there is a specialized and independent three-instance branch for most<sup>108</sup> social security litigation. Only the third instance appellate court is a federal one (the Bundessozialgericht). This is in line with the general structure of the German judiciary.<sup>109</sup> In the legislative sphere, competencies are split between the states and the federal unit.<sup>110</sup> *De facto*, however, almost all important legislation in the field of social security is of federal origin. Again, this is not a peculiarity of the field of social security, but is characteristic of most areas of state regulation.

What is peculiar, though, is the administration of social security, or more precisely, of social insurance. To a large extent, it is organized by autonomous bodies<sup>111</sup> that are subject to public law and mostly separated from the general state administration. Their organization is decentralized and roughly mirrors the federal structures. These autonomous bodies are granted various quasi-legislative competencies<sup>112</sup>, and decision-making generally involves some degree of member participation.<sup>113</sup>

## E. Private Partners in Social Insurance – A Preview

In Germany, private partners do not play a significant role in social insurance. If it were not for the field of long-term care (and maybe, from 2002 onwards, also old age), they would in fact be wholly irrelevant.

At first sight, this statement may seem surprising. And indeed, if the German system of social security is viewed as a whole, private entities, private insurance, and private law arrangements do play an important role. However, almost all of these elements fall outside the scope of this study. Most of what comes to mind when looking for “private entities in social security” does not satisfy the more specific quest for “private partners in social insurance”.

First, many of the private entities involved in the provision of social security do not belong to the insurance sector. In fact, private involvement is particularly strong in the organization and provision of social services<sup>114</sup> – hospitals, kindergartens, nursery homes etc.

Second, the traditional branches of social insurance are still dominated by public law entities. In particular, this is true of unemployment insurance, workers’ compensation, and, with a few qualifications, old age and health insurance as well. To be sure, not all insurance against these risks is provided for by the public system. Private insurance plays a large role

<sup>108</sup> The primary exception being that matters of basic social assistance (Sozialhilfe) must be brought before the general administrative courts. For a general overview, see “Bundesministerium für Arbeit und Sozialordnung – BMA (ed.), Übersicht über das Sozialrecht, 6<sup>th</sup> edition 2000, p. 681 seq.

<sup>109</sup> See Chapter IX, Art. 92 seq. GG.

<sup>110</sup> See Chapter VII, Art. 70 seq. GG.

<sup>111</sup> For a comparative account see Becker, *Staat und autonome Träger im Sozialleistungsrecht*, Baden-Baden 1996.

<sup>112</sup> For a comprehensive analysis see Hänlein, *Rechtsquellen im Sozialversicherungsrecht* Berlin 2001 (forthcoming).

<sup>113</sup> For a short overview over the administrative structure, see BMA, *Sozialrecht*, note 108, p. 19 seq.

<sup>114</sup> For a broad study of the role of private entities in this area see Geis, *Öffentliche Förderung sozialer Selbsthilfe*, Baden-Baden 1997.

especially in retirement savings and health insurance. But this is *on top* or *instead* of the public (i.e. "social") system, not within it.

Third, the legal regime for certain social risks (viz. loss of income due to maternity, illness, and, to a lesser extent, unemployment) puts the (private) employer in a position similar to an insurance company compelled to insure the (social) risks of employees. But such private law arrangements do not literally fit under the heading of "insurance".

In light of these peculiarities of the German system, the report will concentrate on the few areas in which private partners either do in fact play a role in social insurance or in which the system at least exhibits similar features.

## Chapter 2. Old Age

### The Current Situation

For more than a century, a public old age insurance system has existed in Germany. In its current form<sup>115</sup> it is a pay-as-you-go system and it includes pensions for old age, survivors and incapacity for work. Coverage extends to almost all employed and self-employed persons. The major exceptions are civil servants, for whom there is a separate non-contributory scheme, and persons earning less than a statutorily defined amount - currently a little more than three hundred Euro per month<sup>116</sup>.

