

Non-public Actors in Social Security Administration

A Comparative Study

Edited by

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CHAPTER 12

Comparison of the Roles of Non-public Actors and Conclusions

Frans Pennings

§12.01 RESEARCH QUESTIONS AND TERMINOLOGY

[A] The Research Questions

In this chapter, the reasons for giving or not giving particular tasks to non-public actors and the developments in this area will be analysed. I will also analyse the attitude of the public sector (government, parliament, views of the public) towards the role of the non-public actors and developments in their views. Since the chapter is based on the preceding chapters, it is based on predominantly legal descriptions and views. There are few figures on, for instance, effectiveness and efficiency. Still, it shows, *inter alia*, the relationship the authors see between the choices that were made and the structure of the organization of social security. Examples are the relationship with the labour market and reintegration activities, decision-making and differential treatment of categories in society.

More specifically, I will focus on the following questions: what factors influence whether non-public actors have a role in the organization of a social security system; what are the views on, and experiences of, their roles; and what is the impact of their role (or the lack thereof) on the system, in terms of the distribution of responsibilities, participation of the insured and covered persons, and access to the various benefits?

In the preceding paragraph, I used the term *role*, as has also been done in the previous chapters. There are, however, considerable variations in what the role encompasses, and for this purpose it is useful to distinguish between the following elements ('tasks') relating to social security benefits: (a) Who pays for the scheme? (b) Who determines the contents of the scheme? (c) Who decides to whom the scheme applies? (d) Who takes decisions on benefits in individual cases? (e) Who supervises

the administration of the scheme? There may also be other types of activities performed by non-public actors, including advising the government and adjudicating on benefit disputes, but for the administration itself the five tasks (a) – (e) are the most important. The distinction between these five tasks may also be useful for analysing how these tasks are distributed over the distinct pillars of social security in a country, and thus may contribute to a better understanding of the distribution of responsibilities in a country (see also §12.05).

In order to avoid possible misunderstandings, it must be clear that there are no *a priori* preferences as to whether or not non-public actors fulfil one or more of these roles. The distinction serves solely as an analytical instrument for the developments in the countries under study.

For the purpose of answering the research questions, first an inventory and an analysis of the circumstances and developments will be made, explaining the role or the absence of non-public actors – in this section first the situation at the time of the establishment of the system [A], and then the more recent developments [B] are described (§12.02). Second, I will make a comparative analysis of arguments why non-public actors should or should not play a role, and, when available, experiences of this (§12.03). In §12.04 I will describe the relationship between the involvement of non-public actors, the state, and the insured or covered persons; and in §12.05, in the light of the foregoing, I will try to categorize the countries described on how they distributed the tasks ((a)-(e)) through the public and non-public authorities and how they did so between the first, second and third pillars. Combining the analyses of the tasks and the distribution between the pillars will lead to a framework that is helpful for explaining some of the developments seen in the countries, and this can also be helpful for countries when considering changes in their own systems.

Before starting to address these issues, it is important first to categorize the main issues raised in the previous chapters and to reach consistency in terminology. This is done in [B] and [C].

[B] Types and Activities of Non-public Actors

In the previous chapters the non-public actors that play a role in the social security systems of their countries were described. The types that were described can be categorized as follows:

- A major category of non-public actors is, not unexpectedly, that of the social partners, i.e., the organizations of employers and employees (trade unions).
- A second category of non-public actors is that of employers.
- A third category is that of private bodies. There may, of course, be large differences between this type of private bodies, e.g., those working on a profit basis and a non-profit basis. No further distinctions will be made at this point, since this is still the stage of making an inventory of possible non-public actors.

In [A] *supra*, the tasks ((a)-(e)) of non-public actors were mentioned. Of course, non-public actors may also have other tasks than these, which have been described in

the previous chapters, for instance, medical assessment of claimants for disability benefit, or organizing reintegration activities.

Although this role of non-public actors may be important as regards the legal position of beneficiaries, it is not part of the comparison here, since as regards this role the non-public actors fall under the responsibility of the benefit administration, so that organization is finally responsible. For that reason, the discussion in this chapter will be limited to the three categories mentioned *supra*.

[C] The Pillars of a Social Security System

The term *pillar* was used in several of the country chapters, and will also be an instrument for analysis in the next sections. This term was developed in policy documents to advise on the development of social security systems. In particular, the World Bank made use of it when advising countries on the re-establishment of their social security systems after the collapse of the Berlin Wall.¹ The advice was to develop pillars for the system, and not to rely only on a public statutory scheme, since that may make the system very vulnerable in times of financial turmoil and in view of the ageing of society. Thus, by the means of pillars, responsibilities and costs can be distributed between various groups in society. In addition to a public, pay-as-you-go-system, a privately managed, mandatory, defined contribution pillar; and a voluntary private third pillar, were recommended.²

This terminology is not followed in European reports,³ of which the objective is more to categorize the existing systems than to make recommendations for pension reform worldwide. In these publications the first pillar is that of basic pensions fully regulated by statutory law; the second pillar is connected to working conditions, i.e., the employer makes an arrangement for his employees, or social partners make such an arrangement for the employees. The third pillar is left to individual choice to buy additional provisions.

Most often, the pillars are mentioned in relation to old-age pensions, but they can also be used for other forms of social security.⁴

The major difference is thus, that in the World Bank, the second pillar is mandatory, whereas that is not the case in the European reports; that in the World Bank report it is a defined contribution scheme, whereas this is not (necessarily) the case in the European reports; and that in the World Bank report it is privately managed, whereas it is an employers' or social partners' scheme in the European ones.

The meaning of the terms *first, second and third pillar* can vary. In the country chapters differences were also seen in the use of the terms, and sometimes even

1. World Bank, *Averting the Old Age Crisis* (Oxford U. Press 1994). See also European Commission, *Green Paper COM(97) 283 final* (Brussels 1997).

2. *Ibid.*, 16.

3. For example, European Commission, *Green Paper COM(97) 283 final* (European Commission 1997).

4. These terms can also be found with these meanings, although not explicitly defined, in European Commission, *White Paper, An Agenda for Adequate, Safe and Sustainable Pensions COM(2012) 55 final* (Brussels 2012).

alternative terms were proposed, such as tiers.⁵ It was decided not to harmonize the use of the term *pillar* in the country chapters, so that authors could use the terms customary to their countries, even though they are sometimes aware of the atypical use of the terms.⁶ For us, it is useful to know how these terms are used in these countries.

Although the term *pillar* thus has opaque and varying meanings, in this chapter it will still be used, since it is a widely used term and useful for describing the role of non-public actors. It has to be underlined, however, that this should not suggest that all three pillars are necessary for a system, or that they should have the same content or function. Indeed, a social security system does not collapse if one of the pillars is missing, or if one pillar is much smaller than the other(s).

Here, the European approach described above will be followed, since it fits better with the schemes described in this book, and also with our purpose to describe the role of the non-public partners. Generally speaking, public actors fit in the first pillar, social partners and employers in the second pillar, and private partners, in the third. It is therefore interesting to analyse whether this is (still) always the case in the countries studied, and if not, why not. In this sense, the pillar approach is closely connected to an analysis of the role of non-public actors.

Since this description of the pillars is still quite loose, below, a more precise definition will be given, which makes it easier to qualify a particular scheme. Still, since States have the freedom to design systems as they want, and since systems keep developing, in some situations it will remain uncertain to which pillar a particular scheme belongs. However, it is exactly these which are most interesting for our purpose, since they may show important developments.

The pillars are defined as follows:

- (1) The *first pillar* is that of statutory benefits, i.e., benefits of which the contents are defined by statutory acts.
- (2) The *second pillar* is that of schemes provided through the employment contract. These may be based on the decision of the employer, or on an agreement between an employer or employers' organization and trade unions. These schemes often supplement the first pillar system, but they may also replace benefits that were previously part of the first pillar. Second pillar provisions are collective ones, i.e., covering more than one employee. Social partners are free to decide whether to conclude such an agreement, and what the contents are. Once a scheme is adopted, statutory law may state to whom this agreement applies, and it may also impose prudential and other requirements. However, the contents of the scheme are determined by the social partners, hence it is a second pillar scheme. These benefits are often funded schemes (i.e., based on capital funding, not pay-as-you-go), although this is not necessarily the case. They may be organized and regulated by the employer or – if they are based on a collective

5. See, for instance, the comments of Kotkas, in Chapter 4 on Finland, on the term *tier*.

6. See, for instance, Chapter 9, on the Czech Republic.

agreement – administered by representatives of employers’ and employees’ organizations.

