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INTERNATIONAL SOCIAL SECURITY STANDARDS
IN THE EUROPEAN UNION

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INTERNATIONAL SOCIAL SECURITY STANDARDS IN THE EUROPEAN UNION

The Cases of the Czech Republic and Estonia

Albertine Anje Dijkhoff

Proefschrift
ter verkrijging van de graad van doctor aan de Universiteit van Tilburg,
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prof. dr. F.J.L. Pennings

Overige leden
prof. dr. F.H.R. Hendrickx
prof. dr. ing. W.J.H. van Oorschot
prof. dr. G. Katrougalos
prof. dr. S. Klosse
prof. dr. G.J. Vonk
dr. G. Tavits

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Can it be done? Why not?
Treaties have been concluded between one country and another
by which they have bound themselves to kill men;
why should they not be concluded today for the purpose of
preserving men's lives and making them happier?

J. Blanqui, Cours d'économie industrielle, 1838–1839,
cited by E. Mahaim 1934, p. 4.

PREFACE

As a child, I had the ambition to become a missionary worker. Saving the poor and ignorant, not so much from going to hell, but first and foremost from their miserable lives on earth by bringing them food, medical care and education, seemed to me the only reasonable thing to do. During my early teens, I set myself the less ambitious goal of becoming a vet´s assistant (nobody told me that I could become the vet as well…). Saving animals seemed good enough at the time. Growing up, my romantic ideas about the mission and the vet proved to be wrong, and I took another course. Yet, looking at the theme of my research, I have to acknowledge that remnants of the initial inner urge to save the worse-off are still there – a clear case of path dependency. Having left behind romantic views, pretensions and religious morality, the old ideal of social justice for all still remains. It was this ideal, in the end, that inspired me to take up the subject of international standards embodying the human right to social security.

This book will not save lives, nor will it bring much social justice to the many millions who are deprived of any form of social security. What it may do, however, is raise awareness in our rich Western welfare states of the fact that social justice is not a matter of course. On the contrary, our social welfare systems need to be carefully watched and preserved; all the more so in light of the recent economic recession, to which the Member States of the European Union have mainly responded by cutting social security budgets. How far can they go? To what extent is our social welfare guaranteed? It is precisely at this point that the international social security standards are at stake.

A PhD thesis is supposed to prove that the PhD candidate has research skills. To me, it rather seems to prove that the candidate has perseverance. Nevertheless, writing this thesis was not only a struggle; it was also a great challenge and an exciting new experience. I especially enjoyed working in the Czech Republic, Estonia and Canada, and I am very happy that I was given the opportunity to do so. Having completed the research, I would like to thank everyone who supported me one way or another. In this preface, I shall be able to mention only a significant few.

First, my thanks go to my supervisor, Frans Pennings, for his approachability and generosity, his steady support, and his natural focus on the leitmotiv. He helped me cross the finishing line, while giving me lots of space during the whole

research process. My colleagues at the Department of Social Law and Social Policy in Tilburg provided me with a comfortable academic environment that was conducive to thorough research. I have very warm feelings for Barbara Hofman, Maria Korda and Saskia Montebovi, with whom I shared the sweet and the bitter of doing a PhD, and much more. It was great working (and walking!) with them. And, of course, I am grateful to Kees Boos, who was always prepared to correct and improve my drafts, to give practical advice, and, last but not least, to put things into perspective.

I would like to thank Wim van Oorschot, Paul Schoukens, and Gijs Vonk, for their valuable comments on the different drafts of my thesis; I highly appreciated their willingness to think along with me during the different stages of the study. I would also like to thank all the members of the PhD committee for spending their time and energy on my work. Among them, Frank Hendrickx holds a special place, since he drew my attention to this PhD position when I obtained my Master's degree under his supervision. I am very grateful to Stichting Instituut Gak for financing the research project in such a generous way, and for providing a large research network covering different scientific disciplines.

It would not have been possible to write the chapters about the Czech Republic and Estonia without the help of national experts. I had informative and inspiring meetings with, among others, civil servants, representatives of trade unions and employers organisations, with academics, judges, and members of parliament. I thank them all for sharing their knowledge and opinions with me. I would especially like to thank Kateřina Machová, Kristina Koldinská, and Gaabriel Tavits, for carefully reading and correcting the country chapters and giving me helpful suggestions. I thank Jonatan Tomeš for his quick translations of both Czech and Estonian texts, and for kindly letting me use his office in Prague. Thanks, also, to Fiona McGrath for her great editing work; an endless and extremely tedious job it seems to me, but she did it without even one complaint.

This is also a good opportunity to thank my parents for their continuing support throughout my life. My father did not live to see me receive my PhD – I wrote this preface at his sickbed – but he was proud to know that I would make it. As always, Margreet, my sweet sister and best friend, and Tomáš surrounded me with their humour and concern. Finally, my thanks go to Collin for simply being there and for reminding me that there is more to life. He helped me take my mind off the big issue of social justice for all by organising great trips and unexpectedly taking me to concerts and movies. I hope he will carry on doing so after 14 September 2011!

Tineke Dijkhoff
June 2011

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LIST OF ABBREVIATIONS

APPLIS	Database on the application of international labour standards, available on the ILO website
C102	ILO Social Security (Minimum Standards) Convention, 1952
C121	ILO Employment Injury Benefits Convention, 1964
C128	ILO Invalidity, Old-Age and Survivors' Benefits Convention, 1967
C130	ILO Medical Care and Sickness Benefits Convention, 1969
C168	ILO Employment Promotion and Protection against Unemployment Convention, 1988
C183	ILO Maternity Protection Convention, 2000
CCR	Constitution of the Czech Republic
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CEE	Central and Eastern European
CESCR	UN Committee on Economic, Social and Cultual Rights
CFA	ILO Committee of Freedom of Association
CM/ResCSS	Resolution on the application of the European Code of Social Security by the Committee of Ministers of the Council of Europe
CoE	Council of Europe
Coll.	Body of Laws of the Czech Republic
Committee of Ministers	Committee of Ministers of the Council of Europe
CSSA	Czech Social Security Administration
Cz	Czech Republic
CZK	Czech Koruna
EAKL	Estonian Trade Union Confederation
EC	European Commission
ECHR	European Court of Human Rights
ECSS	European Code of Social Security
Ee	Estonia
EEK	Estonian Kroon
EHIF	Estonian Health Insurance Fund

EIROnline	European Industrial Relations Observatory On-line
ENSIB	Estonian National Social Insurance Board
ESC	European Social Charter
EU	European Union
Eurofound	European Foundation for the Improvement of Living and Working Conditions
Eurostat	Statistical office of the European Union
ILC	International Labour Conference
ILO	International Labour Organisation
IMF	International Monetary Fund
IOLEX	Database of International Labour Standards, available on the ILO website
MISSOC	Database of the European Commission, Comparative Tables on Social Protection
OECD	Organisation for Economic Cooperation and Development
Office	International Labour Office, Office of the International Labour Organisation
Pl. Ús	Judgment of the Constitutional Court of the Czech Republic
UN GA res.	Resolution of the General Assembly of the United Nations
UN GA	General Assembly of the United Nations
UN	United Nations
WB	World Bank
WHO	World Health Organisation

PART I
PRELIMINARIES

This part contains the introduction to the research.

First, the human right to social security will be introduced, and it will be shown that Convention No. 102 on Minimum Standards of Social Security (1952) gives legal substance to this universal right.

Then, the research question will be presented and explained, and methodical issues will be discussed.

Finally, the structure of the book will be outlined.

CHAPTER 1
INTRODUCTION

1.1 SOCIAL SECURITY: A GOOD OF GLOBAL CONCERN

1.1.1 SOCIAL SECURITY AS A HUMAN RIGHT

The Universal Declaration of Human Rights, adopted in 1948, proclaims that 'Everyone, as a member of society, has the right to social security.'[1] Mindful of the horrors of war, the recognition of social security as a fundamental right was based on the belief that universal and lasting peace can be established only if it is based upon social justice.[2] Although the acknowledgment of social security as a human right was a milestone in the development of social rights, the substance of the right remained undefined. Moreover, the Declaration expressed a mere intention of the General Assembly of the United Nations, rather than providing a legal right. In 1966, the legal value of the human right to social security was strengthened through its incorporation into the International Covenant on Economic, Social and Cultural Rights.[3] This treaty created legal obligations for the Member States and made them subject to a supervisory procedure. At the same time, the content of the right was still indefinite as its wording remained almost unchanged to that of the Universal Declaration: 'the right of everyone to social security, including social insurance.' Moreover, in contrast to civil rights, social rights were generally considered as objectives rather than enforceable rights.[4] Gradually, however, the idea took root that all human rights are a universal, indivisible and interdependent body of rights, and that 'a comprehensive approach to the promotion and protection of human rights ensures that people are treated as full persons and that they may enjoy simultaneously all rights and freedoms, and social justice.'[5] The time was ripe for a formal recognition of what the human right to social security entails. To this

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1 Universal Declaration of Human Rights, UN GA res. 217A (III), 1948, Art. 22.

2 Preamble to the Constitution of the International Labour Organisation, 1944; Declaration of Philadelphia, Art. II.

3 UN GA res. 2200A (XXI), 1966, Art. 9.

4 Betten 1996, pp. 14–17; Hare 2002, p. 154. Hare recalls in this respect that 'social rights have undoubtedly been the poor cousins of the rights movement since its inception.'

5 United Nations 2005, p. vii.

end, the United Nations' Economic and Social Council drew up a General Comment on the right to social security, which was adopted in 2007.[6] As a basis for its interpretation, the Council's main sources included the social security conventions of the International Labour Organization (ILO).

1.1.2 THE CREATION OF INTERNATIONAL SOCIAL SECURITY STANDARDS

After World War II, the ILO was incorporated into the United Nations as a specialised agency for the social agenda.[7] In response to the Universal Declaration of Human Rights, it took on the assignment of developing the right to social security and giving it legal substance by drawing up a new convention on this subject. In 1952, the Social Security (Minimum Standards) Convention (No. 102) was adopted, defining nine contingencies to be covered by nine corresponding branches of social security. This new comprehensive instrument was designed to promote social security for all by fulfilling several purposes:[8]

> It would give definite form to these new trends and a definite meaning to the concept of social security. It would serve as a basis for national and international policy, on the one hand guiding Members in the creation or reconstruction of their social security systems, and on the other hand constituting the framework for a series of revised and new Conventions elaborating the application of general principles to particular branches of social security.

The 'new trends' to be given form in the instrument referred to:[9]

> [A] movement everywhere towards including additional classes of the population, covering a wider range of contingencies, providing benefits more nearly adequate to needs […], loosening the tie between benefit right and contribution payment, and, in general, unifying the finance and administration of branches hitherto separate.

Another important reason for the adoption of international labour standards in general, and of social security standards in particular, was the fear of commercial competition between countries on the basis of labour costs. It was believed that agreements in the field of labour and social security would help prevent international competition from taking place to the disadvantage of workers, and would constitute a kind of code of fair competition between employers and

---

6 CESCR 2008.

7 For reference Works on the International Labour Organisation, see Bartolomei de la Cruz, Potobsky, Swepston 1996; Leary 1982; Osieke 1985; Valticos 1979; Scott 1934; Servais 2005.

8 ILO Report IV (1) 1951, p. 4.

9 ILO Report IV (1) 1951, pp. 3–4.

between countries.[10] Thus, the following objectives of international social security standards can be listed:[11]

- promotion of the right to social security for everyone, through
- defining the right to social security,
- guiding nations in the creation or reconstruction of their social security systems,
- providing a basis for higher standards, and
- preventing (international) commercial competition on the account of workers.

Although initially ILO Convention 102 did not yield many ratifications,[12] it did serve its purposes in the sense that it provided a clear description of the content of social security, and indeed it has been taken as a basis for subsequent conventions that set out higher standards for specific risks. As well as the ILO, the Council of Europe has also developed higher standards on the basis of ILO Convention 102, specifically for the European region. Furthermore, it has been established that the Convention has played an important role in the development of welfare states all over the world, thus contributing to a level playing field in terms of labour costs.[13]

1.1.3 THE RIGHT TO SOCIAL SECURITY IN THE EUROPEAN UNION

Within the context of the European Union (EU), the right to social security has a poor history. In the Treaty of Rome, which forms the legal basis of the European Community, social policy was left within the exclusive competence of the Member States. It was not deemed necessary to provide for a harmonised level of social protection in the Community, because it was thought that economic growth and the optimum allocation of resources would automatically entail social progress and therefore a common market would not hamper the further improvement of workers' living standards.[14] This optimistic approach has

[10] Higgins 2002, p. 56; Bartolomei de la Cruz, Von Potobsky, Swepston 1996, pp. 25–26.

[11] These objectives have been confirmed repeatedly and recently, for instance, see Bartolomei de la Cruz, Von Potobsky, Swepston 1996, pp. 24–26; Kulke 2007; ILO 2001; Kulke & López Morales 2007, pp. 91–92.

[12] In 1960 it had been ratified by only 7 countries. This has been attributed, among other things, to the fear that by ratifying a convention, a State will be handicapped unless its main competitors ratify it too (see Valticos 1996, p. 408). In 2010, the number of ratifications amounted to 46.

[13] ILO 2008; Kulke, Cichon, Pal 2007; Dijkhoff & Pennings 2007; Kulke & López Morales 2007, pp. 91–97; Pennings 2006A; Valticos 1979.

[14] See, for instance, Shanks 1977; Schutter 2005, pp. 111–112; ILO 1956, p. 54–55.

however been undermined by reality. There is a large – and still growing – disparity in economic performances and living standards between Member States. There are large groups of workers that do not get their share of economic prosperity in the form of social protection, and the deterrent effects of social dumping and social tourism are subject to continuous concern.[15] Although the harmonisation of social security is still not an objective of the European Commission, a framework of minimum regulations or recommendations as a protection against low social standards and unfair economic competition is considered desirable in order to prevent a downward trend of social protection. This issue became all the more urgent in view of the wish of several Central and Eastern European (CEE) countries to enter into the EU in the early 1990s.[16] In an attempt to extend the framework of minimum norms without trespassing on the autonomy of the Member States, in the Treaty of Amsterdam a reference was included to the European Social Charter.[17] The Social Charter requires, among others, compliance with ILO Convention 102.[18] As a consequence, this convention may be considered the desirable minimum level of social security for the EU Member States. It will be shown in the study that this was actively propagated by the European Commission during the pre-accession period of the CEE countries.

It should be kept in mind, however, that the reference to the Social Charter within the *acquis communautair* does not entail any legal obligation for the Member States to actually accept its provisions. Despite academic discussions on the advisability and possibility of accepting the Social Charter at the Community level, for the time being this does not seem a feasible option.[19] Still, the call for a common minimum level of social security holds ground and has become even more pregnant in view of ageing populations and the recent economic recession that has brought about severe cuts in public expenditure, often in the form of a shift of responsibility for social risks from the public to the private sphere. The privatisation of state services accompanied by extensive economic measures inevitably imply an erosion of social security.[20] To prevent an increase in poverty and social exclusion among the more vulnerable groups in society and an intensification of economic competition between Member States on the basis of

15 Schutter 2005, p. 112; Vaughan-Whitehead 2003; Delsen, Van Gestel, Pennings 2000, pp. 10–13; Shanks 1977.

16 Council Recommendation of 27 July 1992 on the convergence of social protection objectives and policies, 92/442/EEC; European Commission 1994, point 19.

17 European Social Charter, Council of Europe, 1961; Apart from this reference to the Social Charter, the European Commission has started to develop recommendations in the field of social policy, a policy that is called the Open Method of Coordination.

18 The Revised Social Charter (1990) requires compliance with the European Code of Social Security, which is almost a copy of ILO Convention 102.

19 Schutter 2005; Witte 1996.

20 Judt 2009; Müller 2007, pp. 65–66; Lamarche 2005, p. 129; Lamarche 2002, p. 96.

labour costs, the establishment of a minimum level of social security seems vital. An attainable way of creating a social security floor within the European Union would be to stimulate ratification, and even more importantly, to stimulate the proper application of ILO Convention 102 or the European Code of Social Security among the EU Member States. Questions have arisen, however, as to the applicability and adequacy of these instruments. Are they still suitable for the promotion of social security in the context of the present day EU, 60 years after their creation?

1.1.4 INTERNATIONAL SOCIAL SECURITY STANDARDS UNDER REVIEW

Drawn up after an extensive investigation of the existing social security schemes and objectives in many ILO Member States at the time, Convention 102 reflects the ideas and practices regarding social security of the post-war period. In the framework of the 75th anniversary of the ILO in 1994, the International Labour Conference reaffirmed, among others, that through national solidarity and fair burden sharing, social security contributes to human dignity, equity and social justice. Furthermore, it was agreed in 2001 that the ILO should base its future activities on the concept of decent work and the values laid down in international labour standards on social security, most importantly, Convention 102.[21]

From this perspective, it may be concluded that the social security conventions are still adequately applicable in present day EU Member States, and are thus able to be promoted in the EU context.[22] However, this is only one side of the coin. The conventions are also subject to criticism at various levels. For example, notwithstanding the ILO resolution of 2001, they are argued to be out-of-date, lacking the flexibility needed for adapting social systems to changed economic and societal conditions, not tailored to the post-industrial society, discriminatory, prescribing benefits that are too low for the European context, not contributing to social protection for all, and lacking legal power.[23] It must be said that these points of criticism are generally not well-substantiated, especially those relating to the conventions being outdated, and most often they reflect opinions of (undefined) others than the authors themselves. Several points are also refuted

[21] ILO 2001, pp. v, 26.

[22] This was also concluded during the International Expert Workshop on Right to Social Security in Berlin, 6–7 April 2005: Bierweiler 2007, p. 179.

[23] Langendonck 2009, pp. 217–218; Maydell 1996, p. 188; Pennings & Schulte 2006; Lamarche 2002, p. 95; ILO 2001, p. 22; Nußberger 2007, p. 110; Bierweiler 2007, pp. 179–180; Servais 2005, p. 311; Langendonck 2007, pp. 7–8; Brinkmann 1996, p. 204; ILO 2001C, pp. 10–11; Kulke, Cichon, Pal 2007, pp. 18–28.

again.[24] Nevertheless, the discussion about the (in)applicability of the international social security standards and the different opinions on this matter emphasises the need for in-depth research at this point. This book meets this need by providing a systematic study of the application of the international social security standards and their effect on social security legislation in two EU Member States that have been rethinking and reconstructing their social security systems during the past two decades.[25] Furthermore, with a review of the research results against the background of current trends in social security, the study seeks to contribute to the discussion about the international social security standards and their possible value for the promotion of social security in the EU context.

1.2 EXPLORING THE RESEARCH PROBLEM

1.2.1 AIM OF THE RESEARCH

As mentioned in the previous section, the ILO Conventions have been created with a view to promoting the right to social security for everyone, to give normative substance to this right, to guide nations in the development of their social security systems, to create higher standards, and to prevent an imbalance in markets caused by unequal social costs. As such, these objectives are worth being promoted at the national as well as at the international level. At the same time, it has been shown that the effectiveness of the social security conventions in today's societies is open to doubt, and that the political interest of EU Member States in entering into international obligations in the field of social security is waning. Against the background of this tension, this study addresses the question of whether the objectives of the international social security standards are still valid in the context of the European Union. Do they indeed contribute to the progressive development of social security systems in EU Member States and to the establishment of a common minimum level of social security?

Many related questions can be asked in this respect, such as: Are these standards still applicable at all, 60 years after their creation? Are they still relevant to our developed welfare states, or are the standards so low that their ratification merely has symbolic meaning? Do they, in fact, prevent social dumping? What application problems do countries encounter after ratification? Do the standards constitute enforceable rights? Answers to these questions can be provided on the basis of information about the actual ratification, implementation and application of the international standards in EU Member States. It will be made clear below

24 Pennings & Schulte 2006; ILO 2001C; Maydell & Nußberger 1996; Riedel 2007.
25 The selection of the countries will be discussed in section 1.3.1.

that studies on this subject are scarce. Therefore, this book aims first and foremost to increase knowledge about the effectiveness of social security conventions in contributing to a progressive development of national social security and in establishing a common minimum level of social security in the EU context. The outcomes may help to form an opinion on whether it would be advantageous to emphasise the importance of their ratification and to promote their application within the framework of the European Union.

Ideally, all EU Member States should be included in this study, in any case, all Member States that have not been examined yet in view of this subject. (Un) fortunately, all sorts of practical restraints relating to time and money made such an approach impossible. Choices had to be made that limit the scope of the research to two countries, and that, consequently, limits the main research question.[26]

1.2.2 MAIN RESEARCH QUESTION

The main research question is formulated as follows:

> *Main Research Question:*
>
> (a) What is the effect of international standards on social security legislation in the Czech Republic and Estonia, and what application problems arise?
> (b) What do these problems mean for the effectiveness of the international standards?

The term 'effect' must be read in the sense of 'the result of a particular influence'.[27] In view of the objectives of the international social security standards, the result of their influence should ideally entail:[28]

- promotion of the right to social security for everyone,
- clarity about the substance of this right,
- guidance in the development of the social security systems, and
- the establishment of a level playing field in respect of labour costs.

Therefore, this study seeks to uncover the effect of the standards that is related to these objectives. Following the same line of argument, the term 'effectiveness' must be read in the sense of 'achievement of the intended results'.

26 These choices will be justified in section 1.3.1.
27 In accordance with the Cambridge Advanced Learner's Dictionary.
28 See section 1.1.2.

International social security standards in this study comprise the normative social security instruments of the ILO and the Council of Europe.[29] Social security legislation in the context of the research question is confined to national provisions pertaining to the nine social risks covered by ILO Convention 102.[30]

Situated within the field of social security law, the question implies legal research in two directions. The first part of the question addresses social security legislation at the national level, how the law relates to and is influenced by international standards. The effect of international standards is assessed on the basis of a comparison of national social security law with the international standards. Because law-making is tightly related to politics, the political development relating to the social reforms is briefly outlined, as far as the legal framework of this study allows for it. On the basis of the findings from the country studies, the second part of the research question involves a review of the international social security standards themselves, in terms of whether they are suitable and adequate to meet their objectives in present day European countries.

1.2.3 RELEVANCE OF THE RESEARCH

As mentioned above, the main aim of this study is to contribute to academic knowledge. International social security standards and their application at a national level have not been subject to extensive academic discourse. Most of the existing writings pertaining to these standards find their origin in the ILO itself.[31] Additionally, a few scholars have conducted studies in this field and initiated discussions.[32] Thus, in-depth studies of the application of international social security standards in specific countries are scarce, and the availability of specific information is crucial for a discussion on the value of these standards. Therefore, this study provides new information on different points. First, the thorough analysis of ILO Convention 102 adds to an understanding of the international standards, whose wordings and concepts are often indefinite and complicated. Secondly, a comprehensive overview is given of the social security systems of two countries that are not often subject to internationally oriented research and on whom there is little literature available in English. Finally, and

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29 For a detailed specification, see section 1.3.1.

30 For a detailed specification, see Chapter 2.

31 Some influential documents are: Valticos 1979; Valticos 1996; Bartolomei de la Cruz 1994; Humblet & Silva 2002; Humblet 2002; ILO 2001.

32 Servais 2005; PenningsA 2006; Pennings 2007A; Maydell and Nußberger 1996; Riedel 2007; Langendonck 2007; Jacobs 1992; Nußberger 2005; Korda (forthcoming), dissertation.

above all, the study provides an actual and detailed insight into the application of the standards in two EU Member States and their impact on the development of national social security systems.

The research must be viewed in the context of the European Union. Since it is confined to two country studies, the outcomes cannot be generalised as if they would relate to all EU Member States. Still, during the study certain trends in social security have been detected that are present not only in these two countries, but Europe-wide, and even in a global context. The study shows that both in the Czech Republic and Estonia these observed trends are sometimes problematic in terms of the application of the international standards. Cases in point are the individualisation of social security rights, the rapid development of employment activation policies, severe cuts in public expenditure in response to an ageing population and the latest economic crisis, and a withdrawal of the state from the social security domain through privatisation. Although the outcomes of this study are based on these countries only, they are also relevant for other EU Member States since they focus in on application problems relating to these common trends.

In the end, the information and discussion provided in this book may contribute to the effectiveness of international social security standards in the furtherance of national social security and in the realisation of a common minimum level for social security within the European Union. Furthermore, a critical reflection on the applicability of the international standards in the 21st century may provide an impetus for the improvement of the instruments and further realisation of the human right to social security.

1.3 METHODICAL APPROACH

1.3.1 JUSTIFICATION OF THE CHOICES

Selection of international social security standards

The selection of international standards follows from the subject of the research that involves an assessment of the application of social security standards. The only normative instruments in this field that are relevant for the EU Member States are those of the ILO and the Council of Europe. Since its first conference in 1919, the ILO has adopted 31 conventions on social security, the oldest being Convention No. 3 on Maternity Protection (1919).[33] From 1995 to 2002 a

[33] All conventions are published on the website of the ILO, IOLEX Database of International Labour Standards.

tripartite working group examined all Conventions and Recommendations on their actual relevance. The work resulted in a list of up-to-date instruments, adopted by the ILO Conference in 2001, to be promoted on a priority basis, among which are six social security conventions.[34] These conventions are taken as a basis for this study. They are the following:

- Convention 102 Social Security (Minimum Standards) Convention, 1952 (ILO C102)
- Convention 121 Employment Injury Benefits Convention, 1964 (ILO C121)
- Convention 128 Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (ILO C128)
- Convention 130 Medical Care and Sickness Benefits Convention, 1969 (ILO C130)
- Convention 168 Employment Promotion and Protection against Unemployment Convention, 1988 (ILO C168)
- Convention 183 Maternity Protection Convention, 2000 (ILO C183)

For the European region, the instruments of the Council of Europe are also relevant. The European Code of Social Security is almost a copy of ILO Convention 102, and is supplemented by a protocol that provides higher standards at certain points. In view of the modernisation of many national social security systems, the Revised Code was adopted in 1990. It will come into force when it has been ratified by two states, but to date, it has only been subject to ratification by one state.[35] In this study, the following instruments of the Council of Europe are taken into account:[36]

- European Code of Social Security, 1964 (ECSS)
- Protocol to the European Code of Social Security, 1964
- European Code of Social Security (Revised), 1990

In spite of the fact that it has not (yet) come into force, the Revised Code is included because the study may provide useful information about its applicability in view of possible future ratifications. Apart from these treaties, the European Social Charter also contains concrete normative provisions that relate to social security, most importantly Article 12, which directly refers to ILO Convention 102.[37] However, since these provisions do not add concrete social security standards relating to the nine branches of social security as specified by ILO

[34] Humblet & Silva 2002, p. 4–5.
[35] The Netherlands ratified the European Code of Social Security (Revised) at 22 December 2009.
[36] These instruments are published on the website of the CoE.
[37] The European Social Charter (Revised) makes reference to the European Code of Social Security.

Convention 102, but merely refer to instruments that are already selected for this study, the Charter is not included in the legal comparison. Because ILO Convention 102 is considered the flagship social security convention on which all other instruments are based, this convention constitutes the core of the research. This implies that the branches of social security under review in this study are confined to those covered by Convention 102. Of course, it would be interesting to also examine recognised new risks, such as long-term care and life-long learning in the light of international standards, but they are beyond the boundaries of this research.

There are some other instruments that provide international standards based on ILO Convention 102, notably, the Caribbean Community (CARICOM) Agreement on Social Security and the Southern African Development Community (SADC) Code on Social Security. Because they are instruments for specific regions only – just as the European Code of Social Security is meant for the European region – they are not included in this study. It should be kept in mind conclusively that only normative instruments are subject to this study, which excludes treaties (including EU Regulations and Directives) in the field of co-ordination or equal treatment.

Selection of countries

The research question limits the choice of countries to EU Member States. Since this study aims to add new information to the existing body of knowledge on the role of international social security standards in EU Member States, countries should be selected that have not been subject to examination at this point. In the book *Between Soft and Hard Law*, edited by F. Pennings, the impact of these standards on social security in the United Kingdom, Spain, the Netherlands, Germany, and France has been described.[38] Furthermore, M. Korda has investigated the case of Greece, and B. Hofman has carried out research into specific social security schemes in the Netherlands within the same research project as this dissertation was conducted.[39] These studies provide a rather representative overview of the old EU Member States, but none of the new Member States are included. Therefore, it seemed expedient to choose two states that have recently entered the EU.

The post-socialist countries were thought to be of particular interest because their transition from a totalitarian communist regime to a democratic republic also involved a complete redesign of their social security systems. The fact that this transition took place within the last two decades makes it relatively easy to

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38 Pennings 2007A.

39 Korda (forthcoming), dissertation.

investigate the reform processes and the underlying steering forces, both national as well as international. Out of the category of newly acceded post-socialist Member States, countries were sought that had ratified at least the minimum social security standards (ILO Convention 102 or the European Code).[40] From these countries, countries were selected that differ in terms of historical backgrounds, prevailing political orientations, and geographical positions, assuming that these differences would yield a greater variety of research results. The inclusion of a Baltic state seemed especially interesting because they are seldom subject to qualitative research and thus there is little knowledge about these EU Members. Since Latvia and Lithuania had not ratified the minimum standards, Estonia was selected. Then, the Czech Republic was chosen out of the CEE countries because it was the only country that had ratified, at an early stage, three ILO social security conventions.

It is a common opinion that a proper case study can only be conducted if the researcher knows the language of the country under review in order to be able to read the primary sources and to put the findings in the right perspective. In general, this opinion seems valid. Nevertheless, the fact that the author of this book has mastered neither the Czech nor the Estonian language and still studied these countries can be justified on the following grounds. The subject of the research is international law, which serves as an assessment framework for national social security legislation. Most documents used for the study were primary sources written in English, notably, the reports on the application of the conventions from the governments of the two countries to the supervising bodies of the ILO and the Council of Europe, and the comments or conclusions of these bodies. Important laws were translated in English in view of EU, ILO, and CoE membership. Furthermore, academic publications on this subject mostly contribute to the international discourse and are, therefore, written in English. To find out the impact of the international standards on political decisions and law making, the lack of access to parliamentary discussions and explanations might be considered problematic. However, it must be noted that social security conventions are hardly subject to political debate, and therefore useful references to the impact of these instruments in official documents are also scarce in the local language. At best, an international section is included in explanatory documents to new bills on social security matters containing the remark that the proposed law will be in compliance with international obligations. To be able to discover the effect of the standards at the policy level, in-depth interviews have been held with national experts.[41] These interviews have also been used to verify the observations of the developments of the social security systems during the

[40] At the start of this study, of the eight post-socialist new Member States, the Czech Republic, Estonia, Poland, Slovakia and Slovenia had ratified at least one of these instruments.

[41] For a list of interviewees, see Appendix 2.

research. Furthermore, the descriptions of the national systems have been reviewed by national experts in the last instance.

1.3.2 RESEARCH METHOD

To answer the main research question 'What is the effect of international standards on social security legislation in the Czech Republic and Estonia, what application problems arise, and what do these problems mean for the effectiveness of the international standards?', a range of sub-questions must be answered first. The research is conducted along the line of these sub-questions, involving a description of international and national social security legislation, an assessment of national legislation on the basis of the analysed international law, and an evaluation of the results. The main research tool is literature study. In addition, in-depth interviews are held with national experts in the field of social security.

The first three sub-questions make up the descriptive part of the research.

1. *What is the precise content of the ILO and CoE social security standards?*
   A comprehensive analysis of the international standards is based on the flagship ILO Convention No. 102 on Minimum Standards of Social Security, and is supplemented with a concise overview of the higher standards in Appendix 1. The analysis involves a description of the concrete norms as well as the general principles incorporated in the different instruments. Complicated or ambiguous norms are explained on the basis of the preparatory documents. This sub-question is dealt with in Chapter 2.
2. *To what extent and in what ways are the international social security standards implemented and applied in the selected countries?*
   The treatment of this question conveys the ways the two countries have dealt with the international social security standards since their attainment of independence. It gives insight into the actual impact of the international standards on national legislative and judicial practice through the different functions they have served during the reform processes. This sub-question is dealt with in Chapters 3 and 4 (notably, sections 1 to 4).
3. *What are the concrete standards within the social security systems of the selected countries?*
   The social security systems of the Czech Republic and Estonia, as developed during the past two decades, are consecutively described. For the purpose of the research, only the nine branches of social security as covered by ILO Convention 102 are studied in depth. This sub-question is elaborated on in Chapters 3 and 4 (notably, sections 5 to 14).

The next questions involve a comparison of national social security law with the international standards:

4. *What are the similarities and differences between the international and national standards?*
   Social security legislation of the two countries is examined on the basis of the analysis of the international standards. Thus, the international standards are used as an assessment framework. Differences and similarities are recognised and described in Chapters 3 and 4 (notably, sections 5 to 14). Additionally, a table is composed, providing a collated, systematic overview of the differences and similarities between national and international standards (Appendix 1).
5. *What application problems can be identified?*
   On the basis of the legal comparison, problematic points regarding the application of the international standards are identified and reviewed in Chapters 3, 4 and 5.

The last question contains an evaluation of the observed application problems:

6. *What do these problems indicate with regard to the effectiveness of international social security standards?*[42]
   After an assessment of national legislation on the basis of the international standards, this question involves an evaluation of the international standards themselves. What can be derived from the identified application problems in terms of effectiveness of the international instruments? To what extent are the intended results of the international social security standards achieved in the two countries? And to what extent can the findings be generalised? For this purpose, the identified problems are discussed in the context of stated criticism on the relevance of the international standards and held against the background of topical developments in the field of social security. This issue is discussed in Chapter 6.

1.3.3 DEFINITIONS

Definitions of specific terms and concepts are formulated in order to provide clarity as to their meaning within the framework of this study:

Effect (of the international standards on national legislation): the result of a particular influence.

Effectiveness (of the international standards): achievement of the intended results.

[42] Effectiveness in the meaning of achieving the results that are intended.

Functions (of the international standards): the way in which the international standards work or operate.

International social security standards: interchangeable with the term 'social security conventions'.

Principles on solidarity and state responsibility: the common principles as prescribed in Part XIII of ILO Convention 102 involving collective financing, state responsibility for the provision of the benefits and for the proper administration of the institutions and services, and participation of representatives of the persons protected in the management.[43]

Privatisation: any measure through which responsibility for the provision of benefits is transferred from the public to the private sphere and/or through which the benefits (partly) depend on market forces.

Social protection: protection against human damage through all kinds of mechanisms managed by a variety of public and private actors, including social security.[44]

Social security: protection against social risks in a way that accords with the rules and principles prescribed in ILO Convention 102.[45]

Social security conventions: if not specified (for example, ILO Convention 128), they include all normative social security instruments of the International Labour Organisation and the Council of Europe. Interchangeable with the term 'international social security standards'.

1.3.4 SOURCES

The study is based on a variety of sources. The analysis of international social security standards s almost exclusively conducted through the study of literature. The main documents used for the analysis are the texts of the conventions concerned, relevant ILO recommendations, preparatory reports for the creation of ILO Convention 102, and explanatory documents of the ILO and the Council of Europe relating to the standards under review. Books and discussion papers of and about the ILO, and academic studies relating to the content of the standards or to the human right to social security in general are also consulted. Because little is written pertaining to the content and interpretation of the social security standards as such, academic literature in that specific respect is limited. In addition to desk research, the social security department of the ILO are visited

[43] For an elaborate description of the principles on solidarity and state responsibility, see section 2.5.

[44] See, for instance, Lamarche 2005, p. 130; Vrooman 2009, p. 124; Vrooman terms this the 'broad approach' of social security.

[45] For the purpose of this research that involves a comparison of national legislation with ILO Convention 102, this restrictive definition of social security is chosen for practical reasons. Vrooman calls this the 'narrow approach' of social security, Vrooman 2009, p. 124.

for additional information and clarification of certain questions relating to the content of the conventions.

The effect of the international standards on law making and social policy is examined through comparison of international and national law, literature study and interviews. Literature includes academic studies on post-communist EU Member States, although they are often rather general and not specific to the different countries. Moreover, decisions of the Supreme (Administrative) Courts and/or Constitutional Courts of the selected countries are studied to get an insight into the way national judges deal with international social security law.[46] Finally, for additional and specific information, experts in social security law and policy from different institutions are interviewed, notably, experts from the ministries of social affairs and health, trade unions, and employers organisations, scholars, members of Parliament, and judges of the Administrative Supreme Court.[47]

For the description of the social security systems of the Czech Republic and Estonia and the comparison of national legislation with the international standards, several sources are used. The main sources of information were the annual reports of the governments on the application of the European Code of Social Security to the Council of Europe and the four-yearly reports on the different ILO conventions. The Czech reports to the Council of Europe are published on the website of the Ministry of Social Affairs. The Czech reports concerning ILO Conventions and the Estonian reports on the European Code are not published, but have been kindly provided by the respective ministries for the purpose of this research.[48] Additionally, the direct requests and observations of the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the conclusions of the CoE Committee of Ministers in reply to the reports (all published on the websites of the ILO and CoE) are consulted. For the discussions of the observed application problems in the two countries, opinions of the CEACR and the Committee of Ministers addressed to other states are referred to as well. Furthermore, other reports of the Ministries of Social Affairs or national social security bodies, available English language academic studies on social security in both countries,[49] and the MISSOC database of the European Commission are used. Both country studies are checked by national social security experts.

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46 For a list of consulted judgments, see the bibliography.

47 For a list of the interviewees, see Appendix 2.

48 All reports on the application of the European Code are consulted as from the years of ratification. The reports on the application of ILO social security conventions of the Czech Republic are consulted as from the reporting period ending by 1999.

49 For overviews of the entire social security systems: Tröster & Vysokajová 2006 (Cz) and Leppik & Kruuda 2003 (Ee).

1.4 STRUCTURE OF THE BOOK

The book is structured as follows. Part One contains the introduction to the thesis. Part Two comprises the core of the research, covering three chapters. First, in Chapter 2, an analysis of the international social security standards is provided to make clear their content and meaning. Chapters 3 and 4 contain the country studies of the Czech Republic and Estonia. Both chapters start with a description of the developments in social security after the establishment of the new republics, with a focus on international influences. This is followed by a systematic comparison of social security legislation with the standards as elaborated in Chapter 2. For each branch of social security, a brief overview is additionally given of the matters of compliance and the observed conflicts or problematic issues. Part Three holds the synthesis of the study. In Chapter 5, conclusions are drawn and reviewed from different perspectives on the effect of international standards on the national social security systems. Finally, Chapter 6 comprises conclusions and discussions on the applicability and adequacy of the international standards in the two countries. Although these discussions are based on the research results and thus relate to the Czech Republic and Estonia in first instance, they are relevant for all EU Member States and for the European Union as a whole.

PART II
ANALYSIS AND COMPARISON

This part contains the descriptive and comparative parts of the research on which the conclusions and discussions in Part III are based.

Chapter 2 provides an analysis of the international standards on the basis of ILO Convention 102 on minimum Standards of Social Security. It elaborates on the first research sub-question:

– What is the precise content of the ILO and CoE social security standards?

In the Chapters 3 and 4 the country studies of the Czech Republic and Estonia are presented. They deal with the following three sub-questions:

– To what extent and in what ways are the international social security standards implemented and applied in the selected countries?
– What are the actual standards within the social security systems of the selected countries?
– What are the similarities and differences between the international and national standards?

For the comparison of national legislation and the international standards, ILO Convention 102, as analysed in Chapter 2, serves as the main assessment base.

CHAPTER 2

INTERNATIONAL SOCIAL SECURITY STANDARDS: AN ANALYSIS ON THE BASIS OF ILO CONVENTION 102

2.1 INTRODUCTION

Setting international social security standards has been one of the core activities of the International Labour Organisation (ILO) since its establishment in 1919. The Preamble to its constitution sets forth a number of goals in this respect, including: the protection of workers against sickness, disease, and injury arising out of employment; the protection of children, young persons, and women; and provision for old age and injury.[1] Accordingly, many conventions and recommendations have been developed in view of these goals. In the first period, the standards were mainly based on the concept of social insurance, aimed at prescribed categories of workers and covering specific risks in specific economic sectors. During the Second World War, a broader conception of social security has been developed. The new ideas were consolidated into one comprehensive instrument containing all contingencies and extending coverage to all workers. This flagship Convention No. 102 on Minimum Standards of Social Security forms the basis for several subsequent ILO conventions setting out higher standards.[2] Furthermore, it has been used by the Council of Europe as a blueprint for its European Code of Social Security (1964), which only differs from Convention 102 on a few points.

In this chapter, Convention 102 will be analysed in order to gain a better understanding of the norms and concepts of international social security standards. Vague terms will be examined on the basis of the preparatory documents so as to recall their initially intended meaning, and important concepts will be clarified. First, in section 2.2, the origins of the Convention will be briefly explored. In the sections 2.3 to 2.8, different concepts included in the instrument will be investigated, including flexibility, administration and

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1 Preamble to the Constitution of the ILO, adopted by the Paris Peace Conference in 1919.

2 For a detailed description of the different generations of social security standards, see Pennings & Schulte 2006, pp. 5–11; Kulke 2007, pp. 126–127.

financing, suspension of benefits, right of appeal, equal treatment, and supervision. Sections 2.9 to 2.17 will contain analyses of the prescribed norms in relation to the nine social risks, as recognised by Convention 102, and similarly, by the European Code of Social Security. A concise overview of the norms in the different instruments will be given in Appendix 1. Finally, conclusions are formulated in section 2.18.