Up to now, private partners do not play any role within this scheme. The statutory system is not limited to poverty prevention. Rather, the insurance principle has been incorporated quite strongly, which evidently narrows the potential scope for additional private saving.

Still, additional saving outside statutory social insurance does, of course, exist. It is governed by private law, i.e. in principle by the law of contracts, but modified by the specific rules of the Law on Insurance Contracts (Versicherungsvertragsgesetz - VVG).<sup>117</sup>

So, "private" insurance is not purely private in the sense that it is subject to additional statutory regulation. But this is not to such a degree that these arrangements could be considered part of the *social* insurance system. Additional insurance remains voluntary, non-redistributional, and the essential elements of the insurance contract are left to the free determination of the parties.

The bottom line is: There is both *social* and *private* insurance against this "*social*" risk, but there are no private partners *in* social insurance.

### The Reform

The current system, however, is going to be changed substantially by the beginning of 2002. The reform bill<sup>118</sup> has just passed the second legislative chamber (Bundesrat) on May 11, 2001 - after years of controversial public debates and fierce political battles.

The background is that in light of the aging of the population, contributions would have to rise dramatically over the next decades if the benefits within the public scheme were to be

<sup>115</sup> The statutory basis is SGB VI.

<sup>116</sup> For details see § 5 II SGB VI, § 8 SGB IV.

<sup>117</sup> §§ 159 seq. VVG.

<sup>118</sup> The so-called "Altersvermögensgesetz" which contains amendments to different existing statutes. At the time this article is written, the authorized text of the bill has not been published. The earliest source will be the web site of the federal ministry of labor ([www.bundesarbeitsministerium.de](http://www.bundesarbeitsministerium.de)).



kept at their current level. This, however, is considered as too heavy a burden on both, the younger generations and, in particular, the employers who pay half of the contributions. Accordingly, there has been a large consensus that additional, capital-funded savings should be raised and replace part of the statutory scheme.

The major controversy was about the degree of state involvement in the advancement of such additional "private" saving.<sup>119</sup> Some advocated a mere roll-back of the public system, leaving it up to the individual whether and how to increase his or her old-age income by additional private saving. Others would have made such saving mandatory. Plainly, this latter option would have meant assigning an important role to private partners in "social" (old age) insurance.

The reform bill, however, did not go that far. While gradually reducing the benefits under the public system, the new law does not prescribe additional saving, but merely promotes it by strong financial incentives. So, government will subsidize private saving for old age, provided that

- the individual belongs to the statutorily defined group of addressees for such subsidies. At present, this definition roughly equals the coverage of public old age insurance. It is planned to be extended so as to include further groups – civil servants, in particular – as soon as their separate pension schemes have been made subject to similar reductions as the general public old age insurance.
- the savings plan has been certified by a public authority<sup>120</sup>. This certification is meant to make sure that the plan meets all statutory criteria. In particular, benefits may only be paid when the saver has reached retirement age or as a survivor's benefit or in case of incapacity to work. Further, benefits must, as a general rule, be paid as a life-long pension. However, state approval neither depends on the reliability of the investment nor on the adequacy of its rate of return. If the savings plan is linked to the savers employment contract – be it on an individual basis or through a collective agreement –, it qualifies for the subsidies without being subject to the certification requirement.
- the individual saves a defined minimum of his or her income. This minimum is raised gradually from 1 %<sup>121</sup> of the savers income<sup>122</sup> in the year 2002 to 4 % by 2008.

The size of the subsidies is raised over the same period. The individual subsidies, which are paid directly into the savings account, will reach a maximum of ca. 150 Euro per person and year by 2008 – plus ca. 185 Euro for each dependant child. So, for example, a family of four could get a subsidy of up to 670 Euro a year. Assuming a family income of 25000 Euro, their minimum saving would be 1000 Euro. So, they would have to add 330 Euro in order to qualify for the full state subsidy.