- (3) The third pillar consists of private provisions, organized and administered by private bodies, such as insurance companies. These are personally funded pensions.

The description of the social security system in terms of pillars enables us to identify the distribution of responsibilities of public and non-public actors and to address the questions relating to these. For instance, if we require the state to be responsible for the first pillar, why admit non-public actors here?

§12.02 DEVELOPMENTS IN THE ROLES OF NON-PUBLIC ACTORS IN THE ORGANIZATION OF SOCIAL SECURITY

In this section the systems are described at the time when they were established. For this purpose, the birth of the present systems was chosen, not their predecessors. Several countries have retained their systems from the beginning, others have adopted completely new systems. In this section, the development of the systems and possible path dependencies in the involvement or lack thereof of non-public actors are relevant, therefore the analysis is made according to country (and not, for instance, according to benefit type).

In [B], the developments of recent decades will be discussed. The distribution of the data over the two sections is not fully synchronic, since the establishment and development of the national systems vary considerable in time and nature.

In some countries there have been many more developments in the organization of social security than in others, and this explains the differences in the text dedicated to each country.

[A] The Context of the Establishment of the Systems

In this section an inventory will be made of the arguments and circumstances that were relevant to giving (or not giving) non-public actors a role in the organization of social security.

In *Germany*, the first country with a statutory social security system, the following reasons were mentioned for involving representatives of employers’ and employees’ organizations in the administration of employees’ insurance schemes: the tradition of employer-run and municipal schemes, the view that the role of the state has to remain limited, the wish to have employers and employees pay for the costs of the schemes, and the undesirability of involving private insurance in the organization of statutory social security. The participation of social partners in the administration of the system was thus a logical consequence of the characteristics of the new system: schemes covering workers only, paid from employers’ and employees’ contributions, and inspired by already existing voluntary funds. Social partners actually administered the social security benefits (tasks (a), (d) and (e)) for old-age, survivors’, disability,

sickness, unemployment and health care benefits – schemes which were established during the pre-war period.

France was directly influenced by Germany, since the German social security system that existed in the occupied Alsace-Lorraine region was retained after the region was returned to France. The French social security system was modelled on this relict of German occupation. In the French system, however, next to social partners other actors also kept a role, including mutual help societies and employers' or religious institutions. The insured persons could thus choose by which institution they wanted to be covered.

Basically, this system was retained after the Second World War, even though France was influenced by the principle of universal coverage, introduced in the *Beveridge Report*.⁷ The Report was prepared during the Second World War in the United Kingdom, and proposed a comprehensive welfare state, funded by government and through contributions made by the individual, and operated exclusively by the state. A major reason for this was the desire to make a radical break from the past, when private bodies and volunteers could seriously interfere with the private sphere of claimants (e.g., in Poor Law arrangements); and to guarantee satisfactory coverage for all citizens across the full range of contingencies. Since the Beveridge Report argued that entitlement to benefit should be a right that was linked to human dignity and freedom from want, that old practice had to be left behind radically. The comprehensive system, which was to include all residents, was no longer linked to the employment contract as such.

However, within the French context, universal coverage meant coverage of all workers (and not others), so the country was not faced with the problem of how to administer residence schemes, which occurred in other countries influenced by Beveridge (e.g., the UK and the Netherlands). The French system became even more Bismarckian, to the extent that solely the social partners were involved in the administration of the schemes; other private institutions no longer had a role. The Second World War also had important effects, since as a result of the position trade unions had acquired in the Resistance, they were initially given a larger role than employers in the administration of social security.

Remarkable, in the French system, is the place of the unemployment benefit scheme. Like in Sweden, this scheme is not seen as part of social security, since it is closely related to the labour market. For this reason it was initially entirely left to the social partners to make rules on these benefits in a collective agreement and to administer this scheme. Later, the legislature introduced some basic provisions in the Labour Code in order that they (the legislature) can bear responsibility in the absence of collective agreement. Basically, this has remained the case, although (because of the integration with placement services) the administration of the insurance at the regional level is now undertaken by a body of a complex public/private nature. Following our definition of the pillars, this is a second pillar scheme, that occupies the place of what are usually first pillar schemes.

7. See on this report also Chapter 3.

In the French system, social partners administer tasks (a), (d) and (e) for old-age, survivors', disability, and sickness benefits. For unemployment benefits, task (b) – determining the contents of the scheme – is also within their competence.

In *Finland* the social security system was established rather late, in the 1960s, and was influenced by the Beveridge ideal of a national, comprehensive universal system. Still, the social partners play a much larger role than appears at first sight. Since the benefits were considered to be low, they put pressure on the government to introduce complementary earnings-related schemes. Thus, the order in which schemes were established is different from most other European countries, where first insurance (earnings-related) schemes were established and subsequently basic benefit schemes were introduced as basic provisions for those not covered or with a low income. It is also important that the Finnish complementary benefit schemes were established in the first pillar, and not the second pillar.

The basic unemployment benefit scheme is administered by a public body (Kela). In order to be entitled to earnings-related unemployment benefit, one has to be member of an unemployment fund that cooperates with the trade unions. Thus, trade unions and non-public funds have a role in the administration of unemployment benefits in the first pillar. The earnings-related benefit replaces the basic benefit, and is paid fully by the fund (the amount of the basic benefit is reimbursed by the state to the fund).

In the case of sickness benefit, the administration of both basic and earnings-related benefits is public, although both are paid from employers' and employees' contributions. As a result of cuts to the statutory system, the importance of the occupational scheme has grown.

Employers may decide to continue to pay wages in the case of sickness; in such cases they are refunded the sickness benefit.

For disability benefit there is also a basic pension and an earnings-related pension – both covered by statutory law. The benefits are administered by authorized pension providers, which are either insurance companies, company pension funds, industry-wide pension funds or other similar pension funds.

In addition to the national old-age pension for all residents, administered by Kela, an earnings-related statutory pension was introduced. The earnings-related part is administered by private pension insurance companies, in which representatives of the social partners take part.

The social partners have a large (informal) political influence on the contents of these schemes, since they finance, to a large extent, the earnings-related part. Parliament only acts, as was concluded in the Finnish chapter, as a rubber stamp to formalize their agreements.

Thus, the Finnish social partners pay ((a)) for the scheme. Employees' organizations, through the funds, decide on individual cases ((d)). The social partners do not formally decide on the contents and applicability of the scheme ((b)-(c)), but they seem, according to the country report, to have a large influence in this.

The Netherlands has, to a large extent, been influenced by the Bismarckian Acts, and the current employees' insurance schemes still have several of these characteristics. When the first Dutch Acts were created, the dominant views at the time were that only employees needed compulsory protection, to be paid by employers' and

employees' contributions. As a result of the subsidiary role of the state, which was a main principle of the legislature at the time, the administration of these schemes (including sickness, unemployment, disability) – tasks (a), (d) and (e) – were in the hands of organizations administered by the social partners.

Influenced by the *Beveridge Report*, after the War new schemes for all residents were gradually added to the employees' schemes. The employees' schemes continued to exist, administered by the social partners, and the residence schemes were administered by a separate public organization, the *Sociale Verzekeringsbank*. The Dutch system was thus administered by different organizations.

Because the residence schemes (for old-age and survivors' benefits) provide a minimum benefit only, complementary schemes are relatively large. These complementary schemes are established by social partners on the basis of agreements, and they are administered by funds administered by representatives of the social partners. These pension schemes can, under some conditions and on request of the social partners, be declared generally binding for a particular occupational sector.