2.2 GENESIS OF CONVENTION NO. 102 ON MINIMUM STANDARDS OF SOCIAL SECURITY, 1952

2.2.1 FROM SOCIAL INSURANCE TO SOCIAL SECURITY

Facing the hardships of World War II, the International Labour Conference (ILC), meeting in Philadelphia, adopted on its twenty-fifth anniversary, the Declaration of Philadelphia.[3] The Declaration was appended onto the Constitution of the International Labour Organisation (ILO) as an integral part, and redefined the principles of the ILO. These principles include:[4]

- labour is not a commodity;
- freedom of expression and of association are essential to sustained progress;
- poverty anywhere constitutes a danger to prosperity everywhere; and
- the war against want requires to be carried on with unrelenting vigour within each nation.

It also reaffirmed the statement in the Constitution that lasting peace can be established only if it is based on social justice, and it set out a programme of action to achieve ten goals, including:[5]

- full employment and the raising of standards of living; and
- the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care.

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3 For reference works on the developments leading towards the creation of Convention 102, see ILO Income Security Recommendation 67, 1944; ILO Medical Care Recommendation 69, 1944; ILO Report IV (1) 1951; ILO 1952; Stafford 1953; Otting 1993; Valticos 1996; Servais 2005, pp. 21–44, 257–259.

4 Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia), annex to the Constitution of the ILO, para. I. The Constitution was adopted in 1919, and is published on the website of the ILO.

5 Declaration of Philadelphia, para. III.

The Declaration of Philadelphia was clearly inspired by the Atlantic Charter – a joint statement by Franklin Roosevelt and Winston Churchill – issued aboard the USS Augusta near the coast of Newfoundland on August 14, 1941. In this charter they expressed certain general principles on which they based their hopes for a better future for the world.[6] The fifth point of the eight-point charter contemplates the object of 'securing, for all, improved labor standards, economic advancement and social security', followed by the aspiration that 'all the men in all the lands may live out their lives in freedom from fear and want.

At the same time in the UK, Sir William Beveridge was working on his report, which was published in 1942.[7] This landmark report turned out to be one of the most important documents in the history of social security. Beveridge, who at one time had been a member of the ILO's Committee of Social Insurance Experts, embroidered on the shared dream of the two war leaders. One of his basic principles was that social security means freedom from want. He specified the scope of social security including unemployment, sickness or accident, retirement through age, loss of support by the death of another person, and exceptional expenditures, such as those connected with birth, death and marriage.[8] His report set out a 'Plan for Social Security' following three assumptions for a satisfactory scheme of social security: children's allowances, comprehensive health and rehabilitation services, available to all members of the community, and avoidance of mass unemployment. The popularity of the Beveridge Report was prompted by the hope that its promise of social security for all after the war was real and attainable.

Following this line of thought, the International Labour Conference (Conference) in 1944 at Philadelphia adopted Recommendation No. 67 concerning Income Security, and No. 69 concerning Medical Care. The preambles of both Recommendations state, referring to the fifth principle of the Atlantic Charter, that income security is an essential element of social security. The notion of income security proceeded from the newly embraced desiderata of social security for all and freedom from want, and required a broadening of both the scope and the coverage of the ILO instruments on this topic. By contrast, during the pre-war period of the ILO standard setting, the so-called 'social insurance' period (1919–1939), standards adopted mainly concerned certain clearly defined questions and covered limited categories of workers. For instance, the third convention, adopted in 1919, concerned the question of maternity protection in industrial and commercial undertakings. During the following 20 years this first social insurance convention was supplemented by standards covering industrial

6 Parrott 1992.
7 Beveridge 1942.
8 Beveridge 1942, point 300.

accidents and occupational disease, a number of conventions concerning sickness, old age, invalidity and survivors' insurance for workers in industrial and commercial undertakings, out-workers and domestic servants, and a convention concerning unemployment. The objective of all these conventions was the establishment of a compulsory insurance scheme for each specific risk, applicable to specific groups of workers.

The Declaration of Philadelphia heralded the beginning of the 'social security' era; it marked a new approach in various respects. First of all, the new social security standards referred not only to workers in the strict sense of the word, but their coverage was extended to all human beings, and concerned society as a whole. Secondly, the range of subjects was broadened, including, for instance, preventive medical care and family benefits. Other novelties of the new generation of conventions were the coherent form of presentation, the provision of minimum benefit rates, the loosening of the tie between benefit rights and contribution payments, and, in general, unification of the administration of separate branches of social security.

2.2.2 THE PHILADELPHIA RECOMMENDATIONS: POINTING THE WAY TO A NEW SOCIAL SECURITY CONVENTION

With the Philadelphia Recommendation on Income Security, the ILO took a prudent first step towards this new way of social security standard setting. The Income Security Recommendation covered the whole range of social risks that was dealt with in separate pre-war conventions, but in a more extended way. For a start, a safety net was introduced: 'Appropriate allowances in cash or partly in cash and partly in kind should be provided for all persons who are in want …'.[9] The so-called social assistance was meant to protect people from poverty who were not covered by social insurance. It also aimed to provide assistance by society to parents to secure the wellbeing of dependent children. Also newly introduced were the supplements for each of the first two children to be added to all benefits payable for loss of earnings.

The range of persons protected by compulsory social insurance was no longer confined to specific categories of workers, but extended to employed and self-employed persons in general, together with their dependants.[10] At the same time, the range of contingencies to be covered by compulsory social insurance was to include, above those already known, emergency expenses, namely, 'certain

[9] ILO Income Security Recommendation 67, 1944, point 3.
[10] ILO Income Security Recommendation 67, 1944, point 17.

associated emergencies, which involved extraordinary strain on limited incomes, in so far as they are not otherwise covered'.[11] Such benefits were to be provided, for instance, in cases of sickness, maternity, invalidity and death. As we will see later, this contingency has never reached the aim of being transposed into a convention.

Together with the Income Security Recommendation, a Recommendation concerning Medical Care was adopted by the Conference. The principles laid down in this recommendation outlined the objectives to be attained by a medical service covering the whole population, whether organised on the principle of compulsory social insurance or of a public service. The Recommendation provides that complete preventive and curative care should be available at any time and place to all members of the community. The care afforded comprises a long list of care and supplies that should be available without time limit and for as long as they are needed.[12]

The Philadelphia Recommendations were based not so much on experience as on plans, reports, and bills that various countries were developing towards the end of the war. For that reason, at the time of adoption, the Committee on Social Security explained to the Conference that the Recommendations could only be converted into conventions after sufficient time, based on actual experience. In fact, they were a prelude to the trends that social security policy would follow in the post-war period, and would cause a transformation of the pre-war systems of social insurance. They affirmed the importance of the social factor in economic issues and set out a programme of action for the future.

2.2.3 OBJECTIVES AND MINIMUM STANDARDS OF SOCIAL SECURITY: A PROPOSAL

In 1950 the Committee of Social Security Experts (Committee) considered it urgent that the progress of the last few years and the needs of all regions of the world should be duly reflected in new or revised international instruments. The Committee found that a fresh impetus and new objectives should be given to the social security movement, which was rapidly evolving and expanding. It was suggested that the first step should be the consideration of a new general social security convention, to give definite form to these new trends and a definite meaning to the concept of social security. On the one hand this general convention would guide Members in the creation or reconstruction of their social security systems, and on the other, it would serve as a framework and

[11] ILO Income Security Recommendation 67, 1944, point 15.
[12] ILO Medical Care Recommendation, 1944, Part III; ILO Report IV (1) 1951, p. 29.

starting point for the revision of the existing conventions of several branches of social security. The new instrument, it was held, should proceed from a consideration of the principles of the Philadelphia Recommendations, with due regard to recent trends of the social security movement.[13]

The Governing Body accordingly placed on the agenda of the 34th session the item 'Objectives and Minimum Standards of Social Security'.[14] The Committee of Social Security Experts worked out a questionnaire as a starting point for investigation and discussion.[15] The concept of social security envisaged was very much the same as that of the Philadelphia Recommendations. However, no distinction was made with regard to the form of administration – the form could be a social insurance scheme, a social assistance scheme or a public service. Benefits were to be guaranteed to as wide a circle of the population as possible, but primarily to workers and their dependants, and to be granted as legal rights and not as discretionary charity. The questionnaire investigated various aspects which are essential to any social security system, such as:

– the branches of social security to be provided;
– the range of persons to be protected by a given branch;
– the amount of the benefits and the qualifying conditions thereof;
– the right of appeal;
– the financial resources;
– the administration.

The questions of what benefits should be provided, and to whom, were considered of primary importance. How the benefits were to be financed and administered were secondary points. It was the view of the Committee that the new instrument should supplement the deficiencies of the existing conventions in several of the branches of social security. These conventions were very precise on certain matters, but on one vital respect, that is, the amount of benefit, they were silent. At the same time, their precision on other matters, such as persons protected, was considered an objectionable stumbling block to ratification by Members. It was found that points of relatively minor importance should not hinder the acceptance of the new instrument by a Member State. Furthermore, the convention was regarded as being acceptable for both highly developed and less developed countries. To meet with this idea of a more flexible instrument, it was held that two standards for national social security systems should be provided: a 'minimum standard' and an 'advanced standard'.

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13 ILO 1950, para. 3 and 4; ILO Report IV (1) 1951, pp. 4–5.
14 For the drafting process, see ILO Report IV (1) 1951; ILO Report IV (2) 1951; ILO Report V (a) (1) 1952; ILO 1952; Wisskirchen 2005.
15 ILO Report IV (1) 1951.

These two standards would be laid down only in the most important provisions: those concerning persons protected, and benefits, including the qualifying conditions. Several grades of ratification should become possible, according to the level attained by the national system concerned. For the less developed countries, the immediate objectives would be those of the minimum standard, while the more developed countries would look to the advanced standard. Flexibility should even be increased by giving a country the possibility of ratifying the convention by complying with the prescribed standards in respect of a small number of contingencies of its choice. In this way the conventions would have a dynamic and not a static character. Governments would be encouraged to develop their social security systems in such a way that during the process of advancement, all branches would be maintained at substantially the same level. Ratifications of branches partly to the minimum standard and partly to the advanced standard was therefore not recommended.[16]

From the outset, the form of the new international regulation was to be that of a convention. This was not a matter of course, though. In the general discussion in the Committee, the employers' members considered that the proposed instrument should only apply to employees, since in their opinion the Conference did not have the competence to deal with problems other than those relating to workers. The general problems of the whole country were considered to be within the competence of other specialised agencies of the United Nations. Furthermore, they argued that the consequences of a flexible instrument as proposed would be incompatible with the principle that a convention should impose equivalent obligations upon each ratifying Member. Consequently, they felt that each branch of social security should be dealt with in a separate convention, supplemented, if necessary, by a general recommendation dealing with the whole problem. Their proposal on this matter was rejected by 36 votes to 58, with 6 abstentions.

2.2.4 CONVENTION ON MINIMUM STANDARDS OF SOCIAL SECURITY ONLY

As a result of the replies from the governments to the questionnaire and the discussions during two sessions of the Conference, Convention No. 102 on Minimum Standards of Social Security was finally adopted in 1952. This 35th Conference had brought together the largest number of delegates recorded in the history of the ILO. There were 654 delegates and advisers, representing the peoples of 60 Member States (of the 66 Member States at that time), and 40 observers and representatives of international organisations. The Convention

[16] ILO Report IV (1) 1951, p. 11.

eventually only provided minimum standards. During the first discussion about the proposals at its 34th Session (1951), the Conference only had time to consider the questions concerning the minimum standards to be submitted for a second and final discussion at the 35th Session of the Conference. The Conference also decided to place the question of 'Objectives and Advanced Standards of Social Security' on the agenda of the 35th Session for a first discussion of the item.[17]

As regards the advanced standards, during the preparations for the 35th Session (1952), the Committee agreed on the submission to the Conference of a draft resolution, but agreement was not reached on the substance of such a resolution. One part of the Committee wanted the resolution to ask the Conference to include the question of advanced standards on the agenda of its next session for a first discussion, as was decided by the Conference. The other part, however, wanted to invite the Governing Body to consider the matter further 'at the appropriate time in the light of experience of the working of the instrument concerning minimum standards, as adopted at this session of the Conference', which would shelve the subject for quite a number of years, considering the time-consuming process of ratification of a new convention.[18] With a majority of 156 votes to 155, with no abstentions, the latter proposal was adopted by the Committee and eventually submitted to the Conference. During the discussion about this resolution it was stressed that the majority of one vote was due to the fortuitous absence of one workers' member at the time of voting. In view of the unsatisfactory outcome of the vote, the Belgian and French government delegates proposed an amendment, which invited the Governing Body to re-examine the question of 'Objectives and advanced standards of social security', and to choose an appropriate time for placing it on the agenda of an early session of the Conference. This compromise was to prevent the subject from getting postponed for an uncertain number of years, but did not oblige the Governing Body to include it in the agenda of the very next Conference. The proposal was founded by emphasising that it only owed to lack of time that it had not been possible to discuss both the minimum, as well as the advanced standards, at the current Conference. However, with the British government as the main opponent, the discussion led to a resolution simply inviting the Governing Body 'to re-examine the question … and to choose an appropriate time for placing it on the agenda', without any further instruction.[19] Obviously, the fear of postponement of the proposal was not unjustified, since time has shown that it was never placed on the agenda again. Instead, different conventions have been developed on the basis of Convention 102, providing higher standards for (a) specific risk(s) only.[20]

[17] ILO Record of Proceedings 1952, p. 518.
[18] ILO Record of Proceedings 1952, p. 386.
[19] ILO Record of Proceedings 1952, pp. 386–391.
[20] For a list of the higher social security standards, see section 1.3.1.

2.3 TRIPARTISM

The principle of tripartism is one important characteristic that distinguishes the ILO from other international organisations. Representatives of employers' and workers' organisations participate in the different proceedings of the ILO, together on an equal footing with those of governments. The notion of tripartism arose during the preparation of the ILO Constitution by the Commission on International Labour Legislation of the Paris Peace Conference in 1919, and has been the very backbone of the ILO ever since.[21] It carries through to all levels of the Organisation, from the different official bodies to the specific working groups for the preparation of one item on the agenda, each body consisting of an equal number of workers' and employers' representatives (counted together) and representatives of governments. Tripartism is also introduced at the national level, for example, by Article 23 of the Constitution, obliging Member States to distribute to the representative organisations copies of the information and reports communicated to the Director-General of the ILO.

In relation to the application of Convention 102, and likewise of the higher standards, tripartism plays a role at different points. First, the governments have to send their reports (or other communications) on the application of the instruments to the workers' and employers' representatives in order to give them the opportunity to express their comments, either to the government or directly to the ILO. Secondly, it is regulated that if the administration of a social security scheme is not managed under responsibility of the public authorities, representatives of the persons protected shall participate in the management.[22]

2.4 FLEXIBILITY CLAUSES

2.4.1 FRAMING STANDARDS TO BE RELEVANT TO THE GREATEST NUMBER OF COUNTRIES

Convention 102 was designed with the idea that it 'should take fully into account the possibilities of achievement open, now or in the near future, to highly developed countries as well as to less developed countries'.[23] It was furthermore considered that the same general level of social security can be attained by different means, since 'the economic, psychological and social conditions of a country may render the coverage of a certain contingency, or the provision of a certain benefit, particularly important'. Therefore, a flexible instrument was

[21] Osieke 1985, pp. 52–55.
[22] ILO Convention 102, Art. 72 (1). See section 2.5.4.
[23] ILO Report IV (1) 1951, p. 5.

envisaged that would leave Member States much discretion with regard to the organisation of the social security schemes and the methods to guarantee the prescribed benefits. Various types of flexibility clauses are incorporated in the Conventions indeed.[24]

2.4.2 OPTIONS REGARDING OBLIGATIONS UNDERTAKEN

Article 2 of Convention 102 gives countries the possibility of choosing, at the time of ratification, the extent of obligations they wish to undertake. Ratification of the Convention always implies the acceptance of the common provisions. Apart from the common parts, the country can choose at least three out of the nine parts that correspond with the nine branches of social security. These three accepted parts should include at least one of the following five parts: unemployment, old-age, employment injury, invalidity, and death of the breadwinner. At a later stage, countries may extend their acceptance to other parts. Thus, this flexibility clause permits the progressive application of the Convention and calls upon the governments to take further action and achievement. This call for further action is emphasised by the fact that contracting parties have to report to the ILO on a regular basis on their achievement in respect of the non-accepted parts.[25] Similar provisions are included in ILO Convention 128 on Invalidity, Old-Age, and Survivors' Benefit (1967).

2.4.3 TEMPORARY EXCEPTIONS FOR DEVELOPING COUNTRIES

Article 3 of Convention 102 leaves room for a country whose economy and medical facilities is insufficiently developed to avail itself of temporary exceptions pertaining to different provisions. The exceptions involve, for example, a smaller personal scope or a shorter duration of benefit.

During the drafting procedure, it was opposed by some Member States that such a provision would constitute a contradiction of the concept of minimum standards. They also suggested the exceptions to be subject to a precise time limit, as to three, five or ten years, which was discussed at length in several sittings. However the Conference decided not to set any precise time limit. It

24 See, for example, ILO Report V (a) 2 1952, pp. 192–193; Valticos & Potobsky 1995, pp. 57–60; López Morales, Silva, Egorov 2001, pp. 446–447; Servais 2005, pp. 259–261; Kulke 2006, pp. 27–29.

25 Convention 102, Art. 76 (2).

would be sufficient to emphasize the temporary character of the exceptions and to oblige the Member to state in its annual reports to the Office that the reason for availing itself of these exceptions still exists, or to renounce its rights in this respect.[26]

Because this study does not include developing countries, but merely addresses social security in EU Member States, these temporary exceptions are not analysed and elaborated in the following chapters.

2.4.4 OPTIONS REGARDING THE TYPE OF A SCHEME

The norms set out by Convention 102 can be reached through different types of social security schemes, notably through universal schemes, occupational insurance schemes, social assistance schemes, or even through private and voluntary schemes. Furthermore, the Convention provides for flexibility regarding the personal coverage of a scheme. The definition of the persons protected may be based on a specific percentage of either employees or residents. In respect of most branches, a country can choose to protect prescribed categories of employees, constituting at least 50 percent of all employees; or prescribed categories of economically active persons constituting at least 20 percent of all residents; or all residents whose means do not exceed prescribed limits.[27]

This flexibility regarding the type of a social security scheme is further developed by the different options for the calculation of benefits. Benefits may be earnings-related or flat rate, or contain components of both. The prescribed levels of the benefits are based on a percentage of average wages in the country concerned, which makes it possible to apply to developed, as well as less developed, countries.[28]

2.4.5 USE OF GENERAL TERMS

The flexibility of the Convention also exists in the usage of general wording in different respects. Several terms or concepts are not well defined, giving the countries freedom in applying the standard concerned. Cases in point are: 'employee', 'suitable employment', 'a qualifying period as may be considered necessary to preclude abuse', and 'the rules concerning cost-sharing shall be so

[26] ILO 1952, p. 291.
[27] The different options regarding the personal scope will be further elaborated on in the sections dealing with the different branches of social security, notably section 2.9.2.
[28] The different options regarding the calculation of the benefits will be further elaborated on in the sections dealing with the different branches of social security, notably section 2.10.3.

designed as to avoid hardship'. The preparatory documents or comments of the supervising committees give some guidance regarding the interpretation of most of these vague norms, but there is still room for some discretion.[29]

2.5 ADMINISTRATION AND FINANCING

2.5.1 PRINCIPLES ON SOLIDARITY AND STATE RESPONSIBILITY

Although the Convention leaves great flexibility to countries with regard to the method of organising the schemes and proving benefits, a set of basic principles has to be complied with irrespective of the type of the schemes established.[30] The importance of these principles has been repeatedly emphasised by the Committee of Experts on the Application of Conventions and Recommendations (CEACR).[31] In order to guarantee the supply of resources needed to pay out benefits according to the given norms, to cover administrative costs, and to ensure an equitable distribution of the financial burden, the Convention lays out clear rules to be complied with by any scheme, public as well as private. These rules contain three fundamental criteria, which together are termed, for the purpose of this study, 'the principles on solidarity and state responsibility'.

2.5.2 FINANCIAL SOLIDARITY

The first principle involves financial solidarity, requiring that contributions or taxes for financing benefits should be charged on the basis of a person's ability to pay, and regardless of their individual risks. More specifically, Convention 102 provides that 'the cost of the benefits […] and the cost of the administration of such benefits shall be borne collectively by way of insurance contributions or taxation or both in a manner which avoids hardship to persons of small means.'[32] In the case of contributory schemes, it is specified that, on the whole employees protected are not to be required to pay more than 50 percent of the financial

29 The general terms will be further elaborated on in the sections dealing with the different branches of social security.

30 ILO Convention 102, Arts. 71 and 72; ILO Report V (a)(2) 1952, pp. 230–232; ILO 1989, pp. 95–101; Humblet & Silva 2002, pp. 11–15; Lopez Morales, Silva, Egorov 2002, pp. 446–448; Pennings 2007B, pp. 7–8; Kulke 2006, pp. 29–31.

31 For example, CEACR: Individual Observation concerning C102 (Peru) 1999, concerning the private pension scheme; CEACR: Individual Observation concerning C102 (Netherlands) 2003, concerning employers' liability for sickness benefit; CEACR: Individual Direct Request concerning C102 (France) 2007, concerning the health care system.

32 ILO Convention 102, Art. 71 (1).

resources allocated for their protection. For the assessment of this limit, all the benefits provided by the country concerned may be taken together, except family benefits and employment injury benefits. It must be borne in mind, however, that within each scheme, hardship for persons with meagre resources must also be avoided if the 50 percent rule has been fulfilled.

2.5.3 GENERAL RESPONSIBILITY OF THE STATE

Closely connected to the obligation of collective financing, the second rule prescribes that the state 'shall accept general responsibility for the due provision of the benefits provided.'[33] It has been made clear by the ILO in an explanatory memorandum that general responsibility 'would not necessarily bind the Member to meet any deficit occurring in the agency administering a scheme [...], but it would oblige it to take measures to ensure that the benefits are duly provided.'[34] Examples of such measures would be for the government to grant a subsidy to meet the deficit, or to secure the provision of the benefits by arranging a loan. General responsibility also includes the government making sure that actuarial studies and calculations concerning financial equilibrium are made periodically, and that contribution rates may only be raised on the basis of an actuarial report of the scheme concerned that shows that financial balance will be achieved in the long-term.[35] This implies that the state must not only supervise the administrative institutions, but must also ensure a balance between the resources raised for social security and benefits delivered, allowing for redistribution between different groups in accordance with the solidarity principle. It has been emphasised in this respect that resources envisaged for social security cannot be used to finance non-social security expenditure, such as a deficit in the state budget.[36] In relation to privatised schemes, this also implies a prohibition on profit-seeking for insurance funds.

The Convention also sets out that governments must accept general responsibility for the proper administration of the institutions and services where the administration is not entrusted to public authorities. This implies that the state has a serious task in monitoring and actively supervising the management and administration of private funds.

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33 ILO Convention 102, Art. 71 (3).
34 ILO Report V (a)(2) 1952, p. 231.
35 ILO 2008, pp. 9–10.
36 Humblet & Silva 2002, p. 12; Humblet & Zarka-Martres 2001, p. 447; ILO 2001a, pp. 57–58.

2.5.4 REPRESENTATION OF DIFFERENT INTERESTS IN THE MANAGEMENT OF THE SCHEME

Because of the flexibility provided in the Convention with regard to the form of organisation of social security schemes, it was considered necessary for the various interests to be represented in the administration of the different systems, particularly the interests of the persons protected.[37] Therefore, it is prescribed that, where the administration is not entrusted to the government, representatives of the persons protected must participate in the management, at least in a consultative manner.[38] This provision ensures that in the case of a privately managed insurance scheme, national regulations require the involvement of persons protected, for instance, through the participation of trade unions. Apart from this obligation, the Convention also prescribes that the participation of representatives of employers and of public authorities may be regulated for, but this is left to the discretion of the national legislators. Private schemes that are administrated in line with these basic rules can be taken into account in terms of the fulfilment of obligations contained in the Convention.

2.6 SUSPENSION OF BENEFITS

Convention 102 regulates the cases in which a benefit may be suspended by way of a common provision that applies to all branches of social security.[39] Because a beneficiary will be in danger of losing a decent standard of living, a benefit should only be withdrawn under carefully prescribed conditions. These conditions can be grouped into three categories. The first situation permitting suspension is when the beneficiary is absent from the country in which the entitlement to the benefit has been acquired. The second category contains situations in which the person is otherwise compensated for the (presumed) loss of earnings, for example, if the person is maintained at public expense or is in receipt of another social security benefit, either public or private. The third category relates to the beneficiary's personal conduct. For example, it covers cases in which fraudulent claims have been made, or where the contingency has been caused by a criminal offence or by the wilful misconduct of the claimant. Suspension of the benefit is also allowed if the beneficiary fails to make use of available medical services (sickness benefit) or employment services (unemployment benefit). Additional grounds for suspension or reduction of the benefit specific to the contingency of unemployment, are situations in which the

[37] ILO Report V (a)(2) 1952, pp. 231–232.
[38] ILO Convention 102, Art. 72 (1).
[39] ILO Convention 102, Art. 69; ILO Report V (a)(2) 1952, p. 231; Humblet & Silva 2002, pp. 14–15.

unemployed person has deliberately contributed to his or her own dismissal, or has left employment voluntarily without just cause.

2.7 RIGHT OF APPEAL

A country that has ratified Convention 102 in respect of any of the nine parts dealing with the specific contingencies should guarantee that every claimant to benefit under the part concerned has a right to appeal.[40] The right to appeal covers the refusal of a benefit or complaints regarding its quality or quantity. In respect of medical care, the right is restricted in case the administration is entrusted to a government department responsible to a legislature. In these cases, the right of appeal may be replaced by a right 'to have a complaint concerning the refusal of medical care or the quality of the care received investigated by the appropriate authority'. In the draft version of the Convention, it was recommended that any appeal should be heard by an authority either independent of, or higher than, the authority that gave the decision.[41] This was considered of great importance in order to protect claimants against administrative discretion, bias, arbitrary action or errors. On the instigation of the government of the United Kingdom, the restriction regarding medical care was included. The Finnish government proposed extending this restriction to all contingencies, however this was not accepted by the drafting Committee of Experts. Nevertheless, in the adopted version of the Convention, the part of the provision involving an independent or higher authority than the authority that gave the original decision has been left out, apparently to satisfy the Finnish government. In the higher standards, the very same addition has been included and further developed.[42]

2.8 SUPERVISION AND INTERPRETATION OF STANDARDS

2.8.1 SUPERVISION

The ILO's system of supervision is founded in its original constitution and has evolved over the years into an advanced system with a wide variety of stages and procedures.[43] Because it is beyond the scope of this study to examine the system

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40 ILO Convention 102, Art. 70; Servais 2005, pp. 263–264.
41 ILO Report IV (1) 1951, pp. 111–112; ILO Report V (a)(2) 1952, pp. 146–147, 230.
42 Humblet & Silva 2002, p. 14; Kulke 2006, p. 31.
43 ILO Constitution, Art. 22; Bartolomei de la Cruz, Potobsky, Swepston 1996, pp. 67–124; Valticos 1979, pp. 692–696; Leary 1982, pp. 17–34; Pennings 2006B, pp. 15–20.

in a general and thorough manner, only a brief outline will be given that is of practical relevance to the application of social security standards.

Once a country has ratified an ILO convention, it is obliged to report regularly on the application of the instrument. For social security conventions, such reports must be submitted every five years to the Committee of Experts on the Application of Conventions and Recommendations (CEACR). In between, the CEACR is free to request reports at more frequent intervals when there are serious difficulties in application. The reports must contain the information listed in a report form for each convention approved by the Governing Body after its adoption. In these reports, the governments are also to provide information, if applicable, on the non-ratified parts of the convention concerned. Governments are required to submit copies of their reports to employers' and workers' organisations. These organisations may comment on the reports and may also send comments on the application of conventions directly to the ILO. This procedure gives expression to the principle of tripartism that constitutes the ILO's primary characteristic.

The CEACR is composed of 20 independent eminent jurists appointed in their own capacity, and not as government representatives by the Governing Body, for three-year terms. When examining the application of the conventions, the Committee makes two kinds of comments: observations and direct requests. Observations contain comments on fundamental questions and the most serious or persistent cases of non-compliance, and are published in the Committee's annual report. Direct requests relate to more technical questions or requests for further information. They are not published in the annual reports, but are communicated directly to the governments concerned. The CEACR expresses its comments in various diplomatic ways. In the first instance, it notes a development or a possible inconsistency in a neutral way, for example, 'the Committee observes that…', or 'the Committee considers that…'. Then, if a highlighted inconsistency has not been brought into compliance with the applicable convention, the Committee will note this omission in a next communication 'with concern'. 'Deep concern' is the strongest expression of criticism, and is only used in exceptional cases of continuing and very serious infringements. In the event of the repeal of the law or the discontinuation of the practice that has been criticised by the CEACR, it is noted with 'interest', or even with 'satisfaction'.

The report of the CEACR is submitted to the annual session of the International Labour Conference and serves as a basis for discussion by the Conference Committee on the Application of Conventions and Recommendations (Conference Committee). This Committee is elected by the delegates of the ILO Conference and is composed of representatives of governments, employers and workers, enjoying equal voting strength. The Conference Committee selects for

discussion certain cases of serious discrepancies between conventions and national law or practice that are noted by the CEACR in its annual report. These discussions are of a more political nature than those of the CEACR. The Conference Committee submits a report to the plenary session of the Conference, which includes a section referring to states that have failed to comply with their reporting obligations, or whose law or practice has not been brought in compliance with the standards concerned. This sanction of naming and shaming is the most serious moral censure available within the supervisory system. Obviously, countries do not like to be named in the so-called 'special list'.[44]

2.8.2 INTERPRETATION

As mentioned in section 2.4.4, the Convention contains various vague terms and concepts that need further explanation to ensure a uniform understanding of the standards. In fact, a Member State who is part of a convention is under the obligation to apply its provisions in the same way as other Member States.[45] Unfortunately, a general introduction or preamble has not been attached to the Convention. During the drafting process in 1952, the International Labour Office (Office) provided an 'Explanation of Proposed Convention', that briefly detailed the background and intentions of the different provisions.[46] However, this document is hard to find as it is only available in a few libraries, and it does not give decisive information on several ambiguous provisions. A consistent interpretation of unclear norms is necessary for countries to be able to implement the Convention into the national legal order and to apply the standards in practice. Therefore, it is important to shed light on how, and by whom, interpretation of the norms is effectuated.

Under the ILO Constitution, responsibility for the interpretation of conventions is assigned to the International Court of Justice and a tribunal that may be established for that purpose.[47] However, a tribunal has never been established and only one case has so far been referred to the Court. This was done in January 1932 by the British government, asking for an Advisory Opinion.[48] On the basis of the Court's opinion, which was issued in November of the same year, the

44 Bartolomei de la Cruz, Potobsky, Swepston 1996, p. 83; Korda & Pennings 2008, p. 136.
45 This follows from the ILO Constitution, Art. 19 para. 5; Osieke 1985, pp. 209–210.
46 ILO Report (5)(2) 1952, pp. 192–233.
47 ILO Constitution, Art. 37; Osieke 1985, pp. 204–210; Penning 2007A, pp. 28–29; Servais 2005, pp. 79–80.
48 The question concerned the draft Convention on employment of women during the night. The British government wanted to know whether the Convention applied to women holding positions of supervision or management. The Court replied that the Convention was couched in general terms and free from ambiguity or obscurity, and that it therefore necessarily applied to all categories of women. Osieke 1985, pp. 204–206.

Conference decided to change the draft Convention. Considering the fact that the Advisory Opinion of the Court provided clarity as to the meaning of the questioned provision, and that it was taken into account by the Conference as a decision under Article 37 of the Constitution, the procedure seemed useful and effective. Despite this, it has never been invoked by any state since then.

Instead, it has become the practice of the Member States to ask the Office for advice on the meaning of specific provisions that are found unclear. The formal requests and the opinions of the Office that are of general interest are published in the Official Bulletin of the ILO, but not included in the databases that are freely accessible through the ILO website.[49] In its interpretations, the Office often refers to observations and direct requests of the CEACR on the question at hand. The Director-General of the International Labour Office, before expressing the view of the Office, always stresses that the Constitution does not give him any special authority to interpret conventions. It might be questioned whether this reservation is necessary, or indeed, justified.[50] Although it is true that the Constitution does not expressly authorise the Office to interpret the texts of Conventions, it does not prohibit it either. Indeed, the functions of the Office 'include the collection and distribution of information on all subjects relating to the international adjustment of conditions of industrial life…', and to 'accord to governments, at their request, all appropriate assistance within its power in connection with the framing of laws and regulations…'.[51] Thus, it does not seem far-fetched to regard the competence to interpret unclear provisions as within the functions assigned to the Office. Furthermore, its interpreting function has become an established constitutional practice of the ILO, since no Member State has ever objected to this practice.[52] On the contrary, many Member States have asked, and still ask, the opinion of the Office on various interpretation matters over the years.

Another body taking part in interpreting conventions, and whose competence on this point is often contested, is the CEACR.[53] Its main task, to determine whether the requirements of a given convention have been met, requires a consistent interpretation of the norms. In this light, interpreting the conventions is essential for the realisation of its task. Indeed, in the observations and direct requests the CEACR often clarifies provisions which are unclear or which are not correctly implemented by a Member State. Because these documents are published on the website of the ILO, they constitute an important and workable

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49 Informal communications between governments and the Labour Office take place as well, but they are not published.

50 See also Korda & Pennings 2008, pp. 135–137; Pennings 2007B, pp. 28–29; Dijkhoff & Pennings 2007, pp. 163–166; Osieke 1985, pp. 206–210.

51 ILO Constitution Art. 10.

52 Osieke 1985, p. 208.

53 Nußberger 2007, pp. 46–48; Pennings 2006A, p. 174–177; Servais 2005, p. 80.

body of 'case law'.[54] Case law is put between quotation marks here because the interpretations of the CEACR are generally not considered authoritative. It must be recognised however, that if a given interpretation is not rejected by the contracting parties, they are bound by it in view of their obligation to apply the conventions in a uniform manner.[55]

2.9 MEDICAL CARE

2.9.1 MATERIAL SCOPE

Medical care and sickness benefit

Convention 102 categorises medical care and sickness into two different contingencies. In the Philadelphia Recommendations, which have served as a basis for the Convention, only one branch concerning medical care was included, comprising medical care as well as cash sickness allowances. Initially, these two types of benefit were both granted under one and the same scheme. At the time of the preparatory examination by the International Labour Office (Office) of the social security schemes effective in the Member States however, some countries provided only one of the two benefits, medical care or cash, and other countries provided both benefits, but under schemes of different scope or type. The Convention therefore distinguishes between a branch granting medical benefits on the one hand, and a branch providing cash sickness allowances, on the other.[56]

Medical care of a preventive or curative nature

Member States for whom this part of the Convention is in force, committed themselves to provide for benefits 'in respect of a condition requiring medical care of a preventive or curative nature'.[57] A condition requiring medical care implies any condition requiring medical care, including ordinary sickness, employment injury and maternity.[58] The term 'preventive or curative nature' was added in the course of the discussions on behalf of the workers' members, referring to the opinion of the World Health Organisation that strongly emphasised the importance of preventive services to individuals who do not have a morbid condition, such as immunisations and periodic health examinations.[59]

54 IOLEX en APPLIS databases.
55 Osieke 1985, p. 210. This also follows from the Vienna Convention on the Law of Treaties, artt. 31–32.
56 ILO Report V (a)(1) 1952, p. 10.
57 Convention 102, Art. 7.
58 ILO Report IV (2) 1951, pp. 211–212.
59 ILO Report V (a)(2) 1952, p. 306.

In the first draft of the Convention, preventive care was not included as a separate part of social security. In the explanation on the proposed Convention, the Office argued in this respect that the aim of the provision of medical care under a minimum standard is to provide medical care to the individual protected, rather than to prevent the need for such care. According to the Office, the importance of the preventive aspects of medical care was sufficiently stressed by the wording of Article 10, paragraph 3.[60] This paragraph stipulates the importance of preventive medical care by the requirement that the medical benefit should aim, not only at restoring, but also at maintaining or improving the health of the persons protected. Moreover it is geared towards restoring, maintaining or improving their ability to work, as well as attending to their personal needs, where these capacities are diminished or threatened by ill-health. Medical rehabilitation should accordingly be included within the range of the medical care provided. The Office underlined that the development of a general preventive health service as an addition to medical care was highly recommended, but that the provision of preventive health care could not be made the responsibility of a social security medical care service, which is often restricted by limited financial resources.[61] Nevertheless, in the final text of the Convention, the addition of care of a 'preventive or curative nature' was included as a result of the proposal put forward by the workers' members, strongly backed up by the opinion of the W.H.O. Consultant Group.[62]

Any morbid condition

A condition requiring medical care has been specified as 'any morbid condition, whatever its cause, and pregnancy and confinement and their consequences'.[63] In response to the request for a definition of the term 'morbid condition', the Office pointed out that at that time, the World Health Organisation was considering the definition of illness. In advance of such definition, a helping hand for practical use was given by reflecting that any condition that requires medical care other than normal pregnancy, confinement and their normal consequences, may be deemed a morbid condition.[64] It is clear that there is no room for any exceptions on the subject of illnesses or circumstances.

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60 Convention 102, Art. 10 (3): 'The benefit provided in accordance with this Article shall be afforded with a view to maintaining, restoring or improving the health of the person protected and his ability to work and to attend to his personal needs.'

61 ILO Report V (a)(2) 1952, pp. 85, 195–196.

62 ILO Record of Proceedings 1952, p. 520.

63 Convention 102, Art. 8.

64 ILO Report V (a)(2) 1952, p. 83.

2.9.2 PERSONAL SCOPE

Coverage reconsidered

One of the revolutionary issues of the Philadelphia Recommendation on medical care was the so-called complete coverage. It was recommended that the medical care service should cover all members of the community, whether or not they were gainfully occupied.[65] The Office, following the Recommendation, first adopted the proposal to admit a medical service protecting the whole population.[66] Subsequently, it proposed to divide medical care and cash benefits into two different branches. Thus, a Member was allowed to ratify on the strength of a cash sickness benefit scheme only, or of a medical benefit scheme only. As a result of this division it proved technically impracticable to verify whether medical assistance actually would be available to all residents, and therefore, the possibility of coverage of categories of the economically active population was included.[67]

Three alternatives

Finally, three alternatives are given in respect of the personal scope. These alternatives apply not only to medical care, but to most contingencies covered by the Convention. The different options take due account of the existence at that time of two distinct policies in national legislation, one tending to protect the entire population, and the other aiming at covering the gainfully occupied population, primarily the employees, and in some cases also their dependants.[68] To meet the conditions of the Convention, the persons protected shall comprise:[69]

(a) prescribed classes of employees, constituting not less than 50 percent of all employees, and also their wives and children; or
(b) prescribed classes of economically active population, constituting not less than 20 percent of all residents, and also their wives and children; or
(c) prescribed classes of residents, constituting not less than 50 percent of all residents.

The term 'prescribed classes' implies that it is left to national legislation to limit the scope of protection to certain groups of employees, economically active population or residents, such as, for instance, employees in industrial

65 Recommendation No. 69 on Medical Care, 1944, point 8.
66 ILO Report IV (2) 1951, pp. 198, 327.
67 ILO Report V (a)(1) 1952, pp. 50–51; ILO Report V (a)(2) 1952, p. 83, 194.
68 ILO Report V (a)(1) 1952, p. 10.
69 ILO Convention 102, Art. 9.

undertakings, or gainfully occupied persons in specified occupations, or all residents within a certain income limit. In any event, those classes of persons must constitute at least the prescribed proportion of all employees or residents.[70]

Initially, in the first draft of the Convention, only the second and third alternatives were proposed. These alternatives were considered to protect just about the same number of people. According to calculations by the Office based on statistical data published in 1948 by the United Nations and the Office, the ratio of the active population aged 15 to 65 to the total population gave an average percentage of about 40 percent. Thus, the proportions were fixed in view of the fact that 20 percent of the population represented, roughly, 50 percent of all gainfully occupied persons.[71] These conclusions were translated in the two alternatives, constituting an equivalent norm. The choice of the exact percentages was also made on grounds of analyses of the then existing social security schemes in the Member States.[72] The same percentages have been applied to most of the branches. Because the Convention prescribes minimum standards, the percentages were chosen so that a great majority of the countries would be able to meet them in respect of at least several branches.

The first alternative was added at a later stage on behalf of the slightly developed countries to meet the standard more easily, as well as to place a greater emphasis on the protection of employees, which was the wish of the Polish government. The statistics showed that in those countries one half of all employees often constituted less than 20 percent of the population.[73] The new alternative aimed to serve as a stepping-stone for less developed countries in particular, in view of the economic development and industrialisation that would cause an increase of employees.[74] Furthermore, the Office argued that under an insurance scheme that protects employees, it may be easier to prove that 50 percent of all employees are protected than to prove that it protects 20 percent of the population. On the other hand, a scheme that includes independent workers under sickness insurance might be insuring 20 percent of the population without attaining 50 percent of all employees.