In 2008, the overall amount of public spending on these subsidies shall reach 10 Billion Euro per year. So, it is obvious that the role of private entities in old age insurance will grow considerably – regardless of the (purely conceptual) question of whether this combination of state approval for certain types of saving and state support for individual

<sup>119</sup> For details on the public debate see *Graser, Magic Money – Riesters American Dream?* (in German language), in: *Boecken / Hänlein / Kruse / Steinmeyer* (ed.) *Öffentliche und private Sicherung gegen soziale Risiken*, Baden-Baden 2000.

<sup>120</sup> i.e. the federal agency in charge of supervising the insurance market (Bundesaufsichtsamt fuer das Versicherungswesen).

<sup>121</sup> including all subsidies.

<sup>122</sup> subject to the same ceiling as the contributions within the public pension scheme

savers adds up to a sufficient degree of regulation for such contracts to be termed "social" insurance.

Apart from this partial privatization, which has been at the center of public attention for years now, the reform has brought about a second important change which has hardly been noticed. It is an attempt to combat old age poverty more efficiently. Under the current system, there is no guaranteed minimum pension. However, there is a comprehensive system of basic assistance in Germany (Sozialhilfe). So, needy pensioners are – in theory – entitled to an additional (tax-financed, means-tested) cash grant. In practice, however, many needy pensioners do not collect this additional aid. The reasons appear to be, first, that they want to avoid the stigma of being a "welfare" recipient, and second, that this basic assistance might ultimately be paid by their own children. For the public entity which distributes this grant can usually shift the cost to the recipient's children, provided that they are not needy themselves.

Now, the new law introduces a right to a minimum pension ("Grundsicherung"). The current structure, however, does not change much. In particular, everybody will continue to receive his or her statutory (contribution-based) pension from the social insurance administration, and, if necessary, an additional (tax-financed, means-tested) amount from the respective municipality (i.e. the same public authority which at the moment distributes the basic assistance). Even the amount of the new minimum pension roughly equals the one under the general system of basic assistance. But there are important differences. First, the new name might help avoid the stigma. Second, the cost will only be shifted to the recipient's children if they earn more than 100.000 Euro a year. Moreover, the social insurance administration will be required to inform potential recipients about their entitlement to this additional support.

### Chapter 3. Survivors

As mentioned above, survivors' pensions fall under the general statutory pension scheme. It includes pensions for surviving spouses and children. Furthermore, the public scheme for workers compensation<sup>123</sup> grants both types of survivors pensions if the insured member dies from an occupational accident (*Arbeitsunfall*) or disease (*Berufskrankheit*). From the perspective of this study, though, both schemes are irrelevant since private partners do not play any role.

### Chapter 4. Unemployment

There is a public system of unemployment insurance<sup>124</sup> Insurance under this system is mandatory for all employees except for those who work less than a statutorily defined minimum. Civil servants are exempt from the system. Sometimes, mandatory insurance may extend to groups other than employees, viz. persons doing their military service, prisoners etc.<sup>125</sup>

<sup>123</sup> The statutory basis is SGB VII.

<sup>124</sup> The statutory basis is SGB III.

<sup>125</sup> For details on the scope of mandatory coverage see §§ 24 seq. SGB III.



The benefits include, among others<sup>126</sup>, the so-called *Arbeitslosengeld* and the so-called *Arbeitslosenhilfe*<sup>127</sup>. The former is an insurance-type benefit calculated as a percentage of the insured's former wage and granted for up to 32 months.<sup>128</sup> The latter is a hybrid benefit that is also calculated as a (lower) percentage of the insured's former wage, but is means-tested.<sup>129</sup> Apart from unemployment benefits (and related ones), the same statute also contains regulation on measures of active labor market policy. Both regulatory aspects are closely interwoven.