In *Sweden*, the first statutory initiatives were influenced by Bismarckian Acts. However, the Acts, establishing a work accident insurance and invalidity/old-age insurance, were administered by the state. The introduction of these schemes coincided with a process of turning the wide range of previously voluntary insurance societies into more regulated – but still independent and non-public – 'health insurance offices'.

Around the turn of the twentieth century, unions set up independent funds for unemployment, occupational injury or sickness. Thus, in the beginning there was a mix of actors; the area of invalidity, old-age and work accidents was clearly dominated by the state, and that of unemployment and sickness was the domain of the trade unions. Unemployment insurance is still funded according to the Ghent system, which means that it has a unique place in the Swedish system because of its administrative structure, and since it is essentially voluntary. Until the 1990s (see below), trade unions and employers were also involved in the administration of sickness benefits, including in decisions on individual cases.

So, for unemployment benefits, tasks (a) and (d) are fulfilled, whereas for the other benefits, the administration has become a public task.

In the *United Kingdom*, non-public actors played a large role, from the sixteenth century until 1945, when the current system was established. From the end of the nineteenth century Bismarckian influences on the system can also be seen. The Second World War marked a new beginning, with a brand new social security system, for which the aforementioned *Beveridge Report* was the basis. It proposed a comprehensive system, which was to include all residents. Since coverage was no longer linked to the employment contract as such, the social partners were not given a place in the first pillar, as was done in Germany, France or the Netherlands. Finally, since the UK has no system of binding collective agreements, there was – and is – no legal basis for generally binding provisions, such as the French collective agreement for unemployment benefits, neither for the first, nor for the second, pillar. Therefore, it is a public task, although the costs are, to a large extent, paid from contributions.

In the *Czech Republic*, non-public actors played a large role in social security (in particular in social assistance) before the Soviet model was imposed on (the predecessor of) this country (from 1956). Disability and old-age insurance was entrusted to the Central Social Insurance Office, a public body. After independence, as a reaction to this period, the development of private initiatives was promoted, since a transition from state paternalism to participation and the responsibility of citizens and groups for their own situations and futures was desirable.

However, despite several attempts, this has not yet led to greater participation of non-public actors in the organization of the first pillar social security schemes (apart from health care). The increase of private initiatives in the first pillar was realized, in particular, by making room for private services providers, such as employment placement offices and hospitals.

Social partners still play no role in the first pillar – so none of the tasks (a)-(e). Trade unions were too much part of the state during the Communist period, and employers' and employees' organizations did not exist as such, or were very weak at this time.

In *Spain* the Constitution provides that social partners can participate in the management bodies of the public schemes (Article 129 of the Constitution). Indeed, representatives of trade unions and employers' organizations have a tradition of participating in several bodies of the public managing entities (task (e)).

In *Denmark*, the social security system provides for uniform benefits to all residents (old-age, unemployment, sickness benefits). These statutory benefits are supplemented by various arrangements.

Non-public actors have played an essential role in setting up the system, funding and administering it, in particular sickness and unemployment benefits. Unemployment benefits are paid to those who have voluntarily subscribed and contributed to an insurance scheme, which is regulated by an Act. The scheme is (still) administered by the private unemployment funds, which have a long pre-statutory history. These are non-profit organizations, and closely linked to trade unions and supervised by the Ministry of Labour. The funds can also impose sanctions, e.g., in the case of unavailability for work. The funds thus still perform tasks (a) and (d). Those who do not participate in the voluntary funds are covered by the public assistance scheme, administered first by the state, currently the municipalities, and financed through general taxes.

The statutory old-age pension was introduced in 1957, and provides a universal old-age pension to all residents. It is administered by the municipalities. In 1961 a statutory system of supplementary pensions was introduced. Since the sum of both first pillar old-age pensions is still very low, second pillar income-based pensions (occupational pensions based on collective agreements) were developed, administered by funds with employers' and employees' representatives on the Board.

The *United States* has a rather limited statutory social security system that is focused primarily on providing old-age pensions and health care for pensioners. This first pillar is completely public, and non-public actors are excluded. The suggestion of introducing non-public actors is politically quite sensitive, and quickly leads to a discussion on privatization, which is not popular in this basic area. Neither trade

unions nor employers' organizations play a role in the first pillar schemes. The reason is that unions are quite weak; in addition, the text of the current Acts does not allow them to administer social security funds.

In health care, non-public actors do not play a role in the first pillar either. This is partly related to the large role of employers in complementary health care insurance. These are sometimes part of a collective agreement for union members, and the unions are also involved in the administration (second pillar). Still, the second pillar does not supplement first pillar schemes, but is the only resource for these workers. The lion's share of health insurance is provided on a private basis, paid by the employer, with substantial employee contributions (through contributions, co-insurance and deductibles). In sum, the private actors have no tasks in the first pillar.

[B] Main Developments Since the 1970s

In 2002, the German Federal Employment Office (*Bundesanstalt für Arbeit*) encountered problems, *inter alia*, because of low placement rates of jobseekers and because of unreliable statistics on placement success rates. In response to this, it was transformed into the *Bundesagentur* (Federal Employment Agency), in which methods of new public management were implemented and government representatives were given more powers, and the social partners were more removed (to supervisory bodies), and thus restricted to task (e).

In sickness benefits funds (covering both sickness benefits and health care) the social partners were removed from the administration of benefits and were deprived of the power to make their own decisions and policies; their role here was also reduced to that of supervisory bodies (task (e)). Private non-profit and profit oriented service providers are also included in the Common Federal Committee, which is supervising the scheme. There is discussion as to whether this should be extended to include other interest groups, including patient organizations, which currently have a consulting role.

Since some categories of the population, since the establishment of the system, have been excluded from statutory sickness benefits and health care insurance (including the self-employed, civil servants and employees earning above a certain amount), third pillar schemes play an important role. A new development is that since 2007 all persons who are not insured by the public scheme must buy private insurance. The law provides a basic rate, benefits have to be at the level of the public scheme, and everybody must have access. This development shows that the difference between first and third pillar schemes is fading, as traditionally, third pillar schemes were voluntary. Still, this scheme is regarded as a third pillar scheme, since to be a first pillar scheme is decisive that the contents of such schemes are defined by statutory law, which is the definition used in this chapter.

Since, over the course of time, statutory old-age pensions were made less generous, second and third pillar pensions became more important, which was further promoted by tax relief, and sometimes by subsidies. Thus, second and third pillar

schemes have been made more attractive, in order to reduce the costs for the first pillar. The state subsidizes the (voluntary) pensions.

Employers have been obliged since the early 1960s to pay sick pay during the first six weeks of sickness. From the beginning of the twenty-first century they have also been responsible for helping those unable to work for longer than six weeks reintegrate into working life.

In *France* the changes in recent years have been primarily in the area of health care. In this area employers have been statutorily obliged to initiate collective bargaining to make health care arrangements; this means that when the employees of a company are not covered by a collective agreement that contains complementary health care benefits, the employer has the duty to bargain on this subject. In such second pillar schemes no risk selection can be imposed. Mutual insurance companies, providence societies managed by employers' and employees' representatives, and insurance companies have been allowed to replace the statutory health care scheme with a scheme of their own (in particular, for civil servants).

In addition, for old-age coverage, the 2003 Pension Reform Act introduced the obligation to bargain on supplementary occupational pension schemes every five years. Thus, here also the obligation to attempt to make second pillar schemes is laid down in an act.

In *Finland* there have not been important changes in the role of the social partners in the administration of first pillar schemes since their establishment (in the 1960s).

Traditionally, occupational sickness benefits have been agreed in collective agreements, whose coverage is about 90% of all wage earners. Occupational sickness benefits paid by the employers provide better protection than the statutory sickness insurance scheme. The social partners played a prominent role in the creation of the current occupational health care system. These engage private health insurance companies.

In addition to mandatory basic residence-based old-age pension insurance, private pension companies provide voluntary complementary pension insurance. The state supports this third pillar scheme through contributions and tax advantages, and allows opting-out from the first pillar to these third pillar schemes.