All insured persons who are normally engaged in economic activity or who normally work as employees can be counted towards the percentages of 50

70 ILO Report IV (2) 1951, p. 198.
71 ILO Report IV (2) 1951, pp. 198–199.
72 ILO Report V (a)(2) 1952, pp. 169–189.
73 ILO Report V (a)(2) 1952, p. 169. In countries such as Bulgaria, Poland, Japan, and Peru, the ratio of the employees to the total population was below 15%; in the Western European countries this was about 30%.
74 ILO Report V (a)(2) 1952, pp. 81–83, 90.

percent of all employees and 20 percent of all residents respectively, including those who are temporarily unemployed or sick.[75] The wives and children of the insured persons are entitled to medical benefit, but cannot be counted towards these percentages.

Coverage of all residents

The third alternative was formulated in consideration of countries providing medical care systems covering individuals as residents. Thus, under such schemes both the breadwinner and the members of their family are insured in their own right. The minimum protection is set at 50 percent because, in this case, the dependants are insured persons and may therefore be counted for the purpose of proving compliance with the Convention. This alternative would suit countries providing public medical care services for the whole population.

Means test

Since medical care does not include cash benefits, a limitation of the scope to persons of small or of insufficient private means is not admitted. An income limit, or the so-called means test, under which benefits are granted only to those with insufficient means, is normally admitted under schemes protecting all residents, but only for cash benefits. Income limits or means tests are, therefore, excluded in respect of this branch.[76]

2.9.3 BENEFITS

Range of care

The reference point in the matter of the range of care was the Philadelphia Recommendation on Medical Care.[77] The Recommendation provides for a broad range of care, including dental care, nursing care at home, maintenance in sanatoria or other medical institutions, and requisite medical supplies, such as prosthetic limbs. For the minimum standard of medical benefits under this branch of Convention 102, these specific services have been left out, restricting the range of care to the most essential items.[78] It was envisaged that only the advanced standards would comprise the full range of care as defined in the Recommendation on Medical Care, with specific emphasis on the prevention of

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75 ILO Report V (a)(2) 1952, p. 194.
76 ILO Report IV (1) 1951, p. 24–26; ILO Report V (a)(1) 1952, p. 51.
77 Recommendation No. 69 on Medical Care (1944).
78 ILO Report IV (1) 1951, p. 37, ILO Report V (a)(1) 1952, p. 18.

sickness and the rehabilitation of the patient.[79] The minimum standard in the event of employment injury, however, should also comprise the full range of care.[80]

General practitioner care

Medical care under this Convention should cover, in the first place, general practitioner care, including home visiting.[81] General practitioner care must be regarded as the first line of defence of any medical care service, as stressed by the World Health Organisation. In the drafts, the Office had explicitly not included home visiting, taking into account the shortage of doctors in underdeveloped countries. At the last stage however, the workers' members proposed to include home visits, referring to the report of the WHO that strongly emphasised the importance of this kind of care. The proposal was retained by the Committee, and thus home visiting was eventually included in the final text.[82]

Specialist care

The second service that must be provided is 'specialist care at hospitals for in-patients and out-patients, and such specialist care as may be available outside hospitals'.[83] The latter part of the provision was added because an emphasis on hospital specialist care could split specialist services into hospital and non-hospital services, which might result in an increased demand for hospital care. Moreover, a survey of the countries had shown that specialist services were commonly made available in other ways than in connection with hospitalisation, especially in outlying, rural districts.[84] Dental care was not included as it was not considered essential.

Pharmaceutical supplies

The third kind of care to be provided is 'the essential pharmaceutical supplies as prescribed by medical or other qualified practitioners'.[85] The initial idea of the Office was to simply require the provision of all essential drugs and preparations, irrespective of their cost. This point of view was supported by the WHO Consultant Group, but regarded as excessive by the Canadian and Norwegian governments. The condition that the supplies should be prescribed by

79 ILO Report IV (1) 1951, p. 40.
80 ILO Report IV (1) 1951, p. 38.
81 Convention 102, Art. 10, para. a (i).
82 ILO Record of Proceedings 1952, p. 520.
83 Convention 102, Art. 10, para. a (ii).
84 ILO Report V (a)(2) 1952, p. 86.
85 Convention 102, Art. 10, para. a (iii).

practitioners was considered to satisfy both opinions.[86] In spite of the fact that dental care, as such, has been excluded from the material scope of the minimum standards, other qualified practitioners in this provision include dentists.[87]

Hospitalisation

Fourth, the Convention requires 'hospitalisation where necessary'.[88] 'Where necessary' means 'where required by the condition of the patient or the particular circumstances of the case, such as the severity of the illness, danger of infection, lack of proper care at the patient's home, inadequate housing conditions, *etc*.'.[89] It may be considered to include all the supportive services required for the proper care of persons in a hospital.[90]

Maternity care

Finally, medical care has to be provided in respect of care relating to childbirth, including pre-natal and post-natal care, either by medical practitioners or by qualified midwives. Where necessary, hospitalisation has to be available.

Cost-sharing

According to Article 10 of Convention 102, 'the beneficiary or his breadwinner may be required to share in the cost of medical care in respect of a morbid condition'. The last part of the provision implies that cost-sharing is not allowed in the case of care related to childbirth. The provision continues by setting out that 'the rules concerning cost-sharing shall be so designed as to avoid hardship'. The wording of this provision is rather vague as a result of different opinions put forward by the Member States during the drafting process. The following abstract of the development of this regulation may shed some light on this matter.

First of all, the preparatory documents make clear that 'cost-sharing' should be understood as 'a direct contribution at the time when the beneficiary receives the care, in addition to any insurance contribution which the person protected may pay under an insurance scheme'.[91] In the first questionnaire it was suggested that cost-sharing should be permitted 'especially as regards pharmaceutical benefits, of which there is frequently considerable waste' and to the extent of one

86 ILO Report V (a)(2) 1952, pp. 86–87.
87 ILO Report V (a)(2) 1952, p. 195.
88 Convention 102, Art. 10, para. a (iv).
89 ILO Report V (a)(2) 1952, p. 195.
90 ILO Report V (a)(2) 1952, p. 307, statement of WHO Consultant Group.
91 ILO Report V (a) 2 1952, p. 195.

third of the cost of the medical benefits for all persons protected.[92] Taking stock of the replies of a number of governments on this issue, the Office came to the following proposal:[93]

- The person protected may be required to share in the cost of the medical care they receive, except where the condition requiring such care is due to maternity, employment injury, or a disease known to entail prolonged care and likely to be cured, and provided such cost-sharing does not involve hardship.
- The proportion of the cost of medical care borne by the beneficiary in conformity with paragraph (1) may not to exceed one third.

However, there was still little consensus on this point. Some countries (Poland, Yugoslavia and Argentina) considered the limit of one-third on cost-sharing too high, while it was regarded as too restrictive and not sufficiently flexible by other countries (for example, Belgium, Germany, the Netherlands, and Norway). The Dutch government wanted to delete the exception concerning diseases recognised as entailing prolonged care in favour of a more extensive range of care than described in Article 10. Belgium proposed allowing certain restrictions to this exception that would fit in with the Belgium system. Germany envisaged, regarding this matter, a possibility of cost-sharing by the breadwinner in the case of care received by his wife and children.[94] The idea of excluding, as such, from cost-sharing, diseases entailing prolonged care, like chronicle diseases, was largely embraced, though with differing remarks. The proposed exceptions in the cases of maternity and employment injury were not commented upon by any country.

The survey of national social security systems by the Office showed that the degree of cost-sharing varied widely from one country to the other.[95] This led to the decision that the proposed maximum of one-third of the costs was too high for some countries and too general a rule for others. In order to avoid this issue from becoming an obstacle to ratification, it was finally regulated that no cost-sharing was allowed for pregnancy related care, or in the event of an employment injury. For all other cases, it was provided that cost-sharing should not involve hardship. In fact, this requirement merely emphasises the importance of the general principle of financial solidarity, namely, that within each scheme, hardship for persons with meagre resources must be avoided.[96] The exception concerning chronic diseases was deleted in its entirety from the minimum

92 ILO Report IV (2) 1951, p. 218.
93 ILO Report IV (2) 1951, pp. 332–333; ILO Report V (a)(1) 1952, pp. 18, 33.
94 ILO Report V (a)(2) 1952, pp. 7–88 (replies of the governments).
95 ILO Report V (a)(2) 1952, pp. 172–173.
96 See section 2.5.1.

standards, apparently to satisfy the Dutch government. Instead, the Office included in the proposal for the advanced standards, which was raised simultaneously with the minimum standards, the following provision:[97]

(a) that the rules concerning such cost-sharing are so designed as to avoid hardship; and
(b) that provision is made to enable cost-sharing to be dispensed with for prescribed diseases recognised as entailing prolonged care.

By subdividing the cost-sharing alternatives in minimum and advanced standards, the Office obviously intended to bridge the gap between the countries with differing cost-sharing policies. Since the advanced standards have never been effectuated in the intended form, this effort has failed, resulting in a provision that is somewhat remote from the initial and generally accepted intentions.

Duration of the benefit

The Convention stipulates that medical care should be granted as long as required by the condition of the person protected.[98] However, in case of a morbid condition, a maximum benefit period may be prescribed, provided that such a period is not less than 26 weeks in each case of treatment. If medical care is required in respect of a disease other than that which led to the previous treatment, the person protected should be entitled to a new period of treatment of up to 26 weeks. It must be taken into account that medical care should not be suspended as long as the beneficiary receives a sickness allowance.[99] This implies that medical care may have to be given for more than 26 weeks in case the patient already received medical care before becoming incapable of work. Pre-natal, childbirth and post-natal care should be granted throughout the contingency. The last point of the provision with regard to the duration is the requirement to extend the maximum benefit period in the case of patients suffering from diseases recognised as entailing prolonged care, for instance, tuberculosis, heart disease or mental illness. To which diseases this provision exactly refers may be prescribed by national laws or regulations.[100]

In the first proposal, the Office made a distinction between healthcare schemes covering all residents and sickness insurance schemes for employees, providing both medical and cash benefits and financed by contributions. It was stated that

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97 ILO Report V (b) 1952, p. 124.
98 Convention 102, Art. 12.
99 The minimum duration of cash benefits in case of sickness is also 26 weeks, Convention 102, Art. 18.
100 ILO Report V (a) 2 1952, pp. 88–89,196–197.

under a public medical care service protecting all residents, time limits for treatment would be impracticable, because of the administrative complications involved and for reasons of health preservation by early treatment. It was accordingly suggested that for the minimum standard for medical benefits granted under such services, no time limit should be allowed. The Office argued, furthermore, that under a sickness scheme limited to employees, the persons protected should receive a somewhat higher standard of care than they would obtain under a public medical care service. It was therefore proposed that under such a sickness scheme, care should be given for not less than 26 weeks per case of illness. However, in no circumstances should medical benefits be suspended as long as the patient continued to be unable to work and was in receipt of cash benefit. These suggestions took into account the standards which had already been attained by the vast majority of sickness schemes.[101] The advanced standard was supposed to include medical care as long as required by the condition of the person protected, without limitation of time periods.[102]

Some countries considered that a possible limitation of medical care of 26 weeks not acceptable in cases of illnesses requiring prolonged care, such as cancer or tuberculosis. This led to the proposal that with a condition recognised as entailing prolonged care, the limit should not be less than 52 weeks in each case of illness. After examination of the statistics and further discussion, this proposal was found, however desirable, too inflexible a standard.[103] Instead, it was proposed that the benefit period may be limited to 26 weeks, but that provision should be made to extend the limit of 26 weeks for medical care in the case of patients suffering from diseases entailing prolonged care, as may be prescribed by national laws or regulations.

In the explanation attached to the final proposal of the Convention, it was stipulated that medical benefit should be provided as long as required by the condition of the person protected. However, in case of a morbid condition – not in the case of maternity – a maximum benefit period might be prescribed, but

101 ILO Report IV (1) 1951, pp. 38–39. According to the medical care table provided by the Office, which comprises statistics of 20 countries, only in the Netherlands (6 weeks) and Turkey (13 weeks) was the minimum period of benefit as regards hospital care beneath the standard of 26 weeks. Therefore, the Dutch Government pleaded for a shorter benefit period than 26 weeks for hospital care where a fuller range of benefit was provided and the insured person would have the opportunity to arrange for voluntary insurance against the uncovered part of the contingency. It was pointed out that medical benefits under the Dutch legislation were much more extensive than those suggested in Art. 10, and that it would be most undesirable if a country with such an extensive system of medical care were to fail to comply with the minimum standards. The Committee responded on this matter by emphasising that the proposed duration of hospital care might also be secured by voluntary insurance, in virtue of the provision concerning such insurance, ILO Report V (a) 2 1952, pp. 88–89.

102 ILO Report IV (1) 1951, p. 127; ILO Report IV (2) 1951, p. 225.

103 ILO Report V (a) 2 1952, pp. 88–89.

not less than 26 weeks in each case of treatment. The distinction between a public medical care service, in which no limitation of the benefit period would be permitted, and a sickness scheme for employees, which would be more extensive and therefore a limitation of 26 weeks would be acceptable, had been removed during the process without (traceable) comment. Treatment in the context of this provision must be interpreted as referring to any consecutive period of treatment. It was stressed that it depends largely on the judgment of the attending practitioner at what stage the treatment may be deemed to be completed. National laws or regulations may also lay down rules on this matter. In any event, if medical care is required in respect of a disease other than that which led to the previous treatment, the person protected should be entitled to a new minimum treatment period of 26 weeks.[104]

2.9.4 QUALIFYING CONDITIONS

Convention 102 allows for a qualifying period pertaining to medical care 'as may be considered necessary to preclude abuse'.[105] In the general provisions of the Convention, a qualifying period is defined as a period of contribution, a period of employment, or a period of residence, or any combination thereof, as may be prescribed.[106] For the prescription of the qualifying periods for the distinctive contingencies, the Office took into account the fact that the main purpose of a qualifying period in relation to short-term allowances and medical benefits is to ensure that the benefits are, in fact, received by the categories of persons for whom they are intended. It was deliberated that the length of the period of contribution, employment or residence, as the case may be, would depend largely on the scope of protection and the nature of the scheme concerned. In order to preclude abuse and to safeguard the financial interests of the general body of contributors, the period may have to be longer where the scope of a scheme is narrow, or where insurance is voluntary, than under a scheme with an extensive or universal scope, such as medical care. Accordingly, only a general statement is included in the present text of the Convention, the detailed provision being left to be determined by national laws or regulations.[107]

However, the analysis of national social security systems shows that most countries did not prescribe any qualifying period for medical care. In general, it was sufficient if the claimant possessed, at the time when the contingency occurred, the requisite status of a person protected, for instance, employee or

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104 ILO Report V (a) 2 1952, pp. 196–197.
105 Convention 102, Art. 11.
106 Convention 102, Art. 1 para. f.
107 ILO Report V (a)(1) 1952, p. 16; ILO Report V (a)(2) 1952, p. 196.

resident.[108] It was also recalled that none of the pre-war conventions on the subject allowed a qualifying period for medical care. The Office brought against this that slightly developed countries might need to prescribe a short qualifying period during the first years of operation of the service.[109] According to the proposal, the advanced standard would not permit any qualifying period.[110]

2.10 SICKNESS BENEFIT

2.10.1 MATERIAL SCOPE

According to Article 14 of Convention 102, a sickness scheme is supposed to cover 'incapacity for work resulting from a morbid condition and involving suspension of earnings, as defined by national laws or regulations'. The term 'earnings' implies income derived from a gainful occupation, whether the person is employed or is an independent worker, or an employer who manages his business himself.[111] Sickness due to employment injury has to be covered, but can, of course, also be covered by a separate employment injury insurance scheme, whether or not it is combined with a sickness scheme. A condition may be deemed morbid as long as medical care is required. Once the condition has been stabilised and care is no longer needed, it ceases being sickness and becomes invalidity. When and where the link between sickness benefit and invalidity benefit is exactly established depends on national legislation.[112] Incapacity for work, as a rule, is the incapacity of the claimant to do their usual work, and, for the minimum standards, implies that it is total.[113]

2.10.2 PERSONAL SCOPE

Similar to the medical care branch, three alternatives are given in respect of the personal scope of a sickness benefit scheme. These alternatives take account of the existence at that time of two distinct policies in national legislation, one tending to protect the entire population and the other aiming to cover the gainfully occupied population.[114] To meet the conditions of the Convention as regards sickness, the persons protected shall comprise:[115]

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108 ILO Report IV (1) 1951, p. 92.
109 ILO Report V (a)(2) 1952, p. 88.
110 ILO Report V (b) 1952, p. 81.
111 ILO Report V (a)(2) 1952, p. 91.
112 ILO Report IV (1) 1951, p. 82.
113 ILO Report IV (1) 1951, p. 81; ILO Report V (a)(2) 1952, p. 197.
114 ILO Report V (a)(1) 1952, pp. 10–11. For further explanation, see section 2.9.2 concerning medical care.
115 Convention 102, Art. 15.

(a) prescribed classes of employees, constituting not less than 50 percent of all employees; or
(b) prescribed classes of economically active population, constituting not less than 20 percent of all residents; or
(c) all residents whose means during the contingency do not exceed limits prescribed in such a manner as to comply with the requirements of Article 67.

Different from the requirements in relation to a medical care scheme, the wives and children of insured persons under the first two options are not included in the personal scope. This is, of course, because of the nature of the risk that provides for a substitute income in the case of suspension of earnings.

The third alternative is formulated to make it possible for Member States to comply with the standard in respect of sickness on the basis of social assistance, protecting all residents whose means, during a period of sickness, do not exceed a prescribed limit. A means test is strictly reserved for schemes that cover all residents.

2.10.3 BENEFITS

Introduction on the calculation of benefits in general

Benefits under the Convention must be provided in the form of periodical payments, for example, per month or per week. A lump sum benefit is only allowed, under strict conditions, in the case of employment injury.[116] Three options for assessment of the level of benefit are given, so as to ensure that contracting parties with different types of systems fulfil equivalent minimum standards. Because the standard of living varies in each country, the benefit amounts are not set in terms of dollars or another currency, but are instead related to the average earnings in each country. The fact that the minimum standards have to be equally applied by countries with diverging benefit systems and differing income levels has resulted in complicated provisions on the calculation of the benefits. In this section, the different options will be detailed and explained, with sickness benefit as a starting point. However, the underlying ideas of the different options and the method of calculation apply to most of the contingencies covered by Convention 102.

[116] See section 2.13.3.

Amount of the benefit

A sickness benefit in accordance with the Convention has to be at least at a rate that amounts to:[117]

- 45 percent of individual earnings, where classes of employees or classes of the economically active population are protected and the benefit is proportionate to the previous earnings of the beneficiary. A ceiling on earnings may be fixed, or a maximum benefit set, but the maximum benefit shall not be less than 45 percent of the average wage of a skilled adult manual male employee; or
- 45 percent of the wage of an ordinary (unskilled) adult male labourer, where classes of employees or classes of the economically active population are protected and the benefit is at a flat rate, or
- 45 percent of the wage of an ordinary (unskilled) adult male labourer subject to a means test, where all residents are protected.

The replacement rate of the benefit was fixed by taking into account the rates in various Member States at the time, and the necessity of not impairing the beneficiary's will to resume work where this is practicable.[118] Initially, the Office had proposed a percentage of 50 percent for all short-term benefits and of 40 percent for all long-term benefits. During the Conference in 1951, the Conference Committee on Social Security recommended a reduction to 40 and 30 percent respectively, which was adopted by 49 to 46 votes, with 6 abstentions. However, at the time this voting took place, only 21 out of the 40 government members of the Committee were present, a circumstance that definitely influenced the outcome of the voting. In its next draft, the Office had overruled the outcome of the voting with reference to the available statistics. It emphasised that the Conventions could not be founded on the lowest common denominator, but should rather correspond to a level attained by a majority of the countries, leaving aside the most highly developed countries.[119] Accordingly, the percentages of long-term benefits were set again at 40 percent (except survivors' benefits), and short-term benefits at 50, with an exception for unemployment benefit, which was kept at 40 percent.[120]

During the last discussion by the Conference Committee, several amendments to the distinctive rates were made again, but finally the percentages were set at 45 percent for sickness, unemployment and maternity, at 50 percent for employment

[117] Convention 102, Art. 16 in conjunction with Arts. 65, 66, 67 and the Schedule to Part XI. The different options will be explained below.
[118] ILO Report IV (1) 1951, p. 62.
[119] ILO Report V (a)(1) 1952, p. 56.
[120] ILO Report V (a)(1) 1952, pp. 56–57, 92; ILO Record of Proceedings 1952, p. 525.

injury, and at 40 percent for old-age, invalidity and survivors' benefit, albeit with a very narrow majority in some cases.

Underlying principles

Before reading up on the subject of cash benefits, the Office reflected on their nature.[121] The rates of social security cash benefits in contingencies involving loss of earnings are governed by one or other of two leading principles. First, there is the principle of conserving the previous standard of living of the beneficiary to an extent that does not negatively affect his will to resume work. The second principle implies a moral obligation on society to maintain its members and their families in health and decency during contingencies involving loss of income, by guaranteeing at least the minimum of subsistence. The first principle was chiefly applied by countries aiming to protect all gainfully occupied persons and their dependants, especially in relation to benefits for short-term contingencies. The minimum-of-subsistence principle was implemented mainly by countries aiming to protect all residents. As a short-term benefit, sickness benefit was subject to the principle of maintaining the previous standard of living of the beneficiary in most European countries. According to the analysis of national systems, the rates of short-term benefits were generally higher than the rates of long-term benefits, since in the case of long-term benefits. account was taken of the fact that the expenses involved in gainful activity were eliminated. Those expenses included transport to and from work, social obligations of a professional nature, special clothing, holidays, *etc.*

The Office furthermore noted that the principle of conserving the previous standard of living during the contingency was under pressure because of a limitation of financial possibilities. Therefore, it was practice to leave out of consideration any excess of earnings above what was determined a 'reasonable' standard of living. As a result, those with incomes above the ceiling in fact received a smaller proportion of their previous income, namely, the amount regarded as a subsistence minimum for the middle class. Only for persons with earnings below the ceiling did the benefit represent the percentage prescribed.

[121] ILO Report IV (1) 1951, pp. 43–44.

Calculation of the benefit: three options

As mentioned above, to meet the condition of flexibility, the Convention offers three options with regard to the calculation of the amount of the benefit.[122] The options are the following: If a country uses an insurance system for employees or economically active persons, there is a choice between a benefit based on the previous earnings of the beneficiary, or a flat rate allowance determined in relation to the wage of an unskilled adult male labourer. In the case that sickness is covered by a social assistance scheme providing for a fixed benefit subject to a means test, the benefit has to be determined at least at a level that will be sufficient to maintain the family of the beneficiary in health and decency.

Addition of family benefit

In all cases, for the purpose of calculating the percentage of the standard wage, family allowances, where such are paid, shall be added to the earnings. If those family allowances are continued to be paid during the contingency, they shall also be added to the benefit.[123] Finally, it must be recalled that by defining the minimum level of benefits in relation to the wages in the country, the provisions take into account differences in levels of economic development between Member States.

Standard beneficiary

The percentages of individual earnings or standard wages, as stipulated in the Convention, relate to what is termed a 'standard beneficiary'. This standard beneficiary is not the same for all contingencies; the definition is specified on the basis of the statistical data from Member States and depends on the character of the benefit.[124] It is provided that benefits for other beneficiaries, such as single persons and families of different sizes, shall bear a reasonable proportion to those of a standard beneficiary.[125] Accordingly, taking the standard beneficiary as a reference point makes it possible to compare the benefit granted with the

122 Convention 102, Art. 16 in conjunction with Arts. 65, 66, and 67. ILO ILO Report V (a)(1) 1952, p. 19; ILO Report IV (1) 1951, pp. 43–64; ILO Report IV (2) 1951, pp. 230–248; ILO Report V (a)(2) 1952, pp. 135, 220–227.

123 ILO Report V (a)(2) 1952, pp. 167, 223.

124 In the case of old age, the standard beneficiary is a man who has a wife of pensionable age dependent on him; in the case of the death of the breadwinner, the standard beneficiary is a widow with two children under school leaving age or under 15 years of age. In the case of maternity, the standard beneficiary is a woman. In the other cases, the standard beneficiary is a man with a dependent wife and two dependent children. Convention 102, schedule to Part XI; ILO Report V (a)(1) 1952, p. 57.

125 Convention 102, Art. 65 (5), Art. 66 (3).

requirements of the Convention.[126] In the case of sickness, the standard beneficiary is a man with a dependent wife, not herself engaged in gainful activity, and two children under school leaving age or under 15 years of age, as the case may be.

Benefit related to earnings

According to the first alternative, the sickness benefit (including family benefit) for the standard beneficiary must attain or exceed 45 percent of his previous earnings (including family benefit).[127] However, in the case that his previous earnings exceeded the earnings of a 'standard' skilled manual male employee (hereafter called the 'standard wage of a skilled worker'), the benefit needs only to be 45 percent of the standard wage of a skilled worker.[128] Thus, although the benefit is based on previous earnings, a ceiling may be prescribed as a safeguard for the solvency of the insurance scheme.[129] In other words, this method obliges Member States to grant every worker with earnings equal to or below the standard wage of a skilled worker 45 percent of his individual earnings, but permits them to grant workers with earnings above the standard wage of a skilled worker a benefit of not more than 45 percent of that wage. In practice, in the calculation of the previous individual earnings, any part of earnings exceeding the standard wage of a skilled worker may be disregarded. It must be kept in mind that under such income related schemes, a benefit can be much less than 45 percent of the standard wage of a skilled worker, that is, if the beneficiary had only a small income.

For the calculation of the previous earnings it is also permitted to take as a basis the basic wages of the wage class to which the beneficiary belongs. This may be practical for countries with insurance schemes where the persons protected are classified according to their earnings in wage classes, for each of which, a so-called basic wage is fixed. In this event, the benefit must be at least 45 percent of the relevant basic wage.[130]

Apart from prescribing a ceiling for the earnings taken into account in the computation of benefit as a way to safeguard the solvency of the insurance scheme, a country can also limit the benefit to a prescribed maximum amount. Such a maximum shall, again, not be less for the standard beneficiary than 45 percent of the standard wage of a skilled worker.[131]

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[126] ILO Report V (a)(2) 1952, pp. 226–227.
[127] Convention 102, Art. 16 (1) in conjunction with Art. 65 and the Schedule to Part XI.
[128] The concept of 'standard wage' will be explained below.
[129] ILO Report IV(1) 1951, p. 61; ILO Report V (a) (1) 1952, p. 19.
[130] ILO Report V (a)(2) 1952, pp. 221.
[131] ILO Report V (a)(2) 1952, pp. 221.

Flat rate benefit

According to the second alternative, the amount of the benefits payable to the standard beneficiary must meet or exceed 45 percent of the earnings of a typical unskilled male labourer (hereafter called the 'standard wage of an unskilled worker').[132] Thus, for all beneficiaries the rate of benefit will be the same, irrespective of their previous earnings, providing that they have similar family charges and fulfil the qualifying conditions.[133] The benefit required under these uniform benefit schemes will be lower than the amount of the maximum benefit paid under schemes with wage-proportionate benefits, since the maximum benefit is related to the standard wage of a skilled worker instead of an unskilled worker. Such differentiation is justified on the grounds that under a wage-proportionate scheme, a beneficiary will receive 45 percent of his individual previous earnings, however low these earnings may be. Under a system of uniform rates, on the other hand, a beneficiary will receive the fixed amount, even if his previous earnings were lower than the wage of the typical unskilled labourer.[134]

Benefit depending on means or income during the contingency

The third alternative is practicable where the scheme concerned protects all residents and imposes a test of need, in other words, through a social assistance scheme.[135] In this case, the benefits are to be fixed according to a scale laid down by the competent public authorities.[136] The benefit should be sufficient to keep the beneficiary and his family in conditions conducive to health and a decent standard of living. The Member State wishing to comply on the basis of social assistance will therefore have to prove that the maximum benefit to a family without sufficient means is actually a subsistence benefit, and large enough to permit the family to live under tolerable conditions. In any case, in order to provide a standard of comparative value, such benefit may not be less than 45 percent of the wage of the typical unskilled labourer, as determined in the second alternative.[137]

The maximum benefit may be reduced where the beneficiary has income or means of his own.[138] After all, social assistance is intended to supplement the means of a person suffering a loss of earnings as a result of, in this case, sickness. Nevertheless, it is stipulated that the beneficiary should be allowed to have a certain amount of means in addition to the maximum benefit. The Convention

132 Convention 102, Art. 16 (1) in conjunction with Art. 66 and the Schedule to Part XI.
133 ILO Report V (a)(1) 1952, p. 19.
134 ILO Report V (a)(2) 1952, p. 224.
135 Convention 102, Art. 16 (2) in conjunction with Art. 67.
136 ILO Report V (a)(1) 1952, p. 19.
137 ILO Report V (a)(2) 1952, p. 225.
138 Report IV (1) 1951, p. 138; ILO Report V (a)(2) 1952, pp. 225–226.

does not fix the amount to be exempt, but simply states that it should be a substantial amount, fixed by the competent public authority in conformity with prescribed rules. In the explanation of the proposed Convention, the Office added at this point: 'It is hoped that these safeguards will be sufficient to ensure that a social assistance scheme exempts a reasonable amount.'[139] It was pointed out, furthermore, that the value of a house belonging to the claimant was not usually taken into account, and exemptions were also made in respect of life insurance, certain savings, and a limited amount of other cash income. Income in excess of the exempt amount may then be deducted from the maximum benefit, as long as the income during the contingency does not fall below the stipulated percentage of the standard wage for unskilled labour or does not guarantee a decent standard of living.

It is evident that persons whose means, other than those exempt, meet or exceed the amount of the maximum benefit, have no entitlement to benefit.[140] In other words, the sum of the maximum benefit and the maximum amount of the means exempt represent the means limit which excludes a sick person from the right to benefit.

Standard wage of the skilled employee

If a country chooses the first alternative, which means that it applies a scheme which grants benefits related to previous earnings, the maximum benefit may not be less than 45 percent of the standard wage of a skilled worker.[141] Although this standard wage will differ from country to country, it has to be determined according to the rules laid down in the Convention.[142] These rules require that the standard wage applicable to an earnings related benefit scheme shall be the wage of a skilled manual male employee who is deemed to be typical of the industry with the largest number of the economically active male persons that are protected under the sickness scheme. Additionally, this industry must be categorised in the major group of economic activities with the largest number of protected persons as well. In order to ensure a certain amount of uniformity in the determination of the standard wage, the Convention imposes the use of the International Standard of Industrial Classification adopted by the United Nations for classifying the major group of economic activities.[143] Since the standard earnings are based on rates of wages, the typical skilled worker can only be an employee.[144] It has been stipulated that the standard wage must be fixed on the

139 ILO Report V (a)(2) 1952, pp. 225–226.
140 ILO Report V (a)(2) 1952, p. 226.
141 Convention 102, Art. 65 (3).
142 Convention 102, Art. 65 paras. 6–7.
143 ILO Report V (a)(2) 1952, pp. 220–221.
144 ILO Report V (a)(2) 1952, p. 140.

basis of rates of wages for normal hours of work, determined by collective agreements, by custom, or by national laws or regulations.[145] The Office explicitly explained that overtime is not considered to be normal hours of work.

To give an example of the standard wage of a skilled worker: where the largest number of insured persons is engaged in manufacturing, and within manufacturing, the largest number of persons protected is found in the manufacture of textiles, the standard wage will be the typical average wage of a skilled manual worker in the textile industry.

In order to facilitate the choice of the typical skilled worker in countries where statistics of classification of the persons protected are not available, or where no single major group of economic activities predominates, a Member State may deem fitters and turners in the manufacture of machinery (except electrical machinery) as representing the typical skilled worker.[146] This group was chosen for bench-marking because at that time this industry was important in a large number of countries and paid relatively high wages. Moreover, data on wages in this industry were regularly supplied to the Office, making it easy for countries to submit evidence regarding compliance with the Convention on this point. Where the largest number of persons protected were found in branches of economic activity with considerably lower wages, such as textiles or agriculture, the former way of fixing the standard wage would be expedient.[147] The Convention gives additional regulations where rates of wages for the selected typical worker vary by region.[148]

Additionally, the Convention gives two other methods of establishing the standard wage of a skilled worker, both relatively easy to calculate, but considered to yield a higher outcome then the other options. The first of these options is to take as a standard the wage of a person whose earnings are equal to or greater than the earnings of 75 percent of all the persons protected, and secondly, the wage of a person whose earnings are equal to 125 percent of the average earnings of all the persons protected.

Standard wage of the unskilled labourer

For the purpose of a scheme providing flat rate benefits that are not proportionate to previous earnings, the standard wage represents the wage of an ordinary adult male labourer.[149] The typical unskilled labourer shall be a person employed in the major group of economic activities with the largest number of persons

145 ILO Report V (a)(2) 1952, p. 222.
146 Convention 102, Art. 65 (6) sub a.
147 ILO Report V (a)(2) 1952, pp. 138–139.
148 Convention 102, Art. 65 (8); ILO Report V (a)(2) 1952, pp. 140, 223.
149 Convention 102, Art. 66 (1).

protected by the scheme concerned, in the division comprising the largest number of persons protected, or an unskilled labourer in the manufacture of machinery, at the behest of the Member State.[150] The wages of an adult unskilled labourer in industry may be assumed to provide a reasonable measure of the income needed for maintaining an average sized family in the conditions prevalent in the country concerned.[151]

Duration of the benefit

In principle, social security benefits should continue as long as the need for support caused by the contingency persists. This principle is universally recognised as the final goal. In practice, however, it is only applied in the case of long-term contingencies, such as old-age, employment injury or child maintenance.[152] Furthermore, a fixed waiting period may be prescribed in relation to several benefits.

Accordingly, the Convention requires a sickness benefit to be paid throughout the contingency, but it provides that the benefit may be limited to 26 weeks in each case of sickness. Moreover, the benefit need not be paid for the first three days of the suspension of earnings.[153] The waiting period of three days excludes cases of very short duration and, where payment is not retroactive, a fraction of all other cases, just as the maximum benefit period excludes a fraction of the cases of very long duration.[154] The principle of meeting the need for support caused by sickness as long as the contingency persists implies the payment of sickness benefit as long as there are prospects of recovery. When and where the link between sickness benefit and invalidity benefit is established depends on national legislation.

The permissive limitations of the maximum benefit period reflect the prevailing practice under social security systems at the time of the realisation of the Convention.[155] It was seen that under insurance schemes in more highly

150 Convention 102, Art. 66 paras. 4–7; ILO Report V (a)(2) 1952, pp. 140, 225.
151 ILO Report IV (1) 1951, p. 63.
152 ILO Report IV (1) 1951, p. 78.
153 Convention 102, Art. 18.
154 On the basis of experience, analysed by the Office, and on the assumption that the maximum benefit period is one year, it was found that a waiting period of three days, without retroactive payment, would have reduced the volume of compensated incapacity by about 8, to 13 percent. A study at that time of the U.S. Public Health Service showed a percentage of 30 in the United States. The effect of an increase of the maximum benefit period from 26 to 52 weeks, both durations with a waiting period of three days, was estimated to be between 2 and 12 percent, and 7 percent in the U.S. The combined effect of a waiting period of three days and a maximum benefit period of 26 weeks was estimated as including 781 to 849 days of incapacity out of 1000. ILO Report IV (1) 1951, pp. 83–84.
155 ILO Report V (a)(2) 1952, pp. 174–175: Analysis of selected national systems, Table III: Sickness.

developed countries, and under normal health conditions, a waiting period of three days and a maximum benefit period of 6 to 12 months resulted in a sickness rate approaching ten days per person per year.[156]

In the original text, the Office had proposed an alternative of a waiting period of 7 days in combination with a benefit period of 52 weeks, instead of 3 days and 26 weeks. This alternative was rejected at an early stage, after which the Office proposed another alternative, consisting of a waiting period of 7 days, providing that there was no limitation of the benefit period, in view of Australia and New Zealand where this was current practice. However, this alternative was turned down again on the initiative of the workers' members by a majority of votes during the final vote on the Convention.[157] It was thought that a waiting period of longer than 3 days would risk minor diseases being neglected in the absence of cash benefits. Minor diseases could become major diseases if people did not go to see the doctor in time.

Adjustment of short-term benefits to the cost of living

The importance of the adjustment of cash benefits to changes in the cost of living has been generally underlined.[158] For sickness benefits on the basis of previous earnings, the previous earnings will normally be calculated over a prescribed period which is fairly short, and adjustment to the cost of living is, therefore, effected automatically. Since the maximum benefit may not fall below 45 percent of the wage of the typical skilled employee, such a maximum will have to be adapted to changes in the level of wages. Where a flat rate benefit is related to the wage of the typical unskilled labourer, either in respect of an insurance system for workers or a social assistance scheme, the position will be the same.[159] In relation to long-term benefits, specific adjustment requirements are prescribed, as will be dealt with in the relevant sections.

2.10.4 QUALIFYING CONDITIONS

Preclusion of abuse

Convention 102 gives room for countries to prescribe a qualifying period for entitlement to a sickness benefit. The Member States are free to determine a qualifying period 'as may be considered necessary to preclude abuse.'[160] In fixing

[156] ILO Report IV (1) 1951, p. 85.
[157] ILO Record of Proceedings 1952, p. 333.
[158] ILO Report V (a)(2) 1952, p. 227.
[159] ILO Report V (a)(2) 1952, p. 228.
[160] Convention 102, Art. 15.

the qualifying conditions, the Office took into account the fact that, for short-term allowances and medical benefits, the main purpose of a qualifying period is to ensure that the benefits are, in fact, received by the categories of persons for whom they are intended.[161]

Survey of qualifying periods prescribed by Member States

The analysis of national social security systems made by the Office, showed that some countries – such as The Netherlands, Germany and Sweden – did not prescribe a qualifying period for sickness benefit.[162] In countries that did prescribe a qualifying period, the character and length of those periods varied greatly. For example, they could be related to contributions paid, or to employment, or to insurance under the scheme concerned. The lengths of the prescribed periods varied from 60 hours of employment in the quarter year preceding the first diagnosis of the illness in France, to 156 weekly contributions in order to qualify for benefit of unlimited duration in the United Kingdom.[163] Taking account of the state of affairs at that time, the first questionnaire suggested a minimum period of six months of contributions or employment within the 12 months, or 12 months of residence. These qualifying periods were, however, considered too long by quite a few countries, and some of them did not wish to provide for any qualifying period at all. In view of these differing opinions, it was deemed preferable not to specify qualifying conditions for short-term benefits in any detail.[164]

2.11 UNEMPLOYMENT BENEFIT

2.11.1 MATERIAL SCOPE

Introduction

At the time of the making of Convention 102, Convention 44 on Unemployment Provision already existed.[165] This Convention, however, did not determine the amount of cash benefits to be granted. At present, Convention 44 has been shelved, which means that it is considered outdated and therefore not open to new ratification, but it is still subject to a supervision procedure for those

161 See section 2.9.4 on medical care.
162 ILO Report V (a)(2) 1952, p. 174; ILO Report V (a)(1) 1952, pp. 93–94.
163 ILO Report V (a)(1) 1952, pp. 93–94.
164 ILO Report IV (a)(2) 1952, pp. 287–288, 294.
165 ILO Convention No. 44 (Shelved) Unemployment Provision Convention, 1934. This Convention had a covering Recommendation, No. 44 (1934). In 1952, Convention 44 had only been ratified by 8 countries, 7 of which were European countries, plus New Zealand.

countries that ratified it in the past. Ratification of Convention 102 with acceptance of Part IV on Unemployment, does not imply that Conventions 44 is no longer applicable. In those cases, both Conventions apply next to each other. ILO Convention 168 substitutes Convention 44, but out of all the EU Member States, only four have ratified Convention 168 until now, including Norway and Switzerland, who had previously ratified Convention 44. Because Convention 44 played an important role in the formulation of the unemployment part of Convention 102, a brief insight into the former Convention is also given in this section, where expedient.

Definition of the contingency

According to Convention 102, the contingency covered 'shall include suspension of earnings, as defined by national laws or regulations, due to inability to obtain suitable employment in the case of a person protected who is capable of, and available for, work.'

The point of departure is clearly the 'suspension of earnings', which excludes newcomers to the labour market from benefitting from this protection until they find employment.[166] When the Yugoslavian government explicitly asked to include these persons, the Office replied that it was not possible to accede to that request, since the scope of unemployment schemes was generally limited to employees. Only two of the countries of which statistics were available extended their schemes to persons not normally employed.[167] Furthermore, Convention 102 focuses on full unemployment; partial unemployment is not included. A reason for this is not given, which is striking, given that Convention 44 applies to both full and partial unemployment.