Viewed as such, the system appears to be totally public. A broader perspective, however, reveals private elements. The law of unfair dismissal (*Kündigungsschutzgesetz*), for example, prescribes that a dismissal is unfair if it is not "socially justified"<sup>130</sup>. The criteria for this are, among others, the age of the employee and the duration of employment<sup>131</sup>. If the dismissal is considered unfair, the employer must either continue employment or, as occurs more frequently in practice, pay a lump sum award to the employee<sup>132</sup>. One key factor in the determination of the award is, again, the duration of employment<sup>133</sup>. From a functional perspective, such awards mitigate the risk of loss of income due to unemployment – just as unemployment insurance does. Now, admittedly, there is no premium. But it is conceivable that the increased costs of the termination of employment may lead to lower wages which could, in turn, be interpreted as indirect "premiums" paid by employees. The risk would thus be spread, like in ordinary unemployment insurance, among the employees, although across a smaller group. Moreover, the "benefit" is linked to the overall sum of the "premiums" paid by employees. This is because the length of employment with a certain employer plays a dual role in the determination of whether a payment is due and what its value is. Thus, on the whole, the legal regime for unfair dismissal puts (private) employers on the one hand and employees on the other hand in a position which is quite similar in effect to the parties of a private insurance contract.

## Chapter 5. Incapacity for Work

Incapacity for work and the consequential loss of income are addressed by several branches of social insurance. First, an incapacitated person might qualify for a pension under the public pension scheme. Second, the public scheme for workers' compensation might be applicable if such incapacity was caused by an occupational accident or disease. Third, for a limited period, public health insurance might compensate the insured for lost earnings. In this regard, maternity is treated similarly to illness.<sup>134</sup>

Evidently, under each scheme there are many conditions for eligibility for the available benefits, and, of course, attempts are made to coordinate the respective schemes in order to

<sup>126</sup> For a list of all benefits see § 3 SGB III.

<sup>127</sup> Translated literally, the first means unemployment *money*, the second unemployment *aid*.

<sup>128</sup> For details on *Arbeitslosengeld*, see §§ 117 seq. SGB III

<sup>129</sup> For details on *Arbeitslosenhilfe*, see §§ 190 seq. SGB III

<sup>130</sup> § 1 section 1 *Kündigungsschutzgesetz* (KSchG).

<sup>131</sup> The criteria used to be statutorily enumerated in § 1 section 3 KSchG. This was changed in 1998. So more criteria may be taken into consideration now. But the former ones criteria still remain relevant.

<sup>132</sup> § 9 KSchG

<sup>133</sup> § 10 KSchG

<sup>134</sup> The relevant norm (§ 200 *Rechtsversicherungsordnung* – RVO), has not been integrated into the SGB yet.

avoid gaps and overlaps in coverage. This will not be dealt with in detail, though, as private partners do not play any significant role.

Again, this does not mean that private insurance does not exist. To the contrary, private insurance companies are present in each of these fields. One can obtain private insurance against incapacity for work as well as private accident insurance, and private health insurers usually offer loss of earnings benefits similar to those of the public scheme. But all these are not integrated into the public, i.e. the "social", system.

There is one aspect, though, which might deserve more attention. This is that under German law, incapacity for work does not necessarily lead to a loss of income. Rather, employers are required to continue to pay wages, first, in the case of illness for an initial period of six weeks<sup>135</sup>, and second, in the case of maternal leave for a period of typically 14 weeks<sup>136</sup> around birth<sup>137</sup>.

So, in taking away part of the social risk by means of labor law, the legislature has narrowed the scope for the social insurance system. But in so doing, it has created a system which, in effect, is quite similar to the integration of private partners into social insurance. The argument resembles the one applied above to the unfair dismissal regime in the context of unemployment insurance, but it is stronger here. First, the interchangeability of a solution through genuine insurance on the one hand, and through an obligation of the employer to continue wages on the other, is much more obvious in this case. Second, the relationship between the "premiums", i.e. the potential cuts in wages, and the benefits, i.e. continued wages in case of illness, is closer here than in the context of unemployment insurance. This is because it is much more uncertain whether a lump sum will be awarded in compensation for unfair dismissal than whether wages will be continued in the event of illness.