In the *Netherlands*, the role of the social partners changed radically in the 1990s, when Parliament decided that they had not been strict enough in the application of the benefit rules. It was thought that the application allowed the benefit administration to pay disability benefits to persons who became redundant during the restructuring of companies in the 1970s and 1980s. As a reaction to this, their role in the administration of the schemes of the first pillar was terminated. Instead, employers and insurance companies were given a larger role. The role of social partners in respect of the first pillar is now limited to giving advice to the government on the development of social policy (so none of the tasks (a) – (e) anymore).

From the 1990s onwards, employers were made responsible for sick pay (initially six weeks, currently twenty-four months) which replaced the first pillar sickness benefits scheme for their employees. Since the obligations of the employer are defined

exactly by statutory law, this is a first pillar scheme. In collective agreements a supplement is often required for the first fifty-two weeks.⁸

The replacement of the social partners with employers was directly linked to the views on the distribution of responsibilities that became predominant in the 1990s; government and its advisory bodies considered that a close link had to be made between taking a decision (e.g., to let an employee go home when he claims to be ill) and feeling the (financial) effects of that decision.

The structure of health insurance was also changed. The employee scheme and private insurances, for the higher earning employees and for civil servants) were replaced by the obligation for all residents to buy private insurance, conditions of which for the basic insurance are regulated in detail by statutory law. In addition, the same companies offer third pillar schemes (these are voluntary) to those insured by their first pillar scheme.

In *Sweden* in the 1990s, a pension reform was launched, which resulted in the introduction of new non-public actors into a sector where there were none before. A component of privately managed individual accounts was added to the previously fully state administered pension system. Still, the so-called premium pension only constitutes a small part of the full pension, and a public agency remains the administrator of the pension scheme.

In the 1990s the sick pay period became a hot topic. The reforms (first increasing and later reducing the length of the sick pay period) were part of the discussion on the role of the employer and the relationship between the work environment, absence from work and work-related rehabilitation. In this reform new non-public actors (including employers) were also given new roles.

The reforms of a decade later, in 2005–2008, were more institutional in nature, and involved the independent social insurance offices for sickness being turned into a state agency. In 2007, a new inspectorate (the Swedish social insurance inspectorate) was created to supervise the new agency. In 2008 the decision-making boards used for internal review by the (previous) social insurance offices were abolished, thus task (e) was removed from non-public actors.

In 2004, the Swedish unemployment insurance board was created, an inspectorate with the task of increasing the supervision of the unemployment funds and unemployment agency. Thus, state presence and control were strengthened through institutional reforms and increased emphasis on supervision and control on state agencies and independent funds.

In the *United Kingdom*, in recent decades also, social partners have not been given a role in first pillar schemes, even when, in the 1980s, more liberal and market approaches to welfare became predominant. The ideal was that of a partnership between state and the individual. However, this was not realized; instead, the statutory benefits became more tightly controlled and restricted.

8. The rules applicable to the first and to the second pillar obligations are different, e.g. in the case of risky behaviour by the employee in the first pillar, sick pay cannot be refused, whereas refusal is possible for second pillar sick pay. The first pillar falls within the scope of the EU coordination regulation, whereas the second pillar does not.

The exclusive public administration of first pillar schemes was interrupted between the 1980s and 2002, when it was possible to opt out of the state earnings-related pension scheme (SERPS).⁹ This occupational pension had to meet standards defined by the Act. Employers could offer participation in such schemes or employees could opt out by participating in private pensions. Thus, second and third pillar pensions respectively could replace the first pillar pension, i.e., the SERPS part. In April 2002, SERPS accrual ended and was replaced by the *State Second Pension*. The main reason for the change was to provide a larger pension to people on low income.

Currently, the Pensions Act (2008) obliges employers to take the required steps to ensure the automatic enrolment of workers who are not already in certain existing occupational or personal pensions schemes. In other words, the Act requires coverage of workers in this second pillar scheme for those not sufficiently covered by other pensions; the Act still gives the worker the right to opt out.

The role of employers in the first pillar has increased over time. Employers were given a role in the administration of statutory sick pay, which replaced short-term sickness benefit for employees in 1983, and maternity benefits since 1986. Employers are now responsible for supervising their employees in respect of claims for short-term sickness. Since 1994, the employer is no longer reimbursed sick pay, which is paid for up to twenty-eight weeks (extended from a original limit of eight weeks). Thus, employers have both the responsibility for the funding and administration.

In *Denmark* the sickness funds were abolished in 1971, and their responsibility, administration and the payment of sickness benefits were taken over by the municipalities. Employers play a significant role in the payment of sickness benefits, since they are under the statutory obligation of paying the sickness benefits (usually without reimbursement) during the first thirty days of absence of the employee. Smaller employers might insure themselves against that risk by taking out insurance with the state. In addition, collective agreements may stipulate a right to a wage paid by the employer in the case of sickness.

Since 1969, in the area of unemployment, the state (now municipalities, through jobcentres) has been responsible for placement activities. The jobcentres have, however, since 2003, been encouraged to outsource their task to private actors, since it was thought that the private sector could provide better value for money. Municipalities can outsource to trade unions, funds and private undertakings. The effects of this are still difficult to assess. Private undertakings to which tasks are outsourced have to respect the rules on administrative law in their contact with the jobseekers; the jobseekers thus also enjoy the protection of administrative law.

Since 1971, all health care (provided by practitioners and hospitals) has been universal, administered by the state through the regions, and essentially financed through taxes. Yet, from 2002 to 2012, the role of private insurance companies in covering health expenses was promoted through tax exemption of employer-paid health insurance. Employer-paid health insurance was very popular during that period, and could also cover hospital care falling within the statutory scheme, when provided

9. The main pension scheme remained in existence, but the possibility of opting out gave private actors room to perform first pillar tasks.

by a private hospital. The advantage is that care could be provided more quickly to the patient. Private health insurance is not an opt-out construction, since one remains covered by the statutory scheme (paid by taxes).

In the *Czech Republic* private old-age pension arrangements are now promoted to complement the first pillar by allowing individuals to transfer 3 % of the contribution of the first pillar to the third pillar.

In 2006 an act was introduced requiring employers to pay sick pay to their employees for twenty-one days. The reason for this seems quite similar to that given in the Netherlands, i.e., that the employer can check more easily whether the employee is really ill, and can thus reduce improper use of benefits.

In *Spain*, non-public actors have acquired a certain role in the first pillar in the form of Work-related Accident and Occupational Disease Mutual Companies, which are non-profit business associations set up by employers for their employees. Trade unions are not on the Boards of the mutual companies, but they are part of the supervisory committees (task (e)). The mutual companies are strictly supervised by the state (their surplus must be used for the goals of the general social security system). Initially, these companies administered second pillar schemes only, but gradually their scope was extended from industrial accidents and occupational diseases to first pillar schemes (non-occupational accidents and diseases and maternity benefits) if the employer had opted for this. For these first pillar schemes, the funds receive reimbursement from the general system.

The material scope of the mutual companies (second pillar) was further extended in 2010 to insurance for the care of children with a critical illness on request of the employer. These costs are reimbursed by the general public system.

Employers can opt out of certain first pillar schemes (health care and temporary disability due to work-related accidents and occupational diseases) by covering these risks themselves. This opting-out saves them from paying contributions.

Employers have to pay sick pay from the fourth to the sixteenth day of the sick leave (if not caused by an occupational disease or accident), which is not reimbursed by the general system.

In the *United States* private partners do not play a role in statutory social security (first pillar), but the lion's share of health insurance is in the third pillar (provided on private basis, paid by employers, with substantial employee contributions). Second pillar complementary old-age pensions are also important. In this second pillar, employers' and employees' representatives play a role in the administration. The second pillar does not supplement first pillar schemes, but is the only resource for these workers.

The Patient Protection and Affordable Care Act (PPACA) – ObamaCare – might increase the number of first pillar schemes administered by public bodies. In addition, this Act will require employers with more than fifty employees to offer health care plans to their employees, and thus require them to offer second pillar schemes. Thus, depending on how these are to be regulated by statutory law, these may come closer to first pillar schemes.