Suitable work

The material scope of the contingency covers the 'inability to obtain suitable employment.' With regard to the reach of the contingency, the meaning of 'suitable' in this context is of crucial importance. However, the Convention does not provide a definition of 'suitable employment'. Furthermore, during the drafting process surprisingly few comments were made regarding the content of this concept. Only three governments made remarks on this point. The Yugoslavian government wanted it to be specified that the qualifications and the personal aptitude of the claimant should be taken into account. The Argentinean government considered the definition too generally formulated, whereas the Austrian government argued that the claimant must explicitly be willing to

166 See also Bartelomei de la Cruz 1994, p. 41.
167 ILO Report V (a)(2) 1952, pp. 96–97.

work. The Office responded to these remarks that 'suitable' may be interpreted as meaning that the claimant's training and personal aptitude should be taken into account. Additionally, it stated that the inclusion of 'available' means that the claimant must also be willing to accept suitable work.[168] Further specifications as to the meaning of 'suitable employment' were left to be determined by national laws or regulations, in light of the particular conditions of the countries' economies and employment markets.[169]

More clarity on the exact meaning of the term 'suitable' is provided in Convention 44. This Convention states that a claimant may be disqualified from the receipt of benefit for an appropriate period if they refuse an offer of suitable employment. The Convention subsequently points out when an employment shall not be deemed to be suitable. Roughly, that would be the case in the following situations:[170]

- if acceptance of a job would involve residence in a district in which suitable accommodation is not available;
- if the rate of wages offered is lower, or the other conditions of employment are less favourable (subject to some conditions);
- if the situation offered is vacant due to a trade dispute; and
- if, for any other reason, bearing in mind all the considerations involved including the personal circumstances of the claimant, its refusal by the claimant is not unreasonable.

Recommendation 44, which accompanied Convention 44, additionally specifies that the length of the claimant's service in the previous occupation, their chances of obtaining work in it, their vocational training, and their suitability for the work must be taken into account. Within the preliminary reports as regards Convention 102, no reference was made at this point to Convention 44, or to the accompanying recommendation. Nevertheless, Convention 102 was considered to set out, in general, higher standards than were provided by the existing pre-war conventions on social security. Moreover, Recommendation 67 on Income Security, which had explicitly served as a guide for the development of Convention 102, also indicates what should be considered suitable employment. It says that during an initial period reasonable in the circumstances of the case, only the following should be deemed to be suitable employment:[171]

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168 ILO Report V (a)(2) 1952, pp. 96–97.
169 ILO Report V (a)(1) 1952, p. 15.
170 Convention 44, Art. 10.
171 Recommendation 67 on Income Security, Annex, Art. 14 (3).

(a) employment in the usual occupation of the insured person in a place not involving a change of residence and at the current rate of wages, as fixed by collective agreements where applicable; or
(b) another employment acceptable to the insured person.

After the expiration of the initial period, suitable employment may include, under conditions, a change of occupation, change of residence, or employment under conditions less favourable that in the usual occupation.[172]

Taking stock of the definition of suitable employment in the ILO instruments that have served as a basis for the formulation of the part of Convention 102 on unemployment, it can be concluded that a benefit must be granted if an unemployed person is unable to obtain a job that meets a number of requirements, in any case during the first period of unemployment. During such an initial period, the occupation of the jobseeker, the distance to work, and the previous level of wages at least shall be taken into account for the determination of suitable employment.

2.11.2 PERSONAL SCOPE

Convention 102

In respect of unemployment benefit, the following persons shall be protected:[173]

(a) prescribed classes of employees, constituting not less than 50 percent of all employees; or
(b) all residents whose means during the contingency do not exceed limits prescribed in such a manner as to comply with the requirements of Article 67.

The country surveys prepared by the Office showed that, at that time, the scope of unemployment insurance was relatively limited. In several countries only urban employees were protected, in other countries (certain classes of) employees were insured subject to an income limit, and in three countries the insurance was voluntary.[174] It was found that countries with a voluntary unemployment scheme might have difficulty, especially at the outset, in covering as much as 50 percent of all employees. Therefore, the Office had reduced, in the last proposal, the percentage from 50 to 40, so as to make the standard more attainable for countries wishing to introduce unemployment insurance initially on a modest scale. Proposals for a higher standard were to be taken into account in the advanced

[172] See also Bartelomei 1994, point 121, 126, 131.
[173] Convention 102, Art. 21.
[174] ILO Report V (a)(1) 1952, pp. 68, 72.

standards. However, the Conference Committee on Social Security amended this alteration and made it 50 percent again, which was adopted at the last vote.

In view of the fact that the majority of unemployment schemes were meant only for employees, the term 'all residents' in the second alternative had been changed in the last proposal to 'all employees'. However, in the end this alteration was reversed again without explication.[175] In any case, the two options imply that insurance schemes for employees that provide means tested benefits are not in line with this provision.

Compliance with this part of the Convention can, as with most other parts (except employment injury and family benefit), be effected on the basis of compulsory as well as voluntary insurance, or of a public service, or any of these combined. All insured persons, whether at work or unemployed but still insured, can be counted towards the required percentage.

Convention 44

Convention 44 applies to all persons habitually employed for wages or a salary.[176] The scope of this Convention seems very wide. However, a long list of exceptions allows the Member States to considerably reduce the scope, such as persons employed in domestic service, home workers, workers in the service of the government, or seasonal workers. In practice, the scope can be far more limited in the end compared to Convention 102.

2.11.3 BENEFITS

Amount of the benefit

The allowance for a standard beneficiary has to be a periodical payment at a rate which amounts to at least:[177]

– 45 percent of individual earnings, where classes of employees or classes of the economically active population are protected and the benefit is proportionate to the previous earnings of the beneficiary. A ceiling on earnings may be fixed, or a maximum benefit set, but the maximum benefit shall not be less than 45 percent of the average wage of a skilled adult manual male employee; or

[175] ILO Report V (a)(2) 1952, p. 96; ILO Record of Proceedings 1952, p. 521.
[176] Convention 44, Art. 2 (1).
[177] Convention 102, Art. 22, in conjunction with Arts. 65, 66, 67, and the Schedule to Part XI. For an explanation of the method of calculation, see section 2.10.3 on sickness benefit.

- 45 percent of the wage of an ordinary (unskilled) adult male labourer, where classes of employees or classes of the economically active population are protected and the benefit is at a flat rate; or
- 45 percent of the wage of an ordinary (unskilled) adult male labourer subject to a means test, where all residents are protected.

The standard beneficiary in respect of the unemployment benefit is a man with a wife and two children (under school leaving age or under 15 years of age) dependent on him. The applicable percentages are the same as those concerning the other short-term benefits, i.e. sickness and maternity benefits. The statistics provided by the Office, comprising 45 countries, showed that a minority of countries were maintaining, at that time, an unemployment scheme. These countries, including UK, the Netherlands, Czechoslovakia and Greece, had relatively high incomes per capita and provided comparatively high benefits. The relative value of the benefits in none of these countries amounted less than 50 percent of the reference wage, the percentage that was initially proposed by the Office.[178] As a result of several alterations and amendments, as explained in section 2.10.3 on sickness benefit, the rate was first changed to 40 percent, and subsequently fixed at 45 percent.

Duration of the benefit

As with all social security benefits, the unemployment benefit has to be granted, in principle, throughout the contingency.[179] Nevertheless, a limit of 13 weeks within a period of 12 months is allowed, where the classes of employees are protected under an insurance scheme or a public service, i.e. under schemes without a means test. Alternatively, the benefit may be limited to 26 weeks within a period of 12 months, where all residents whose means do not exceed certain limits (prescribed by national law) are protected under a social assistance scheme. The longer benefit period required under a social assistance scheme was justified by the fact that a means test could be applied. As a third alternative, a benefit period may vary with the length of the contribution period and/or the amount of benefit previously received in a given period, provided that the average duration of benefit shall be at least 13 weeks within a period of 12 months.[180] An exception is made for seasonal workers, such as building workers or certain categories of agricultural workers, in whose case the duration may be adapted to their special conditions of employment.[181]

[178] ILO Report V (a)(1) 1952, pp. 60–61 (table), pp. 68–69.
[179] Convention 102, Art. 24.
[180] Convention 102, Art. 24 paras. 1 and 2; ILO Record of Proceedings 1952, p. 521.
[181] Convention 102, Art. 24 (4); ILO Report V (a)(2) 1952, p. 201.

The Convention leaves room for a waiting period that should not exceed the first seven days in each case of the suspension of earnings.[182] Days of unemployment preceding and following a short spell of employment shall be counted as part of one and the same case of unemployment. However, as regards seasonal workers, the waiting period may be determined in the light of their conditions of employment. A 'case' of unemployment refers to a period of unemployment accompanied by a suspension of earnings, or two successive periods separated by intervals of work whose maximum length is to be prescribed by national laws or regulations.[183]

Before fixing a duration limit, the Office had mentioned that unemployment is not a biological contingency as, for instance, maternity, sickness and old age. Its occurrence and duration depend on the economic situation of the country on the one hand, and on the individual ability, skill and initiative of the person protected, on the other. The main requirements of an unemployment scheme are, therefore, an efficient employment service, facilities for retraining, and, thirdly, a general programme of full employment. Only then can unemployment be controlled and its duration shortened if it does occur.[184]

During the discussions of subsequent proposals, the duration as well as the waiting period was changed several times. In the last proposal, only two alternatives were given, one comprising a minimum duration of 13 weeks within 12 months, with a waiting period of three days per case. The second option was a benefit period of at least 26 weeks, with a waiting period of seven days per case. The third option, involving a varying duration depending on the contribution period, was added only in last instance in behalf of, among others, the United Kingdom, which had, at that time, an unemployment scheme that provided benefits related to the insurance period of the beneficiary.[185]

2.11.4 QUALIFYING CONDITIONS

Entitlement to unemployment benefit may be made subject to the completion of a qualifying period. However, such a qualifying period may not exceed the duration considered necessary to preclude abuse.[186] A qualifying period can either be a period of contributions or employment, or a period of residence, depending on the scope of the scheme concerned.[187] In the first draft, the Office

[182] Convention 102, Art. 24 paras. 3 and 4; ILO Record of Proceedings 1952, p. 521.
[183] ILO Report V (a)(2) 1952, p. 201.
[184] ILO Report IV (1) 1951, p. 87.
[185] ILO Record of Proceedings 1952, p. 521; ILO Report IV (1) 1951, p. 85.
[186] Convention 102, Art. 23.
[187] ILO Report V (a)(1) 1952, p. 30.

had suggested two alternatives for the allowed maximum length of the qualifying period, either six months of contributions or employment within the 12 months, or 12 months of contributions within the 24 months, preceding the claim. Under general schemes for residents of insufficient private means, 12 months of residence was proposed. It turned out that there was no consensus on the qualifying periods for short-term benefits in general, and especially not for the unemployment benefit: less than one half of the 24 governments that had replied to the Office's proposal at this point agreed with the proposal. The other governments proposed either shorter (for example, Poland and Denmark) or longer periods (for example, India), or had different periods of reference, or included no detailed provisions at all (for example, the United Kingdom). In view of these differences of opinion, the possibility of reaching agreement was considered so small, that it was deemed preferable not to specify qualifying conditions of the short-term benefits in any detail. Accordingly, the Convention states no more than the instruction that it should only be long enough to ensure that the benefits are, in fact, received by the categories of persons for whom they are intended.[188]

2.12 OLD-AGE BENEFIT

2.12.1 MATERIAL SCOPE

Definition of the contingency

In principle, to comply with Convention 102, an old age scheme has to provide a pension to insured persons at the age of 65 years.[189] Nevertheless, the Convention allows a higher pensionable age 'as may be fixed by the competent authority with due regard to the working ability of elderly persons in the country concerned.'

Pensionable age

The phrasing of the provision regarding pensionable age has been substantially changed since the Office's first draft. It was presumed that an old age pension should be paid at the age at which people commonly become incapable of regular work and at which invalidity and unemployment, if present, tend to become permanent. A table, provided by the Office, showed that the percentage of persons who had reached the age of 65 differed greatly from country to country. It appeared that in India, for instance, in 1931 only 3.8 percent of the population

188 ILO Report IV (2) 1951, p. 106, 288–289, 294–295; ILO Report V (a)(1) 1952, p. 16; ILO Report V (a)(2) 1952, p. 176–177 (table).

189 Convention 102, Art. 26 paras. 1and 2.

aged 15 to 64 was over that age, while in the Netherlands the corresponding percentage was 9.8, and in Norway, 13.1. It was found that in countries with a moderately advanced stage of economic and social development, the number of persons aged 65 or over represented, roughly, 10 percent of the active population. Accordingly, the Office had fixed the normal pensionable age at 65, but with the possibility of countries with a higher proportion of persons of over 64 setting a higher pensionable age. The determination of that higher age was, initially, not left to the national authorities, but restricted by the provision itself. It was regulated that the age could be higher, on condition that the proportion of people having reached the pensionable age was not less than 10 percent of the active population. At a later stage, an exception to the 10 percent rule was added, which took account of the possibility that the proportion of persons of pensionable age might fluctuate. Therefore, a percentage of 9 percent was deemed satisfactory for a period of not more than five years.[190]

However, during the last discussion at the Conference in 1952, Norway, having its pensionable age set at 70, submitted an amendment to this provision.[191] The government adviser stressed the fact that the normal working age varied considerably in the different countries, according to different climatic conditions, general health conditions and other factors. He argued that the implementation of the 10 percent formula would give different results according to the demographic structure of the population in the different countries. Moreover, even in one country, the ratio between people having reached the prescribed retirement age and the active population would continuously vary from year to year. It could well be, therefore, that a country which fulfils the condition one year would suddenly find its old age scheme falling outside the scope of the Convention in another year, not because there had been any change in its legislation, but merely because there had been a change in the demographic structure of the population. A temporary broadening of the 10 percent rule to 9 percent was not found to be sufficient. Thus, Norway considered this provision too inflexible, all the more since the 10 percent rule was not to be applied in connection with the 65-year age limit, although it was shown that there were several countries where the amount of persons that had reached the age of 65 did not represent 10 percent of the active population. In short, the amendment implied that the retirement age would be for the legislative authorities in each country to decide. It should be noted that the same amendment presented by Norway had been defeated earlier in the Committee of Social Security by a vote of 147 for to 147 against, with 12 abstentions.[192] This time it was more successful;

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[190] ILO Report IV (1) 1951, pp. 301–303; ILO Report V (a)(1) 1952, pp. 52–53; ILO Report V (a)(2) 1952, pp. 101–103.

[191] ILO Record of Proceedings 1952, pp. 333–334.

[192] ILO Record of Proceedings 1952, p. 522.

at the very last moment the amendment was adopted by 65 to 52 votes, with 14 abstentions.[193]

2.12.2 PERSONAL SCOPE

Persons covered

To meet the conditions of the Convention as regards old age, the persons protected shall comprise:[194]

(a) prescribed classes of employees, constituting not less than 50 percent of all employees; or
(b) prescribed classes of economically active population, constituting not less than 20 percent of all residents; or
(c) all residents whose means during the contingency do not exceed limits prescribed in such a manner as to comply with the requirements of Article 67.

Compliance with this part of the Convention, as with most other parts (except employment injury and family benefit), can be effected on the basis of compulsory or voluntary insurance, or of a public service, or any of these combined.

The tables prepared by the Office showed that, at that time, most countries afforded some protection in old age. Schemes protecting all residents (with or without a means test) or the whole economically active population were relatively frequent, especially in the upper income group of countries.[195] The distinctive options were designed in consideration of the fact that some countries might find it easier to prove that they would cover 50 percent of all employees than that they would cover 20 percent of the population, since their old age insurance was confined to employees. Countries including independent workers in their old age schemes might insure 20 percent of the population without reaching 50 percent of all employees and would prefer the second option. For countries with public services covering old age, the third alternative would be the most applicable.[196]

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[193] ILO Record of Proceedings 1952, p. 334. The rejected 10 percent formula has been included in the European Code of Social Security, Art. 26.

[194] Convention 102, Art. 27. For an explanation of different options, see sections 2.10.2 on sickness benefit and 2.11.2 on unemployment benefit.

[195] ILO Report V (a)(1) 1952, pp. 69, 62–63.

[196] ILO Report V (a)(2) 1952, p. 203.

2.12.3 BENEFITS

Amount of the benefit

The allowance for a standard beneficiary has to be a periodical payment at least at a rate that amounts to:[197]

- 40 percent of individual earnings, where classes of employees or classes of the economically active population are protected and the benefit is proportionate to the previous earnings of the beneficiary. A ceiling on earnings may be fixed, or a maximum benefit set, but the maximum benefit shall not be less than 40 percent of the average wage of a skilled adult manual male employee; or
- 40 percent of the wage of an ordinary (unskilled) adult male labourer, where classes of employees or classes of the economically active population are protected and the benefit is at a flat rate, or
- 40 percent of the wage of an ordinary (unskilled) adult male labourer, subject to a means test where all residents are protected.

The standard beneficiary in respect of the old-age benefit is a man with a dependent wife of pensionable age.[198] Under an insurance scheme where the man alone is the beneficiary, any supplement to the pension for his dependent wife can be added to prove compliance with the Convention. However, any pension which the wife receives in her own right cannot be taken into account for this purpose. Under a social assistance scheme or an insurance scheme applying to all residents, in which cases thus both husband and wife receive a pension, the two pensions may be taken together; together they will have to attain the fixed percentage of the reference wage.[199] In all cases, benefits for single persons must be reasonably proportionate to those fixed for standard beneficiaries.[200] Unlike other benefits, in view of the age of the beneficiaries, family allowances are not to be added to the benefit and earnings.[201]

As regards the percentage of 40 percent, the Office had initially proposed this very percentage for all long-term benefits. After a discussion that ranged from the deletion of any percentage to the regulation of different percentages for each branch, the Labour Conference in 1951 decided, with a narrow majority, to lower the percentage for long-term benefits to 30 percent. Nevertheless, in the next

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197 Convention 102, Art. 28 in conjunction with Arts. 65, 66, 67 and the Schedule to Part XI. For an explanation of the way of calculation, see section 2.10.3 on sickness benefit.
198 Convention 102, Schedule to Part XI.
199 ILO Report V (a)(2) 1952, pp. 165, 205.
200 ILO Report IV (2) 1951, p. 246.
201 ILO Report V (a)(2) 1952, p. 205.

draft the Office proposed 40 percent again, a move criticised by not more than four countries, and apparently based on the statistics showing that only a few of the investigated countries could not meet this standard in respect of one or more contingencies at the time.[202] One of those countries appeared to be Norway, which argued that the personal scope of the Norwegian scheme was very extensive, and therefore the benefits were lower than under schemes of much more restrictive scopes.[203]

Suspension or reduction of the benefit

The Convention permits the pension to be suspended in case the beneficiary is engaged in any gainful activity.[204] Furthermore, in a contributory system, pensions may be reduced by earnings exceeding an amount fixed by national laws or regulations. Under a non-contributory system, a reduction is allowed in respect not only of earnings exceeding the fixed amount, but also in respect of other means of the pensioner.[205] Originally, it had to be a 'substantial' amount, however, the word 'substantial' was deleted by the Conference Committee, on the proposal of the employers' members in the last instance.

Duration of the benefit

No limitation on the duration of benefit, other than to that of the contingency, is permitted for old age pensions.[206]

Adjustment of long-term benefits to the cost of living

For long-term benefits, the adjustment of cash benefits to changes in the cost of living is more complicated than it is for short-term benefits.[207] Indeed, the purchasing power in the case of long-term benefits will continually diminish after they have been awarded. Moreover, if they are based on previous earnings, they are calculated over a long prescribed period during which the earnings are not adapted to the wage level at the time of calculation. For these reasons, special provisions have been added where the benefit is related to previous earnings or to the wage of the typical unskilled labourer. The provisions require long-term benefits to be 'reviewed following substantial changes in the general level of earnings where these result from substantial changes in the cost of living.'[208]

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202 ILO Report V (a)(2) 1952, pp. 178–181, 186–187 (tables).
203 ILO Report V (a)(2) 1952, p. 144.
204 Convention 102, Art. 26 (3).
205 ILO Record of Proceedings 1952, p. 522.
206 ILO Report V (a)(1) 1952, p. 21.
207 ILO Report V (a)(2) 1952, pp. 227–228; For the adjustment of short-term benefits, see section 2.10.3 on sickness benefit.
208 Convention 102, Art. 65 (10) and Art. 66 (8).

Where the rate of the benefit is subject to a means test and is supposed to be sufficient to maintain the family of the beneficiary in health and decency,[209] a certain adaptation to the cost of living is implicit; therefore, in this case a special provision was found redundant. The Convention does not prescribe a particular method to ensure the automatic adjustment of benefits to a cost of living or wage index. It merely imposes a moral obligation on countries to review the rates of current periodical payments when they are no longer in line with present economic conditions as a result of substantial changes in the cost of living.[210]

2.12.4 QUALIFYING CONDITIONS

Qualifying period for a full benefit

The concept of a qualifying period plays an important role in old age benefit. Even so, the regulation included in the Convention in this respect is rather complicated. The main rule stipulates that a full old age benefit – to be discerned from a reduced benefit – has to be paid to all persons protected who have completed a qualifying period, which may be, at most, either 30 years of contribution or employment, or 20 years of residence.[211] These periods are based on the conditions most commonly required in national legislation for entitlement to full pensions at the time.[212] The prescribed qualifying period has to be completed 'prior to the contingency, in accordance with prescribed rules'. This clause implies that a country can regulate that the required period, either of contribution, employment, or residence, must have been completed within a specified number of years prior to the attainment of pensionable age. The prescribed period may also be the total period that has elapsed since the person concerned first entered insurance, or, when their insurance has been interrupted for a longer period, since they last entered insurance.[213]

As an alternative, a country is allowed to require that the person protected must have paid, or have paid in respect of him, a prescribed yearly average number of contributions during his working life.[214] This option has been designed exclusively for countries where old age insurance extends to the whole economically active population. Evidently, under such a scheme, every claimant will have been insured during the greater part of their working life, and thus qualify for a pension.

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209 Convention 102, Art. 67.
210 ILO Report V (a)(2) 1952, p. 228.
211 Convention 102, Art. 29 (1) sub a.
212 ILO Report V (a)(1) 1952, p. 16.
213 ILO Report V (a)(2) 1952, p. 105.
214 Convention 102, Art. 29 (1) sub b; ILO Report V (a)(2) 1952, p. 204.

Qualifying period for a reduced benefit

A pension must also be granted to persons protected who have completed half the qualifying period for the normal pension.[215] Such pensions may then be lower than the normal pension. Thus, a person who has completed 15 years of contribution or employment, where the qualifying period for a full pension is 30 years, qualifies for a reduced pension.[216] Similarly, a person who has paid half of the average number of contributions is also entitled to a reduced pension.[217] The Convention does not stipulate that a reduced pension must be paid to persons protected who have less than 20 years of residence under a public service or a social assistance scheme, where residence is the only qualifying condition.[218] In the third proposal, the condition of 10 years of residence had been included, but the Office had dropped that clause again because it had been proved that, in practice, reduced pensions were never provided for under such schemes.[219] Inserting a provision requiring a reduced pension in such cases would, therefore, exclude ratification on the basis of social assistance and public services, however high the pensions in the county concerned might be; logically, this was not found expedient.[220]

To what extent the benefit may be reduced, is not specified. The Belgium government had proposed to include that the amount of the benefit must not be less than half of the normal, 'full' benefit. The Office replied on this point that, desirable as such provision might be, the statistics showed that it would not be realistic in view of the fact that even countries with relatively advanced systems of social security did not always pay a reduced pension at all after ten years.[221] For that reason, the extent of the reduction was left blank.

Limited qualifying period

In last instance, the Committee on Social Security proposed adding two provisions concerning the relation between the length of the required qualifying period and the amount of benefit; both of these provisions were adopted by the Conference.[222] One of these supplemental clauses stipulates that where an old age scheme prescribes a qualifying period for a full pension of only ten years of contribution or employment, or five years of residence, the amount of the full

215 Convention 102, Art. 29 (2).
216 Convention 102, Art. 29 (2) sub a.
217 Convention 102, Art. 29 (2) sub b.
218 ILO Report V (a)(2) 1952, p. 204.
219 ILO Report V (a)(1) 1952, p. 31.
220 ILO Report V (a)(2) 1952, p. 106.
221 ILO Report V (a)(2) 1952, p. 106.
222 Convention 102, Art. 29 paras. 3 and 4.

benefit may be reduced by ten points, thus amounting to 30 percent of the reference wage.[223] This exception to the 40 percent rule makes it easier for countries with a scheme requiring a limited qualifying period, and thus with a broader scope, to meet the conditions of this part of the Convention.

The second supplemental clause points out that where the required qualifying period for a full pension is more than ten years, but less than 30 years of contribution or employment, a reduction of the prescribed 40 percent of the reference wage may be effected, proportional to the reduced 30 percent mentioned in the previous section. For example, where a qualifying period of 20 years has been fixed, after 20 years of contribution a full pension of 35 percent of the reference wage should be granted. Moreover, where a qualifying period of more than 15 years of contribution or employment is required, a reduced pension must also be paid to any person protected who has at least fulfilled 15 years of contribution or employment, upon reaching the pensionable age; this provision has to be in conformity with the rules concerning the reduced pensions explained in the former section. Again, it has been left to national laws or regulations to determine the amount of such reduced pensions. In other words, where the old age scheme imposes a qualifying period of between 15 and 30 years, a reduced pension has to be granted, where a person protected has fulfilled at least 15 years of that period. Thus, where a scheme requires 20 years of employment, certain benefit should also be payable to a pensioner who has been employed for only 15 years within the prescribed period prior to the attainment of the pensionable age.[224]

2.13 EMPLOYMENT INJURY BENEFIT

2.13.1 MATERIAL SCOPE

Definition of the contingency

An employment injury scheme has to cover not only one, but several contingencies, to comply with Convention 102.[225] In the first place, the scheme has to cover any morbid condition due to an accident or a prescribed disease resulting from employment.[226] Secondly, compensation must be paid in respect of incapacity for work involving suspension of earnings due to employment injury, as defined by

223 ILO Record of Proceedings 1952, p. 522; Bartelomei 1994, point 208.
224 ILO Record of Proceedings 1952, p. 522.
225 Convention 102, Art. 32; ILO Report IV (2) 1951, pp. 305–306; ILO Report V (a)(1) 1952, pp. 14, 29.
226 Convention 102, Art. 32 (a).

national laws or regulations.[227] Incapacity for work should be interpreted as total incapacity for the victim's usual work continuing as long as medical care is required and received.[228] Thirdly, when the victim's condition has been stabilised and it becomes apparent that he has suffered a loss of earning capacity which is likely to be permanent, or a permanent loss of faculty, compensation has to be granted proportionate to the degree of permanent incapacity.[229] Full compensation has to be paid in respect of total loss of earning capacity or corresponding loss of faculty. Where loss of earning capacity or of faculty is only partial, a minimum degree of incapacity that will give rise to an allowance can be prescribed by national laws or regulations. The compensation for partial loss of earning capacity must, however, be a suitable proportion of that specified for total loss thereof.[230] Finally, if the victim of employment injury dies as a result of such injury, their widow and dependent children have to be entitled to survivors' pensions, which may be conditional on their being presumed incapable of self-support. In the case of a widow, it is left to national laws or regulations to determine the conditions in which incapacity for self-support is presumed to exist.[231] In the case of a child, they must be presumed to be incapable of self-support as long as they are under school leaving age, or are aged under 15 years, as the case may be.[232]

In brief, an employment injury scheme should provide:

- Medical benefits in the case of a morbid condition due to employment injury;
- Sickness allowances in the case of incapacity for work involving suspension of earnings as a result of a morbid condition due to employment injury;
- Invalidity pensions in the case of inability, which is likely to be permanent, to engage in any substantially gainful occupation, due to employment injury and (total or partial loss of earning capacity); and
- Survivors' pensions in the case of presumed incapacity of the widow and the children or orphans of a breadwinner, whose death was due to employment injury, to self-support.

Disease resulting from employment

In the initial proposal of the Office, the provision referred to any disease resulting from employment. The British government considered this too general, and suggested instead referring either to diseases which are prescribed by national laws and regulations, or to those scheduled in Convention No. 42 concerning

[227] Convention 102, Art. 32 (b).
[228] ILO Report V (a)(2) 1952, p. 206.
[229] Convention 102, Art. 32 (c).
[230] ILO Report V (a)(2) 1952, p. 206.
[231] Convention 102, Art. 32 (d).
[232] ILO Report V (a)(2) 1952, pp. 206–207.

workmen's compensation for occupational diseases. Since most countries had composed a list specifying diseases that were deemed to result from employment, or the conditions under which a disease was deemed to be occupational, it was decided to substitute the term 'prescribed disease' for 'disease'. Thus, it is left to national regulations to determine whether a disease resulting from employment is covered by the scheme.[233]

Distinction between incapacity for work and invalidity

The Dutch government was of the opinion that the first proposal was not clear about the distinction between temporary incapacity and loss of working capacity that is likely to be prolonged or permanent. The Office pointed out in its response that there is incapacity of the victim to carry out their usual work, continuing as long as medical care is required on the one hand, and invalidity on the other, which means a condition that has become stabilised or consolidated. In this latter case, the criterion applied in determining the degree of invalidity will be, as a rule, either loss of earning capacity in the general employment market, or loss of faculty, rather than incapacity of the victim to do their former work. To establish this distinction, the term 'incapacity for work' is used in the case of a morbid condition, and 'loss of earning capacity' in the case of invalidity.[234]

Partial loss of working capacity

Differing opinions existed on the minimum degree of partial loss of earning capacity in respect of which a periodical payment would have to be granted. Because of the fact that the minimum degree of permanent incapacity giving rise to compensation in the form of pensions differed considerably from country to country, the Office had chosen not to propose a fixed minimum degree at all. Belgium and France in particular, opposed this (in their eyes) unfortunate decision. Belgium suggested subscribing a minimum degree of incapacity of 20 percent. However, considering the widely varying national regulations at that time (not supported by figures, though), the Office replied that it did not find it possible to propose a minimum degree at which a compensation would have to be granted, but that it would leave it to the Conference to decide whether or not such a possibility could be taken into account.[235] Apparently, this did not succeed, since the actual provision leaves the determination of the degree to national laws or regulations. In its explanatory document to the final proposal, the Office emphasised that, unlike under a general invalidity scheme, partial loss of earning capacity has to be covered, and that 'the compensation of partial loss or earning capacity should

233 ILO Report V (a)(2) 1952, pp. 63, 109.
234 ILO Report V (a)(2) 1952, pp. 38, 110.
235 ILO Report V (a)(2) 1952, pp. 9, 110.

be a suitable proportion of that specified for total loss thereof", thus providing a rather practicable guideline after all.[236]

Survivors' pensions

In the preliminary text it was stipulated that incapacity of the widow to self-support was presumed to exist where the widow was either responsible for one or more children, or where she had reached a prescribed age, or when she was an invalid.[237] It was suggested by the Chilean government that a pension should be granted to a widow, regardless of whether or not she had children, and irrespective of her age or invalidity. The Conference, however, decided to treat death due to employment injury in the same way as death not due to employment injury. As a consequence, it is left to national laws or regulations to prescribe the conditions in which the widow, whether or not she has children, shall be entitled to compensation in her own right.[238] The compensation in the widow's own right must be distinguished from additional pensions or family allowances for the children.

In reply to a proposal of the Belgian government concerning benefits for full orphans, the Office clarified that the child of the deceased breadwinner, irrespective of whether the latter was their father or mother, as well as the child who has lost both their father and mother, should be entitled to a survivors' pension.[239]

2.13.2 PERSONAL SCOPE

In respect of the employment injury benefit, the Convention requires the following persons to be protected:[240]

(a) prescribed classes of employees, constituting not less than 50 percent of all employees, and, for benefit in respect of death of the breadwinner, also their wives and children.

The tables prepared by the Office showed that employment injury benefits were generally reserved for employees, and that in most cases no income or means test was applied.[241] Therefore, the second and third option that is given in respect of

236 ILO Report V (a)(2) 1952, p. 206.
237 ILO Report V (a)(1) 1952, pp. 82–83, Art. 33 paras. d (i) and (ii).
238 ILO Report V (a)(2) 1952, pp. 111, 206.
239 ILO Report V (a)(2) 1952, pp. 110–111.
240 Convention 102, Art. 33 (a). For an explanation of this option, see section 2.10.2 on sickness benefit.
241 ILO Report V (a)(1) 1952, p. 59.

most other risks was left out in respect of employment injury. The Polish government proposed extending the scope to all employees, without exception. This was, however, not accepted with regard to the minimum standards, particularly in view of the fact that in many countries it did not seem possible to extend employment injury insurance to agricultural workers in the short-term. The Polish proposal was supposed to be taken into account in the formulation of the advanced standards of social security.[242]

Compliance with this part of the Convention can only be effected on the basis of compulsory employment injury insurance. The Office opined that compensation in the case of employment injury was recognised in the labour legislation of the great majority of countries, and that its provision could not be left to the hazard of voluntary insurance or the individual liability of the employer.[243] An employers' liability scheme may serve as a basis for ratification only if benefits are guaranteed by a fund which is collectively financed.[244] Ratification on the basis of social assistance covering all residents, finally, is not allowed in view of the fact that an income limit or means test was not found permissible in respect of employment injury.[245]

2.13.3 BENEFITS

Medical care

Medical care in cases of employment injury must comprise:[246]

(a) general practitioner and specialist in-patient care and out-patient care, including domiciliary visiting;
(b) dental care;
(c) nursing care at home or in hospital or other medical institutions;
(d) maintenance in hospitals, convalescent homes, sanatoria or other medical institutions;
(e) dental, pharmaceutical and other medical or surgical supplies, including prosthetic appliances, kept in repair, and eyeglasses; and
(f) the care furnished by members of such other professions as may at any time be legally recognised as allied to the medical profession, under the supervision of a medical or dental practitioner.

242 ILO Report V (a)(2) 1952, pp. 108–109.
243 ILO Report V (a)(2) 1952, p. 78. The same view was expressed in relation to maternity and the maintenance of children.
244 ILO Report V (a)(2) 1952, p. 207.
245 ILO Report IV (1) 1951, p. 26; ILO Report V (a)(2) 1952, p. 207.
246 Convention 102, Art. 34 (2).

This enumeration of the items to be included is meant to be exhaustive.[247] All services shall be afforded with a view to maintaining, restoring or improving the health of the person protected, as well as their ability to work and to attend to their personal needs.[248] The provision was copied from the Medical Care Recommendation. Whereas under the general medical care branch the range of care has been restricted to the most essential items, in the event of employment injury, the full range of care as defined in the Recommendation has been adopted. Since the majority of schemes provided all medical services required for full rehabilitation, no objections were made on this point.[249] The Office has made clear that compliance with this part of the Convention can be effected on the basis of an employment injury insurance scheme and a sickness insurance scheme jointly satisfying the requirements of this provision.[250]

Cost-sharing

In the second last draft, no reference was made to cost-sharing.[251] This is striking, since in the preceding draft, following the replies of several governments, a specific provision concerning cost-sharing had been included that allowed demanding from the person protected a share in the cost of medical care, except where the condition requiring such care was due to maternity, employment injury, or to a chronic disease.[252] The government of the United Kingdom observed the absence of such clear provision in the next draft and recalled that cost-sharing under the general medical care branch had been explicitly permitted. As a consequence of the absence of such provision, cost-sharing would not be allowed under this branch. The Office responded to this comment by pointing out the problem that could arise, indeed, for countries where all medical care services were brought under a health scheme that did not make a distinction as to the cause of the condition requiring medical care. It was found that, in that event, any cost-sharing allowed in respect of medical benefit provided in compliance with the general medical care branch would also have to be allowed in respect of the same medical benefit provided in compliance with the employment injury branch.[253] Accordingly, a provision was introduced in the succeeding draft allowing cost-sharing where the same range of medical care was provided in any condition requiring medical care, whether due or not to employment injury. This would have been, as it was in the general medical care part, subject to the safeguard that no hardship was inflicted.[254]

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247 ILO Report V (a)(2) 1952, p. 207.
248 Convention 102, Art. 34 (4).
249 ILO Report IV (1) 1951, pp. 37–38.
250 ILO Report IV (1) 1951, p. 37; ILO Report V (a)(2) 1952, pp. 113, 207.
251 ILO Report V (a)(1) 1952, p. 83, Art. 35.
252 ILO Report IV (2) 1951, p. 332, point 42.
253 ILO Report V (a)(2) 1952, pp. 113–114.
254 ILO Report V (a)(2) 1952, pp. 208, 260, Art. 34 (4).

However, at the instance of the workers' members, this afterthought was left out again in the final text, with the remark that the provision had been intended chiefly to meet the case of a national health service, and not an insurance scheme covering employees.[255] With the deletion of this provision that explicitly allowed cost-sharing in the case of employment injury under specific circumstances, it must be concluded that cost-sharing is prohibited under this branch in all cases.

Periodical payment or lump sum

In principle, benefits have to be provided in the form of periodical payments; a lump sum will generally not satisfy the requirements of the Convention. Nevertheless, two exceptions to this principle are made in respect of employment injury, one in the case of permanent total loss of earning capacity of a minor degree, the limit of that degree to be fixed by national regulation, and the other, where the competent authority is satisfied that the lump sum will be properly utilised.[256] These exceptions – the latter of which was copied from the Conventions of 1925 on workmen's compensation – were added in last instance at the proposal of the Conference Committee of Social Security, as a result of various proposals and an exchange of views.[257]

On previous occasions it had been discussed, however, that the time had come to insist more on the payment of periodical pensions than was done 25 years previously, because the payment of a capital sum might deprive the person protected of security for the future. Only a few countries proposed that in the case of a young and childless widow, or in the case of incapacity of a minor degree, a lump sum could perhaps be considered.[258] The Office had firmly rejected these suggestions at the time, referring to former discussions that had resulted in the adoption of the principle of periodical payment by the Conference.[259] Apparently, during the 14 sittings of the Conference Committee on Social Security, this principle had been called into question again, and, in the end, was considerably watered down. This is likely to be due to the fact that, according to the statistics, in a considerable number of countries the survivors of victims of employment injury received, at that time, only one-off grants and not periodical payments.[260] Without the adoption of quite a general exception, these countries would not qualify for ratification on the basis of employment injury.

255 ILO Record of Proceedings 1952, p. 522.

256 Convention 102, Art. 36; ILO Report V (a)(2) 1952, pp. 208–209; ILO Report IV (2) 1951, pp. 277–278.

257 ILO Record of Proceedings 1952, p. 522.

258 New Zealand, in respect of permanent partial loss of earning capacity; Denmark, in respect of death of the breadwinner resulting from employment injury; ILO Report IV (2) 1951, p. 277–278.

259 ILO Report V (a)(1) 1952, p. 114.

260 ILO Report V (a)(1) 1952, pp. 59–66. Six of the 38 investigated countries providing a benefit in the case of death of the breadwinner due to employment injury did pay a capital sum instead of periodical payments.

Amount of the benefit in the event of incapacity for work and invalidity

The allowance for a standard beneficiary has to be a periodical payment at a rate which amounts to at least:[261]

- 50 percent of individual earnings, where the benefit is proportionate to the previous earnings of the beneficiary. A ceiling on earnings may be fixed, or a maximum benefit set, but the maximum benefit shall not be less than 50 percent of the average wage of a skilled adult manual male employee; or
- 50 percent of the wage of an ordinary (unskilled) adult male labourer, where the benefit is at a flat rate.

The standard beneficiary in this respect is a man with a dependent wife and two children. The applicable percentages are higher than those with respect to the long-term benefits in case of old age, invalidity and survivors. According to the statistics provided by the Office, in the majority of countries benefits were related to previous earnings, and among the richer countries, the rates were generally higher; in more than half of those countries the rate was as much as 70 percent or more.[262] Consequently, the fixed percentage of 50 percent has not been subject to heated discussions. As explained in section 2.13.1, the compensation for partial loss of earning capacity must be a suitable proportion of that for total loss thereof.[263]

Amount of the benefit in the event of death of the breadwinner

The allowance in the event of death of the breadwinner has to be at a rate which amounts to at least:[264]

- 40 percent of individual earnings, where the benefit is proportionate to the previous earnings of the beneficiary. A ceiling on earnings may be fixed, or a maximum benefit set, but the maximum benefit shall not be less than 40 percent of the average wage of a skilled adult manual male employee; or
- 40 percent of the wage of an ordinary (unskilled) adult male labourer, where the benefit is at a flat rate.

The standard beneficiary in this respect is a widow with two dependent children. The Office stipulated that the compensation of at least 40 percent of previous or

261 Convention 102, Art. 36 (1), in conjunction with Arts. 65 and 66 and the Schedule to Part XI. For an explanation of the way of calculation, see section 2.10.3 on sickness benefit.
262 ILO Report V (a)(1) 1952, pp. 60–65, 181.
263 Convention 102, Art. 36 (2).
264 Convention 102, Art. 36 (1), in conjunction with Arts. 65 and 66 and the Schedule to Part XI. For an explanation of the method of calculation, see section 2.10.3 on sickness benefit.

standard wages could be complied with either by granting a pension to the widow in her own rights, and additional pensions or family allowances for the children, or by granting pensions or family allowances to the children only. What exactly the rate of a benefit should be for orphans is not given. The Belgian government had proposed that the case of orphans should be treated separately from that of a widow with children, providing for a benefit of 10 percent of the reference wage. The Office responded by stressing that the actual provision included the entitlement to a survivor's pension of a child who has lost both their father and their mother. However, no attention was paid to the suggested percentage.[265] Apparently, the general provision that in the case of other beneficiaries the benefit shall be reasonably proportionate to the benefit for the standard beneficiary was deemed sufficient.[266]

Duration of the benefit

Both medical benefit and financial compensation shall be granted throughout the contingency.[267] Thus, no maximum benefit period is permitted for compensation in respect of total incapacity for the victim's usual work (sickness), nor in respect of permanent loss of earning capacity (invalidity) in excess of a prescribed degree, nor for survivors' pension. The only exception that has been made is the insertion of a maximum waiting period of three days in respect of incapacity for work.[268]

2.13.4 QUALIFYING CONDITIONS

No qualifying period in terms of contribution, employment, or residence may be prescribed.[269] The only qualifying condition that may be required is that the accident resulting in employment injury or death must have occurred while the victim was employed in the Member's territory. In the case of an occupational disease, the claimant may be required to have been employed in the territory at the time when they contracted the disease. This provision was in accordance with the employment injury schemes at the time, since it was deemed sufficient for the injured person to have been employed at the time of the accident or the exposure of the disease.[270]

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[265] ILO Report V (a)(2) 1952, pp. 110–111.
[266] Convention 102, Arts. 65 (5) and 66 (3).
[267] Convention 102, Art. 38.
[268] ILO Report V (a)(2) 1952, pp. 115–116, 208.
[269] Convention 102, Art. 37; ILO Report V (a)(2) 1952, p. 208.
[270] ILO Report V (a)(2) 1952, p. 115.