## Chapter 6. Health Care

### A. Medical Care

Also in the field of health<sup>138</sup> insurance, public and private schemes co-exist. About 90 % of the population are insured under the public system<sup>139</sup>, membership of which is, in principle, mandatory. However, far more people are exempt from mandatory membership than under the public pension scheme<sup>140</sup>. In addition to the groups exempt from old age insurance, self-

<sup>135</sup> § 3 Law on the Continuation of Wages (Entgeltfortzahlungsgesetz)

<sup>136</sup> § 11 Law on the Protection of Mothers (Mutterschutzgesetz)

<sup>137</sup> Provision is made for the employers to spread this risk (see the Lohnfortzahlungsgesetz, which is the predecessor of today's Entgeltfortzahlungsgesetz and which remained in force only with respect to these risk-spreading provisions). For small employers (up to 20 employees), this risk-spreading is compulsory and organized by the social insurance administration (§ 10 seq. Lohnfortzahlungsgesetz). For larger employers, risk-spreading is not mandatory, but the law allows for similar schemes to be organized among the employers of a branch (§ 19 Lohnfortzahlungsgesetz). In practice, however, such voluntary funds do not play any important role. The same is true for private insurance against this risk.

<sup>138</sup> For the purpose of this comparative study, the term "health care" is meant to cover both, medical and long term care. However, in the following I will use it in a narrower sense, covering only such medical care which is not long term care.

<sup>139</sup> BMA, Sozialrecht, note 108, p. 127.

<sup>140</sup> For details see the complex regulation in §§ 5 seq. SGB V.

employed persons and employees earning over a certain wage limit may, but are not obliged to, join the public system. Nor are they required to obtain private health insurance. However, private insurance is of course available – both as an alternative to public system membership<sup>141</sup> as well as in addition to it, and in particular to secure superior treatment in hospital (e.g. two-bed room placement, treatment by senior physicians etc.) or to cover expenses which the public scheme does not (e.g. a relatively small flat-rate amount on most medication). Additional private insurance is also common among civil servants because their statutory, non-contributory scheme covers only a fraction of their health expenses. They are not obliged to obtain additional insurance from a private company, but they often do. For a minority, the remaining part of their health expenses is insured through the general public system<sup>142</sup>.

Again, as for old age insurance, “private” insurance in the health sector is not purely private but subject to additional statutory regulation. Partly, such regulation can be found in the statute on public health insurance (SGB V), but the primary source is, again, the “Law on Insurance Contracts” (Versicherungsvertragsgesetz – VVG)<sup>143</sup>.

Arguably, the degree of statutory interference with the freedom of contract is higher than for old age insurance. First, there are a few instances in which the insurance company is compelled to enter into an agreement<sup>144</sup>. This is, for example, in the case of a newborn child whose parent is insured with the private insurance company<sup>145</sup>. Second, as a general rule, contracts on private health insurance may not be concluded for a limited term and cannot be terminated by the insurer<sup>146</sup>. Moreover, even the contents of these agreements are subject to strict regulation. In particular, the calculation of the premiums and their potential adjustment are in many cases subject to state supervision<sup>147</sup>.

Yet, far-reaching though these statutory impositions may be, they do not suffice to alter the “private nature” of such insurance agreements. The general rule remains that it is up to the parties whether and against what eventualities to insure. Private health insurance thus plays an important role, but in addition to the “social” insurance system, not as a part of it.

It may be worth noting, though, that not only is private insurance not purely private, but that public insurance is not purely public. Increasingly, over the last number of years, private elements have been introduced into the public system. In particular, the various public insurers have been exposed to increased, albeit still limited, competition.