[C] Analysis: Path Dependency and Deviations from the Path**[1] *Historical Reasons for Involving Social Partners***

Historical reasons appear to have been important for the way a social security system is designed, and these help to explain the differences between the countries. These reasons are often related to the dominant views in a society on the role of the state in the labour market and the economy. In the first countries that established statutory schemes (around the turn of the twentieth century), at the time of establishment public responsibility was accepted for covering particular risks, but there was also consensus that state interference should not go further than necessary. Thus, responsibility for the administration of the schemes was given to representatives of the social partners or persons from their sphere who were elected, which meant that public authorities could be placed at a distance. This happened in Germany, France and the Netherlands¹⁰ (tasks (a), (d) and (e)).

Other countries introduced responsibility of the state for social security later; here, the administration of social security remained the responsibility of funds (Finland, Denmark), sometimes with public subsidies. In Sweden, the state was already a primary actor when social security schemes were established (pensions, health). When the welfare state grew, public contributions to the funds grew, but the social partners remained involved in several of the funds for a considerable time. However, in recent decades, in several of the countries, this influence has declined.

There are still important differences in the extent to which the state historically controlled the funds. Sometimes social partners were given great freedom to define the contents of the scheme (French unemployment benefits), in others the state had a supervisory – and financial – role, and sometimes the state regulated the benefits in detail by statutory law (Sweden and the Netherlands (until the 1990s)), even though the organizations were/are self-governing.

In some countries the approach was different: since the state was responsible for social security, it followed that the state also had to administer the schemes (tasks (a) – (e)). The reasons mentioned for this included that the legal position of the insured had to be guaranteed, and interference of non-public actors was feared (USA and Spain), or in any case firm regulation was required in case of their interference (UK). Other reasons included that the schemes were paid from taxes (USA) or contributions to a general scheme (UK). In these countries, as we saw in the country chapters, the question of involving non-public actors was interpreted as being the same as the issue of privatization of social security.

In chapters on countries that involve social partners in the first pillar, we saw that there are many variations in the way this is realized; several hybrid forms of private and public involvement have developed. This does not mean that all these are unproblematic or desirable, or that these would also fit in other countries, but for the

10. Mentioning names of countries does not mean that the situations and developments were and are completely identical.

matter of analysis it is interesting to study these variations. We will come back to this in §12.03

[2] *Path Dependency*

It may be concluded that the path dependency of the presence or absence of social partners in the first pillar is quite large. This means that if they were involved in the system in the beginning, they are often still involved (Germany, France, Denmark, Finland and Sweden); and if they were absent, they still do not have a role, even if views on private initiative have changed (USA, UK and Czech Republic).

For the UK and the Czech Republic, it has to be added that the current social security system was preceded by an earlier statutory system; with the new system a new path was developed, deviating from that of the predecessor. In the UK, the Beveridge Report was a watershed in development, and here a new path emerged from 1945 on. This path of entirely public administration was continued, even when the views on the organization of the welfare state changed. In the Czech Republic a new path started when the Soviet model was imposed, and benefit administration became entirely public. After the reform, private initiative was stimulated, but only so far this did not really affect administration of social security benefits in the first pillar. Of course, these developments vary in many respects, but they are mentioned together here because they signified a new path for the social security system.

In the Netherlands path dependency was radically interrupted when the social partners were removed from the administration of the schemes, while the system itself was not replaced. The reason for this was a change in political views and the desperate feeling that it was difficult to reduce the claims for disability and sickness benefits.

In Sweden the role of the social partners was reduced in the social insurance offices, even though no clear incidents were reported. It seems more likely that this was because the predominating idea was that in a publicly paid system, public administration is required, since it ensures better equal treatment, protection of individuals and legal certainty. In this sense, public administration also fits well in the approach of liberal (oriented) governments, and explains the public administration of the public schemes of the UK, USA and the Netherlands.

[3] *Transfers between Pillars*

We have also seen developments in how responsibilities are reorganized, i.e., transfers between pillars.

This is true in particular for health care systems, which in several countries have gradually been extended coverage to the whole population. This means, in first pillar schemes, that the influence of social partners has declined or disappeared, since there is no longer a reason to link the administration or financing to the employment relationship. In some countries the second or third pillar schemes are becoming less

important, since first pillar schemes have been created (Netherlands, France). To a lesser extent, this is also the effect of ObamaCare (United States).

In addition, in some countries employers are given a statutory obligation to negotiate on second pillar schemes, or individuals have the obligation to buy a third pillar scheme insurance. These schemes are bound by strict statutory rules (prudent finance, access for all, minimum requirement on contents).

Thus, on the one hand, non-public actors others than social partners enter the first pillar, i.e., private insurance companies; and on the other hand, public rules (administrative law framework) become strictly applicable to the second and third pillar schemes. As a result, it has become more difficult to decide whether a scheme belongs to the first or third pillar, according to the definitions used in this chapter.

In the case of old-age pensions, we can also see an interaction between the first pillar and the other two. This is in particular the case in countries with flat-rate pensions (the Netherlands, the UK and Denmark), even though there are important differences.

In the Netherlands there is a long tradition of introducing second pillar schemes, based on collective agreements, which can be declared generally binding. Although these are voluntary, once they exist they can be made compulsory in the sector concerned. Tax exemptions for the contributions encourage the introduction of the schemes, but also strictly define the contents. In Denmark also, there is now tax support for contracting private pension schemes in the form of tax deductions.

Since in the UK the whole system of pension schemes based on collective bargaining does not exist, it is the individual employer who has been made responsible for making a second pillar arrangement, whereas the first pillar serves as a safety net for those employees not sufficiently covered in the second and third pillars.

Moreover, we see that by cuts to first pillar pensions, the second and third pillars have grown in several countries.

With regard to unemployment benefits, social partners had, or still have, a special role in several countries. In some countries they have had complete freedom to make the rules (France). Although social partners are still involved in the administration of unemployment benefits in several countries, here also the applicable law has become more complicated because of the combination (or sometimes even the mergers) with work placement agencies that introduced a hybrid type of public and private law relevant to the administration (France, Germany and Denmark).

A last general remark concerns another category of non-public actors. In several countries employers were given the statutory obligation to pay sick pay (the Czech Republic, Germany, the Netherlands, Spain, Sweden and the UK). These obligations were meant to increase the responsibility of the employer for making working conditions safer and to help workers back into work. In some countries (the Netherlands, the Czech Republic) better supervision of the employee was also envisaged.

**§12.03 ANALYSIS OF ARGUMENTS AND EXPERIENCES: WHY
NON-PUBLIC ACTORS SHOULD PLAY A ROLE IN THE FIRST
PILLAR**

In this section there will be a discussion of the reasons put forward as to why today it is or is not useful for non-public actors to play a role in social security. First, the social partners will be discussed ([A]–[C]), followed by the other non-public actors. This discussion does not mean that all these arguments are always used in all countries, or that they are always the official arguments. It is solely based on remarks and observations in the previous chapters, and compares these with the experiences mentioned in the chapters.

[A] Social Partners are Involved to Guarantee the Balance of Power

[1] *The Relationship between the Social Partners and the State*

One argument for involving social partners in the organization of social security (first pillar) is that interference of the state in society has to be restricted; this was already being argued when the first schemes were created. Although societies have changed since then, and the reasons for restrictions to public interference may also have changed, this approach still exists in some countries. This does not mean that the state and the social partners are antipodes. It concerns the concept of organizing society – in other words, how much support from society for state activities is found desirable. Nor does it have to be due to political controversies. Often, trade unions with the same ideology as the political parties benefit from this approach. An exception seems to be Sweden, where government, trade unions and some large enterprises have, for decades, been social democratic in nature, and even membership of unions often means membership of the party. In countries with coalition governments the need for achieving balance was felt more strongly.

[2] *The Relationships between the Pillars*

Space for social partners was reserved, in particular, in the area of the labour market, where extensive room is left for their negotiations, as is laid down in international treaties. Since unemployment benefits are closely related to the labour market situation and provisions are thus linked to this, in some countries the social partners were also made responsible for – or retained responsibility for – the administration of unemployment benefit funds. This still leaves open how to organize the system and indeed we have seen variations in the countries studied here.