2.14 FAMILY BENEFIT

2.14.1 MATERIAL SCOPE

Definition of the contingency

The contingency covered under this part of the Convention is responsibility for the maintenance of children as prescribed.[271] The term 'child' means a child under school leaving age or under 15 years of age, at the choice of the country concerned. This definition of the contingency is a quite vague compromise between several more specific options.

Number of children

Indeed, in its first draft, the Office proposed that allowances be payable from the second child. This was based on a survey among the Member States that showed that in most countries the usual earnings of a breadwinner were considered to be sufficient for the full maintenance of one child and for defraying part of the expenses of maintenance of other children. It was noted, however, that in some countries family benefits were granted in respect of every dependent child (for example, Czech Republic, the Netherlands, and Sweden), and only in a few countries as from the third, or even the fourth child (Germany, and Brazil).[272] In the subsequent draft, drawn up after the first reading at the Conference in 1951, the provision was retained unamended. However, the replies of the Member States during the second round showed, again, differing views on the number of children in respect of whom an allowance should be paid, and a few countries insisted on another solution. On the one hand, there was Germany suggesting that child benefit should be ensured only as from the third child, stressing that it would otherwise make heavy demands on financial resources.[273] On the other, Yugoslavia argued strongly in favour of a benefit from the very first child.[274]

In view of these opposing views, the Office passed over the arguments of Germany and retained the original definition, however, with the addition of an alternative provision. This new alternative provided for ratification on the basis of benefits for all children, including the first, while the total rate of the benefits would be proportionately about the same.[275] During the last meeting of the Conference Committee on Social Security in 1952, this solution could not hold up; on the proposal of the employers' members, the Committee decided to

[271] Convention 102, Art. 40.
[272] ILO Report IV (1) 1951, pp. 70–71.
[273] ILO Report V (a)(2) 1952, p. 30.
[274] ILO Report V (a)(2) 1952, p. 66.
[275] ILO Report V (a)(2) 1952, pp. 117–119; 209–210.

replace the two alternatives with the actual provision. It was argued that the changed wording would fit with a great variety of systems, leaving it to national regulations to determine the number of children in respect of whom benefits are payable.[276] While Germany could breathe a sigh of relief, the Dutch government delegate remarked on this last-moment revision that the provision had become extremely vague. It was pointed out that under the new definition a state was permitted to ratify this part of the Convention even by giving a family allowance only after the third child, and, moreover, on a decreasing scale, according to the number of children. The latter was considered to discourage large families and was therefore found undesirable. In order not to complicate the situation, the Dutch government did not propose amendments on this matter, but instead the necessity for drawing up a special convention concerning family allowances was suggested.[277] History has shown, however, that specific conventions on all contingencies were adopted subsequently, except on family allowances.

2.14.2 PERSONAL SCOPE

Persons covered

To meet the conditions of the Convention as regards family benefit, the persons protected shall comprise:[278]

(a) prescribed classes of employees, constituting not less than 50 percent of all employees; or
(b) prescribed classes of economically active population, constituting not less than 20 percent of all residents; or
(c) all residents whose means during the contingency do not exceed prescribed limits.

Means test

Until the last draft that was presented by the Office, the Convention provided for only two alternatives in respect of the personal scope. The third option, allowing for a means test, was not included. On the contrary, the Office had previously recalled that the Conference did not wish to allow for a means test regarding family benefit, and emphasised this again in the accompanying explanation of its last draft.[279] The same point of view was taken by the Conference at an earlier

[276] ILO Record of Proceedings 1952, p. 523.
[277] ILO Record of Proceedings 1952, p. 317.
[278] Convention 102, Art. 41. For an explanation of the different options, see sections 2.10.2 on sickness benefit and 2.11.2 on unemployment benefit.
[279] ILO Report V (a)(1) 1952, p. 21; ILO Report V (a)(2) 1952, p. 210.

stage, and, accordingly, in none of the drafts was a means test allowed.[280] Nevertheless, in last instance, the Conference Committee created a new text that differed substantially from the Office's proposal.[281] Indeed the text adopted by the Conference, in the end, included the previously rejected means test. Since the Committee did not provide explanatory notes to the alterations of the last proposal, it is not clear why a means test was still accepted.

Voluntary insurance

As is the case with employment injury and maternity, compliance with this part of the Convention is not possible on the basis of voluntary insurance.[282] In its last report on the proposed Convention, the Office affirmed explicitly that family allowances could not be assured by voluntary insurance, referring in this respect to the decision of the Conference Committee that social assistance was not to be recognised as a method of covering these contingencies.[283] Apparently, in the view of the Office, these two matters were interconnected in such a way that where social assistance was not seen as an appropriate way of covering the specific contingency, voluntary insurance would not be appropriate either. This approach however, was put aside by the Conference when, in the end, social assistance was accepted with regard to family benefits while, at the same time, voluntary insurance remained prohibited.

2.14.3 BENEFITS

Benefits in cash or in kind

The Convention provides for two types of benefits: one being periodical payments, and the other, to be provided exclusively in respect of children, benefits in kind. The latter includes food, clothing, housing, holidays or domestic help. Examples of such benefits are free meals for schoolchildren and free milk or vitamins for infants, or rent subsidies for large families. To comply with the requirements of the Convention, a combination of both types of benefits is also allowed.[284]

The idea of including benefits in kind was not embraced unanimously. Germany, for example, proposed removing this option altogether, since verification would be very difficult and it might lead to abuse. Poland urged allowing such benefits

280 ILO Report V (a)(1) 1952, p. 12; ILO Report V (a)(2) 1952, p. 78.
281 ILO Record of Proceedings 1952, p. 523.
282 Convention 102, Art. 6; ILO Report V (a)(2) 1952, p. 210.
283 ILO Report V (a)(2) 1952, pp. 78–79.
284 Convention 102, Art. 42; ILO Report V (a)(2) 1952, p. 210.

only to the extent of 50 percent of the value of cash allowances, while the Norwegian government wanted to also take into account tax exemptions in respect of children. It was recognised by the Office that allowing benefits in kind to be counted to the extent of their value in addition to family benefits in cash, gave rise to a number of difficulties. First of all, the Office explained, the cost of benefits in kind in any one period must probably be estimated, since benefits in kind may be provided for all children, but also for certain groups of children, such as schoolchildren, who are not necessarily the children of the persons protected. Then, the estimated cost has to be added to the value of the cash allowances.[285] The suggestion that a calculation may be made by estimating the cost was apparently found sufficient to overcome the difficulties mentioned, since the provision was retained in spite of the various objections. It was also noted by the Office that benefits in kind would be particularly expedient for less developed countries, where a low level of nutrition or housing may exist.[286]

Amount of benefit

The total value of both benefits in cash and in kind has to be such as to represent:[287]

(a) 3 percent of the wage of an ordinary adult male labourer, as determined in accordance with the rules laid down in Article 66, multiplied by the total number of children of persons protected; or
(b) 1.5 percent of the said wage, multiplied by the total number of children of all residents.

In contrast to the provisions of all other contingencies, the level of family benefit is not related to a standard beneficiary, but has to be reached at a global level.[288] The Office argued at this point that benefits for the maintenance of dependent children are distinguished from other benefits under the Convention in that they do not replace, but supplement, earnings or other income. They are paid while the breadwinner is working, as well as during sickness, unemployment, or invalidity, and also often after the breadwinner's death. Since the benefits are intended to assist with the cost of family charges, they are proportionate to the size of the family rather than to the beneficiary's individual earnings.[289]

To prove compliance with the Convention, the total amount of (periodical) family benefits granted during a given period has to be calculated and, if applied,

285 ILO Report V (a)(2) 1952, pp. 119–121.
286 ILO Report IV (1) 1951, pp. 73–74.
287 Convention 102, Art. 44.
288 See the schedule to Part XI of Convention 102, in which maintenance of children is not included; Humblet 2002, p. 440.
289 ILO Report IV (1) 1951, p. 70.

the total value of benefits in kind provided during the same period has to be added. The total amount has to be divided by the number of children covered by the scheme. The quotient then has to be the fixed percentage of the average wage of an unskilled labourer. To be specific, when classes of employees or economically active persons are protected, the total value of the benefits, divided by the total number of children of the persons protected, has to amount to 3 percent of the standard wage of an unskilled labourer. In case a government chooses to protect all residents, the value of the benefits, divided by the total number of children of all residents, has to amount to 1.5 percent of the standard wage.[290]

Duration of the benefit and adjustment to the cost of living

The benefit has to be paid throughout the contingency.[291] This means at least until the child reaches school leaving age, or the age of 15 years – it is the choice of the country concerned.

Since the amount of the benefit is related to the average wage of unskilled labour, the benefit will automatically change with the changing level of wages.

2.14.4 QUALIFYING CONDITIONS

Entitlement to family benefit may be made subject to the completion of a qualifying period of three months of contribution or employment, or of one year of residence, as may be prescribed. Initially the Office had proposed 6 months of residence; this was, however, raised at an early stage, since several countries were in favour of longer periods.

2.15 MATERNITY BENEFIT

2.15.1 MATERIAL SCOPE

For a maternity scheme to comply with the requirements of the Convention, it has to cover two contingencies, namely, pregnancy and confinement and their consequences, and the resultant suspension of earnings as defined by national laws or regulations.[292] Thus, on the one hand, medical care has to be required, and on the other, maternity allowances must be paid in the case of suspension of earnings.

[290] ILO Report V (a)(2) 1952, pp. 120–121.
[291] Convention 102, Art. 45.
[292] Convention 102, Art. 47.

There were no comments made in respect of the definition of this contingency. The clause 'as defined by national laws or regulations' was, however, added by the Conference Committee on Social Security only in last instance. This addition was referred to as a 'drafting amendment', therefore no explanation is given regarding the discretion of a Member State when it comes to prescribing the definition of suspension of earnings.

2.15.2 PERSONAL SCOPE

To meet the conditions of the Convention as regards maternity, the persons protected shall comprise:[293]

> (a) all women in prescribed classes of employees, constituting not less than 50 percent of all employees and, for maternity medical benefit, also the wives of men in these classes; or
> (b) all women in prescribed classes of economically active population, constituting not less than 20 percent of all residents and, for maternity medical benefit, also the wives of men in these classes.

Compliance with this part of the Convention may be effected on the basis of compulsory insurance or of a public service, or a combination of these. The insurance or public service may separately or jointly secure both medical care and maternity allowances for the women protected. In any case, medical care must not only be secured for the women protected, but also for the wives of men covered by the scheme concerned. For the purpose of proving compliance with this article, all insured persons, or all persons who are covered by the public service, both men and women, can be counted towards the given percentages.[294]

This part of the Convention cannot be ratified on the basis of voluntary insurance. It was found by the Office that compensation in the case of abstention from work before and after childbirth was firmly recognised in the labour legislation of the great majority of countries, just as it was in the case of employment injury. Therefore, it did not seem appropriate to leave their provision to the hazard of voluntary insurance or to the individual liability of the employer.[295] Ratification on the basis of social assistance is not allowed because of the fact that an income limit or means test was not found permissible in respect of maternity.[296]

293 Convention 102, Art. 48.
294 ILO Report V (a)(2) 1952, pp. 211–212.
295 ILO Report V (a)(2) 1952, p. 78.
296 ILO Report IV (1) 1951, p. 26; ILO Report V (a)(1) 1952, p. 12; ILO Report V (a)(2) 1952, p. 212.

2.15.3 BENEFITS

Medical care

The Convention provides for both medical and cash benefits. Medical care must include at least pre-natal, confinement and post-natal care, either by medical practitioners or by qualified midwives. Hospitalisation must be made available where necessitated by the circumstances of the case.[297] The care shall be afforded with a view to maintaining, restoring or improving the health of the women protected, as well as their ability to work and to attend to their personal needs.[298] It is additionally provided that the women protected shall be encouraged to avail themselves of the general (preventive) health services which are organised by the public authorities, or by other bodies recognised by the public authorities.[299]

Cost-sharing

The Convention does not allow for out-of-pocket payments for maternity related medical care.[300] It has been made clear under the general medical care branch that cost-sharing may be required only if it is explicitly allowed. Article 10 makes such an exception for medical care in relation to a morbid condition. Under the employment injury and maternity branches, the Convention does not provide for the possibility of imposing out-of-pocket payments, which thus implies that it is prohibited.

In its explanatory document, the Office emphasised again that for maternity medical benefit, cost-sharing is not permitted.[301] This indeed is considered a matter of principle. Imposing out-of-pocket payments for pregnancy related health care discriminates women against men. Furthermore, it may imperil the vulnerable condition of mother and child, especially since the breadwinner, at the time, was usually the man.

Amount of cash benefit

In the event of the suspension of earnings resulting from pregnancy, confinement and their consequences, a periodical payment must be paid.[302] The allowance for a standard beneficiary has to be a periodical payment at a rate which amounts to at least:

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[297] Convention 102, Art. 49 paras. 1 and 2; ILO Report V (a)(2) 1952, p. 212.
[298] Convention 102, Art. 49 (3).
[299] Convention 102, Art. 49 (4).
[300] Convention 102, Art. 49.
[301] ILO Report V (a)(2) 1952, p. 212.
[302] Convention 102, Art. 50.

- 45 percent of individual earnings, where classes of employees or classes of the economically active population are protected, and the benefit is proportionate to the previous earnings of the beneficiary. A ceiling on earnings may be fixed, or a maximum benefit set, but the maximum benefit shall not be less than 45 percent of the average wage of a skilled adult manual male employee; or
- 45 percent of the wage of an ordinary (unskilled) adult male labourer, where classes of employees or classes of the economically active population are protected and the benefit is at a flat rate.

The typical beneficiary in the case of maternity allowances is simply a woman protected by the scheme, irrespective of her conjugal status and family charges.[303] The statistics prepared by the Office showed that in most upper income countries, the maternity allowance represented well over 50 percent of average earnings.[304] The Convention allows the amount of the periodical payment to vary in the course of the contingency, under the condition that the average rate complies with the required percentages.[305]

Duration of the benefit

The medical and cash benefits shall be granted throughout the contingency, however, the cash benefit may be limited to 12 weeks, unless a longer period of absence from work is required or authorised by national laws or regulations, in which case the benefit must be paid during the whole period of absence.[306] As regards the minimum period, the Office opined that the necessity for absence from work in the case of maternity depends, to some extent, on national customs and on general health conditions. Nevertheless, there was a consensus of opinion among the Member States that the health of the expectant mother and the child require a minimum period of absence of 12 weeks. This should preferably be divided into 6 weeks before and 6 weeks after childbirth, on the assumption that the confinement would be a normal one.

A time limit regarding medical care is not permitted under this branch, as is the case under a general health care scheme. It was stressed by the Office that medical care regarding pregnancy, confinement and its consequences are usually covered by general health or sickness insurances, but where there is no general insurance, the coverage by maternity insurance becomes essential.[307] On the suggestion of one Member State to limit the duration of hospitalisation, the Office argued that

303 ILO Report V (a)(1) 1952, p. 19; Schedule to Part XI.
304 ILO Report V (a)(1) 1952, p. 72; ILO Report V (a)(2) 1952, p. 184 (table).
305 Convention 102, Art. 50.
306 Convention 102, Art. 52.
307 ILO Report IV (1) 1951, pp. 80–81; ILO Report IV (2) 1951, pp. 223–224.

hospitalisation is already restricted to 'necessary' hospitalisation; a further lowering of the standard was considered unacceptable.[308]

2.15.4 QUALIFYING CONDITIONS

Both medical care and cash benefit shall be secured at least to women in the classes protected who have completed such qualifying periods as may be considered necessary to preclude abuse. The medical benefit shall also be secured to the wives of men in the classes protected, where the latter have completed such qualifying periods.[309]

The Office explained that a reasonable qualifying period for a maternity allowance should show that the women protected are *bona fide* working women and have not undertaken insurance or taken up work only for the purpose of obtaining benefit.[310] The reports show that a great number of governments proposed different qualifying periods, from no such period at all, to a period of 15 months.[311] In its reply, the Office noted that, even under advanced social security systems, medical care in the case of maternity was not infrequently made conditional upon the completion of a qualifying period of ten months preceding the confinement.[312] However, in view of the lack of agreement on this matter, as was the case regarding the other short-term benefits, the detailed provision is left to the discretion of the Member States, without much guidance as to the length of a 'reasonable' qualifying period. Nevertheless, it is clear that it is a matter of weeks or months, and not of years.

2.16 INVALIDITY BENEFIT

2.16.1 MATERIAL SCOPE

Definition of the contingency

The contingency covers the 'inability to engage in any gainful activity, to an extent prescribed, which inability is likely to be permanent or persists after the exhaustion of sickness benefit.'[313]

308 ILO Report IV (2) 1951, p. 221.
309 Convention 102, Art. 51.
310 ILO Report V (a)(2) 1952, p. 212.
311 ILO Report IV (2) 1951, p. 289.
312 ILO Report V (a)(2) 1952, p. 124.
313 Convention 102, Art. 54.

The explanatory notes make clear that a pension must also be paid in the case of temporary incapacity for work, if the person protected has exhausted his right to sickness benefit under a scheme covering sickness.[314] Furthermore, the reference to 'any' gainful activity implies that the insured person's incapacity is not only measured against the occupation they were engaged in prior to the injury, or the disease that caused the inability to work.

The definition was based on the Office's survey of the Member States of the existing invalidity schemes. A person was generally deemed to be an invalid when they were unable to engage in any substantially gainful work by reason of a morbid condition that was not likely to be cured by medical care. The cause of invalidity may not necessarily be a physical injury due to an external event, but may also be a disease, such as tuberculosis or arthritis. Consequently, the risk covered under a general invalidity scheme is of a broader scope than invalidity under an employment injury scheme.[315]

Extent of inability to engage in any gainful activity

Where under the employment injury branch the Convention prescribes partial loss of earning capacity to be covered, under this branch no provision for partial invalidity is given. At the same time, the contingency does not cover total incapacity for work only, as indicates the phrase 'to an extent prescribed'. In the last draft, this phrase was not included; instead it was provided that the contingency would cover a person protected who was unable to engage in 'any *substantially* gainful activity'. As regards the term 'substantially', the Office had explained that the most common definition of invalidity in the existing schemes at the time was the loss of working capacity of at least two-thirds, and that those schemes were supposed to comply with the provision. Some schemes had a broader concept, and only one country (Australia) had a more stringent one, requiring total incapacity for work in any occupation in order to be entitled to an invalidity pension.[316] In spite of the broad consensus regarding the extent of incapacity, the provision was redrafted at the request of the employers' members to ensure that the extent of inability to be eligible to a benefit was left to national regulations to determine.[317] However, the Office stressed in its explanation to the last draft that the payment of benefit in respect of total incapacity alone would not satisfy the requirement of the Convention.[318] This implies that the prescribed benefit also has to be provided when a person

[314] ILO Report V (a)(2) 1952, p. 127.
[315] ILO Report IV (1) 1951, pp. 95–96.
[316] ILO Report V (a)(2) 1952, pp. 126, 186–187 (table), 213.
[317] ILO Record of Proceedings 1952, p. 523.
[318] ILO Report V (a)(2) 1952, p. 126.

has a loss of working capacity of more than two thirds, but less than hundred percent.

2.16.2 PERSONAL SCOPE

To meet the conditions of the Convention as regards invalidity, the persons protected shall comprise:[319]

(a) prescribed classes of employees, constituting not less than 50 percent of all employees; or
(b) prescribed classes of economically active population, constituting not less than 20 percent of all residents; or
(c) all residents whose means during the contingency do not exceed limits prescribed in such a manner as to comply with the requirements of Article 67.

An extension of the personal scope was proposed by the Canadian government to include the dependants of the persons in the classes protected, except those for whom family allowances were paid. It was pointed out that invalidity often results from a disease or an accident suffered by the individual before they reach working age, which means that they never become a member of the economically active population. The Office replied that it would be difficult to realise such an extension under schemes of limited scope, the coverage under which is determined by the status of the employee or of the gainfully occupied person. However, a country the third option, would evidently have to cover invalidity existing prior to the attainment of working age.[320]

Compliance with this part of the Convention can, as with most other parts, be effectuated on the basis of compulsory or voluntary insurance, or of a public service, or any of these combined. Under an insurance scheme, all insured persons who are normally engaged in an economic activity, or who normally work as employees, can be counted towards the given percentages, but not beneficiaries of invalidity pensions.[321] Countries providing for public services covering invalidity can count towards the percentage all residents who are entitled to invalidity pensions in the event of invalidity of the degree covered.[322]

As is the case regarding all contingencies, the distinctive options are designed in consideration of the fact that some countries might find it easier to prove that they cover 50 percent of all employees than that they cover 20 percent of the

319 Convention 102, Art. 55.
320 ILO Report V (a)(2) 1952, p. 125.
321 ILO Report V (a)(2) 1952, p. 214.
322 ILO Report V (a)(2) 1952, p. 203.

population, since their invalidity insurance is confined to employees. Countries including independent workers under their invalidity schemes may be insuring 20 percent of the population without attaining 50 percent of all employees; they would prefer the second option.[323]

2.16.3 BENEFITS

Amount of the benefit

The allowance for a standard beneficiary has to be a periodical payment at a rate that amounts to at least:[324]

- 40 percent of individual earnings, where classes of employees or classes of the economically active population are protected and the benefit is proportionate to the previous earnings of the beneficiary. A ceiling on earnings may be fixed, or a maximum benefit set, but the maximum benefit shall not be less than 40 percent of the average wage of a skilled adult manual male employee; or
- 40 percent of the wage of an ordinary (unskilled) adult male labourer, where classes of employees or classes of the economically active population are protected and the benefit is at a flat rate, or
- 40 percent of the wage of an ordinary (unskilled) adult male labourer subject to a means test, where all residents are protected.

The standard beneficiary in respect of the invalidity benefit is a man with a dependent wife and two children.[325] The Office pointed out in its explanatory notes that, where the pension is more or less proportionate to earnings, or consists of both a uniform amount and increments depending on earnings, the Member may elect the first as well as the second option, but the second option was expected to be considered preferable.[326]

Duration of the benefit and adjustment to the cost of living

The benefit has to be provided throughout the contingency, no limitation other than to that of the contingency is permitted for invalidity pensions. The only exception is that the benefit may be substituted by an old-age pension when the

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[323] For further explanation of the different options, see sections 2.10.2 on sickness benefit and 2.11.2 on unemployment benefit.
[324] Convention 102, Art. 56 in conjunction with Arts. 65, 66, 67.
[325] Convention 102, schedule to Part XI; ILO Report V (a)(2) 1952, p. 216.
[326] ILO Report V (a)(2) 1952, p. 216.

beneficiary reaches pensionable age.[327] The Office had not found it necessary to put the latter possibility in this provision, because it was supposed to be covered already by a common provision on the suspension of benefits. However, the Committee of Social Security considered this common provision to be insufficient, therefore in last instance it was explicitly inserted in the actual provision.[328]

Where the benefit is related to previous earnings and/or to the wage of the typical unskilled labourer, the rates of current periodical payments have to be reviewed when they are no longer in line with economic conditions as a result of substantial changes in the cost of living.[329]

2.16.4 QUALIFYING CONDITIONS

Qualifying period for a full benefit

The structure of the regulation concerning the qualifying periods in respect of invalidity benefit is quite similar to that of old-age pensions, although the number of years required are different. The main rule is that a full benefit has to be paid to all persons protected who have completed a qualifying period which may be, at most, 15 years of contribution or employment, or 10 years of residence.[330]

A third alternative is given for countries whose scheme covers the whole economically active population. In that case, for a full pension, a country is allowed to require that the claimant has completed three years of contribution and, additionally, a prescribed yearly average number of contributions must have been paid in respect of the claimant while they were of working age.[331] According to this formula, the qualifying period varies with the age at which the person protected becomes an invalid, increasing from three years of full contributions that may be fixed as a minimum for those who become invalids shortly after reaching working age, to a prescribed average number of contributions per year during 48 years or so for those who become invalids at the age of 64.[332]

In comparison with employment injury schemes, the provision for a qualifying period under general invalidity schemes had been justified by the fact that the chance of abuse was greater than under employment injury insurance. It was

327 ILO Report V (a)(1) 1952, p. 21.
328 ILO Report V (a)(2) 1952, p. 129; ILO Record of Proceedings 1952, p. 523.
329 ILO Report V (a)(2) 1952, p 228; Convention 102, Arts. 65 (10) and 66 (8).
330 Convention 102, Art. 57 (1) sub a.
331 Convention 102, Art. 57 (1) sub b; ILO Report V (a)(2) 1952, p. 215.
332 ILO Report V (a)(2) 1952, p. 128.

also pointed out that the risk covered under an invalidity scheme is considerably higher, especially since the cause of invalidity may not only be due to an external work-related event, but also due to a disease, whatever its cause.[333] Initially, the Office had proposed a qualifying period of 5 years, which was the most common period at that time. In many countries, the length of the qualifying period depended on the range of persons protected and on whether or not the pension varied in contributions or duration of employment.[334] At a later stage this provision was further itemised and developed, by distinguishing a 'full' benefit, to be paid after the above-mentioned qualifying periods, and a 'reduced' benefit, to be paid after, at most, five years of contribution or employment.

Qualifying period for a reduced benefit

A pension must also be granted to a person protected who has completed a qualifying period of five years of contribution or employment.[335] Where all economically active persons are protected, a pension must additionally be paid after a period of three years of contribution and half the yearly average number of contributions demanded for the normal pension. Such pensions may then be lower than the normal pension.[336] To what extent the benefit may be reduced, is not given. Thus, a person who has completed five years of contribution or employment where the qualifying period for a full pension is 15 years, qualifies for a reduced pension. The Convention does not stipulate that a reduced pension must be paid to persons protected who have less than 10 years of residence under a public service or a social assistance scheme.

Limited qualifying period

In last resort, the Committee on Social Security proposed adding two provisions, in line with the proposals in respect of old age, concerning the relationship between the length of the required qualifying period and the amount of benefit. Both the provisions were adopted by the Conference.[337] One of these supplemental clauses stipulates that where an invalidity scheme prescribes a qualifying period for a full pension of only five years of contribution or employment, or five years of residence, the amount of the full benefit may be reduced by ten points, thus amounting to 30 percent of the reference earnings or wages instead of 40 percent.[338] This exception to the 40 percent rule makes it easier for countries with a scheme requiring a relatively short qualifying period,

[333] ILO Report V (a)(1) 1952, p. 96.
[334] ILO Report V (a)(1) 1952, p. 97.
[335] Convention 102, Art. 57 (2) sub a; ILO Report V (a)(2) 1952, p. 215.
[336] Convention 102, Art. 57 (2) sub b; ILO Report V (a)(2) 1952, p. 215.
[337] Convention 102, Art. 57 (3) and (4).
[338] Convention 102, Art. 57 (3).

but with a broader scope, to meet the conditions of this part of the Convention. Additionally, where the required qualifying period for a full pension is more than five years, but less than 15 years of contribution or employment, the pension may be correspondingly lower than 40 percent, provided that it is higher than 30 percent.[339] For example, where a qualifying period of 10 years has been fixed, a full pension of 35 percent of the individual or standard wages should be granted.

In any event, under an insurance scheme where a full pension is secured after a qualifying period of more than five years but less than 15 years, a reduced invalidity pension must be paid after five years of contribution or employment. This means that where the qualifying period is 10 years of contribution with the corresponding pension of 35 percent, a reduced pension has to be paid after, for instance, seven years of contribution. Again, the rate of such a reduction has been left to national regulations.

2.17 SURVIVORS' BENEFIT

2.17.1 MATERIAL SCOPE

The contingency covered is the loss of support suffered by the widow or child as a result of the death of the breadwinner.[340] Thus, the protection concerns widows and children who were maintained by the deceased breadwinner. A child in this context means a child under school leaving age or under 15 years of age, according to national legislation.[341] In the case of a widow, the right to benefit may be made conditional on her being presumed, in accordance with national laws or regulations, to be incapable of self-support.[342] This definition leaves it to the discretion of the ratifying countries to determine the conditions in which such incapacity should be presumed to exist.

The Conference Committee on Social Security had, in the course of the discussion, decided in favour of a more specified definition of the presumed incapacity of self-support of the widow.[343] Accordingly, it had been stipulated that such incapacity should always be presumed to exist:

- where the widow had one or more dependent children; or
- where she had reached a prescribed age or was invalid, even if she was not responsible for children.

339 Convention 102, Art. 57 (4); ILO Record of Proceedings 1952, p. 523.
340 Convention 102, Art. 60 (1).
341 Convention 102, Art. 1 (1) sub e.
342 Convention 102, Art. 60 (1).
343 ILO Report V (a)(1) 1952, pp. 53–54.

It was left to the ratifying country to prescribe the age at which the childless widow should become entitled to a survivors' pension, and to decide in what other cases a childless widow should be presumed incapable of self-support. Furthermore, a provision had been included that permitted a prescribed period of marriage for the aged or invalid childless widow as an additional qualifying condition.

However, the Office cancelled this specification, again as a result of the survey of the Member States.[344] It stated that the statistics showed that the conditions in which a survivors' pension was paid to a widow varied widely from country to country. In view of the found diversity, the Office proposed to stipulate, as a general rule, that the child of a breadwinner shall be entitled to a survivors' pension, whether the breadwinner was the father or the mother. In the case of the widow, however, the right to benefit is not absolute, but may be conditional on her being presumed to be incapable of self-support. The conditions in which such incapacity is presumed to exist are left to be determined by national legislation. This appeared to be the best achievable formulation, as it was adopted by the Conference. The Office explained that the prescribed conditions may, for instance, be the care of dependent children, the age or invalidity in the case of a childless widow, or the age and invalidity only, or another condition that proves that the widow is incapable of self-support.[345]

To comply with the requirements of the Convention, it is apparently not necessary that the scheme covers a widower who was dependent on his deceased wife's earnings. In its explanation of the first proposal, the Office stated that widowers must, as a rule, be incapable of work in order to obtain the pension.[346] However, the text of the Convention refers to the dependant wife, which is, considering the division of roles between men and women at that time, not very surprising. It must be kept in mind that the Convention provides minimum standards, which means that a country is always free to extend the definition by including dependent widowers.

2.17.2 PERSONAL SCOPE

To meet the conditions of the Convention as regards death of the breadwinner, the persons protected shall comprise:[347]

(a) the wives and the children of breadwinners in prescribed classes of employees, constituting not less than 50 percent of all employees; or

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344 ILO Report V (a)(2) 1952, pp. 130–131.
345 ILO Report V (a)(2) 1952, pp. 216–217.
346 ILO Report IV (1) 1951, p. 80.
347 Convention 102, Art. 61.

(b) the wives and the children of breadwinners in prescribed classes of the economically active population, constituting not less than 20 percent of all residents; or
(c) all resident widows and resident children who have lost their breadwinner, and whose means during the contingency do not exceed limits prescribed in such a manner as to comply with the requirements of Article 67.

Compliance with this part of the Convention can, as with most other parts, be effected on the basis of compulsory or voluntary survivors' insurance, or of a public service, or any of these combined. Under an insurance scheme, all insured persons, whether breadwinners or not, who are normally engaged in an economic activity or who normally work as employees, can be counted towards the given percentages, but old-age pensioners and beneficiaries of invalidity pensions cannot. Under a public service, all residents in the classes covered by the scheme concerned, whether or not they have dependants, can be counted towards the percentage.

If a country has chosen to fulfil the requirements of this part of the Convention on the basis of social assistance, which means that all resident widows and orphans whose means do not exceed a prescribed limit are protected, a number of additional conditions regarding the amount of the benefit are stipulated, which are referred to in the benefit section.[348]

2.17.3 BENEFITS

Amount of the benefit

The allowance for a standard beneficiary has to be a periodical payment at a rate that amounts to at least:[349]

- 40 percent of individual earnings, where classes of employees or classes of the economically active population are protected and the benefit is proportionate to the previous earnings of the beneficiary. A ceiling on earnings may be fixed, or a maximum benefit set, but the maximum benefit shall not be less than 40 percent of the average wage of a skilled adult manual male employee; or
- 40 percent of the wage of an ordinary (unskilled) adult male labourer, where classes of employees or classes of the economically active population are protected and the benefit is at a flat rate, or
- 40 percent of the wage of an ordinary (unskilled) adult male labourer subject to a means test, where all residents are protected.

348 ILO Report V (a)(2) 1952, pp. 217–218.
349 Convention 102, Art. 62 in conjunction with Arts. 65, 66, 67.

Similar to invalidity and old-age pension, the Office pointed out that where the pension is more or less proportionate to earnings, the Member can elect the first as well as the second option, as long as the benefit complies with the additional requirements of the applicable provision.[350] The standard beneficiary in the case of death of the breadwinner is a widow with two children under school leaving age or under 15 years of age, as the case may be. The pensions payable in respect of the widow and the two children, or in respect of the two children where the widow has no pension of her own, must be at least 40 percent of the deceased husband's previous earnings, or of the standard wage.[351]

In previous drafts, the rate of the general survivors' benefit amounted to 30 percent, while under an employment injury scheme the survivors' pension must be at least 40 percent of the reference wage. The Conference Committee on Social Security proposed in last instance to raise the percentage under a general scheme to 40 percent, especially because the percentage may be up to ten points lower where the scheme requires a qualifying period of only five years for entitlement to a full benefit. Furthermore, it seemed logical to adapt the rate to the same level as that for old-age and invalidity pensions. The Conference adopted this proposal during the final voting with a narrow majority of 144 to 141 votes.[352]

Suspension or reduction in case of gainful activity

Similar to old-age benefit, it is stipulated that a benefit may be suspended if a person who is otherwise entitled to it, this may be the widow or orphan, is engaged in any prescribed gainful activity. It is left to national laws or regulations to determine the definition of a gainful activity.[353] The reason for this provision has been dealt with in the old-age section. Another option in the case of gainful activity is to reduce the pension if the beneficiary earns more than a prescribed amount. In the case of social assistance pensions, means other than earnings may also be taken into account.[354]

Duration of benefit and adjustment to the cost of living

No limitation of the duration of benefit, other than to that of the contingency, is permitted for survivors' pensions.[355] Where the benefit is related to previous earnings and/or to the wage of the typical unskilled labourer, the rates of

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350 ILO Report V (a)(2) 1952, p. 219.
351 Convention 102, schedule to Part XI; ILO Report V (a)(2) 1952, p. 227.
352 ILO Record of Proceedings 1952, p. 525.
353 Convention 102, Art. 60 (2).
354 ILO Record of Proceedings 1952, pp. 523–224.
355 Convention 102, Art. 64.

periodical payments have to be reviewed when they are no longer in line with economic conditions as a result of substantial changes in the cost of living.[356]

2.17.4 QUALIFYING CONDITIONS

Qualifying period for a full benefit

The concept of qualifying period in respect of survivors' benefit is similar to that of invalidity benefit. The main rule is that a full benefit has to be paid to a person protected whose breadwinner has completed, within a prescribed period preceding their death, a qualifying period which may be, at most, 15 years of contribution or employment, or 10 years of residence.[357] A third alternative is given for Member States whose scheme covers the wives and children of all economically active persons. In that case, the normal pension may be reserved for the survivors of a breadwinner who has a minimum of three contribution years and, additionally, in respect of whom a prescribed yearly average number of contributions have been paid while they were of working age. It has to be clear that, for this alternative, the minimum qualifying period for the full pension may not be more than three years. According to this formula, the qualifying period varies with the age of the breadwinner at the time of their death: the length of the contribution period required increases with age at death.[358]

Qualifying period for a reduced benefit

A pension must also be granted to the persons protected whose breadwinner had completed a qualifying period of five years of contribution or employment at the time of their death.[359] Where all economically active persons are protected, a pension must also be paid after a period of three years of contribution and half the yearly average number of contributions demanded for the normal pension. Such pensions may then be lower than the normal pension.[360] To what extent the benefit may be reduced, is not given. Thus, the survivors of a breadwinner who had completed five years of contribution or employment, where the qualifying period for a full pension is 15 years, qualify for a reduced pension. The Convention does not stipulate that a reduced pension must be paid to persons protected who have less than 10 years of residence under a public service or a social assistance scheme.

[356] ILO Report V (a)(2) 1952, p. 228; Convention 102, Art. 65 (10) and Art. 66 (8).
[357] Convention 102, Art. 63 (1) sub a.
[358] Convention 102, Art. 63 (1) sub b; ILO Report V (a)(2) 1952, pp. 133, 218.
[359] Convention 102, Art. 63 (2) sub a; ILO Report V (a)(2) 1952, pp. 218–219.
[360] Convention 102, Art. 64 (2) sub b; ILO Report V (a)(2) 1952, pp. 218–219.

Limited qualifying period

As with old-age and invalidity pensions, a rate of benefit ten points lower than that for a full pension is permitted, where such benefit is paid after a qualifying period of five years of contribution or employment, instead of 15 years, or after five years of residence, instead of ten years.[361]

Additional condition for a childless widow

In the case of a widow without dependent children who is presumed to be incapable of self-support, an additional qualifying condition relating to the minimum duration of marriage may be required.[362] The reason for such a condition is to preclude abuse. A widow may be presumed incapable of self-support on the grounds of, for instance, age or invalidity, as prescribed by national regulations.[363] A proposal to make a social assistance pension conditional upon the completion of a period of residence by the widow, as well as by the husband, was not accepted. It was, however, pointed out that normally the widow with children would have resided in the country with her husband for a number of years, and that a childless widow can be required to have been married for a prescribed period.[364]

2.18 SUMMARY AND CONCLUSIONS

ILO Convention 102 is a comprehensive treaty that covers the nine social risks that were generally recognised at the time of its creation. With the adoption of this instrument in 1952, the ILO switched from its former way of standard setting that focused on the insurance of specific categories of workers in specific fields of industry, towards a method that aimed at social security for all. Indeed, Convention 102 comprises many features that serve that aim. In order to be attainable for the greatest number of countries, flexibility clauses have been included regarding different subjects, and quite a lot of discretion is left to national legislators. At the same time, clear and concrete norms have been fixed that provide a minimum level of social protection for all contracting parties. In addition, certain principles on solidarity and state responsibility have been formulated to guarantee the effective provision of the prescribed benefits. According to the ILO's system of supervision, Member States submit reports on the application of the Convention on a regular basis, which are assessed by a

[361] Convention 102, Art. 64 paras. 3 and 4; ILO Record of Proceedings 1952, p. 524.
[362] Convention 102, Art. 63 (5).
[363] ILO Report V (a)(2) 1952, p. 219. See section 2.17.1.
[364] ILO Record of Proceedings 1952, p. 524.

tripartite Committee of Experts. By way of a special list, cases of incompliance are notified to the International Labour Conference.

The definitions of the nine contingencies are generally clear and unambiguous, while at the same time they leave room for interpretation at the national level. Sometimes, however, important concepts are very vague, such as 'suitable employment' or 'a widow presumed to be incapable of self-support', which makes it difficult to determine the exact scope of the risk concerned. Moreover, some risks that were not yet recognised in the post-war period, but which are topical in the 21st century, are not included. Cases in point are long-term care, the necessity of life-long learning as a result of changed labour relations, and the combination of work and family responsibilities. Since the ILO Convention 102 is broadly considered to substantiate the human right to social security, these 'new social risks' are, as yet, on the periphery of international attention as it comes to legislation.

With the different options for the personal scope of social security schemes, the Convention is applicable to countries with different designs of welfare systems. For countries with a system that is based on the Bismarckian insurance concept, the option of coverage of categories of employees to prove compliance with the Convention is most expedient. States with a social democratic welfare model may prefer the option of coverage of categories of the economically active population, or of all residents.[365] The possibility in relation to most risks of covering all residents subject to a means test is useful, especially for liberal welfare states providing universal means tested benefits as a last resort, when all other resources have been exhausted. Although the Convention first and foremost reflects the insurance methods applied in the 1950s, the given options for personal coverage are flexible enough to be applied in present times as well.

The Convention also gives different options regarding the calculation of benefits in order to assess compliance with the prescribed norms. The norms consist of a fixed percentage of wages, which makes them attainable for highly, as well as less developed, countries. The assessment takes place on the basis of the average wage of a 'standard beneficiary', which varies according to the type of scheme, for example, an income related, flat rate, or universal scheme. It must be acknowledged that the different methods of calculation and the determination of the wage of a standard beneficiary for each risk are very complicated and difficult to perform in practice.