The background to this is that the public scheme has traditionally been very decentralized, not necessarily in a local sense. Compulsory membership with one of the various health insurance funds (*Krankenkassen*) used to result from employment in a large enterprise (which maintained its own fund), association with a certain professional group, or, as a default rule, residence within a region.

<sup>141</sup> Currently, about 90 % of the population, that is about 72 million people, are covered by the public system. Of the remaining 8 million people, almost all are covered either by a comprehensive private insurance contract or by partial private insurance in addition to coverage under the special system for civil servants. The group of the non-insured has constantly been shrinking and currently is around 0, 3 % of the population. On the data, see BMA, Sozialrecht, note 108, p. 110.

<sup>142</sup> *Ibid.* at p. 397.

<sup>143</sup> §§ 178a - o VVG.

<sup>144</sup> One example is § 5 section 10 SGB V which under certain conditions gives a right of reentry into a private insurance contract after a short interval of mandatory membership in a public fund.

<sup>145</sup> § 178d VVG. For a similar obligation see § 178e VVG.

<sup>146</sup> For details and exceptions see §§ 178 a section 4, 178 i seq. VVG.

<sup>147</sup> § 178g VVG.

Today, the public funds are still organized that way, but the insured member is in principle free to choose between the various public funds<sup>148</sup>. The funds themselves can (and do) differ with regard to the contributions (levied as a percentage of the insured person's earnings) and, albeit to a very limited degree, with regard to the services covered. The system does seek, however, to prevent competition from resulting in risk selection. The funds are generally obliged to grant membership to everybody who desires it<sup>149</sup>. Moreover, the law prescribes a system of revenue equalization (*Risikostrukturausgleich*)<sup>150</sup>, i.e. that the financial gains of some funds as a result of favorable risk selection be offset by transfers to the other funds. However, as it is not intended that competition be completely prevented, the system of revenue equalization has been limited to a few criteria of favorable risk selection. In particular, the law takes account of differences in (1) the earnings (and thus the contributions), (2) the age, (3) the gender of the insured, as well as (4) the fraction of persons who are covered by the insurance as family members of an insured person without paying contributions on their own<sup>151</sup>. As far as differences in the number of people who are in need of exceptionally costly treatment (chronic diseases, cancer etc.), the public funds are allowed, but are not required, to maintain systems of revenue equalization. Thus, it can be seen that the public health insurance scheme is not purely public nor is the private scheme purely private. Yet, both spheres remain separate.

## B. Long Term Care Insurance

Alongside the public health insurance system is another one for long term care (*Pflegeversicherung*). Its introduction in 1995 was probably the single most important reform of the German social security system in many decades. Structurally, long term care insurance is closely linked to the health insurance system. At first glance, both systems indeed seem to be fully congruent. Both private and public insurance schemes for long term care exist. Public insurance is mandatory for the same group of people as for health insurance. Even the institutional pattern has parallels. In particular, each public health insurance fund is required to maintain another fund for long term care, which, however, is to be kept strictly separate with regard to both contributions and benefits. Despite these similarities and connections between health and long term care insurance, there is a crucial difference. It is that there is an almost universal<sup>152</sup> statutory duty to insure against long term care. So, in this branch of social protection, there is mandatory private insurance, viz. for those who, first, are not mandatorily covered by the public scheme and who, second, do not choose nevertheless to insure with a public fund voluntarily.

<sup>148</sup> for details see §§ 173 seq. SGB V

<sup>149</sup> § 175 SGB V

<sup>150</sup> §§ 266 seq. SGB V. Currently, it is planned to reform the system of revenue equalization (see *Frankfurter Allgemeine Zeitung* of April 6<sup>th</sup>, 2001, p. 15). For a limited period of three years, the contribution rate of the insured is required to be at least 12,5 %. For some of the public funds within private enterprises (*Betriebskrankenkassen*), this will foreseeably lead to additional revenues, which shall be exempted from the system of revenue equalization.