The main question is whether the room left to the social partners is to be in the public sector (first pillar) or outside this, and complementary (second pillar). Both approaches can be defended by argument that the role of the state has to be restricted.

However, in the first approach, where social partners are given an institutional role in the first pillar, the state assumes responsibility for these schemes. In other

words, the state guarantees the benefits payable on the basis of the schemes, but within this responsibility there are restrictions to the power of the public bodies, by giving the social partners a role, or even awarding them full responsibility for the administration.

In the second approach, the state organizes statutory provisions (that may be small or more substantial), and additional, complementary schemes are organized, outside the public sphere. In such a system with a small first pillar, the non-public actors can still have a large role to play, but in the second and third pillars. They are not, then, directly involved in the statutory benefits.

In addition, it can be seen that there are important developments in which the state promotes and sometimes even (indirectly) requires that second pillar or even third pillar schemes are established or joined. We saw this in the UK, Denmark, Germany and France. Moreover, public authorities can, in some countries, impose a second pillar scheme on others than those who agreed to it, by declaring it generally binding for a particular sector, e.g., in the Netherlands.

Increasingly, it seems states want more coverage of employees or residents than is provided by the benefits regulated in the first pillar, and therefore they promote second and third pillar schemes (e.g., by means of tax breaks), make rules to protect such schemes and their beneficiaries (e.g., against bankruptcy, and to ensure adjudication, sometimes even within administrative law), and sometimes force negotiation on, or the creation of, such schemes. Thus, this development shows that the responsibility the state accepts for the welfare state sometimes grows, but this is not the same as the state (fully) paying for the protection and (fully) determining the contents.

[3] (Developments) in Tasks Entrusted to Social Partners

If social partners are involved in the first pillar, this may be at the level of actual administration ((d), rule-making (b), and/or of supervision (e)). Sometimes they are even involved in the courts dealing with social security cases. Alternatively, their role may be outside the actual administration, as advisors to the government.

In the case of actual administration and rule-making, we are at the micro level of actual management.

The balancing of powers can mean here that the social partners defend the interests and views of their respective members, while the representatives of the public authorities (or independent experts, who are sometimes appointed) give their opinions, and the outcome produces the best mix. Also relevant is how the schemes are funded: if the costs of the scheme are, to a large extent, paid by contributions, the claim that contribution payers have to be represented in the body that administers the benefits is more easily made.

The administration of first pillar schemes by non-public actors has advantages and disadvantages; empirical data are very scarce on this. These are not so easy to obtain, since one cannot have two identical states, one with social partners involved, and others without. After all, in one and the same state public funds and rules are so closely linked to non-public actors, that it is difficult to determine the causes of problems and inefficiencies.

Also, in the previous chapters no decisive information on the effects of counterbalancing the interests was found.

An advantage of involvement of the social partners is that at the micro level of actual paying benefits, they can give information on what happens in the branch concerned (the usual work conditions, what work is suitable for a jobseeker in a particular situation, how the benefit interacts with actual working conditions, etc.). This information can indeed be useful, although qualified public employees should also have access to this information.

However, there is also the risk that they bend the benefit rules in order to respond to the needs of the labour market or of benefit claimants ('it is our money'). Such deviation from public rules makes supervision by public bodies more difficult. In the Netherlands this came to the surface, but it can also happen elsewhere. The German experiences with the Federal Employment Agency are an example; and in France, where in the first period of the unemployment insurance, the grounds for dismissal of a worker were not investigated, the fund was also seen as 'our money'. In both the Netherlands and Germany, social partners have been removed from the operational business (task (d)), although in Germany they are still on the supervisory boards of the Federal Agency.

Of course, it can also be a deliberate choice of the legislature not to make (many) rules on the type of benefit concerned. In that case, bending the rules does not so easily become a problem. Still, when public money has to be paid to a fund because of its deficits, or when public objectives such as reintegration are to be imposed, or when inequalities become an issue, not strictly following the rules set by the legislature becomes problematic.

Supervision of the schemes (e) or participation in advisory bodies are alternatives to actual administration where providing information on work situations and relationships with the labour market is concerned. In [B], the protection of the funds will be discussed, which could also be relevant.

[4] *Participation of Social Partners and Democracy*

If benefit schemes are paid partly or wholly from public funds, the issue of balancing powers also has problematic aspects, since other groups in society may also want to put their own views and interests in the balance. Whether groups that benefit from a scheme but do not contribute to this should have a say in the governance of a scheme has to be founded on an argument other than that for representatives of contribution payers. This argument can be based on a concept of democracy, i.e., those affected by a scheme should have a say in it. However, whether such a representation by interested parties takes sufficient account of all persons and public interests is another issue.

Involving social partners in the administration may thus be – rightly or not – based on a democracy argument, but there may also be arguments that democracy is affected, since the system may become less transparent. At the level of administration

this may be the case since employees of the fund and their managers carry out the actual administration, whereas the social partners, although responsible, are not involved on a day-to-day basis (since they do not have the time for this). These organizations can use the social partners as a buffer against influence by public authorities, and can develop their own practices and policies. In the German chapter it was mentioned that it may be difficult for representatives of the social partners to manage large organizations in addition to their regular work. Enforcing professional management can then mean that the managers are, on the one hand not controlled by the self-governing body, and on the other hand, not controlled by the public bodies.

It can also work the other way around, in that public authorities and parliament use the social partners as a scapegoat when things go wrong, by which the real cause of the problem remains unclear. This was mentioned in the German chapter, and in fact it occurred in the Dutch situation, where social partners were removed from the benefit administration, whereas their disputed practices were earlier supported by public authorities.

At a macro level, keeping the state at a distance by involving social partners in the administration of schemes can make the whole decision process less transparent, as was seen in the Finnish chapter in particular. In Finland, Parliament seems to function merely as a rubber stamp to proposals made by the social partners. Other authors are less explicit on this effect, but sometimes hint at this phenomenon as well. Forms of modernization, such as extending the system to new categories, involving other interests groups and introducing more activation may sometimes be more difficult with the social partners occupying a strong position. On the other hand, the involvement of social partners can also create support for retrenchment in social security, for instance, the Dutch Disability Benefit Act, where social partners were involved in official advisory bodies to the government – support without which the change may not have been possible.

Related to the transparency issue is also that social partners may have interests other than solely those of the social security system. One is that their funds make it more interesting for persons to become members of a union, or in any case that by joining the fund, workers receive more attractive benefits, which gives the unions a better image and promotes the unionization rate. Indeed, in the Nordic countries the unionization level is much higher than in countries without union funds.

Second, sometimes, social partners have ‘business’ interests in the administration of the scheme, since they may offer services to the ‘clients’ of the benefit scheme for remuneration. This was mentioned in the German chapter, which describes how, before the reforms, employment schemes were often organized by enterprises that were part of employers’ organizations or trade unions. This is not necessarily the case, but public regulation is necessary to define the precise role of the participants. In Germany the market has been opened to private companies by procurement procedures.

[B] Involving the Social Partners in Order to Protect the Fund against Expenses for Other Aims

One argument asserted is that administration by social partners has to prevent contribution money from being used for activities other than those of the fund to which they were paid. It seems self-evident that social partners have an important say in how the contributions they have paid are spent.

They can also do this by sitting on advisory bodies to the government or parliament, but if they are involved in the administration of funds they can also influence minor issues that are not the core business, e.g., subsidizing research projects or volunteer activities. This can also lead to conservative attitudes, such as not being willing to spend money on activation or reintegration measures, even though this would reduce expenditure on the long run.

[C] To Exert Influence on Policy Decisions and Participation of the Insured

Another argument is that the administration by social partners and their members makes them feel closer to the system and thus more responsible. This line of argument fits well with the concept of citizenship and democracy. This argument was already hinted at in [A], but there it concerned participation by organizations. Now, the issue of participation by individuals is relevant.

Such influence can take place in elections to the boards of representatives. However, as was discussed in the country chapters, although in Germany all insured persons have the right to vote, they do not have much choice in terms of candidates, since there are only lists of the employers' and employees' organizations. In France, they no longer keep up appearances and have not held elections since the first time they took place. If the members do have any influence, it is only trade union members within their own organizations.