The required levels of benefits have been fixed in such a way that ratification of the Convention was considered possible for most more or less developed

365 For a description of the different welfare models, see Esping Andersen 1990.

countries at the time. The fact that the Convention sets out minimum standards of social security, and that it was intended to be supplemented by higher standards for countries with a relatively high standard of living, means that the norms must be considered rather low for Member States of the European Union at the present time. For each risk, the duration of the different benefits is formulated as 'throughout the contingency', but may be limited to a prescribed number of days, weeks, months, or years, depending on nature of the risk. Several flexibility clauses have been inserted at this point as well, allowing for a fixed duration per calendar year, or per instance of occurrence of the risk.

The qualifying conditions are different for each risk. In general, for short-term risks a period of contribution, employment or residence may be prescribed that is no longer than necessary to prevent abuse. The determination of the exact length of such a period is left to the national legislator, and the Convention does not provide any guidance on this point. For the long-term risks, the Convention sets out specific maximum periods that may not be exceeded.

The fact that the Convention is not prefaced by a preamble to point out the underlying thoughts and goals, nor accompanied by an explanatory memorandum, makes it an instrument that is difficult to comprehend. Another thing that does not help to clarify the vague norms and undefined concepts is the absence of a court that could provide certainty with regard to the meaning of unclear provisions through case law. The Committee of Experts on the Application of Conventions and Recommendations and the Labour Office fill in this gap by formulating requests, observations, and interpretations, but the Labour Office always emphasises that it does not have special authority to interpret conventions. Such reserve seems unnecessary and a may hamper the adaptability of the standards to changing values and new methods in the field social security.

CHAPTER 3

COMPARISON OF NATIONAL SOCIAL SECURITY LEGISLATION WITH INTERNATIONAL STANDARDS

– The Czech Republic –

3.1 INTRODUCTION

In this chapter, the Czech social security system will be examined in light of the international standards and compared with the norms of ILO Convention 102 (ILO C102), and implicitly with the European Code of Social Security (ECSS), as discussed in the previous chapter.[1] Additionally, it will briefly be assessed whether or not the national provisions comply with the higher standards. Before the different schemes will be described in detail and the comparison made, a general introduction to the Czech social security system will be given. Firstly, the actual social security system will be briefly outlined, prefaced by a reference to its historical roots for the purpose of a better understanding of the present. Then, the role of the social partners will be discussed, especially in connection with international obligations. This is relevant in order to be able to conclude whether the social partners are sufficiently involved in national social security matters, which is one of the fundamental requirements in respect of all ILO Conventions, as well as the ECSS.[2] Thereafter, in a comprehensive section on the effect of the international standards on the Czech social security system, it will be discussed which social security conventions are ratified, how the Czech Republic deals with the international standards in respect of legislation and the judiciary, and its position regarding the international supervising bodies will be considered. In sections 3.5 to 3.13, the Czech social security provisions pertaining to the nine social risks will be described and compared with the international standards. For this purpose, the order of ILO C102 will be followed. In the nine

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1 The main part of the research for this Chapter was finished in August 2008; the data used are, therefore, generally the most recent data available in that year. Changes in legislation that took place in 2008, 2009, and January 2010, which are directly relevant for the comparison with the international standards, are incorporated into the text in later stage. Regulations that became effective after January 2010 are not taken into account.

2 See section 2.3.

sections, the Czech provisions in relation to each contingency will first be described to subsequently compare the national rules with the international standards. At the end of each section, in a concise table, an overview will be given of the matters of compliance and observed problematic issues. Finally, section 3.14 will contain a summary of the findings.

3.2 SOCIAL SECURITY IN THE CZECH REPUBLIC: AN OVERVIEW

3.2.1 HISTORICAL DEVELOPMENT

From the Austro-Hungarian Empire to the Velvet Revolution

The history of the Czech social security system goes back as far as the Austro-Hungarian Empire.[3] The presence of social democratic political movements in the Czech lands began with the foundation of the Czech-Slavic Social Democratic Party in 1878. In 1906, the Parliament, influenced by Bismarck's corporatist insurance model, adopted the first mandatory pension insurance scheme for employees. After World War I, when the Czechoslovakian Republic was formed, the pension system suffered fragmentation because different pension schemes existed in different parts of the newly created country. Efforts were made to unify the systems, while increasing the quality and coverage of the scheme. Worth mentioning in this respect is that the country was an active member of the ILO from the formation of the Organisation, and was thus involved in the global discussion about the protection of workers and the development of occupational insurance schemes. All this led to the creation of a new social insurance law for manual workers in 1924, providing for pensions consisting of two components: a flat rate base supplemented by an earnings-related element, a structure that appears to have been restored again in the present pension scheme.

During World War II, while German occupiers were confiscating the funds of several pension schemes, the Czechoslovakian government in exile became impressed by the Beveridgean model of their host country, the UK. They prepared social reforms in which the old traditions of the Czech lands, as well as modern trends, were reflected. In 1948, the Law on National Insurance was adopted, covering both pension and health insurance, incorporating the formerly fragmented schemes into one, and providing similar conditions for all workers, including the self-employed. In the same year, however, the communists

[3] Cerami 2007, pp. 5–6; Potůček 2007B, p. 23; Natali 2004A, p. 1; Mácha 2002, p. 75; Müller 1999, p. 127.

took over, and started to change the existing social insurance schemes fundamentally, following the example of the Soviet system.[4] Some important alterations they made were the abolition of contributions for the greater part, together with the introduction of financing from taxation, and the lowering of the retirement age to 60 years for a man, and 53 to 57 for a woman, depending on the number of children she had raised. In conformity with the Soviet ideology, Czechoslovakian citizens had the right to free health care, a flat rate pension benefit, and family allowances. In principle, all social rights were derived from the employment status, which did not differ from the former corporatist approach. In practice, because of the almost non-existence of unemployment, coverage was universal. It must be acknowledged that the benefits were very low, and for most people, there was a chronic shortage of all kinds of resources, including medicines and medical devices. All in all, it might be concluded that the Czech social security system stems from a tradition quite similar to western European countries, but has suffered significantly by changes under the Soviet oriented regime. With the Velvet Revolution in 1989, the paternalistic Soviet system in Czechoslovakia came to an end, and the reconstruction of the welfare state was to begin.

Developing a new social security system: 1989 onwards

From the very beginning, important reform steps were taken by the socio-liberal federal government that were widely supported within the political scene as well as in society. These steps mainly concerned the elimination of the social privileges of the former communist establishment, and the introduction of an insurance contribution system to be administrated by an autonomous administrative body. In the meantime, the federal government adopted a Scenario of Social Reform (1990), which was a long-term reform plan in which both social democratic and liberal ideologies were incorporated. The plan included the creation of compulsory universal health and social insurance, a means tested state social support scheme, an active employment policy, and the development of a social safety net.[5] This conceptual document became the basis for the Czech social policy reform that turned out to be a slow and lengthy political process, mostly because of the weak coalition structure and a series of minority cabinets.

After the election of a neoliberal government in 1992 and the following split of the Czechoslovakian federation on 1 January 1993, the Czech government focused primarily on the division of the federation and on economic reform, which placed the social scenario onto the backburner. It is true that some of the

4 Večerník 2008, pp. 497–499; Cerami 2007, pp. 8–10; Mácha 2002, pp. 75–78.
5 Večerník 2008, p. 500; Potůček 2007B, pp. 26–27.

intended reform steps were realised, most importantly the creation of the compulsory social insurance and the introduction of state social support in 1995, but other reform plans were totally abandoned, such as the creation of a pension fund that would be separated from the state budget, and the introduction of a supplementary occupational pension insurance.[6] At the same time, the country faced an economic downturn, which influenced the elections of 1996. Although the neoliberals won the elections, the social democratic party gained political power. Therefore, and because of strong opposition from the trade unions, proposals of the government towards a radical pension reform with reference to the World Bank, focussing on a compulsory private co-insurance scheme and largely abandoning the pay-as-you-go concept, were not accepted. When the social democrats were able to form a minority government in 1998, they started to re-constitute the initial social reform concept. Their first landmark policy was the ratification of the European Social Charter, which showed the renewed emphasis on social reform and the willingness for social dialogue. In practice, however, successive governments were not able to hold a steady course, mainly due to budgetary constraints and political deadlock. As a consequence, the Czech Republic has been experiencing a continuous and fragmented reform of its social security system that still has not been completed.

3.2.2 EXTERNAL INFLUENCES DURING THE REFORM PROCESS AFTER 1989

International influences verses internal factors

The moment Czechoslovakia had recovered from the shock of the revolution and prepared for social reforms, global actors from different directions were ready to make recommendations on the design of a new social security system. It has been argued, however, that internal factors were decisive forces in the Czech reform process rather than international interferences.[7] This was mainly because of the fact that the Czech Republic was not affected by a deep economical crisis as other CEE countries were at that time, and therefore it was not dependent on loans from the IMF and the World Bank. Neither was the country in such a critical state in terms of social policy that organisations such as the CoE, ILO, and EU were given much room to interfere. Nevertheless, it will be shown below that these organisations still played a specific role in the reform of the social security system, both directly and indirectly.

6 Potůček 2007A, p. 141; Mácha 2002, pp. 95–97.
7 Večerník 2008, p. 506; Potůček 2004, p. 259; Mácha 2002, p. 106.

International Labour Organisation

Under the first federal government, after the completion of the initial reform plan that included the determination of the different social security benefits, a delegation of experts went to the ILO Office in Geneva to discuss the plan and to gather information and advice.[8] As a matter of fact, there was not much concern about the ILO standards as such, since the intended schemes were considered rather generous in terms of the level of the benefits, as well as their personal scope. Consequently, the government was open-minded with regard to the ILO and willing to make new commitments in the field of social security, which was demonstrated by the ratification in 1990 of Convention 102 on Minimum Standards of Social Security, Convention 128 on Invalidity, Old age and Survivors' benefits, and Convention 130 on Medical Care.[9] Furthermore, the idea and implementation of the subsistence minimum as a universal standard for the various benefits was developed and realised with the technical assistance of the ILO.[10] A few years later, the new Pension Act (adopted in 1995) was discussed with the ILO before it was submitted to Parliament, to be sure that the proposed act was in line with the ratified conventions.

In the course of the 1990s, under the successive neoliberal governments, the active commitment towards the ILO weakened. This was not only caused by the neoliberal preferences in politics, but also because the political focus shifted towards the preparations for EU accession. Neither new conventions in the field of social security, nor the unratified parts of ILO C102 and C128, have been nominated for ratification since, although national legislation was considered in line with the requirements of C168 on Unemployment and Part IV of ILO C102.[11] In 2005, under the Social Democratic government, the findings of an expert team on the future of the Czech pension scheme were discussed during a conference organised by the Ministry of Labour and Social Affairs in cooperation with the ILO Office for Central and Eastern Europe.[12] Although this was a clear signal that the Czech Republic had dissociated itself from the ideas of the global financial institutions on the replacement of public pensions by private schemes, the substantive input of the ILO was limited and did not lead to the ratification of higher standards. Furthermore, the recent economic recession has hampered the political will to take up new international obligations in field of social security even more.

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8 Information obtained from experts.

9 Concerning Convention 102: Part IV on Unemployment and Part VI on Employment Injury were not accepted. Concerning Convention 128: only Part III on Old age was accepted.

10 Orenstein 1995, p. 183.

11 Information obtained from experts.

12 National Tripartite Seminar on Pension Reform in the Czech Republic, 5–6 December 2005, Prague.

Council of Europe

As far as the Council of Europe is concerned, the Czechoslovakian Republic became a member in 1993, the date the preparations for EU accession also began. At that time, the CoE heavily promoted the Social Charter among the CEE countries, stressing its importance in relation to EU accession. In 1999, the Czech Republic took the step to ratify this instrument, and included in its ratification Article 12 on social security, which requires compliance with the standards of ILO Convention 102. In fact, this step did not imply commitment to higher social security standards as such, since this Convention had already been ratified and legislation had been kept in line through time. Nevertheless, at the invitation of the CoE, the social democratic government additionally ratified the European Code of Social Security in 2000. This time, the ratification did imply commitment to higher standards, since it also involved Part IV on Unemployment, one of the parts that had been left aside when Convention 102 was accepted a decade earlier.

European Union

The influence of the EU on the reform process was limited. First of all, preparations for accession were mainly focused on economic reform on the basis of the Copenhagen criteria of 1993. Social goals in this respect were very limited and were at the bottom of the list of priorities. Besides, the neoliberal governments from 1992 until 1998 were not so much in favour of joining the EU, and therefore not much effort was made in general to adapt to European rules unless it was strictly necessary.[13] And, of course, since the European Commission is not competent to develop legislation on social security matters, the EU did not impose specific standards in the field of social protection. Nevertheless, the EU Commission did point out in its reports on progress towards accession that the country had not yet ratified the Social Charter, thus implicitly emphasising the necessity of ratification.[14] Indeed, as has been shown above, both the European Social Charter and the Code of Social Security were ratified during the accession period. Although these ratifications did not directly follow from EU obligations, the prospect of accession persuaded the government to accept these international standards, thus communicating that from a social point of view the Czech Republic was ready for the EU adventure.[15]

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[13] Potůček 2004.
[14] European Commission 1998.
[15] Schoukens 2007, p. 90; information obtained from experts.

3.2.3 MAIN FEATURES OF THE CURRENT SOCIAL SECURITY SYSTEM

Social security as a fundamental right

Social protection for Czech citizens is firmly anchored in the Constitution of the Czech Republic. As a part of the Constitution, the Charter of Fundamental Rights and Freedoms[16] proclaims the basic rights on, among other things, social security: the right to work and to material security for those who are unable to do so;[17] the right to adequate material security in old age, during periods of work incapacity, and in case of loss of the breadwinner;[18] the right to free health care and medical aids;[19] the right to special care of pregnant women and children.[20] These rights are more specifically enacted by individual laws and international agreements.

Social insurance

The social security system is divided into three strata: social insurance, state social support, and social assistance.[21] Firstly, the obligatory social insurance scheme represents the core of the system, providing protection against the risks of loss of income due to old age, sickness, childbirth, invalidity, death of the breadwinner, and unemployment. The unemployment benefit is embedded in the so-called 'state employment policy', developed in the early 1990s with the objective to 'preserve full and effective employment and to provide services that would facilitate the achievement of the goal through the network of regional labour offices.'[22] It comprises not only financial compensation in the case of temporary loss of employment, but the labour offices also manage an active employment policy including retraining programmes, investment incentives for the creation of new jobs, and public works programmes.[23] The labour offices operate separately from the social insurance scheme, but financially the employment policy is part of the insurance scheme. The social insurance scheme is funded by employees, employers and the state. Additional voluntary private

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16 Resolution of the Presidium of the Czech National Council of 16 December 1992 on the declaration of the Charter of Fundamental Rights and Freedoms, as a part of the constitutional order of the Czech Republic. Published on the website of the Constitutional Court of the Czech Republic.

17 Charter of Fundamental Rights and Basic Freedoms, Art. 26.

18 Charter of Fundamental Rights and Basic Freedoms, Art. 30.

19 Charter of Fundamental Rights and Basic Freedoms, Art. 31.

20 Charter of Fundamental Rights and Basic Freedoms, Art. 32.

21 Tröster & Vysokajová 2006; Potůček 2004, pp. 258–261; Mácha 2002, pp. 77–78; website of the Ministry of Labour and Social Affairs.

22 Potůček & Radičová 1997, p. 9.

23 For more information, see the website of the Ministry of Labour and Social Affairs.

pension insurance is available, but it is rather underdeveloped, mainly due to political controversy that brings about half way measures, resulting in fragmented state supervision, low security of invested funds, a lack of transparency, and high operating costs.[24] This supplementary pension scheme is based on individual pension savings accounts to which employers are not required to contribute.

Social support

The second tier of social security, the state social support, complements the social insurance scheme and is mainly aimed at parents with children. Benefits, funded directly from the state budget and not related to participation in the labour market, include: child allowance, social allowance, housing allowance, parental allowance, foster care benefits, birth grants, and funeral grants. Initially, all these benefits were universal, however, in 1995 the first three were transferred into means tested benefits. Attempts of the government in the period 1998–2006 to switch these three benefits back to universal allowances were blocked by both coalition parties and the opposition.[25]

Social assistance

Citizens who are not able to work and who do not have (sufficient) recourse to social insurance and/or social support benefits can call upon the third tier: social assistance. The social assistance benefit is regarded as a social floor, the level of which is set as the subsistence minimum, and codified by the Act on Assistance in Material Need. The defined subsistence minimum depends on the structure of the household and the age of the beneficiary. Based on the idea that 'all persons who work must be better off than those who are out of work or who avoid work',[26] social assistance is subject to the principle of subsidiarity, which states that the individual is responsible for their own support and the support of their family, and only if a person is objectively unable to increase their income, will social assistance by the state be provided.[27]

Health care

Another part of the social security system, that has not been mentioned yet, is health care. Separate from the general social insurance scheme in terms of its codification, organisation, and financing, health care is covered by a compulsory

[24] Antošík 2003, p. 20; Král 2000, III.7; Mácha 2002, pp. 84–88.
[25] Potůček 2007B, p. 31.
[26] Website of the Ministry of Labour and Social Affairs.
[27] Potůček 2004, p. 261.

public health insurance scheme, providing care to all persons with permanent residence in the Czech Republic, and to persons who are employed by an employer registered in the Czech Republic. Supplementary forms of voluntary contractual insurance are possible for care beyond the reach of the public insurance, such as cosmetic operations, acupuncture, or operations not considered necessary.

3.2.4 ADMINISTRATION AND FINANCING

Czech Social Security Administration

The central player in the field of social security administration is the Ministry of Labour and Social Affairs, as the responsible body for the Czech Social Security Administration (CSSA).[28] This administrative institution, established in 1990, is an organisational body of the state, and it reports directly to the Ministry. It is currently divided into the Central Administration and about 90 District Social Security Administrations, which are linked together by 15 regional offices.[29] The main tasks of the CSSA include: collecting premiums for the social insurance scheme (comprising the pension schemes and sickness insurance) and the state employment policy; calculating and paying benefits from these schemes; performing doctor appraisal services; keeping record of the individual accounts of insured persons; and fulfilling obligations ensuing from international conventions and EC law.[30] The CSSA does not deal with the ILO conventions or the European Code of Social Security; in its annual reports only the EU obligations and bilateral agreements are mentioned.[31] Yet, the ILO conventions and the ECSS are not completely ignored, since the two-yearly Actuarial Reports on Social Insurance contain a brief section on the obligation of ILO Conventions 102 and 128, in which the ECSS is also mentioned. However, these reports are drawn up by the Ministry, not by the CSSA itself.

Financing

The financing of the social insurance system is based on the pay-as-you-go system, which means that the benefits provided in a certain period are paid for from the contributions collected in that same period. Payment of the benefits is guaranteed by the state, in the case of pensions, this is at least the basic part. The contributions for the pension scheme, medical care, sickness

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28 Ripla & Mareš 2009; Ministry of Labour and Social Affairs (Cz) 2006, pp. 17–18; Tröster & Vysokajová 2006, points 73–82.

29 Website of the Czech Social Security Administration.

30 Ministry of Labour and Social Affairs (Cz) 2006, p. 19; Mácha 2001, pp. 78–80.

31 See, for example, Czech Social Security Administration 2007, pp. 44–46.

benefits, and employment policy, amount to 45 percent of gross salary, of which 11 percent is paid by the employee and 34 percent by the employer.[32] The premiums for the public health insurance are allocated to the health insurance companies, the employment policy premiums are paid into the state budget, and the contributions to the pension scheme are deposited into a separate account for pension insurance that was created in 1996 as a part of the state budget. The funds in this account may only be used for the payment of pension insurance benefits and for making up any deficit between revenues and expenditures.

3.2.5 JUDICIAL REVIEW OF SOCIAL SECURITY MATTERS

Re-establishment of the Supreme Administrative Court

The Czech system of administrative justice was, after its suppression by the communist regime, re-established in 1991 with the adoption of the Charter of Fundamental Rights and Freedoms. A new administrative justice procedure was hastily adopted in 1992, but proved to be inadequate from the very beginning. To remedy the deficiencies, during the 1990s several attempts were made to improve the legislative framework, but without success. Eventually, it was the Constitutional Court that paved the way for new legislation by annulling a considerable part of the Code of Civil Procedure, namely, the part concerning administrative procedures.[33] It was found that judicial review in administrative justice was inconsistent with international obligations, specifically with the Articles 6 and 13 of the European Convention on Human Rights, because the law did not cover protection against the inaction of an administrative body or unlawful interference that did not result in an administrative decision.[34] In 2003 the new Code of Administrative Justice came into force and the Supreme Administrative Court was re-established, fifty years after its abolition.

Administrative procedure

Under the current legislation, citizens have the right to stand up against the decision of an administrative body concerning a social insurance benefit. Within two months of the notification of the final decision, an action can be brought before the administrative chamber of the competent regional court. This can be an action for judicial review of unlawful acts, an action for the failure to act, as well as an action against unlawful interference that is not a decision. The

[32] MISSOC (Cz), 2009.
[33] Constitutional Court, judgment No. Pl. ÚS 16/99, 27 June 2001.
[34] Wagnerova 2005, p. 7.

petitioner does not need to be legally represented before these regional courts, which act as courts of first and last instance. Additionally, a cassation complaint against the final decision of a regional court, by invoking one of the grounds of cassation, can be filed before the Supreme Administrative Court within two weeks of the regional court's decision becoming final. In this case, the complainant must be represented by an attorney.[35] It must be noted, however, that Czech citizens do not go to court easily. By and large, there is a lack of confidence in judiciary, partly stemming from its poor performance in the past, partly because of the continuous occurrence of problems such as a lack of uniformity of decisions, extreme formalism resulting in unjustifiable outcomes, and delays in proceedings.[36]

3.3 THE ROLE OF THE SOCIAL PARTNERS

3.3.1 DEVELOPMENT OF THE CZECH SOCIAL DIALOGUE

Transition from state unions to trade unions

Obviously, during the communist regime there was no such thing as tripartite social dialogue, since the state was the only employer and trade unions were rather state unions. Trade unions were not seen as independent associations to protect workers' interests, but used as transmission belts between the communist party and the employees, with administrative and control functions over the working class.[37] Their activities were restricted to formal collective bargaining and open support for state policy. Organising strikes for more favourable working conditions did not belong to their range of duties. Not surprisingly, the trade unions distanced themselves from the massive demonstrations and strikes that took place during the last months of 1989, and which resulted in the overthrow of the communist rule. As a matter of fact, they remained faithful to the communist party until the very last moment. It goes without saying that the collapse of communism and the emergence of democracy turned the fundamental basis of trade unions upside-down, left behind as they were, empty-handed without the back-up of the regime. The new trade union movement originates from the November strikes, when the then established strike committees took over the old trade unions and started sweeping reforms from the inside out.

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35 Website of the Supreme Administrative Court; Bobek 2006, point 2.4.2; Tröster & Vysokajová 2006, points 559–568.

36 Balik 2004, p. 5; Kühn 2004.

37 Svoreňová 2000, pp. 131–132.

The ups and downs of social dialogue

Under Vaclav Havel's presidency, the first federal government acknowledged the need for a political and institutional basis to prevent, or at least minimise, social conflicts.[38] Indeed, it was decided to establish institutions to represent different interests and provide feedback. In co-operation with the trade unions and the emerging associations of businesses and employers, the government created the tripartite Council for Economic and Social Agreement, with the intention of starting serious and systematic social dialogue in society to maintain social peace.[39] This institution still exists and aims at making voluntary agreements between the three parties involved. The rules for its activities are formulated in a statute and are based on the principle of consensus.[40] It should be noted that the existence of neither the Council, nor its relationship to Parliament, was (and still is) set down in legal regulations. Therefore the existence, tasks and competences of the Council have been constantly under discussion. Under the neoliberal government after the elections of 1992, the Council's functions were gradually curtailed from bringing about agreements, to providing information on a narrowed range of topics, resulting in a new statute in 1995 and a new name: Council for the Dialogue of the Social Partners.[41] This strategy gave away the government's hidden agenda of getting rid of a tripartite bond as an intervening body and boosting Parliament as the main place where interests should be defended.[42] It also reflected the view of Vaclav Klaus, Prime Minister at the time, on the concept of 'civil society' that should include 'a standard system of political parties without national fronts and civic movements.'[43]

After the elections of 1996, a minority coalition government was formed of the same parties as the previous coalition, however this government was dependent on the support of the social democratic party, which had significantly gained strength. This shift of power, together with the worsening of the economic situation and growing social tension, gave cause for a greater willingness on the part of the government to negotiate with the social partners to seek support for intended reform steps. In 1997, the tripartite Council was reconstituted in its previous form and with its previous name, and started to recover its former significance.[44] From then on, the influence of the trade unions increased hand

[38] Hála & Kroupa 2005; Kroupa & Mácha 1999, pp. 103–108.

[39] Initially, the body was called the Council for Social Agreement, but shortly afterwards changed in order to reflect the functions of the Council more precisely.

[40] Eurofound 2006, p. 5.

[41] Cox & Mason 2000, p. 339; Myant, Slocock, Smith 2000, p. 731; Kroupa & Mácha 1999, p. 104.

[42] Kroupa & Mácha 1999, p. 105.

[43] Myant, Slocock, Smith 2000, pp. 730–731; Potůček 1999, p. 165.

[44] The body currently consists of eight representatives of the government, and seven representatives of both the trade unions and the employers.

over fist. The successive social democratic governments thus far have attached considerable importance to social dialogue, engaging the social partners in preparation of policies affecting, among other things, social security.[45] Additionally, the access to the EU has definitely stimulated social dialogue, as the EU encouraged active engagement of the social partners during the accession process. Consequently, these days, the trade unions are considered veto figures opposing radical reform, such as the introduction of a mandatory savings system for old-age pension.[46] Nevertheless, the growth to maturity of the trade unions is not mirrored in the scale of membership; there has been a steady decrease in membership from 84 percent of all employees in 1990, to 22 percent in 2004 and 20 percent in 2009.[47] It should be born in mind, of course, that the high figure of 1990 stems from the socialist period, when membership was required to obtain or keep a job. The public's confidence in the trade unions, on the other hand, has slightly increased over the years,[48] and the level of unionisation is not that far below the EU average of 23 percent (2009).[49]

As far as the employers' side is concerned, with the transition to a market economy, accompanied by a major withdrawal of the state, a large number of employers' organisations began to emerge. Because of the initial lack of strong and demanding trade unions as their counterparts, they were formed as interest or lobbying groups, and were not focused so much on social dialogue.[50] In terms of political power and the rate of organisational articulation, the employer organisations were initially weak, not in the least part because they were extremely fragmented. It was by intervention of the government, which required employer representation within the Council for Economic and Social Agreement, that they became organised into a more coherent structure.[51] Nevertheless, the employers' organisations have never strongly influenced the social debate. On specific issues on which employers and employees have opposite views, such as collective bargaining or legal regulation of strikes, they form a bond with the government against the unions, but on most issues they have no specific opinion.[52] Accordingly, their influence and impact have remained limited.

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45 Mácha 2002, pp. 105–106; Myant, Slocock, Smith 2010, p. 53.
46 Mácha 2002, p. 104.
47 Kroupa & Hála 2006; OECD StatExtracts, Trade Union Density.
48 Kroupa 2004, p. 3.
49 Website of the European Trade Union Institute (ETUI).
50 Kauppinen 2004, p. 38.
51 Cox & Mason 2000, p. 339.
52 Mácha 2002, p. 104; Myant, Slocock, Smith 2000, p. 73.

3.3.2 PARTICIPATION RELATING TO INTERNATIONAL LEGISLATION

When it comes to the matter of international instruments on social security, the role of the social partners is twofold. In the first place, within the Council of Economic and Social Agreement a working group has been set up especially for ILO matters, with three representatives of the government, trade unions and employers' organisations. In this expert group, the social partners can express their views on specific issues relating to ILO conventions and the annual ILO conferences. Although the line of approach in the working groups is to achieve a certain level of consensus on important issues, it also happens that the respective viewpoints cannot be brought together. One case in point is the non-cooperation of the employers at the signing of the ILO Employment Relationship Recommendation in 2006.[53]

The second way of co-operation follows from the ILO regulations. According to the ILO Constitution, the government is obliged to distribute to the social partners copies of information and reports on the application of the ratified conventions.[54] The same goes regarding the reports on the ECSS. Through this requirement, the social partners are able to provide additional information or express their opinions on specific matters. Another way participation is achieved in this respect is that the social partners are consulted prior to the submission of newly adopted conventions and recommendations to Parliament. The Ministry of Labour and Social Affairs prepares the documents, on the basis of which Parliament has to decide whether or not to ratify the convention in question, or to adapt national regulations to meet objectives of the specific recommendation. For this purpose, the international instrument is translated and compared with national legislation. The prepared documents are sent to prescribed bodies and organisations for comment, among which are the social partners, after which they are forwarded to the Cabinet. In practice, substantive discussions on social security treaties take place exclusively within the Working Group ILO. In general, it has been found by the trade unions that there is no real dialogue and that only minor comments from their hands concerning less important issues are taken into account. Furthermore, the procedure seems rather formal, since politicians in charge of the ratification of international (social security) instruments have taken their position beforehand, on the basis of party strategy, and no annexed comment of a social partner will change their points of view on a specific matter. An example of this is the request in 2006 of the tripartite working group to the Cabinet to ratify ILO Conventions 151 on Labour Relations and 154 on Collective Bargaining, as it was found that the Czech legislation met

[53] Information obtained from experts.
[54] ILO Constitution Art. 23 section b.

the required conditions. Although there was consensus on this issue within the working group, the request did not result in political action. As mentioned above, the employers are not very interested in these matters and, consequently, they are hardly involved in these procedures.

3.4 THE INTERNATIONAL SOCIAL SECURITY STANDARDS WITHIN THE CZECH LEGAL SYSTEM

3.4.1 RATIFICATION OF INTERNATIONAL STANDARDS

In total, the Czech Republic has ratified 62 ILO conventions (both labour and social security conventions),[55] which is just about average within the EU. On the website of the ILO it is not traceable when most conventions were ratified, because the ILO uses in its databases the year of origin of the current Czech Republic, namely 1993, when Czechoslovakia split up. After the separation, both countries took over, as legal successors, the existing obligations towards the ILO. In spite of a request of the government to use the real ratification dates in order to provide a historically correct overview, the statistics give 1993 as the ratification year of all conventions ratified before the separation from Slovakia. They do, however, show that since 1993 twelve conventions have been ratified in mainly two rounds: four in 1996 and six in 2000/2001. After that, only two conventions have been ratified, one in 2007 and one in 2008. None of these conventions dealt with social security. It must be recalled at this point that several conventions – both social security and labour conventions – could have been nominated for ratification, since national legislation had already been considered in line with the requirements for several years. Cases in point are Convention 168 on Unemployment, Convention 102 Part IV on Unemployment, and also the above-mentioned Conventions 151 and 154. This seems to indicate that the government's commitment to the ILO is waning, and that currently there is no political will to accept international obligations in the social sphere.

In total, ten social security conventions have been ratified by the Czech Republic, of which only three are considered up-to-date, namely, Conventions 102, 128 and

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55 Situation of 1 January 2011. Of all ratified conventions, 25 are considered outdated, generally because the standards are not relevant anymore or because the specific subjects have been dealt with in newer conventions. Therefore, most of these outdated conventions have been shelved (not open for new ratifications), and in some cases, the reporting obligations have been lifted in order to limit the administrative burden for the Member States. For the Czech Republic, there are another 39 up-to-date conventions open for ratification. See ILO website, ILOLEX or APPLIS database.

130. Of Convention 102, all parts have been ratified, except Part IV on unemployment and Part VI on employment injury. Ratification of Convention 128 only covers old age; the parts on invalidity and death of the breadwinner are not included. Next to these ILO conventions, the Czech Republic has also ratified the European Code of Social Security, with the exception of Part VI on employment injury. The additional Protocol of the Code has not been ratified. The European Social Charter has also been ratified, with the inclusion of Article 12 on social security, requiring acceptance of the standards of Convention 102. Conclusively, in respect of the nine social risks, the government is bound by the standards shown in Table I. To be complete, in this table the ILO standards that are outdated but towards which the obligation to submit regular reports has not been lifted, are included.

Table I. Social security standards ratified by the Czech Republic

Medical care	C102, Part II; ECSS, Part II; C130
Sickness benefit	ECSS, Part III; C130*
Unemployment benefit	ECSS, Part IV
Old-age benefit	ECSS, Part V; C128, Part III*
Employment injury benefit	C12; C17; C42
Family benefit	C102, Part VII; ECSS, Part VII
Maternity benefit	C102, Part VIII; ECSS, Part VIII
Invalidity benefit	C102, Part IX; ECSS, Part IX
Survivors´ benefit	C102, Part X; ECSS, Part X

* Ratification of Convention 130 automatically replaced Part III of Convention 102 (Convention130, Article 36 sub 1) and Convention 128 replaced Part V of Convention 102 (Convention128, Article 45 sub 1 b).

3.4.2 FULFILMENT OF THE OBLIGATION TO REPORT ON THE APPLICATION OF INTERNATIONAL STANDARDS

After ratification, the government is required to submit regular reports to the ILO on the application of conventions.[56] Between 1993 and 2008 the Czech government received 134 direct requests from the CEACR in reply to its regular reports concerning the 62 ratified conventions. These direct requests deal with possible conflicts with conventions concerned, or simply require more detailed

[56] For the reporting procedure, see section 2.8.1.

information on specific issues.[57] The number of direct requests may say something about the quality of the reports, or the complexity of the national legislation, or the number of cases of non-conformity with the conventions; in any case it indicates that the country submits its reports. Three times in the given period the government failed to send in its reports, and, additionally, from 1996 until 1999, the CEACR observed that the government had failed to submit newly adopted conventions to Parliament. It should be noted, though, that in 2009 and 2010 the Czech Republic failed to submit any reports on the application of ratified conventions, while 22 reports were due. Specific issues in connection with social security conventions that the Committee addressed in its requests concerned Conventions 102, 128 and 130, and Conventions 17 and 42 on Workmen's Compensation (accidents and occupational diseases).[58] These issues will be examined in the relevant sections of this chapter.

All reports on ILO conventions and the ECSS are prepared by the Ministry of Labour and Social Affairs.[59] However, in practice, necessary information concerning Convention 130 on Medical Care and Sickness, Part II of Convention 102, and Part II of the ECSS, is requested from the Ministry of Health. It is to be expected that the former ministry has a more structural and systematic approach regarding the reporting obligations of the great number of conventions than the Ministry of Health, where the ILO conventions are not well-known. This perhaps explains the continuous requests for information about national legislation in connection with Convention 130 as of 1992 until the date of writing, as well as the repeated requests made concerning other conventions. An obstacle for preparing efficient reports seems to be the fact that intended changes of legislation, especially in the field of medical care and employment injury, have been obstructed for years. For example, after years of tussling, a new Act on Occupational Accident Insurance was adopted and published in 2006, to come into effect on 1 January 2007. This was put in the report of 2006 on Convention 42, as this Act was supposed to solve one of the issues the CEACR had raised several times.[60] However, it happens frequently in the Czech Republic that before an act becomes effective, Parliament adopts a bill that postpones the date the act concerned will come into force, especially after there has been a shift in political power. In the case of the Act on Occupational Accident Insurance,

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[57] For comparison: Hungary has ratified 58 conventions and received 143 direct requests in the same period; Greece 63 conventions, 108 direct requests; Estonia 32 conventions, 80 direct requests; Sweden 76 conventions, 137 direct requests; Germany 72 conventions, 108 direct requests. See ILO website, ILOLEX database, universal query form.

[58] Conventions 17 and 42 are replaced by Convention 121. However, since the Czech Republic has not ratified this Convention, it is still bound by these pre-war standards.

[59] The annual reports on the ECSS are published on the website of the Ministry of Labour and Social Affairs; the reports on the ILO conventions are not published.

[60] CEACR: Individual Direct Request concerning C042 (Czech Republic) 2007.

shortly before it was to come into force, the date was postponed on the initiative of the newly elected government until 2010, and in 2009 it was postponed again until 2013. In view of the fact that the government at that time did not agree with this act, it was then expected that the Act would never come into effect, despite the fact that it had already been adopted by Parliament. Instead, it will probably be superseded by its forthcoming successor. In this situation it is, indeed, not easy to report in a consistent way.

3.4.3 LEGAL STATUS OF INTERNATIONAL INSTRUMENTS

The Constitution of the Czech Republic (CCR) prescribes that international agreements approved by Parliament are part of the legal order and take precedence over national law:[61]

> Article 10
> Promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply.

Judges are competent to decide on alleged inconsistencies of lower regulations with legislative acts and treaties that are part of the legal order. A conflict between a legislative act and the constitutional order is exclusively within the competence of the Constitutional Court:[62]

> Article 95
> (1) In making their decisions, judges are bound by statutes and treaties which form a part of the legal order; they are authorised to judge whether enactments other than statutes are in conformity with statutes or with such treaties.
> (2) Should a court come to the conclusion that a statute which should be applied in the resolution of a matter is in conflict with the constitutional order, it shall submit the matter to the Constitutional Court.

The Constitutional Court has exclusive competence to annul statutes or other legal enactments if they are in conflict with the constitutional order.[63] Constitutional laws, altogether forming the constitutional order, are legislative acts of the highest level and are passed by a special majority in both chambers of Parliament.[64] An important question for the application of the international

[61] Constitution of the Czech Republic of 16 December 1992, Art. 10 (as last amended in 2002 – the so-called 'Euro Amendment' – in view of EU accession). Published on the website of the Constitutional Court.
[62] Constitution of the Czech Republic of 16 December 1992 (as amended in 2002), Art. 95.
[63] Constitution of the Czech Republic of 16 December 1992 (as amended in 2002), Art. 87 par 1.
[64] Constitution of the Czech Republic of 16 December 1992 (as amended in 2002), Art. 39 par 4; Bobek 2006, point 3.2.1.

social security standards is whether they are part of the constitutional order. After all, only then can a case be submitted to the Constitutional Court, which can annul conflicting provisions and provide case law relating to these standards. Article 112 CCR exhaustively defines the content of the constitutional order and this definition does not contain international agreements.[65] Nevertheless, it is not as clear as it seems.

A particular reason for confusion about the status of treaties stems from the period prior to an amendment of the Constitution in 2002 (in view of EU accession) that changed, among other things, Article 10. As a matter of fact, before this amendment, the text of Article 10 dealt with human rights treaties only:[66]

> Article 10 [Human Rights Treaties]
> Ratified and promulgated international accords on human rights and fundamental freedoms, to which the Czech Republic has committed itself, are immediately binding and are superior to law.

These human rights treaties took precedence over national acts and were part of the constitutional order. As to the position of ordinary treaties, no reference was made. An international agreement qualified as a human rights treaty if the prescribed procedure for the approval of constitutional acts and Article 10 treaties was followed.[67] Most remarkable in this respect is a decision of the Constitutional Court in 2000 concerning Article 16 of the European Social Charter.[68] In this decision, the Court treated the Charter as a human rights treaty, in spite of the fact that just one year before, Parliament had refused to qualify it as a human rights instrument under Article 10 of the (as yet unamended) Constitution, approving it only as an ordinary international agreement.[69] The status of a treaty ratified before 1992, such as the ILO social security conventions, was not clear, but was hardly discussed. In fact, this would depend on the vision of the Constitutional Court.

With the above-mentioned amendment of the Constitution in 2002, all treaties ratified with the approval of Parliament were part of the legal order and took precedence over national legislation. This included the ILO social security conventions and the European Code. Since the amended provision explicitly classified treaties as part of the legal order and not of the constitutional order,

[65] In respect of EU treaties, specific provisions are included in the Constitution; they are not taken into account.
[66] Constitution of the Czech Republic of 16 December 1992, Art. 10.
[67] Constitution of the Czech Republic of 16 December 1992, Art. 39 (4).
[68] Pl. Ús 3/00.
[69] Wagnerova 2005, footnote xvii.

human rights treaties ceased to qualify as constitutional law. The Constitutional Court, however, decided differently. The Court ruled that:[70]

> Therefore, the scope of the concept of constitutional order cannot be interpreted only with regard to §112 para.1 of the Constitution, but also in view of Art. 1 para. 2 of the Constitution, and ratified and promulgated international agreements on human rights and fundamental freedoms must be included within it.

Article 1 paragraph 2 says that '[t]he Czech Republic shall observe its obligations resulting from international law.' In its reasoning, the Court also referred to the fact that 'changes in the essential requirements for a democratic state governed by the rule of law are impermissible.'[71] In this context, the Court further argued that 'no amendment to the Constitution can be interpreted in such a way that it would result in limiting an already achieved procedural level of protection for fundamental rights and freedoms.'[72]

Consequently, differentiation of legal status among treaties has been re-established, which again means that it is not clear to what category a specific international agreement belongs until the Constitutional Court has decided to use it as a referential norm in a proceeding. Furthermore, the effectiveness of the preference of 'ordinary' treaties over national acts is dubious. Indeed, in the same judgment, the Court pointed out that in the case of a conflict between a statute and an international agreement, a general court judge is, under Article 10 of the Constitution, obliged to proceed according to the international agreement. However, the Court argued that íf such a decision were taken, it could never have *de facto* derogative consequences, since judicial precedent does not constitute the binding nature of a source of law.[73] The Court continued to point out that general courts are obliged to interrupt proceedings and submit the matter for evaluation to the Constitutional Court. In the view of the Court it was, therefore, necessary to include (only!) the human rights treaties in the constitutional order, to the effect that a general court is required to submit the matter to the Constitutional Court for evaluation. The reasoning of the Court does not explain why this dichotomy between human rights treaties and other treaties has been created, or when a treaty is considered a human rights treaty. It only makes clear that, apparently, the Court does not want to take all international agreements automatically as referential norms, but it wants to be able to decide in every individual case whether it will base its judgment on a relevant treaty or not. The ambiguous and inconsistent (constitutional) legislation at this point gives room for the Court to make its own rules. Thus, whether conflicts between national

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70 Pl. Ús 36/01 (25 June 2002), point VII; an English translation of this judgment is published on the website of the Constitutional Court.