<sup>151</sup> The exact conditions of such "family insurance" are set out in § 10 SGB V.

<sup>152</sup> Universality is imperfect as the duty is linked to the preexistence of health insurance, be it public or private. Accordingly, persons who are not covered by any type of health insurance, are not subject to the statutory duty to obtain insurance against long term care. This incompleteness is justified by the administrative problems to enforce such an obligation to insure against persons who have not already been part of the health insurance system. (see BMA, Sozialrecht, note 108, p. 397)

Accordingly, this is an area – and, in fact, it is the only one up to now – where private partners do indeed play a role in social insurance in Germany.

As a consequence of its incorporation into the public system, “private” insurance is subject to heavy statutory regulation. In particular, private insurers may not<sup>153</sup>

- reject individual applications<sup>154</sup> for insurance or terminate such agreements<sup>155</sup>
- exclude coverage for pre-existing health conditions<sup>156</sup>
- require higher premiums depending on the sex of the insured<sup>157</sup>
- make benefits dependent on longer minimum periods of insurance than in the public system<sup>158</sup> (according to § 33 section 2 SGB XI)
- deny free family insurance to the children of the insured under the same conditions as in the public system<sup>159</sup> (according to § 25 SGB XI)<sup>160</sup>

Moreover, if the individual seeking private insurance against long term care has already had an insurance contract for health or long term care with the same company for at least five years, the premium may not exceed the statutory maximum for the public scheme<sup>161</sup>. Further restrictions apply for private agreements on long term insurance which were concluded in the initial months after the law’s entry into force in 1995<sup>162</sup>.

The reach of statutory regulation is not limited to the conclusion of private insurance contracts and the calculation of the premiums, but also extends to the benefits. First, the definition of the need of long term care and of the degree of care needed must be the same in private contracts as in the public system<sup>163</sup>. Second, the benefits under the private agreement must be kept equivalent (albeit not identical<sup>164</sup>) to those available under the public scheme<sup>165</sup>. Consequently, private agreements are indirectly made subject to the statutory rules on benefits under the public scheme – and thus even to the system of “dynamic adjustment”<sup>166</sup> under which government is empowered to issue norms<sup>167</sup> to adjust the statutory level of benefits in the public scheme.

Finally, public regulation also affects the structure of the insurance market. Private insurers are required to organize a system of revenue equalization between each other<sup>168</sup>. In effect, this system is designed so as to allow for competition only with regard to administrative costs<sup>169</sup>.

<sup>153</sup> see § 110 SGB XI.

<sup>154</sup> § 110 section 3 Nr. 1, § 110 section 1 Nr. 1 SGB XI.

<sup>155</sup> § 110 section 4 SGB XI.

<sup>156</sup> § 110 section 3 Nr. 2 SGB XI.

<sup>157</sup> § 110 section 3 Nr. 3 SGB XI.

<sup>158</sup> § 110 section 3 Nr. 4 SGB XI.

<sup>159</sup> § 110 section 3 Nr. 6 SGB XI.

<sup>160</sup> The concept of free family insurance stems from the public health insurance system. Its statutory basis there is § 10 SGB V. For long term care, the corresponding norm is § 25 SGB XI. As in the health context, it applies in principle not only to children, but also to spouses. However, private insurance against long term care is not required to cover spouses for free.

<sup>161</sup> § 110 section 3 Nr. 5 SGB XI

<sup>162</sup> For details, compare the restrictions set out in § 110 section 1 SGB XI to those in section 3.

<sup>163</sup> § 23 section 6 Nr. 2 SGB XI. For the rules on the public system, see §§ 14 seq. SGB XI.

<sup>164</sup> It is explicitly acknowledged in § 23 section 1 SGB XI that private agreements will be based on a system of cost retribution and thus differ from the public schemes which partly rely on prestations in kind.

