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Public interests of social security

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Abstract

The line between public and private social security changes over the years. In the Dutch social security system we see an increasing influence of private arrangements. Sometimes this is caused by a reconsideration of the public and private *responsibilities*. For example, changes in the Sickness Benefits Act and the Work and Income Act created a system in which the employer is responsible for both sickness and partial disablement of his employees. In this system it is expected that the employer will take out insurance for these risks with a private insurance company. The public responsibility is limited to the situation in which the employer is unable to fulfil his obligations, for example in case of bankruptcy and to the situation in which the employee is unfit for work for at least 35%. Other shifts in the relationship between public and private social security have to do with the use of *private instruments*. Regarding to the job placement of unemployed or disabled persons the public job service has been replaced by private providers who offer to coach and support these persons on a commercial base.

These changes in the balance between public and private social security lead to the central question we want to answer in our paper: to what extent is a privatisation of public social security possible? What is the inviolable public responsibility that needs governments' interference? The answer to this question lies in the existence of the public values. Often this public values will be safeguarded in public regulation. Nevertheless alternative policy instruments are conceivable as well.

To find out what these public values of social security are we will first explore to what extent (international) norms laid down in human rights leave room for a private social security system. The national constitution and international treaties, such as the European Social Charter and the treaties of the International Labour Organization, demand a certain public responsibility for the social security system. The first part of

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the paper will present these legal boundaries. These boundaries can be considered as the 'core' public values of the social security system.

As the changes in the Dutch social security system show, it might be possible to introduce private arrangements within these boundaries. The use of these private arrangements aims to certain goals. Often these goals are related to an increasing efficiency or effectiveness. We will not examine or question the achievement of these policy goals. Nevertheless, it is predictable that the use of private arrangements also has several consequences. From a perspective of legal economics we can predict certain failures of a private system. For example, a market situation might lead to adverse selection or cherry picking. As a result employers will not be able to take out insurance for the risks he carries. These consequences can be judged from a normative perspective: some failures might lead to a violation of other principles, such as the principle of solidarity or the principle of legal certainty.

Besides the consequences from a legal economics point of view, the use of private arrangements in social security has several consequences with regard to the applicable law. For example, the shift from a mainly public system to a hybrid system with the use of private contracts, might lead to questions with regard to the legal protection. The person entitled to social assistance has to sign a contract with agreements about the reintegration-services provided with both the administrative body and the (private) job service. Another example of diffuse legal protection is the employee who applies for an invalidity benefit that will be rejected by the administrative body because the employers' efforts to reintegrate the employee are considered insufficient. In this situation the employee has to lodge an administrative appeal against the administrative body. At the same time the employer might lodge an appeal against the decision of the public body with the obligation of continued payment after the statutory period of two years. And in case the employer doesn't comply with this obligation, the employee might have to bring an action against his employer to recover back wages.

Besides these juridical consequences in national law, the use of private arrangements might also have consequences from a European perspective. In a more private social security the importance of both competition law and the directives with regard to the quality of services might increase. For the question to what extent European law might interfere in the private social security, it is important to establish the 'services of general interests'.

The elaboration of the consequences of a more private social security system indicates the public values involved. With the summary of these public values it becomes clear to what extent privatisation of social security is possible.