71 Art. 9 (2) CCS.

72 Pl. Ús 36/01 (25 June 2002), point VII.

73 Pl. Ús 36/01 (25 June 2002), point VII, 4th indentation.

law and international social security standards can be brought before the Constitutional Court depends on whether they are recognised by the Court as human rights treaties, which will not become clear until an actual procedure is initiated.

3.4.4 INTERNATIONAL STANDARDS AND LEGISLATIVE PRACTICE

In order to fulfil the obligations stemming from the international social security instruments, it is regulated that any bill must contain information on compliance with, among others, international treaties. Accordingly, it is general practice to compare draft bills with the international standards before they are presented to Parliament. The bill concerned is sent to the relevant ministries and, since it concerns social matters, also to the social partners. Each party has the opportunity to examine the proposal in connection with the relevant convention(s). Although the policy is aimed at monitoring all bills in this respect, in the heat of a political debate this can be easily overlooked. In practice, it does happen that the check on international legislation has not been carried out, due to the fact that the Cabinet has taken its position no matter what. Other reasons for this are lack of knowledge or lack of personal capacity at the ministry to keep an eye on all proposals and amendments, a tight time schedule for a proper research, or fear of a politically inconvenient outcome. Correction from the side of the social partners on such an omission is not likely, as they are either uninterested in the international standards in general (employers), or they are not familiar with the international standards in the field of social security (employees).

Nevertheless, the Ministry of Labour and Social Affairs seems to put a high value on the existing international obligations. In case a discrepancy is noticed between national and international legislation, a solution is searched for within the national framework. A good example of a change of national legislation with the intention of solving an emerging inconsistency with international requirements is the following: In 2004, the level of the old-age pension fell below the norm of C128, which stipulates that a pension, after 30 years of insurance, must amount to at least 45 percent of the average wage of a skilled worker. This occurred because the annual adjustment of the pensions did not keep up with the growth of wages. In view of the international requirements, the government increased the first reduction limit with regard to the pension's calculation base in 2005, a measure that brought the pensions in line again with Convention 128.[74]

[74] Ministry of Labour and Social Affairs (Cz) 2006, p. 73 and 2004, p. 71. For more details, see section 3.8.

Another example, also relating to old-age benefit, concerns an amendment of the Pension Act that became effective in 2010. Apart from a further increase of the pensionable age, this amendment involved an increase of the qualifying period. It was the political wish to raise the required insurance period from 25 years to 35 years. However, because this measure would cause a conflict with ILO Convention 128, that allows an insurance period of 30 years maximum, it was decided to set the qualifying period at 30 years of insurance or 35 years if non-contributory periods are included.[75]

The Ministry gives account of the fulfilment of international obligations in its biennial Actuarial Reports on Social Insurance, which are published on its website. With the production of these reports as of 2002, the Czech Republic fulfils its obligation ensuing from ILO Convention 102 that 'the necessary actuarial studies and calculations concerning financial equilibrium are made periodically.'[76] However, no reference is made to medical care in relation to international obligations; the existence of international standards on medical care seems to escape any notice.

3.4.5 INTERNATIONAL STANDARDS AND JUDICIAL PRACTICE

In principle, since the social security conventions are part of the Czech legal order and take precedence over national law, they can be invoked by citizens before court and can also have direct effect. The Constitutional Court has stressed that 'not all provisions of international conventions under Article 10 of the Constitution are also "directly effective", rather only those which are appropriate and capable of being directly effective.'[77] Provisions that are addressed to the state's parties and do not guarantee a specific right in a single, absolute and immutable form, are not considered directly effective.[78] Whether or not a specific provision of an ILO social security convention or the ECSS would be directly effective, has not been subject to a judgement yet. Theoretically it should be possible, providing that the provision guarantees a right in a clear and unambiguous way.

Although the ordinary courts are obliged to apply international agreements in preference to national acts and regulations, they only play a role in court

75 Information obtained from experts. See section 3.8.5.
76 ILO Convention 102, Art. 71 (3).
77 Pl. ÚS 304/98.
78 For example, the Constitutional Court did not ascribe direct effect to Art. 6 (1) ICESCR, 'the right to work'.

proceedings in exceptional circumstances.[79] This might contribute to the fact that the issue of the legal status of treaties is not subject to political debate or academic discourse, and therefore the urgency for creating clarity is lacking. Conversely, it might also be that the obscure position of conventions such as the ILO social security conventions and the ECSS within the legal order discourages lawyers and judges from using them.

Another important reason that judges do not refer to these instruments is the emphasis on textual positivism in the Czech judiciary. This typical feature of the judiciary in post-communist countries is rooted in the socialist legal theory that a judge should take nothing into account but the text of law.[80] In this theory, law is considered to be domestic law as set down in statutes. Legal principles, for example, are only part of the law if they are included in the text of a statute, and even so, they only play an indecisive role. While after World War II precedents became an important source of law in Western Europe, the socialist legal science continued to deny a role for case law. Legitimisation of precedents as a source of law would conflict with the principle of centralised law making,[81] which was fully controlled by the Communist Party, and would be harmful to socialist legality. Interpretation of a law was seen as an easy cognitive operation of logical deduction of a written rule, without taking into consideration principles as unity of law, legal certainty, or the purpose of a law. This methodology, however, fits only easy cases, and is not appropriate for complex issues of, for instance, international legislation. Kuhn shows that after the 'big bang' of 1989, judges continued to adhere to textual positivism and formalism, with the exception of the Constitutional Court.[82] As a consequence, precedents, soft law, legal literature, and teleological arguments are still considered beyond the limits of the law. This doctrine also has consequences for the application of international conventions, which Kühn clearly points out:[83]

> Most Central European judges are without any experience in the application of international law, although almost all post-communist legal systems are now based on monist models. Monism stands, however, only on paper. In the general legal community, including the ordinary judiciary, international treaties are not viewed as a common source of law and common legal arguments. With the exception of the Polish high courts, international law is rarely applied. In fact, the ordinary courts rarely consider even the European Convention on Human Rights, perhaps relying upon the implicit formalistic notion that it is not for them to use anything which is not the domestic law.

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[79] Wagnerova 2005, p. 7.
[80] Kühn 2004, pp. 540–545.
[81] Hondius 2007, p. 11.
[82] Kühn 2004, pp. 549–567.
[83] Kühn 2004, p. 562.

A judge of the Constitutional Court illustrated during an international seminar the reality of the disregarding of international law in the Czech general courts by the following anecdote:[84]

> In 1994, at a Prague appeals court, as a legal counsel I quoted a passage from the Convention for the Protection of Human Rights and Fundamental Freedoms, whose Czech text had already been known for two years, as it was contained in the Czech Collection of Laws. The chairing judge interrupted me and instructed me that 'this court decides according to Czech law…'

And on top of this, íf a judge were to apply, for instance, an ILO convention, it would have very little impact because of the negligence of precedents, even if it concerned a judgement of the Supreme Administrative Court.[85] It should also be noted in this respect, that only the case law of the Constitutional Court and the Supreme Administrative Court is published and available online; decisions of the two High Courts and the lower courts are not publically accessible, apart from incidental case notes in legal periodicals.[86] It goes without saying that this attitude towards precedents does not contribute to a uniform interpretation of the law, including international treaties, but instead leads towards a casuistic and unpredictable case law.

3.4.6 APPRECIATION OF INTERNATIONAL 'CASE LAW'

In view of this attitude towards precedents, even when it concerns case law of the highest courts, it is not surprising that international case law is on the sidelines of judicial practice. In fact, the Constitutional Court is the only court that takes decisions of international courts into account, in particular, the case law of the European Court of Human Rights (ECHR).[87] It is also true, however, that these anti-formalist judgements of the Constitutional Court are often criticised by the legal academia and the ordinary judiciary.[88] The Court's battle against textual positivism, as yet, has not yielded results. Moreover, its decisions are not binding on other public authorities or natural persons, which hampers, of course, its practical influence. It does happen, for example, that the government adopts measures that flagrantly conflict with a recent ruling of the Court.[89] As regards the opinions of the supervising bodies of the ILO, the Constitutional Court seems to take a more reluctant position than it does in relation with the ECHR,

84 Balik 2004, p. 3.
85 See also: Emmert 2003, p. 295.
86 Bobek 2006, point 2.4.1.
87 Balik 2004, p. 5.
88 Kühn 2004, p. 564.
89 Balik 2004, p. 4.

as illustrated by the fact that only in a few cases reference has been made to the opinions of these bodies. One of these rare cases dealt with a complaint, concerning the right to strike, that was partially based on ILO Conventions 87 and 98 and on decisions of the ILO Committee on Freedom of Association concerning these conventions. The Court responded:[90]

> [T]hat this international organisation is not an international court and its acts or positions of its bodies are not the source of the constitutional nor of any other law in the Czech Republic, and they are not part of its constitutional order nor its legal order. Such positions are addressed to Governments of Members States of the International Labour Organisation, or parties of its Conventions respectively, and have character of a recommendation not binding under the International Law (so-called "soft law"). Such positions can in no way be a referential norm for the Constitutional Court in proceedings dealing with control of constitutional compliance of an Act, and they will not become such even in cases when the wealth of thought contained therein is used by the Constitutional Court as an inspiration or as a basis for comparative argumentation in the course of interpretation of norms of Czech constitutional law.

To put it into other words, the Court is willing to take the Committee's opinion into consideration, but feels free whether or not to follow its decisions – which it did not in this particular case. The argument seems to touch the bounds of the anti-formalist attitude of the Constitutional Court. Of course, it is true that the decisions of the Committee on Freedom of Association and the CEACR are not legally binding. On the other hand, these opinions are important for a proper understanding and uniform interpretation of the conventions, as much as opinions of the ECHR. Nevertheless, at least up to 2008, recognition of the opinions of the CEACR as guiding principles seemed to be beyond the Constitutional Court's anti-formalist aspirations.

3.5 MEDICAL CARE

3.5.1 INTRODUCTION

Health care reform

In the past twenty years, the Czech health care system has undergone major changes. Before the collapse of the communist regime, the system was planned and managed by the central government and financed directly from the state budget. The health care reforms after 1989 were mainly aimed at solidarity, decentralisation, and privatisation, to be realised firstly by the creation of a

90 Pl. Ús 61/04 (5 October 2006), point 39.

national health insurance fund, secondly, by the transfer of hospitals to decentralised private control and of state-employed health care workers to private practices, and thirdly, by the creation of competition in the field of health insurance and health care providers.[91]

Although the health care reform is not complete yet (more steps are to be taken in the field of effectiveness and transparency in particular), the main goals have been achieved. The system is based on compulsory health insurance funded by employees, employers and the state. Nine health insurance companies are currently in operation, the biggest of which is the general Health Insurance Company, covering approximately 66 percent of the whole population. Health care is offered by different types of providers that belong either to the state, to municipalities, or to private owners. Most hospitals are still state-owned, while most of the outpatient facilities are in private hands. Patients are free to choose among the health insurance companies and among the health care providers that have a contract with the chosen insurance company. However, current legislation does not permit individual insurance companies to fix their own fees or service package, which limits competition within the health insurance sector.[92]

With regard to medical care that is in general not covered by public health insurance, such as cosmetic surgery and acupuncture, citizens can make use of supplementary forms of voluntary contractual insurance.

Legislation

As mentioned above, the right to health care is primarily established by the Czech Charter of Fundamental Rights and Freedoms (1992). In accordance with Article 31, all citizens 'have the right, on the basis of public insurance, to free medical care and to medical aids under conditions provided for by law'. This right is specified by Act No. 48/1997 Coll. on Public Health Insurance, which also regulates the personal coverage, the range of care, the qualifying conditions, and the duration of care. Act. No. 20/1966 Coll. on Public Health Care affirms three principles of health care, which are, roughly: the personal responsibility of every individual; the importance of scientific research; and the focus on preventive protection. The main acts with regard to the administration and financing and the organisation of the insurance funds are: Act No. 551/1991 Coll. on the General Health Insurance Institution; Act No. 280/1992 Coll. on Sector, Branch, Enterprise and other Health Insurance Funds; and Act No. 592/1992 Coll. on General Health Insurance Premiums.[93]

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91 Scheffler 1998, p. 3.

92 For more information, see the website of the Czech Medical Chamber.

93 At the time of writing, no English translation of the relevant legislation was available. Therefore, information is based on the websites of the Ministry of Labour and Social Affairs

At the international level, the Czech Republic is bound, in respect of medical care, by ILO Convention 130 that replaces ILO convention 102, Part II, and by the European Code of Social Security, Part II.

Administration and financing

Statutory public health insurance is implemented by health insurance companies as public law subjects. The sector, branch, enterprise and other health insurance funds, which are, contrary to the General Health Insurance Company, not established directly by an Act, need the permission of the Ministry of Finance and the Ministry of Health.[94] The public health care system is controlled and managed together by the Ministry of Health and the General Health Insurance Company. As the contributions to public health insurance are paid directly into the account of the health insurance company in which the beneficiary is insured, the health insurance companies are under statutory obligation to submit annual financial statements and reports containing their health insurance plans. These documents must be approved subsequently by the government, and by the Chamber of Deputies of the Parliament.[95]

Health insurance funds are financed through contributions from employees and employers, amounting to 13.5 percent of the employees' gross income, up to a ceiling of 48 times the monthly average wage per year. The employee pays 4.5 percent and the employer 9 percent. Self-employed persons pay 13.5 percent of their assessment income. The state covers health insurance for the unemployed, pensioners, students, women on maternity leave, women taking care of one child of less than 7 years or more children aged less than 15 years old, prisoners, soldiers, and people receiving other social security benefits. In total, the state pays for 53 percent of the population. People without a taxable income (for example, housewives) pay their contributions themselves, based on the national minimum wage.

The self-governing bodies of all insurance companies include representatives of the insured persons, the insured persons' employers, and the state.[96] The management of the General Health Insurance Company is partially appointed by the government, and partially elected by the Czech Parliament.[97] Representation of employees and employers in the sector, branch, enterprise and other health insurance companies is regulated by Act No. 280/1992 Coll. Section 10 of this Act

and the Czech Social Security Administration, on reports of the government, and on information obtained from experts in this field.

94 Tröster & Vysokajová 2006, point 85.

95 Tröster & Vysokajová 2006, point 38.

96 Tröster & Vysokajová 2006, point 86.

97 ILO C130 Report (Cz) 2000–2006, Art. 31.

determines that the managing board of an insurance company should consist of five members named by the government, five members elected by employers, and five by the insured employees. Moreover, the Board of Supervisors of the insurance companies should consist of three representatives of the Ministry of Finance, the Ministry of Labour and Social Affairs, and the Ministry of Health, appointed by the government, and six representatives of the social partners, equally divided about employers and insured persons. With these rules, the Czech Republic complies with the requirement of the European Code of Social Security and ILO Convention 130 that where the administration of a social security scheme is not entrusted to a public institution, representatives of the persons protected shall participate in the management of the insurance company.

3.5.2 MATERIAL SCOPE

According to Act No. 48/1997 Coll., obligatory health insurance covers the costs of health care provided to an insured person with the purpose of maintaining or improving the person's health. Any insured person suffering from any disease or injury, regardless of its causes, has the right to health care. The same applies in relation to pregnancy, childbirth and its consequences.[98]

3.5.3 PERSONAL SCOPE

Persons protected

General public health insurance applies in the first place to natural persons with permanent residence in the territory of the Czech Republic. Secondly, it applies to individuals who are not permanent residents of the Czech Republic, but who are employed by an employer who has a seat or permanent residence in the territory of the Czech Republic.[99] Within these groups, the following sub-groups are differentiated: employees, self-employed, individuals without taxable income, and individuals for whom the insurance is paid by the state. In practice, this means that the scope of protected persons covers 100 percent of the population.[100] After entry into the European Union, the citizens of all EU Member States are covered by the Czech system on the basis of EU law (coordination law). To prove compliance with Article 9 of ILO Convention 102 and the Code, reference is made to the option of coverage of prescribed classes of residents, constituting not less than 50 percent of all residents.[101]

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[98] ECSS Report (Cz) IV, p. 9; ILO C130 Report (Cz) 2000–2006, Art. 13; Tröster & Vysokajová 2006, points 177–180.

[99] Act No. 48/1997 Coll. on Public Health Insurance, section 2.

[100] ECSS Report (Cz) IV, p. 9; ILO C130 Report (Cz) 2000–2006, Art. 10.

[101] For an explanation of the different options, see section 2.9.2.

Individual basis

Every person is insured in their own right; the system is not based on the breadwinner's model. Consequently, for every insured person, the insurance contribution amounts to 13.5 percent of the assessment base, which is, however, different for the various groups of citizens. All individuals for whom insurance contributions are paid by the state are entitled to receive the complete available health care under the same conditions as economically active persons.

3.5.4 BENEFITS

Range of care

Health care is granted to insured persons in the form of ambulatory or institutional care, thus the insurance provides benefits in kind, depending on the character and the type of the required care. The care includes, among other things, out-patient and in-patient medical treatment, including general practitioner care, rehabilitation, care of chronically ill patients, preventive care, follow-up care, spa care, disability assessments, transportation of patients and compensation of travel expenses, provision of pharmaceuticals, medical devices, and dental care.[102] Additionally, insurance covers health care associated with pregnancy and childbirth.

Cost-sharing

According to the Charter of Fundamental Rights and Freedoms, all citizens are entitled to free medical care and to medical aids under conditions provided for by law. This fundamental right to free health care was laid down by Act No. 48/1997 Coll. up to 2008. In general, the insurance covered all costs, including hospitalisation, medicines and dental care. Direct financial participation of insured persons only concerned payments for certain medicines and dental performances when, at the request of the insured person, a more expensive treatment than the regular one was carried out. In each group of medical treatments there was at least one that was fully covered by the public health insurance, and each group of dental procedures had at least one procedure that was fully covered.[103] As of 1 January 2008, major changes have taken place in relation to out-of-pocket-payments. In order to combat a relatively high frequency of doctor's visits by the Czech citizens and excessive use of medication,

102 Act No. 48/1997 Coll. on Public Health Insurance, sections 19–39.

103 ECSS Report (Cz) I, p. 15; ECSS Report (Cz) V, p. 7; ESC Report (Cz) 2000, p. 75; ILO C130 Report (Cz) 2000–2006, Arts. 13 and 17.

so-called 'regulatory fees' were introduced. Charges of CZK 30 are levied on every visit to the doctor and on prescriptions, CZK 60 for each day spent in hospital, and CZK 90 for emergency services, with a maximum of CZK 5,000 per year.[104] These fees are also paid by patients with chronic diseases and victims of industrial accidents or occupational disease. For women, certain exemptions are regulated relating to pregnancy and delivery: pregnant women are exempt from the first three prescription fees, and for babies born in hospital, no fee for hospitalisation has to be paid.[105]

Duration of the benefit

In the case of illness or accident, health care benefits are provided during the whole period of sickness and the whole period of convalescence. There is no time limit provided for health care.

3.5.5 QUALIFYING CONDITIONS

If a person meets the requirements for participation in public health insurance, as stipulated by Act No. 48/1997 Coll., they do not have to comply with any other condition or qualifying period. Starting from the first day of insurance, a person has all rights arising from their participation in the health care scheme.[106]

3.5.6 COMPARISON WITH THE INTERNATIONAL STANDARDS[107]

Matters of compliance

In respect of the definition of the contingency and the personal coverage, the Czech health care system complies amply with the requirements of ILO C130 and the ECSS. Insurance covers any condition requiring medical care, whatever its cause, including preventive care. Furthermore, with about 100 percent of the population insured, even the requirements of the Protocol to the ECSS and the ECSS (Revised) are fulfilled although not ratified. The same goes for the range and the duration of care, as well as for the qualifying conditions. The insurance covers dental care and prosthetic and orthopaedic appliances, which are not included in the ECSS, but they are entered on the lists of ILO C130. Health care

[104] The exchange rate of the Czech Koruna on 1 January 2008 was € 1.00 to CZK 26.52.
[105] Act 48/1997 Coll. on Public Health Insurance, sections 16a and 31.
[106] ECSS Report (Cz) IV, p. 16–17.
[107] For a detailed description of the international norms regarding medical care, see section 2.9.

is provided without a time limit, and no qualifying period is required. It can be concluded that the universal and comprehensive Czech health care system complies with the minimum as well as the higher standards.

Problematic issues

It must also be recognised, however, that a problem has emerged in respect of the required out-of-pocket-payments since January 2008. ILO Convention 130 and the European Code on Social Security allow cost-sharing in respect of a morbid condition, as far as it does not give rise to hardship.[108] Since rules concerning cost-sharing are generally considered to avoid hardship when the patient has to contribute not more than one third of the total costs, the modest Czech patient fees do not cause a problem in the case of morbid conditions. Nevertheless, it has been made clear that under the European Code, cost-sharing is not permitted in the case of pregnancy, confinement and their consequences.[109] The Czech regulations on co-payments provide for some exemptions for pregnant women, but in most cases, the fees have to be paid by them as usual. Although the fixed amounts may not be very high, it is against the principles of maternity protection, as laid down in the international instruments.

Summary of matters of compliance and problematic issues

Table II. Medical care (Cz) compared with the international standards

The Czech Republic in bound by the ECSS and ILO C130				
Medical care	**ILO C102 (1952) / ECSS (1964)**	**ECSS Protocol (1964)**	**ILO C130 (1969)**	**ECSS Rev. (1990)**
Material scope	✓	✓	✓	✓
Personal scope	✓	✓	✓	✓
Benefit	Out-of-pocket payments for pregnancy related care is prohibited.	Out-of-pocket payments for pregnancy related care is prohibited.	✓	✓
Benefit: duration	✓	✓	✓	✓
Qualifying periods	✓	✓	✓	✓

✓ = compliance of national provisions with the international standards.

108 ILO C102, Art. 10; ECSS, Art. 10.
109 See section 2.9.3 and 3.11.6.

3.6 SICKNESS BENEFIT

3.6.1 INTRODUCTION

Legislation

In light of the social security reforms since 1989, it was found that the Act on Sickness Insurance of 1956 no longer reflected the social and economic developments of the Czech Republic. Therefore, extensive modifications were proposed and laid down in a new Sickness Insurance Act, which was adopted in 2006.[110] The Act was intended to come into force on 1 January 2007, but that date was postponed to 1 January 2008, and then again to 1 January 2009, when it eventually became effective.[111] Thus, the current main legal basis for sickness benefits is Act No. 187/2006 Coll. Apart from sickness, it also deals with short-term social events, such as caring for a child or family member, pregnancy, and maternity. The Act regulates personal coverage of the insurance, the conditions for entitlement, and the amount and duration of the benefits. All employed individuals participate *ex lege* in the sickness insurance system. One of the striking changes included in this Act, in connection with the new Labour Code,[112] is that the employers are responsible for the payment of their sick employees during the first period of sick leave, which will be described below.

At the international level, in respect of sickness benefit the Czech Republic is bound through ratification by ILO Convention 130 that replaces ILO convention 102, Part III, and the European Code of Social Security, Part III.

Administration and financing

Key actors in the field of sickness insurance are the Ministry of Labour and Social Affairs and the Czech Social Security Administration. The main task of this social security body is the realisation of benefit claims. In addition, the District Social Security Administrations fulfil certain roles concerning the payment of sickness benefits in their own districts. The management and control of the administration is in the hands of the Ministry of Labour and Social Affairs, as is the compliance with obligations arising from international treaties in the field of social security.

110 Tröster & Vysokajová 2006, point 248a; website of the Ministry of Labour and Social Affairs.

111 At the time of writing, no English translation of the relevant legislation was available. Therefore, information is based on the websites of the Ministry of Labour and Social Affairs and the Czech Social Security Administration, on reports of the government, and on information obtained from experts in this field.

112 Act No. 262/2006 Coll., Labour Code, Arts. 192–194.

Sickness insurance is funded through contributions from employers, and, if participating, from self-employed persons. Since 2010, employees no longer contribute to the sickness scheme. The percentage rate which is paid by the employer amounts to 2.3 percent of the calculation base.

3.6.2 MATERIAL SCOPE

Sickness insurance covers temporary incapacity of the claimant to work due to an illness, injury or quarantine, resulting in a loss of income.[113]

3.6.3 PERSONAL SCOPE

The compulsory sickness insurance scheme covers employees working in the Czech Republic. Additionally, the scheme covers certain categories of workers who are given equal rights as employees in this respect, including public servants, judges, and specific voluntary workers. However, in the new Act coverage is made subject to the length of the employment, which is set at a minimum of 15 calendar days, and to a minimum income of CZK 2,000 – an amount that will be annually adjusted according to the development of average wages. Self-employed persons can participate on a voluntary basis, if their income is at least CZK 4,000. In 2007, 230,000 of the 714,910 self-employed persons were insured.[114] To prove compliance with Article 15 of ILO Convention 102 and the Code, reference is made to the option that prescribed classes of employees must be covered, constituting not less than 50 percent of all employees.

3.6.4 BENEFITS

Different kinds of benefits

From sickness insurance the following benefits in cash are provided:

- sickness benefit;
- financial aid during care for a family member;
- compensatory benefit in pregnancy and maternity; and
- maternity benefit in cash.

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[113] Website of the Ministry of Labour and Social Affairs.

[114] ECSS Report (Cz) V, Art. 15.

In this section only the sickness benefit will be dealt with, since income replacement during care for a family member is not part of any of the international instruments, and the benefits pertaining to maternity are described in section 3.11.4.

Amount of the benefit

Sickness benefits are periodical payments consisting of a fixed percentage of the so-called 'daily assessment base'. As of 2009, the employer is responsible for wage compensation during the first fourteen calendar days of incapacity for work.[115] However, a waiting period of three days is prescribed, during which the employee does not receive any compensation.[116] From the fifteenth day of sickness, the Social Security Administration pays out the sickness benefit.

The daily assessment base is, roughly, the average income subject to social security and state employment policy contributions per day of the claimant. The decisive period for calculation is usually the period of 12 calendar months before the calendar month in which incapacity for work occurs. The daily assessment base is reduced if it exceeds prescribed amounts, and as of 2009, there are three reduction limits fixed by the government. For the calculation of the benefit, 90 percent of the daily assessment base is taken into account up to the first reduction limit, 60 percent from the first to the second limit, and 30 percent from the second to the third limit. The part of the assessment base that exceeds the third reduction limit is not taken into account.

During the fourth until the 14th day of sickness, the employer has to pay 60 percent of the employee's reduced daily assessment base. From the 15th to the 30th day, the sickness benefit also amounts to 60 percent of the reduced daily assessment base, from the 31st to the 60th day it amounts to 66 percent, and from the 61st day, the benefit amounts to 72 percent of the assessment base. The benefit amounts to 100 percent of the daily assessment base if the insured person is incapable of work due to their participation in specific kinds of rescue work, which includes, for instance, fire fighters.

In order to examine whether the sickness benefit complies with the minimum norm set out in the international instruments, the average salary of a standard beneficiary has to be determined. The Czech Republic takes a skilled male worker with a dependent spouse and two children as a reference point.[117] According to

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115 An extension of this period is under discussion (2010).

116 Websites of the Czech Social Security Administration and the Ministry of Labour and Social Affairs.

117 ECSS Report (Cz) VI, p. 14; for a skilled worker, a metal lathe operator (tuning and service technician) is taken into account, according to ECSS Art. 65, para. 6(b).

the ECSS and ILO C102, the benefit must be at least 45 percent of the average wage of the standard beneficiary, and according to ILO C130, it should be 60 percent of that wage.

Calculation example[118]

In 2008, the monthly average gross salary of a skilled worker was CZK 24,757, and the daily assessment base was CZK 814.[119] In 2009, the reduction limits were fixed at CZK 786, CZK 1,178, and CZK 2,356.[120] This means that, for this example, 90 percent of CZK 786 has to be taken into account, and 60 percent of CZK 28.

Reduced daily assessment base:		
(786 * 0.90) + (28 * 0.60)	=	CZK 725
4th to 30th day: 60% of CZK 725	=	CZK 435
Monthly benefit: 30 * 435	=	CZK 13,050
Benefit (2008) for 2 children aged 6 to 15	=	CZK 1,220
Sickness benefit incl. child benefit	=	CZK 14,270

The average net monthly salary of a skilled worker with a dependent wife and two children amounted to CZK 22,570, which, supplemented with child benefit, was CZK 23,790. The ratio between the sickness benefit, which is not subject to taxation, and the net income during employment, was CZK 14,270 / CZK 23,790 = 0.6.

The replacement rate of the sickness benefit (including child benefit) during the first month that it is paid, amounted to 60 percent in 2008. The following months, the rate is higher because in the second month the benefit amounts to 66 percent of the reduced daily assessment base, and from the third month, it is 72 percent. However, for comparison with the international standards only the lowest part is relevant, since the benefit must reach the given percentage of the reference wage during the whole prescribed period of entitlement to the benefit.

Duration of the benefit

Sickness benefits are provided from the fifteenth day of sick leave until the termination of the incapacity for work, or the recognition of invalidity or partial invalidity, but with a maximum of 380 calendar days beginning from the first

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118 Amounts based on ECSS Reports (Cz) VI and VII. According to Article 65 of the ECSS, the calculation must be based on figures from the same year. However, in the Czech reports, data from different years are used. Therefore, the outcome differs from those in the reports. The exchange rate of the Czech Koruna on 1 January 2008 was € 1.00 to CZK 26.52.

119 CZK 24,757 * 12 / 365 = CZK 814. Amount based on ECSS Report (Cz) VII, p. 10.

120 Amounts given in ECSS Report (Cz) VI. At the time of writing, the average wage of a standard beneficiary in 2009 was not yet available in the reports of the government. However, because it would not be expedient to make the calculations according to the old Sickness Insurance Act, the new calculation method with the new reduction limits are taken into account. As a result, the example is based on the wages of 2008, but the benefit is calculated according to the rules and reduction limits of 2009. This means that the calculation is not accurately

day of sick leave. Thus, after the wage compensation by the employer during the first fourteen days, the sickness benefit is paid for one year at most.

If a new case of incapacity for work occurs within one year after the first day of the previous sick leave, the maximum period of one year for sickness benefit includes both periods of sick leave. Only if the claimant has worked for at least 190 days after the first sick leave, or if the incapacity for work is caused by an industrial accident or occupational disease, the maximum period of one year starts anew.[121]

3.6.5 QUALIFYING CONDITIONS

Under the new Sickness Act, no qualifying period is stipulated. To receive a benefit, a medical certificate of temporary incapacity for work, signed by a physician, has to be handed over to the employer. Self-employed persons must submit the certificate to the District Social Security Administration, and for them a qualifying period of three months of contribution is required.

3.6.6 COMPARISON WITH THE INTERNATIONAL STANDARDS[122]

Matters of compliance

The personal scope of the Czech sickness insurance scheme – covering all employees and more than 30 percent of the self-employed – meets the requirements of the ECSS and ILO C130. Regarding the ECSS, the Czech Republic refers to the option of coverage of at least 50 percent of all employees, and regarding the ILO C130, of 75 percent of the whole economically active population.[123] Moreover, it satisfies the conditions of the Protocol of the ECSS, which has not been ratified by the Czech Republic, stipulating that there must be coverage of 80 percent of all employees, and also that of the ECSS (Revised). Under this instrument, 90 percent of all employees or 80 percent of the economically active population must be covered. The level of the benefit is higher than the stipulated 45 percent by the ECSS and the Protocol (50 percent) and it is equal to the replacement rate of 60 percent required by ILO C130. In order to comply with the requirements of the

performed according to the international standards, but it can still serve as an indication of the ratio between previous income and the sickness benefit.

121 ECSS Report (Cz) IV, Art. 18.

122 For a detailed description of the international norms regarding sickness benefits, see section 2.10.

123 ECSS, Art. 15 (a); ILO C130, Art. 19 (b).

conventions, a benefit usually has to be the fixed percentage of gross wages. However, for the Czech Republic, the setting of the ratio to net wages is accepted by the supervising bodies. This is sustainable because social security benefits are only taxed from an amount exceeding the amount of the average wage of a skilled worker, and the state pays the social security contributions.[124] No qualifying period is prescribed, although all international standards allow for a qualifying period in order to preclude abuse. The imposed waiting period of three days, leaving the responsibility for the first days of incapacity for work with the employee, is also in accordance with the international instruments.

Problematic issues

The CEACR made some comments in its last direct request on ILO C130.[125] One question concerned Article 26 of ILO C130, requiring that 'the grant of benefit may be limited to not less than 52 weeks in each case of incapacity, as prescribed.' The wording 'in each case' may be an obstacle for full compliance of the scheme with C130. The CEACR explained that the Convention 'requires the grant of the benefit to be not less than 52 weeks in *each case* of incapacity even in the event of an onset of a new incapacity within the time limit prescribed by section 15(4).' This refers to the provision in the Act. No. 54/1956 on sickness insurance of employees that prescribes that a maximum period of one year for sickness benefit may include more than one period of sick leave. As a consequence, during a second case of incapacity leading to sick leave within one year, and without 190 working days in between, the claimant will receive a benefit for a shorter period than prescribed in ILO C130. This issue has not been solved in the new Sickness Act, and therefore the country does not completely comply with the Convention in respect of the duration of the benefit.

Another question asked of the CEACR was about the granting of funeral benefit for persons qualifying for sickness benefit, provided for in C130, Article 27. It was not clear from the report of the government whether this allowance was granted to all persons entitled to a sickness benefit. In its next report, the government clarified that a funeral allowance was granted in respect of all persons who, on the day of passing, had permanent residence in the Czech Republic.[126] However, the state Social Support Act provides for a funeral grant to a person who has arranged the funeral of a dependent child, or to a person who was the parent of a dependent child, on the condition that the deceased was a permanent resident of the Czech Republic on the date of death. Thus, not all

[124] Ministry of Labour and Social Affairs (Cz) 2006, p. 73.
[125] CEACR: Individual Direct Request concerning C130 (Czech Republic) 2003.
[126] ILO C130 Report (Cz) 2000–2006.

insured persons are entitled to a funeral benefit, which implies a conflict with Convention 130.

Another point that should be mentioned concerns the level of the benefit. As shown above, a benefit for the standard beneficiary in 2008 amounted to 60 percent of the previous net wage. Rounded up, this is exactly the required percentage in ILO C130. An increase in wages without a simultaneous increase in the first reduction limit will inevitably reduce the ratio between previous income and benefit. An annual adjustment of the first reduction limit according to the increase in wages is not envisaged by the new regulations; the reduction limits are incidentally adjusted by a governmental decree. Consequently, after subsequent years of wage growth, the required percentage of 60 percent of the reference wage may no longer be met.

Finally, attention has also to be paid to the new rules on employer's liability for wage compensation during the first two weeks of sick leave. Apart from the norms pertaining to the level and duration of the payments, the principles on solidarity and state responsibility also have to be taken into account.[127] First of all, according to Article 70 of the ECSS, the benefits must be borne collectively by way of insurance contributions or taxation or both. In contrast to this, the wage compensation during the initial two weeks of illness is paid solely by the employer. Secondly, in the same Article (and in C130 Article 30) it is stated that the government is responsible for the due provision of the benefits. Important in this respect is whether the employer's obligation is sufficiently regulated in such a way that the stipulated income replacement for the employee is guaranteed. This is not clear in the Czech case. What happens, for instance, if the employer does not pay the required compensation, either willingly or unwillingly? Is a safety net provided in these cases? Furthermore, where the administration is not entrusted to a public authority, the international standards require representatives of the persons protected to participate in the management, which is not the case during this period of employers' liability. In view of these common principles on solidarity and good governance, it is not obvious that this initial period of employers' liability is in line with the conventions.[128] As yet, the supervising committees have not commented on this issue, but these questions will have to be dealt with in the next reports of the government on the application of both the European Code and ILO C130.

[127] For a more detailed description of these principles, see section 2.5.
[128] For a further discussion on employers' liability for sick pay, see section 6.2.3.

Summary of matters of compliance and problematic issues

Table III. Sickness benefit (Cz) compared with the international standards

The Czech Republic is bound by the ECSS and ILO C130				
Sickness benefit	**ILO C102 (1952) / ECSS (1964)**	**ECSS Protocol (1964)**	**ILO C130 (1969)**	**ECSS Rev. (1990)**
Material scope	✓	✓	✓	✓
Personal scope	✓	✓	✓	✓
Benefit: amount	During the first 14 days: no collective financing, no state responsibility, and no participation of persons protected.	During the first 14 days: no collective financing, no state responsibility, and no participation of persons protected.	Replacement rate will drop below 60 percent. During the first 14 days: no collective financing, no state responsibility and no participation of persons protected. Funeral benefit is not granted to all insured persons.	Replacement rate is less than 65 percent. During the first 14 days: no collective financing, no state responsibility and no participation of persons protected. Funeral benefit is not granted to all insured persons.
Benefit: duration	✓	Benefit is not provided for at least 52 weeks in *each case* of sickness	Benefit is not provided for at least 52 weeks in *each case* of sickness	Benefit is not provided for at least 52 weeks in *each case* of sickness
Qualifying periods	✓	✓	✓	✓

✓ = compliance of national provisions with the international standards.

3.7 UNEMPLOYMENT BENEFIT

3.7.1 INTRODUCTION

History

As a rule, unemployment was non-existent under the communist regime. Consequently, there was no insurance for unemployment. Within the framework of the social security reforms after the velvet revolution, the first step to unemployment insurance was taken by developing a state employment policy that included mediation, retraining programmes and incentives for the creation of new jobs, as well as financial compensation in the case of temporary loss of

employment, paid from the state budget.[129] The first contributions to this policy were collected in 1993, however, a real unemployment insurance scheme has as yet not been realised.

Legislation

Unemployment benefit is codified in employment legislation as a part of unemployment and retraining support. Act No. 435/2004 Coll. on Employment – valid since 2004 – guarantees the right to employment to all citizens who are looking for a job and who are actually able and willing to work. The Act also regulates the conditions for entitlement to unemployment benefit and the amount of the benefit.

At the international level, the Czech Republic is bound through ratification by the European Code of Social Security, Part IV on Unemployment. It should be noted that the unemployment part of ILO C102 was one of the two parts that have never been ratified by the Czech Republic. Ratification of this part is no longer considered necessary because the Czech system meets the level of protection of ILO C102 implicitly by fulfilling the obligations of the Code. ILO C168 was not accepted because of certain obstacles to ratification under the former legislation. Since the new Act on Unemployment of 2004, ratification was considered possible from the legal point of view, but was not realised.[130] The latest amendments of 2009 have again hindered ratification of this instrument.

Administration and financing

The obligatory contributions to the state employment policy are collected, together with the pension and sickness insurance contributions, by the Czech Social Security Administration. In 2009, the contribution for the state unemployment policy amounted to 1.2 percent of the employee's gross salary, to be paid by the employer or by the self-employed person. The contributions are deposited into the state budget, from which the costs of unemployment benefits are transferred to the budget of the Ministry of Labour and Social Affairs and distributed to individual labour offices.[131] The labour offices carry out the employment mediation and retraining of jobseekers. Together with the employers, the labour offices also carry out the so-called 'new job generating programmes', instigated by the Ministry, to broaden the selection of jobs offered

[129] Tröster & Vysokajová 2006, points 35 and 46; Potůček 2001, pp. 89–91.
[130] See section 3.2.2.
[131] ECSS Report (Cz) IV, p. 5.

in their territories.[132] The Ministry controls and manages the labour offices as a part of its responsibility for the administration of the state employment policy.

3.7.2 MATERIAL SCOPE

Definition of the contingency

A person is unemployed for the Czech system if they have no working activities,[133] are not studying, and are registered as a jobseeker with a labour office for assistance in finding suitable employment.[134] As one of the requirements for entitlement includes that the jobseeker has been employed for a prescribed period,[135] unemployment does not relate to persons who are seeking a job for the first time. However, it should be noted that certain activities are treated as equivalent to employment, for example, the personal care of a child of up to four years of age, thus meaning that first-time jobseekers in such a situation can successfully apply for unemployment support. Unemployment includes partial unemployment, in the sense that a jobseeker has the right to extra earnings while receiving unemployment benefit, as long as those earnings do not exceed half the minimum wage and the activity in question does not take up more than 20 hours a week.[136]

Suitable employment

In Article 20 of ILO C102 it is stated that 'the contingency covered shall include suspension of earnings, […], due to inability to obtain suitable employment'.[137] According to the Czech legislation, employment must meet four conditions to be considered suitable.[138] In the first place, the gainful activity must imply the obligation of paying insurance for old-age pension and contributions to the state employment policy. Secondly, the working hours must be at least 80 percent of the stipulated weekly working hours, which means that the job must cover 32 hours minimum. Thirdly, the employment contract must be for an indefinite

[132] Tröster & Vysokajová 2006, points 97 and 354–359.

[133] Working activities include: an employment relationship, a relationship similar to employment, self-employment, training for a future job, or any other activities which are an obstacle to inclusion and keeping in the jobseeker records, ECSS Report (Cz) IV, Arts. 19 and 20, Act No. 435/2004 Coll. on Employment, Section 24.