Article 129.1 of the Spanish Constitution states that 'the law shall establish the forms of participation of the persons concerned in Social Security and in the activities of those public bodies whose operation directly affects quality of life or general welfare'. However, to date, at the social security institutional level, this participation has been limited to the presence of representatives of trade unions and social partners in several bodies of the public managing entities.

In [A] the collective representation by social partners was discussed, and the Finnish situation was discussed, where Parliament follows the decisions of the social partners closely. Thus, voting for a particular political party will not particularly influence these social security issues, and non-union members are thus deprived of having influence in practice. We have to keep in mind, though, that this is the effect of the choice of the political parties concerned, and does not necessarily follow from the system.

[D] Non-public Actors Other than Social Partners: Linking Better Decisions and Costs

In several countries employers have been responsible for a certain period of sick pay. The idea is that if they have to bear the financial costs of a particular contingency like sick pay, they are more likely to do their best to reduce these costs, for instance, by assessing an employee who reported being ill more thoroughly. This argument has now been followed in several countries (the UK, Spain, the Netherlands, the Czech Republic). This employer's obligation was also introduced in Germany in the early 1960s, and in Sweden, although for somewhat different reasons. There is not so much information on the effects of these measures.

However, from the Dutch experience it appears that the mere obligation to pay wages to sick employees was not sufficient to really improve reintegration efforts by employers. After all, private insurance could still cover the costs for the employer, and, if only economic arguments applied, it was sometimes cheaper to wait until the end of the sickness period than to undertake expensive reintegration activities. Therefore, additional obligations in respect of reintegration were made. This approach seems to be successful in reducing absence due to sickness and reinforcing the responsibility for a real integration into suitable, adjusted work.

Responsibility, or, in economic terms, the introduction of incentives to influence behaviour, may also have negative effects, such as not recruiting employees who have a history of illness and the dismissal of ill employees. Labour law can give protection against this, but practice is sometimes stronger than the law.

[E] The Efficiency Argument

In respect of the involvement of private enterprises including insurance companies, often the efficiency argument is voiced. It is not clear how valid this argument is. Some chapters in this book refer to experiences with private companies offering to place unemployed persons in work, where the results were not better than those of the public bodies. This does not, however, provide us with information on the functioning of private actors in all relevant areas of social security. Moreover, the placement of the 'target groups' (the long term unemployed, the disabled, migrants etc.) is very difficult, so this need not be representative for all activities. However, it is indeed possible that without clear targets, without good supervision, or if the available budget is low, private enterprises merely cherry pick, driven by quick profit and resulting in negative effects.

Private insurance is another issue. If private insurance companies are given the choice, they tend to be selective in admitting insured persons. Once, however, persons are admitted, policy will vary. In some situations they may grant claims quite easily, since it is a way of keeping clients and also more efficient than investigating cases very thoroughly. They may, of course, also be very restrictive. In any case, such approaches do not sit well with public rules, where selection on application is not permitted, but where benefits should be paid only when all the rules are satisfied. In the Netherlands,

private insurance companies in health care are now threatened – after several reports of excessive hospital bills – with a public fine if they pay excessively costly invoices.

[F] To Make Union Membership More Attractive

Unions can be given the task of administering a scheme in order to make membership of the union more attractive. This can also be in the public interest, since by having strong unions, social partners can organize the labour market themselves, and can have collective labour agreements without the need to extend or enforce them through public authorities. Involvement in the administration will not be sufficient for this, since free riders then still have the same advantages. Specific, higher benefits for trade union members are more helpful. In the present situation, such a distinction is no longer made. An example is provided in the Swedish case, where before 1998, union membership was necessary in order to become eligible for unemployment benefits.

[G] Introducing Greater Choice

Another argument could be that involving non-public actors next to public bodies is attractive, as it gives more choice to the insured (or sometimes their employers). Creating such choice fits with the idea that a one-size-fits-all approach does not always provide the best results, and also because variety in society can be great.

Choice can also lead to competition, and this can also lead to better client orientation and improved client friendliness. In Spain the mutual companies have a good reputation because they seem to be less bureaucratic than the public system and more client friendly, which explains the employers' enthusiasm for them, although empirical evidence seems to be missing. In the long term this could influence the public organizations as well.

§12.04 THE RELATIONSHIP BETWEEN THE INVOLVEMENT OF NON-PUBLIC ACTORS AND THE INSURED OR COVERED PERSONS

Involving non-public actors in social security can have various effects. First of all, it has to be mentioned that some effects cannot be measured, in any case not on the basis of our research. These are, *inter alia*, that social partners prevent or hinder retrenchments or changes in the system. It can also be that they foster the support of the insured persons and of employers for the system and its related costs. This can, from the point of view of the insured, be seen as a positive influence. It can also be noted that in several situations the insured do not notice the effect of the regulation or administration by social partners. This was, for instance, noted in the French chapter, which states that the nature of the scheme does not have specific effects on the legal position of the beneficiaries (any more), in comparison to the situation when the scheme would have been defined by an Act. However, the regular negotiation on the national agreement means that financial issues and new developments, including activation,

can be flexibly inserted into the agreement. Finally, it must be noted that effects do not have to follow automatically from the absence or presence of social partners. The legislature can often make other choices.

However, here the discussion will concentrate on effects that differentiate between groups in society.

One element is the difference between the groups they represent and others. Such differences can be found at various levels. On a macro level, the situation in Finland shows a clear effect, in that social partners have important political influence: they can block the rise in the basic unemployment benefit if the earnings-related part is not increased as well. This may mean that, because of the ensuing costs, the basic benefit is not increased, which affects those on lower incomes and those yet to begin their careers, or the unemployed, more than employees in work.

A second effect might be that only union members receive a benefit, as was the case with unemployment benefit funds. An effect of the involvement of social partners in the Swedish system is that the earnings-related unemployment benefit, though part of the first pillar, is voluntary. This is not a necessary effect of the involvement of the unions, although it follows from the objective to make union membership attractive.

An effect of the involvement of non-public partners may also be that there is greater choice in terms of service providers. Although more choice fits well with the trend of individualization, it also creates differences between the insured, and this may be problematic in a mandatory scheme. After all, this is based on solidarity, which suggests control of the redistribution of income, and these differences are not (fully) controlled

Another type of effect, but of a different nature, is that in several countries retrenchments in first pillar old-age pensions have led to an increase in the number of second and third pillar schemes. As a result, the differences between groups of the population are growing, depending, *inter alia*, on the employer, personal income, or the possibility of buying private insurance.

This may also mean that rehabilitation and health care services are different, depending on whether one is employed and where one is employed. For instance, in Finland it is remarked that the need for rehabilitation of persons relying on basic income is often recognized at a later stage, that their rehabilitation is occasional and fragmentary in nature, and that the occupational health care system provides a more speedy and comprehensive service than the municipal system.

In Finland the state is left in charge of the management of the basic benefit system, whereas the social partners are in charge of different earnings-related schemes. As a consequence, benefits that once were based on the idea universal social insurance have become tax-funded targeted benefits for the poor. Social partners have undoubtedly played an important role in this development.

§12.05 CONCLUSIONS

[A] The Relevance of Involving the Second and Third Pillars in the Overview of the System

Although the involvement of social partners and other non-public actors is largely path dependent, it is only a dependency, and deviations from the path have occurred, as we have seen. These variations and developments offer an interesting perspective on social security as a system for distributing responsibilities.

As was discussed in the chapter on the United States, in this country it is considered that only within the first pillar is it possible to organize a form of solidarity, and this is impossible in other forms of social security organization in the US. Allowing non-public partners into the first pillar may, in this view, distort solidarity. We have seen in the chapters of this book that this is not necessarily the case, and that various forms of involvement by non-public actors are possible.

Second, we have also seen that the relationships between the pillars may vary, and keep changing. For instance, solidarity is growing, at least to some extent, in the second pillar in some countries, since employers and/or individuals are obliged to establish a scheme or to buy insurance, or employers are obliged to negotiate on this. This seems to occur in the area of health care in particular.