<sup>165</sup> § 23 section 1 SGB XI.

<sup>166</sup> § 30 SGB XI (“Dynamisierung”)

<sup>167</sup> subject to the approval of the second legislative chamber (Bundesrat)

<sup>168</sup> § 111 SGB XI; the system is subject to state supervision.

<sup>169</sup> See BMA, Sozialrecht, note 108, p. 431.

Accordingly, one may well conclude that there is more room for competition among *public* health funds than among *private* long term care insurers. This observation fits neatly into the overall picture, i.e. that there is hardly anything private about private long term care insurance, except for the legal status of its providers. It is no surprise, then, that litigation about private long term care insurance is not assigned to the ordinary courts for private matters, but must be brought before the specialized courts for social security issues<sup>170</sup>.

## Chapter 7. Family Burden

### A. Support for Families throughout the Whole System of Social Security

The German *Basic Law* prescribes that special protection be afforded "to marriage and the family"<sup>171</sup>. As a result, there are many ways in which the social security system as a whole favors families.

One example can be found within the public pension scheme. Taking care of a child might prevent the insured from continuously paying contributions and, thus, it might reduce the benefit. This effect is partially offset by special provisions within the public pension scheme<sup>172</sup>. Another example comes from the field of unemployment insurance. There, benefits are higher if a child is living in the household of the insured<sup>173</sup>.

Social partners, however, are usually not affected by these norms. This is because they are rarely involved in the provision of social insurance in Germany.

There are, however, a few exceptions. Some have been addressed before, viz. family insurance as provided in the fields of health and long term care. As mentioned earlier, this is relevant for private insurers as well. In long term care insurance, they are compelled to offer free family insurance for the children of the insured. A private health insurance company is also obliged to insure a newborn child if one of his or her parents is insured with this very company.

### B. Genuine Family Benefits

Looking at genuine family benefits, there are several means by which families are compensated for the financial burdens of child-raising. None of these means, however, belongs to the sphere of social insurance. Rather, the German system relies entirely on a combination of tax relieves and tax-financed benefits. In particular, these are the so-called *Kinderfreibetrag* (a tax credit), *Kindergeld* (varies between state benefit and tax credit), and *Bundeserziehungsgeld* (a state benefit).

#### Persons in Need of Long Term Care

Finally, it should be noted that long term care insurance has been designed so that such care be provided by the family. To achieve this aim, the system departs from the traditional approach of public health insurance in that it is not restricted to services-in-kind. Instead, a monthly cash benefit may be paid. Although it is the insured who actually receives this payment, it practically serves to compensate the care-taker at least partly for his or her loss

<sup>170</sup> § 52 section 2 Sozialgerichtsgesetz (statute on the procedure in the courts for social security litigation)

<sup>171</sup> Art. 6 section 1 GG

<sup>172</sup> §§ 56 seq. SGB IV

<sup>173</sup> For Arbeitslosengeld see § 129, for Arbeitslosenhilfe § 195 SGB III.

of income. Further, the law on long term care insurance prescribes that the (public or private) insurer pay contributions into the public pension scheme for the care-taker<sup>174</sup>. So this benefit even goes directly to the care-taker, who will usually be a family member.

## Chapter 8. Outlook

It has been said at the outset that there are hardly any "private partners in social insurance" in Germany - although private law arrangements, private entities and even private insurance against social risks do play a significant role in the German system of social security. Up to now, the only exception can be found in long term care insurance, i.e. in the youngest branch of social insurance in Germany. Further, the newly enacted scheme of state subsidized private saving for old age might be considered as another exception, if the conception of "social" insurance were to be understood that widely. So, to the extent that there is an involvement of private partners in social insurance, this is a very recent development. However, it is certainly too early to declare this the beginning of a future trend in the German system of social security.

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<sup>174</sup> § 44 SGB XI.