[B] Increasing Obligations to Organize Second and Third Pillar Schemes

Thus retrenchment of first pillar schemes is not the end of the story, since second pillar and third pillar schemes may compensate for cuts in the first pillar. Moreover, some states do not only reduce first pillar schemes, but also take responsibility for protecting persons in the second or third pillars, by obliging and/or promoting such arrangements. In fact, the difference between obliging all residents to buy private health care insurance that is statutorily defined (the Netherlands) and the obligation for all who are not covered by the statutory scheme to buy private insurance that is subject to detailed statutory rules (Germany) is not so big from a policy point of view, although there may be important legal differences. Indeed, other country reports also indicate that administrative law has become important in second and third pillar schemes.¹¹ Sometimes such schemes are importantly subsidized by the state.

[C] The Place of the Non-public Partners in the System

In the previous sections we have also seen that from the point of view of transparency and democracy, the relationship between the social partners and parliament, the

11. And where non-public partners are involved in the first pillar, administrative law is also applicable (e.g., the pension funds in Sweden or Germany). An exception applies for sick pay paid by employers, which is subject to labour law.

influence of the insured on the composition of boards of funds and their decision-making, and the choice of other interest groups are issues that are sometimes problematic in the involvement of non-public partners in first pillar schemes.

Therefore a first question to be addressed is at what level should involvement of non-public partners take place: in (b) determining the contents of the scheme, in (d) decision-making, in (e) supervision, or outside the administration of the scheme, in general advisory committees? Involvement in supervision and/or general advisory committees can solve some of the problems mentioned *supra*, including a lack of transparency, the choice of other interest groups, the broken promises of democracy, and better control by public bodies.

The involvement of other non-public actors in the first pillar is currently mainly restricted to employers having to pay sick pay. In order to avoid negative effects on employees, a strict regulation is necessary. The same is true for the involvement of private insurance companies in the first pillar if this is imposed or promoted by public authorities; strict regulation is also necessary here.

In fact, we have seen that the more non-public actors are allowed in the first pillar, the more public the overall administration has to be, since otherwise the distortion of competition, inefficient use of money (cherry picking), a lack of legal certainty and unequal treatment are serious dangers.

An alternative is to give non-public actors an exclusive role in the second and third pillars, which means that those who decide are also those who bear the costs of the decisions. State responsibility can then be realized in making rules, including rules on legal protection, access for all, minimum provisions etc.

Of course, by transferring schemes from the first to the other pillars, public expenditure may be reduced. However, if first pillar schemes paid by contributions are transferred to the second pillar, the financial effects are more diverse. Employers may contribute less to the general scheme (which also affects, by the way, non-employees still in that scheme), and as a result the first pillar becomes more expensive for the public finances. On the other hand, second and third pillar schemes may be subsidized by public means (e.g., by means of deducting contributions from taxes).

[D] A Framework for Assessing the Distribution of Tasks over the Pillars

As a starting point for an analytical framework for distributing tasks, the concepts mentioned in the German chapter are taken, i.e., those of internalizing and externalizing solidarity (see §2.05[B]). In the internalizing approach, the risk is addressed in the relevant community itself, and in the externalizing approach the state has to tackle solidarity. However, in view of the developments described in the previous sections, these concepts seem to have become somewhat outdated, although they are useful as starting point.

Currently, the organization of solidarity, in any case, of social security, has become less dichotomized between internalized and externalized solidarity. Indeed,

there are still forms of solidarity (in the form of social security schemes, plans, provisions, etc.) that are entirely outside the public scope.

However, we have seen that in some countries non-public actors – in particular social partners – play a considerable role in the first pillar, while the costs are born for the major part by the state.

In addition, there is a tendency in several countries to publify private schemes, by which the state requires private partners to negotiate on establishing schemes, or to give access to all persons in a particular area without selection, and in which the state determines the contents and costs, and subjects the scheme to legal protection (sometimes even of (partly) administrative law).¹²

In order to assess this, it is useful to refer to the tasks mentioned earlier, i.e., the distinction between: (a) who pays for the scheme, (b) who determines the contents, (c) who decides to whom the scheme applies, (d) who takes individual decisions on benefits, and (e) who supervises them.

If the answer to all five elements is the state, then it is clear that non-public actors are not involved in the first pillar.

If a scheme belongs to the first pillar and benefits are paid from contributions (a), this is often a reason for involving non-public actors in the first pillar, even if public contributions to the funds are large. In such situations, public authorities are responsible in most cases for (b) the contents, (c) the personal scope, and (e) supervision, although there can also be hybrid forms, in which the benefit administration, governed by social partners, makes additional rules, and social partners participate in supervision.

Taking the individual decisions (d) is a problematic element: can such an essential task be performed by other actors than public authorities? In previous chapters we found references to such issues, for example, as who decides on sanctions if a person refuses a job, or who decides whether a person is disabled or ill. In addition, taking individual decisions can also be problematic from the point of view of the state, since the application of the rules can be more generous, or less scrupulous or different to what was originally intended (e.g., for other purposes, or not taking all desired objectives into account). So (d) is a problematic issue, and we have seen that indeed in several countries this has become an entirely public task. Paying for the scheme, and, often in cooperation with others, remains. Paying contributions, and having no influence on the scheme may not be so satisfactory.

If benefits are organized in the second or third pillar, bringing these pillars within the public sphere means that (b) the contents, (c) personal scope, and (e) supervision are regulated by public rules, although whether and how this happens can, of course, vary considerably. The tasks of (a) financing and (d) decision-making can then be left to the non-public partners. This gives the advantage of creating greater choice for the individuals and more room for defining the rules for the actors.

12. Even in the US, the Patient Protection and Affordable Care Act (PPACA) – ObamaCare – will require larger employers to offer health care plans to their employees, and thus will require them to offer second pillar schemes. Thus, depending on how these are to be regulated by statutory law, these come closer to first pillar schemes.

The advantage for the state is now that those who make the decisions also feel the financial consequences. If they are more generous than justified from a public social security scheme point of view, this is less of a problem for the state (it still is, in so far as public contributions or tax breaks are involved). The choice of the various interest groups involved in management and supervision is also then a responsibility that can be left to the organizations concerned. Thus, this division of limiting purely public tasks to the private sector and giving the non-public sectors a place in the second or third pillars can be compared in terms of the distribution of tasks, and the effects of this distribution.

The description of tasks also highlights the weak points, and those that may need public regulation, as a way of improving. One type of negative effect relates to the way in which the personal scope is defined (c). In some countries everybody who is not covered by a public scheme has to join. However, if there is choice for the individuals, or if it depends on the choice of the employer or membership of unions, the differences between groups in society will grow. The other type depends on the impact on individual situations if non-public actors take a decision (d). The effects can be reduced by organizing (good quality and easily accessible) legal protection. Furthermore, if there is choice between providers, this can also influence client friendliness. Supervision of the implementation of a scheme is also an important issue (e). In some countries we have seen that public law defines the contents (b) of the scheme.

In describing these variants, one size is certainly not recommended for all countries – on the contrary. Moreover, there is a large variation in the degree to which the developments described (in particular, publication) take place, and in some countries these may not have occurred yet. Nor is this section a plea for enlarging the second and/or third pillars. It only seeks to demonstrate the possible variations and ways to approach issues that have highlighted problems in a different way. It also tries to systematize different aspects of the involvement of non-public actors and discuss how these could fit in the various pillars.

Thus, a system like the US one, with a purely public first pillar, can be well explained by the consistency of having all five tasks in one hand. Also, the ‘weak’ elements of the second and third pillars become clear, where little public involvement has taken place, and thus little protection is provided.

In systems where the tasks in the first pillar are shared by non-public partners and public actors, there may be a lack of transparency and/or less strict application of the rules. In the case of involving actors that both (a) pay and (d) make the decisions, such effects are smaller, but it is still important to make sure the supervision, personal scope and the contents of the scheme are well protected by public provisions.

The study of the distribution of tasks over the respective pillars thus clearly shows the choices countries can make in organizing their systems and realizing the objectives, which problems occur in relation to a particular distribution, and the alternatives to the present situation.