[134] MISSOC (Cz), 2007, Unemployment; Pieters 2003, pp. 36–37; ECSS Report (Cz) IV, p. 23.

[135] Employment in this context means an employment relationship or any gainful activity that causes the obligation to pay insurance for old-age pension and contribution to the state employment policy, Tröster & Vysokajová 2006, point 364.

[136] Website of the Ministry of Labour and Social Affairs; MISSOC (Cz), 2007, Unemployment.

[137] For the meaning of the term 'suitable job' in the conventions, see section 2.11.1.

[138] Website of the Ministry of Labour and Social Affairs.

period or for a fixed term of more than three months, and, finally, the employment must correspond to the jobseeker's state of health. Thus, qualifications or skills of the jobseeker and length of previous employment are not necessarily taken into consideration. As a consequence, a jobseeker is obliged to accept a job offered by the Labour Office for which they may be overqualified, from the very beginning of the period of unemployment. Furthermore, the Labour Office may also arrange employment for a period shorter than three months, in which case the jobseeker has to accept the offer, whether the job is suitable or not. The only condition in such cases is that the employment has to correspond to the jobseeker's state of health. After one year of registration as a jobseeker, a job offered by the Labour Office does not have to meet any of the above-mentioned requirements.

3.7.3 PERSONAL SCOPE

All persons with permanent residence in the territory of the Czech Republic who have been in employment or an equivalent labour law relation, as well as self-employed persons who were obliged to pay insurance for old-age pension and contributions to the state employment policy, are covered by the unemployment policy.[139] To prove compliance with Article 21 of the European Code, reference is made to option of coverage of prescribed classes of employees, constituting not less than 50 percent of all employees.

3.7.4 BENEFITS

Unemployment support

A jobseeker who is registered with the Labour Office is entitled to unemployment support, consisting of financial support and active employment policy measures. The latter include the development of an individual action plan to increase the employment chances, retraining possibilities as part of the jobseeker's further professional education, the provision of publicly and socially beneficial jobs, and the provision of a bridging contribution for jobseekers to become self-employed.[140]

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139 Ministry of Labour and Social Affairs (Cz) 2009, pp. 53–54; Tröster & Vysokajová 2006, points 360–361.

140 Website of the Ministry of Labour and Social Affairs.

Amount of the benefit

Unemployment benefit is based on the previous income of the beneficiary. The rate of the benefit amounts to 65 percent of the previous net income during the first two months of unemployment, falling back to 50 percent during the next two months, and to 45 percent during the remaining period.[141] However, if the jobseeker retrains, the benefit amounts to 60 percent of the previous income throughout the whole period of retraining. For the calculation of the previous income, the average net monthly earnings over the last quarter prior to registration as a jobseeker is taken into account. The maximum amount of unemployment benefit is 58 percent of the national average wage of the first to the third quarters of the year preceding the year of the application for the benefit. During a retraining period of the jobseeker, the maximum is 65 percent.

Calculation example[142]

In 2008, the monthly average net salary of a skilled worker with a dependent spouse and two children was CZK 22,570, and the child benefit for two children amounted to CZK 1,220. The maximum monthly benefit amounted to CZK 12,249.

Benefit during the first two months: 0.65 × CZK 22,570	=	CZK 12,249 (max. benefit)
Benefit during the next two months: 0.50 × CZK 22,570	=	CZK 11,285
Benefit during the last month: 0.45 × CZK 22,570	=	CZK 10,157
Benefit for 2 children aged 6 to 15	=	CZK 1,220
Unemployment benefit incl. child benefit (3 months)	=	CZK 13,148
Unemployment benefit incl. child benefit (5 months)	=	CZK 12,665

The average net monthly salary supplemented with child benefit amounted to CZK 23,790. For the calculation of the replacement rate, the lowest benefit during the first three months has to be taken as a basis, because the benefit has to comply with Art. 65 for the duration of 13 weeks. The ratio between the unemployment benefit (which is not subject to taxation) of the third month and the previous net income was CZK 11,285 / CZK 23,790 = 0.474.

Conclusively, the replacement rate of unemployment benefit of a standard beneficiary in 2008, compared to the reference wage, amounted to at least 47.4 percent during the first 13 weeks of unemployment.

Duration of the benefit

In principle, the benefit is granted for a maximum of five months, or until the end of retraining. Exceptions are made for people from 50 to 55 years of age and

[141] MISSOC (Cz), 2009, Unemployment; ECSS Report (Cz) IV, pp. 25–26; ECSS Report (Cz) VI, p. 17; Act No. 435/2004 Coll. on Employment, Art. 50.

[142] The calculation is based on amounts of 2008, taken from ECSS Reports (Cz) VI and VII. The method of calculation is based on the Act on Employment as amended in 2009. The exchange rate of the Czech Koruna on 1 January 2008 was €1.00 to CZK 26.52.

for people over 55; for them the support period has been extended to eight and eleven months respectively.[143] If a person becomes unemployed repeatedly within a period of three years, they are entitled again to unemployment benefit after an employment period of at least six months, providing they meet the condition of the total duration of previous employment as will be discussed in the following section.[144] The Czech law does not require a waiting period – a jobseeker is entitled to receive a benefit as of the date of application for the benefit.

Sanctions

A benefit is not granted, or is stopped, if the jobseeker intentionally frustrates the efforts of the Labour Office in employment mediation, or fails to fulfil the conditions stipulated in their individual action plan. Moreover, the benefit can be suspended if the jobseeker refuses suitable employment or retraining without serious personal or family reasons.

3.7.5 QUALIFYING CONDITIONS

Qualifying periods

For entitlement to unemployment benefit, a person must have been employed or self-employed for a period of at least 12 months during a period of three years prior to the inclusion of the applicant in the jobseeker records.[145] Employment in this context includes any gainful activity giving rise to the obligation of paying insurance for old-age pension and contributions to the state employment policy, as well as substitute periods that are treated as equivalent to employment. Substitute periods include the personal care of a child up to four years of age and community service.

Other qualifying conditions

To successfully apply for unemployment benefit, the claimant must be registered as a jobseeker with the Labour Office and must, if requested, undergo a medical examination. Furthermore, the jobseeker cannot be a student or a recipient of an old-age pension, and must be available for work. This means that a former self-employed person can no longer be registered as self-employed. Lastly, no right to

[143] ECSS Report (Cz) IV, pp. 25–26; Act No. 435/2004 Coll. on Employment, Art. 43; Ministry of Labour and Social Affairs (Cz) 2009, pp. 53–54.
[144] Act No. 435/2004 Coll. on Employment, Art. 49.
[145] ECSS Report (Cz) IV, p. 25.

a benefit exists if the unemployment arose due to the claimant's own will or breach of obligations within six months before the registration as a jobseeker, or if the claimant receives an end-of-service benefit that is higher than the unemployment benefit.

3.7.6 COMPARISON WITH THE INTERNATIONAL STANDARDS[146]

Matters of compliance

The personal coverage of the Czech unemployment policy includes all employees and self-employed, therefore it meets the requirements of all the relevant international instruments, whether ratified or not. The duration and replacement rate of the benefit – amounting to 47.4 percent for the duration of 5 months – meet the requirements of the ECSS (45 percent, for at least 13 weeks). It does not comply with its protocol (50 percent, for at least 21 weeks), ILO C168 (50 percent, for at least 26 weeks) or the ECSS (Revised) (65 percent, for at least 39 weeks). The qualifying period of twelve months within 3 years complies with all standards, allowing for a qualifying period in order to preclude abuse.

Problematic issues

The Committee of Ministers asked for additional information regarding unemployment in its resolution on the application of the ECSS over the period 2003/2004. One question concerned the determination of a 'suitable job', and the other concerned the possibility of denying a benefit to a jobseeker whose employment relationship has been terminated due to unsatisfactory work performance or for a breach of their obligations at work.[147] Although the information was not provided by the government in the next report(s), the following four resolutions (the last one covering the period until 20 June 2007) do not refer to the former requests. It is possible that the government submitted the required information to the Committee in between, and as a result it was not published. However, looking at the current legislation, the questions still seem relevant.

First of all, the Labour Office is not obliged to take into account the qualifications or skills of the jobseeker and the length of their previous employment when offering a job, not even during the first month of unemployment. This regulation

146 For a detailed description of the international norms regarding unemployment benefits, see section 2.11.

147 Resolution ResCSS(2005)3.

is not in line with ILO C102 and the ECSS. This is particularly apparent in the direct request of the CEACR to Denmark concerning Convention 102, where the Committee explains that:[148]

> Part IV of the Convention is based on the concept of "suitable employment", which ensures that at least during the minimum period of protection of 13 weeks provided for in Article 24 of the Convention unemployed persons shall be offered jobs with due regard, inter alia, to their skills, qualifications, acquired experience and length of service in the former occupation – the criteria normally used in assessing the suitability of employment – and that in no case covered by Article 20 (in relation to Article 69(h) of the Convention) their benefit could be suspended for refusal to accept a job unsuitable in this respect.

Furthermore, the preliminary reports on ILO C102 point in this direction.[149] Thus, there is a clear indication that Czech law is not consistent with the international requirements on the point of suitable employment. Relevant in this respect is, of course, how the labour offices deal with this concept. Although the research does not cover 'law in practice', it must be noted that, according to the Ministry of Labour and Social Affairs, the labour offices take into account the qualifications of the applicant during the first period of unemployment. However, since it is not laid down in a regulation, it really depends on the official what job is considered suitable in a specific situation.

Another possible problem is that the benefit is limited to five months within three years. Only if the jobseeker has a period of employment of at least six months before they become unemployed again, is a benefit is granted. The ECSS only allow for a limitation of thirteen weeks within a period of one year. In the case of several periods of unemployment within three years, without six months of employment in between, in the Czech system the jobseeker might be deprived of a benefit in the second and third year after the outset of the first unemployment period. The supervising bodies have not made any comments on this topic, however this could be explained by the fact that the government never mentioned this rule in its reports.

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148 CEACR: Individual Direct Requests concerning C102 (Denmark) 2005 and 2007. Similar requests were made in relation to the United Kingdom. See also: Gómez Heredero 2009, p. 129.

149 See section 2.11.1.

Summary of matters of compliance and problematic issues

Table IV. Unemployment benefit (Cz) compared with the international standards

The Czech Republic is bound by the ECSS				
Unemployment benefit	**ILO C102 (1952) / ECSS (1964)**	**ECSS Protocol (1964)**	**ILO C168 (1988)**	**ECSS Rev. (1990)**
Material scope	The interpretation of 'suitable employment' is too strict.	The interpretation of 'suitable employment' is too strict.	The interpretation of 'suitable employment' is too strict.	The interpretation of 'suitable employment' is too strict.
Personal scope	✓	✓	✓	✓
Benefit: amount	✓	Replacement rate is less than 50 percent.	Replacement rate is less than 50 percent.	Replacement rate is less than 65 percent.
Benefit: duration	Benefit is not provided for at least 13 weeks *in each case of suspension of earnings.*	Benefit is not provided for at least 21 weeks *in each case of suspension of earnings.*	Benefit is not provided for at least 26 weeks.	Benefit is not provided for at least 39 weeks.
Qualifying periods	✓	✓	✓	✓

✓ = compliance of national provisions with the international standards.

3.8 OLD-AGE BENEFIT

3.8.1 INTRODUCTION

Development of the pension reform

After the Velvet Revolution in 1989, the transition from a strong state paternalism with guaranteed incomes for all, to the participation and responsibility of citizens for their own social situation and future, began. The main objectives of the pension reform were, on the one hand, to build on the historical traditions of social insurance and, on the other, to create a transparent and financially stable pension system, persisting with the traditional intergenerational solidarity.[150] In spite of the criticism that the traditional pay-as-you-go approach would be too expensive and would have an adverse impact on the market economy, the Czech Republic adhered to this approach wholeheartedly. It was stressed that

150 Král 2000, pp. 4–5.

intervention by the government 'is indispensable and that free market will never be in a position to provide adequate financial protection in old age.'[151]

The pension reform can hardly be characterised by revolutionary changes, but merely by an ongoing evolutionary process, however pushed or slowed depending on the colour of political power.[152] Milestones are, firstly, the introduction of insurance premiums to be paid by both employers and employees (1993), and the introduction of a supplemental voluntary pension insurance scheme with state contributions (1994). Subsequently, the retirement age was raised and a special account was created within the state budget in order to clearly define the balance of the pension scheme (1996). All in all, the reform measures taken so far have resulted in the creation of a two-pillar system: a strong basic pillar, and a much weaker individual supplementary pillar.[153]

However, the state of pension insurance to date has been found unsatisfactory and insufficient to cope with the ageing of the population. The somewhat half-hearted realisation of the pension reforms, as planned by the federal government, can be ascribed to the inconsistent political opinions on this matter and the indecisiveness of the consecutive minority coalition governments from 1996. A new pension reform concept was approved by the government in 2001, with the aim of a reduction in pension expenditure, the expansion of voluntary pension insurance, and of transparency and effectiveness of the system.[154] Nevertheless, two bills which sought to take the first new reform steps were subsequently rejected when presented to Parliament. One of these drafts concerned the creation of a Social Insurance Corporation, a self-governing public institution with tripartite bodies, to take over the management of the social insurance from the Czech Social Security Administration. At the same time, the pension fund was to be completely separated from the state budget. The aim of these measures would have been to increase the transparency of management, to reduce the dependency on political decisions, and to improve the provision of client-centred services. The other draft that did not pass Parliament concerned the creation of compulsory occupational pensions as a second pillar scheme.[155]

In 2003, a number of (minor) changes were adopted, such as a further raising of retirement ages of, roughly, one year, a limitation of possibilities for an early old-age pension, an increase in insurance contributions of 2 percent, and a gradual

151 Král 2000, p. 2.
152 Antošík 2003, p. 4.
153 Ministry of Labour and Social Affairs (Cz) 2005, p. 2; Mácha 2002, pp. 78–81; Vylitova 2002, p. 5–7; Král 2000, pp. 5–8.
154 Mácha 2002, p. 88.
155 Tröster & Vysokajová 2006, point 36; Mácha 2002, pp. 88–90; Vylitova 2002, p. 26; Král 2000, p. 13.

increase of the minimum assessment base for self-employed persons.[156] Furthermore, an expert team was established in 2004 to (re)consider the future shape of the Czech pension scheme.[157] All political parties, as well as the Prime Minster, the Minister of Labour and Social Affairs and the Minister of Finance, had representatives on this team. The results of the work of the expert team, presented in 2005, were to be used for further political negotiations. Because of political deadlock, it took three years before a new reform plan was prepared, consisting of three stages. Under the pressure of the economic crisis, measures to be taken for the implementation of the first stage were finally approved in June 2008.[158] These measures included: the continuation of a gradual increase in the retirement age to 65 years for men and women with no or one child, and 62 to 64 years for women with more children, an extension of the insurance period required for entitlement to the old-age pension, and a restriction of non-contributory periods. The new regulations became effective on 1 January 2010.

Legislation

The main act in the field of the first pillar old-age pensions is Act No. 155/1995 Coll. on Pension Insurance, which also covers invalidity and survivors' pensions. In this act, the following subjects are regulated: the personal and material scope of the pension insurance, conditions for participation, insurance periods, including substitute insurance periods, conditions for entitlement to the benefit, calculation of the benefit, and adjustment of the benefit to the cost of living. In Act No. 582/1991 Coll. on the Organisation and Implementation of Social Security, organisational and procedural matters are regulated, such as the duties and rights of employers and insured persons, and the tasks of the social security authorities. Matters concerning the premiums, such as who pays pension insurance premiums, and the cost of the premiums, are drawn up in Act No. 589/1922 Coll. on Social Security and State Employment Policy Premiums.

The Czech Republic has ratified several international instruments with regard to old-age pensions. In the first place, it is bound by Part V of ILO Convention 102, as well as Part V of the European Code of Social Security. Furthermore, ILO Convention 128 has been ratified in respect of the part on old-age pensions.

Administration and financing

As part of the social reforms in the 1990s, the administration of the pension scheme was taken over from the State Pension Administration by the newly

[156] Ministry of Labour and Social Affairs (Cz) 2005, p. 11.
[157] Ministry of Labour and Social Affairs (Cz) 2005, pp. 21–22.
[158] Král 2009, p. 42; Ministry of Labour and Social Affairs (Cz) 2008, pp. 9–12.

created Czech Social Security Administration.[159] This state institution comes under direct responsibility of the Ministry of Labour and Social Affairs. After a history of financing through general taxation, from 1993 social insurance contributions were imposed on employers (20.4 percent) and employees (6.8 percent). In the first three years, these contributions exceeded pension expenditures, however the surplus was merged into the state budget. In 1996, a special state budget account was created for pension insurance, and surpluses in this account may be used only to increase pension provisions or to fill up an overdrawn insurance account. In 1997, the pension system went into the red due to several factors, including a reduction in the contribution rate to 26 percent, a cutback in the ratio of insured persons to persons of working age, the introduction of so-called compensatory time or substitute periods,[160] a favourable contribution system for self-employed persons, and the granting of favourable early retirement pensions. Two proposals were launched in 1998 to raise insurance rates, but they were rejected by Parliament. In 2004 the rate was eventually increased to 28 percent of gross income, of which the employers had to pay 21.5 percent, and the employees, 6.5 percent.[161]

3.8.2 MATERIAL SCOPE

Until 1995, the retirement age in the Czech Republic for men was 60 years and for women, 53 to 57 years, depending on whether or not they had children and how many children they had reared.[162] In 1996, a gradual increase in the retirement age was introduced, consisting of a yearly increase of 2 months for men and 4 months for women, which would result in a retirement age of 63 years both for men and women without children. For women having personally taken care of children, the retirement age would continue to vary, ranging from 59 years for women with five or more children, to 62 years for women with one child. However, the reform measures adopted in 2008 included a further rise in pensionable ages from 2010, to 65 years for men and women without children, as well as for women who have raised one child. The pensionable age for women with more than one child will be 62 to 64 years, depending on the number of children.[163] Personally taking care of a child in this context means that the

[159] Mácha 2002, p. 78–81.
[160] Periods taken into account for entitlement to and the calculation of the pension, but for which no insurance premiums were paid, e.g., periods of education, military service and of caring for a child of up to 4 years of age. See also: Král 2000, p. 6.
[161] MISSOC (Cz), 2009.
[162] Tröster & Vysokajová 2006, point 393; Pieters 2003, pp. 32–33; The pensionable age for women who had not brought up any children was 57 years, 56 years in the case of one reared child, 55 years in the case of two, 54 years in the case of three or four, and 53 years in the case of five or more reared children.
[163] Král 2009, p. 43; Ministry of Labour and Social Affairs (Cz) 2008, p. 10.

woman must have taken care of a child under adult age for a period of at least 10 years, or, if the woman has taken care of a child as of eight years of age, for a period of at least 5 years.[164]

The Czech law also provides for early retirement up to three years prior to normal retirement age if a person (man or woman) has been insured for at least 25 years, however this results in a permanently reduced old-age pension.[165] As of 2010, the possibility for early retirement will be gradually extended to 5 years prior to normal retirement age, but only if an insurance period of 35 years has been completed, and with a simultaneous further reduction of the amount of the pension. The Czech system does not provide for specific early retirement rules for persons that have been engaged in arduous or unhealthy occupations.

3.8.3 PERSONAL SCOPE

Participation in pension insurance is compulsory for all economically active persons, both persons in dependent gainful activities, including employees, civil servants and members of the armed forces, as well as the self-employed.[166] Additionally, insurance is compulsory for other groups, such as soldiers in military service, and persons caring for a child up of to 4 years of age, or for a person who depends on care because of the state of their health. These specific categories do not have to pay contributions during these so-called substitute insurance periods. Voluntary participation is possible for other persons over 18 years of age who are not insured by law.

To prove compliance with Article 27 of the European Code, reference is made to option of coverage of prescribed classes of employees, constituting not less than 50 percent of all employees.

3.8.4 BENEFITS

Amount of the benefit

The old-age benefit consists of two components, a basic part and an earnings related sum. The basic amount is a fixed amount, determined by a decree of the government that is identical for all pensions. The earnings related sum depends

[164] ILO C128 Report (Cz) 2001–2006, Art. 15.
[165] Tröster & Vysokajová 2006 points 397–400; ILO C128 (Cz) Report 2001, Art. 15; Antošík 2003, p. 5.
[166] ECSS Report (Cz) V, Art. 27; ESC Report (Cz) 2003–2004, p. 65; Tröster & Vysokajová 2006, points 389–390; ILO C128 Report (Cz) 2001–2006, Art. 16.

on the level of previous income and the number of years the beneficiary has been insured. The earnings related pension gives 1.5 percent of earnings for each year of contributions. The amount of earnings taken into account is based on the average gross income during the period from 1985 until the year preceding the year of entitlement to old-age benefits, with a maximum of 30 years.[167] Earlier years' earnings are valorised by the growth of economy-wide average earnings. However, this average amount is subject to two reduction limits that are set by the government. To be precise, for determining the personal assessment base, the average wage is reduced in a way that 100 percent is counted up to the first reduction limit, only 30 percent of the person's income is counted between the first and second reduction limit, and only 10 percent is counted of the amount above the second reduction limit.[168]

Calculation example[169]

The average gross salary of a skilled worker (qualified metal lathe operator) in 2008 was CZK 24,757, which is the calculation base. In 2008, the reduction limits were fixed at CZK 10,000 and CZK 24,800 respectively. The calculation base was only reduced by the first limit, because it does not exceed the second limit.

CZK 10,000 × 100%	=	CZK 10,000
(24,757 – 10,000) × 30%	=	CZK 4,427
Total	=	CZK 14,427

The percentage sum for thirty years of insurance is 30 * 1.5% * 14,427 = CZK 6,492.[170]
Together with the basic sum of CZK 1,700, the monthly old-age benefit amounted to CZK 8,192.
The average net salary of a skilled worker with a dependent spouse amounted to CZK 20,790.
The ratio between the old-age benefit, which is not subject to taxation, and the income during employment, was 39.4 percent.

In conclusion, the replacement rate of the old-age pension of a standard beneficiary, compared to the reference wage and calculated in a way as prescribed in Article 65 of the ECSS, amounted to 39.4 percent in 2008.

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167 Originally, in 1996, it was determined as the average of gross income for the last ten years preceding the year of retirement. Every year this period is being increased by one year until it reaches 30 calendar years.

168 ECSS Report (Cz) V, Art. 28; ILO C128 Report (Cz) 2001–2006, Art. 26; Tröster & Vysokajová 2006, points 401–405; website of the Ministry of Labour and Social Affairs.

169 The calculation is based on data given in the ECSS reports (Cz) VI and VII, Art. 28. According to Art. 65 of ILO C102 and the ECSS, the wage of the skilled employee, the benefit, and the family allowances must be calculated on the same time basis. However, in its reports on the ECSS, the government takes data from different years, namely, the wage from one year earlier than the reduction limits, the basic sum, and child benefit. In this example, this is corrected, resulting in a lower replacement rate than stated in the reports of the government. The exchange rate of the Czech Koruna on 1 January 2008 was €1.00 to CZK 26.52.

170 In this example, 30 years of insurance has been taken into account according to the requirements of the relevant international provisions.

Duration of the benefit

The old-age pension is paid throughout the contingency, until the death of the beneficiary. Until 2010, the benefit was paid alongside income from gainful activity only if the employment contract had been concluded for a definite period of time that did not exceed one year, or in case of self-employment.[171] There was no entitlement to a benefit if the beneficiary engaged in gainful activity on the basis of an employment contract for an indefinite period, or a period of more than one year after the attainment of the pensionable age. However, with the first stage pension reform measures, this restriction has been abolished since 2010.[172]

Adjustment to the cost of living

Since 2004, the periodical old-age pensions have usually increased every year in January through a government decree.[173] The adjustment of pensions is determined on the basis of at least 100 percent of the price increase and at least one third of the increase in real wages. As regards the price increase, the total growth of the overall household consumer price index during the period from July to July preceding the pension adjustment is taken into account. The basis for the growth in real wages is the calendar year that precedes the year of the pension adjustment by two years. A different procedure is used only in the case of a very low (less than 2 percent) or very high (more than 10 percent) inflation rate.

3.8.5 QUALIFYING CONDITIONS

Until 1 January 2010, the minimum qualifying period for entitlement to old-age pension was a period of 25 years of participation in insurance. Periods that counted for insurance periods included: care for a child of up to the age of 4, or up to 18 years of age if the child was severely disabled and required special care; periods of study in secondary schools and institutions of higher education for the first six years of study after reaching the age of 18 years; military service; and periods of receiving unemployment benefit and a subsequent period of unemployment up to three years.[174] However, from 2010 the insurance period required for entitlement to the old-age pension is being gradually extended to 35 years if non-contributory periods are included, or to 30 years if non-contributory periods are excluded. Furthermore, a limitation of non-contributory periods has taken place, which means that some of these periods count for only 80 percent,

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171 ESC Report (Cz) 2003–2004, p. 65; Tröster & Vysokajová 2006, points 406–409.
172 Ministry of Labour and Social Affairs (Cz) 2008, p. 10.
173 Website of the Ministry of Labour and Social Affairs.
174 ECSS Report (Cz) IV, Art. 29; ILO C128 Report (Cz) 1999–2001, Art.18.

and periods of study will no longer be taken into account as non-contributory insurance periods at all.[175] The rules for a reduced benefit are also gradually being changed, resulting in entitlement to a reduced pension after the completion of a period of at least 20 years of insurance. As with the full pension, each year of contribution counts for 1.5 percent of the calculation base.

3.8.6 COMPARISON WITH THE INTERNATIONAL STANDARDS[176]

Matters of compliance

In spite of the consecutive increases, the retirement age in the Czech Republic is in line with the relevant international instruments, whether ratified or not. All instruments set a pensionable age of 65 years, which can even be higher if this is justified by demographic, economic and social criteria.[177] Article 26 of the ECSS is the most specific on this matter: a higher pensionable age is allowed if the number of residents having attained that age is not less than 10 percent of the number of residents under that age, but over 15 years of age. The personal scope of the pension system is also sufficient, covering all employees as well as self-employed persons. ILO C128 (ratified) requires all employees to be covered, representing the highest international norm at this point, together with the ECSS (Revised) (not ratified). The benefit is granted until the death of the beneficiary, therefore the duration of the benefit is in compliance with all relevant standards. In conclusion, the newly fixed qualification period of 30 years of insurance (not comprising substitute periods) is in line with the requirements of all the international standards except the Revised Code, which requires a full pension to be paid after 15 years of insurance. The austerity of the substitute periods does not cause a conflict because the international standards do not provide for such periods.

Problematic issues

The main problem with the public pension is the amount of benefit. According to the ECSS Report on 2008/2009, the amount of benefit of a standard beneficiary, for example, a man with a dependent wife of pensionable age, was 42.4 percent of the average salary of a skilled worker, which would meet the obligations of the ECSS (40 percent), by which the Czech Republic is bound.[178] However, for the

175 Král 2009, p. 42; Ministry of Labour and Social Affairs (Cz) 2008, pp. 9–12.
176 For a detailed description of the international norms regarding old-age pensions, see section 2.12.
177 ECSS, Art. 26; ILO C128, Art. 15; ECSS (Revised), Arts. 26–27.
178 ECSS Report (Cz) VI, Art. 28.

calculation, data from different years were used, which is in conflict with Article 65 of the ECSS. As shown above, the replacement rate of the pensions in relation to the average wage of the standard beneficiary in 2008 was actually 39.4 percent, which means that neither of the ratified standards were met. The figures given in the reports on ILO C128 and the governments´ actuarial reports from 2004 on confirm a steady decrease in pensions over time. In 1995, the calculated replacement rate amounted to 51.3 percent, in 2000 it was 47.4 percent, and in 2004 it had dropped to 43.8 percent – below the level of ILO C128.[179] At that time, this incompatibility with ILO C128 was solved by an increase in the first reduction limit and in the flat rate part of the pensions in 2005 and 2006 respectively. These measures pushed the rate to 45.2 percent in 2005 and 46.2 percent in 2006. However, because these were random measures, they could not prevent the replacement rate from dropping again. The government is aware of this problem, and even points out that '[w]hereas up to 1999, the Czech Republic fulfilled the ILO Convention No. 128 even by setting the replacement ratio from 125 percent of the average wage in the national economy, in the following years the Convention was fulfilled only when using the average wage of the skilled labourer (which is lower in the Czech Republic).'[180]

The main reason for the decrease in the replacement rate is the way the pensions are being adjusted to the general level of earnings. For a long period, the Czech system did not contain clear regulations on the point of regular adjustment of long-term benefits, until the adoption of an amendment to the Act on Pension Insurance in July 2002, which contained stricter rules for a periodical increase in the basic, flat rate, pensions. The Committee of Experts has asked for more information on this matter in relation to ILO C128, as well as to the Code several times, lastly in 2003 and 2005 respectively. In respect of the Code, the Committee concluded – on the basis of the information provided by the Czech government – that the new law gave full effect to the Code. However, it remains to be seen whether this point of view will hold its ground in the long-term. It has been shown above that the valorisation of pensions is based on 100 percent price increase and at least one third of the increase in real wages. Moreover, as a starting point for the adjustment, the average wages of two years prior to the adjustment are taken into account. This means that the level of adjustment is not in keeping with the level of wage increases, which causes a downward trend in the replacement rate of the pensions.[181] It has to been seen how the current infringements of both the ECSS and ILO C128 will be solved this time.

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[179] ILO C128 Report (Cz) 1999–2001; ILO C128 Report (Cz) 2001–2006; Ministry of Labour and Social Affairs (Cz) 2006; Ministry of Labour and Social Affairs (Cz) 2008.

[180] Ministry of Labour and Social Affairs (Cz) 2008, p. 59.

[181] This downward development has also been pointed out by Potůček: Potůček 2001, pp. 94–95.

A second problem concerns the qualifying period. According to the ECSS and ILO C128, a reduced pension has to be provided after 15 years of contribution. Since the amendments of 2010, including a gradual increase in the required contributions years for a reduced pension from 15 to 20 years, the Czech pension system no longer fulfils this obligation.

Summary of matters of compliance and problematic issues

Table V. Old-age benefit (Cz) compared with the international standards

The Czech Republic is bound by the ECSS and ILO C128				
Old-age benefit	**ILO C102 (1952) / ECSS (1964)**	**ECSS Protocol (1964)**	**ILO C128 (1967)**	**ECSS Rev. (1990)**
Material scope	✓	✓	✓	✓
Personal scope	✓	✓	✓	✓
Benefit: amount	Replacement rate is less than 40 percent.	Replacement rate is less than 45 percent.	Replacement rate is less than 45 percent.	Replacement rate is less than 65 percent.
Benefit: duration	✓	✓	✓	✓
Qualifying periods	A reduced benefit is not provided after 15 contribution years.	A reduced benefit is not provided after 15 contribution years.	A reduced benefit is not provided after 15 contribution years.	✓

✓ = compliance of national provisions with the international standards.

3.9 EMPLOYMENT INJURY BENEFIT

3.9.1 INTRODUCTION

Introduction

Under the Soviet regime, compensation for occupational accidents or illness was the responsibility of the employer.[182] However, because enterprises were generally state owned, income compensation was, in fact, paid out by the state. The benefits were generous, aiming at an income level equal to that prior to the accident or illness. After the Velvet Revolution, the system was adapted to the new social and economic reality, notably the privatisation of companies, but it was not fundamentally changed. One of the measures that was taken was that the employers' liability insurance for work accidents was made compulsory for all

[182] Biskup & Kotrusová, pp. 45, 58–60.

employers in 1993. Compensation for loss of earnings from this insurance is paid on top of a sickness benefit or disability pension, up to the level of the person's average previous income, and it is provided up to 65 years of age without casual reviews of the state of health.

Thus, the Czech social security system does not include a specific insurance scheme for occupational injury and diseases. It is true that in 2006 an employment injury insurance act was adopted that provided for a comprehensive compulsory insurance covering all employees, which was to come into force on 1 January 2008.[183] However, this date has been repeatedly postponed – most recently until 2013 – because of political controversy, and it is not believed that it will come into effect after all.[184] Therefore, employees who become unable to work because of a work-related accident or illness will still be covered under the general health scheme, sickness insurance, and pension scheme, supplemented by compensation from the employer. This compensation part will not be taken into account in this section, since it does not comply with several prerequisites of the international standards. Most importantly, the state is not responsible for the effective provision of the benefits, protected persons do not participate in the management of the scheme, the administration is not controlled by a public authority, and some amounts are paid in the form of a lump sum instead of periodical payments.[185] Any scheme that complies with these principles on solidarity and state responsibility cannot be counted for the fulfilment of the international obligations.

Legislation

The legal basis for medical care, sickness benefit, invalidity benefit, and survivors' benefit in the case of employment injury is prescribed in the relevant sections. Entitlement to compensation for work injury and occupational disease by the employer is based on Act No. 262/2006 Coll., Labour Code.[186] It prescribes the contingency, the content of the different compensations provided, and the conditions for entitlement.

The Czech Republic has exempted the parts on employment injury from the ratification of ILO C102 and the ECSS. Therefore it is not bound by any up-to-date international instrument on this point. However, the pre-war conventions on workmen's compensation have been ratified, and, although not open for new ratifications, they are still valid.[187]

[183] Act 266/2006 Coll. on Occupational Accidents.
[184] Information obtained from experts.
[185] For a description of these principles on solidarity and state responsibility, see section 2.5.
[186] Act No. 262/2006 Coll., Labour Code, Arts. 274, 365–393.
[187] ILO Convention 17 on Workmen's Compensation (Accidents), 1925 and ILO Convention 42 on Workmen's Compensation (Occupational Diseases), 1934.

Administration and financing

Administration of financial compensation in the case of work injuries or occupational diseases is in the hands of the employer and the insurance company. Employers are *ex lege* insured for liability for such compensation. The rate of the insurance contributions is determined by a governmental decree.

3.9.2 MATERIAL SCOPE

The Czech Labour Code defines the contingency as damage caused by industrial injuries and occupational diseases.[188] The definition comprises loss of earnings, pain and lesser employability, costs related to medical treatment, and material damage. In the case of an employee's death, it additionally comprises costs related to the employee's funeral, costs of the survivors' maintenance, and a lump sum indemnification to the survivors.

3.9.3 PERSONAL SCOPE

All employees are covered for financial compensation by the employer. For the general insurance schemes, see the relevant sections.

3.9.4 DIFFERENT BENEFITS

Medical care

Medical treatment is covered by public health care insurance, as described in section 3.5.4. Any other necessary costs for medical treatment fall under the employer's liability.

Incapacity for work benefit

In the case of loss of earnings as a result of temporary incapacity for work, the employee receives a sickness benefit, as described in section 3.6. On top of that, the employer shall compensate the difference between the employee's average earnings before the occurrence of damage and the sickness benefit. In the case of incapacity for work which likely to be permanent, an invalidity pension is provided, as described in section 3.12. Additionally, the employer shall compensate the difference between the employee's average earnings before the

188 Act No. 262/2006 Coll., Labour Code, Art. 365.

occurrence of the damage and the earnings attained after the industrial injury or disease, including the disability pension paid due to the same cause.

Survivors' benefit

Compensation for the cost of survivors' maintenance shall be paid by the employer to the dependents of the deceased, until the duty to maintain the dependents has ended. The compensation shall amount to 50 percent of the deceased employee's average earnings if he maintained (or was under the duty to maintain) one person, or 80 percent if he maintained two or more persons. This amount shall be reduced by the pension benefit awarded to the survivors.

3.9.5 QUALIFYING CONDITIONS

No qualifying conditions are required of an employee for entitlement to financial compensation. For the general schemes, see the relevant sections.

3.9.6 COMPARISON WITH THE INTERNATIONAL STANDARDS[189]

Reasons for non ratification

The public insurance schemes do not comply with the international standards in respect of employment injury on several points. For example, the rules on co-payment by insured persons for home visits by a family doctor, in-patient care, and prescription pharmaceuticals are in conflict with ILO C102 and the European Code, which do not allow any cost-sharing in the case of employment injury. Furthermore, the prescribed levels of the different benefits in the case of employment injury are higher than the normal sickness benefits and pensions. The invalidity benefit in particular is too low to comply with any of the international standards. On other points the minimum standards are largely met, for example, in relation to the personal scope, and the qualifying periods. Under the conventions, no qualifying periods may be required. Accordingly, in the Czech Pension Act, all qualifying periods are waved in the case of employment injury.

It must be mentioned here that employers' liability for the provision of benefits is not ruled out as a principle. If such a private form of social protection is

[189] For a detailed description of the international norms regarding employment injury, see section 2.13.

implemented in line with the principles on solidarity and state responsibility incorporated in the international standards, it may be taken into account for compliance with the standards. The issue of privatisation of social security will be discussed in section 6.2.3.

3.10 FAMILY BENEFIT

3.10.1 INTRODUCTION

Introduction

Family benefits in the Czech Republic are covered by the state social support system, through which the state participates in certain costs of living, particularly those of families with children.[190] Family support comprises a number of benefits, some of which are provided irrespective of income, and some of which are (as of 1993) dependent on the level of family income.[191] The income related benefits are child allowance, social allowance, and housing allowance. Irrespective of income, the following benefits are granted: parental allowance, foster care benefits, birth grant, and funeral grant. Of all state social support benefits, child allowance is the most important and can be supplemented, under specific conditions, by the other above-mentioned benefits. For the purpose of this study, only child allowance is taken into account, since the nature of this benefit corresponds best with family benefits as prescribed in the conventions.

Legislation

The state social support is regulated by Act No. 117/1995 Coll. on State Social Support. As the amount of the benefit is related to the income of the family and the family's subsistence level, Act No. 110/2006 Coll. on Living and Subsistence Minimum is additionally relevant. This Act came into force in January 2007, substituting Act No. 463/1991 Coll. on Subsistence Level.

At the international level, the Czech Republic is bound by Part VII on Family Benefit of both ILO C102 and the ECSS.

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190 Website of the Ministry of Labour and Social Affairs, state social support; ECSS Report (Cz) IV, Arts. 39–40; ILO C102 Report (Cz) 1999, Art. 40; OECD 2005, p. 10; MISSOC (Cz), 2007, Family benefits.

191 Coulter 1997, pp. 314–316; Mácha 2001, pp. 93–102; Tröster & Vysokajová 2006, points 199–247.

Administration and financing

The administration of the state social support benefits is undertaken mainly by the labour offices and the Ministry of Labour and Social Affairs. The Ministry is authorised by law to supervise the system. The costs of the benefits are entirely financed by the state, as the system is funded by taxes. The child allowance is paid on the basis of an application, which has to be submitted on behalf of the dependent child by their legal guardian. The allowance for a minor child is paid to the person taking care of the child; in the case of a dependent major, it is paid directly to them.[192]

3.10.2 MATERIAL SCOPE

The child benefit is a long-term benefit provided to families with dependent children.[193] For the purpose of the state social support, a family is understood to mean the cohabitation of parents and dependent children in a common household. A child is considered dependent at least until the termination of compulsory education. Education is compulsory for 9 school years, but at the latest, until the child reaches 17 years of age. After compulsory education has ended, the child is considered dependent only under specific conditions until the age of 26 years as a maximum. These conditions include that the child is being trained systematically for a future profession, or that the child is not able to do so, or to perform a gainful activity, due to an unfavourable health condition, illness or (accidental) injury.

3.10.3 PERSONAL SCOPE

According to the Act on State Social Support, all dependent children are covered by the system, provided that the family's income does not exceed a specified amount related to the minimum family subsistence level. Until 31 December 2007, the children of families with an income of up to 4 times the subsistence level were covered, and as of 2008 this was downsized to families with an income of up to 2.4 times the subsistence level. In terms of the conventions, this means that all residents, whose means during the contingency do not exceed prescribed

[192] Tröster & Vysokajová 2006, points 214–215.

[193] Website of the Ministry of Labour and Social Affairs, state social support; Ministry of Labour and Social Affairs (Cz) 2009, p. 27; Tröster & Vysokajová 2006, points 207–210; ECSS Reports (Cz) IV and V, Arts. 39–40.

limits, are covered.[194] Assets and property are not tested in this context.[195] In 2008 approximately 38 percent of all dependent children were provided with child benefit.[196]

3.10.4 BENEFITS

Amount of the benefit

Until 31 December 2007, the benefit was calculated as a percentage of the child's minimum subsistence level, fixed by the Act on Living and Subsistence Minimum, whose percentage depended on the income of the family.[197] The higher the family income, the smaller the percentage rate of the child's minimum subsistence level. Since 1 January 2008, the monthly benefit depends on the age of the child: CZK 500 for children up to 6 years, CZK 610 for children of 6–15 years, and CZK 700 for children of 15–26 years. For the calculation of the benefit, no distinction is made between first, second, or subsequent children.

For the purpose of comparison with the conventions, the amount of child benefit should be assessed at a general level and not, contrary to the other benefits, in relation to a standard beneficiary. The total expenditure on child benefit has to be calculated in relation to a fixed percentage of the gross salary of an unskilled worker, multiplied by the total number of (protected) children.

Calculation example[198]

In 2008, the expenditure on child benefit amounted to CZK 6.2 billion.
The average gross salary of an unskilled worker was CZK 14,685.
The number of dependent children of all residents was 2,310,600.
The total monthly expenditure, divided by the number of children and the average salary, gives a percentage of the average salary of an unskilled worker:

6,200,000,000 (expenditure) / 12 (months) / 2,310,600 (children) / 14,685 (salary) = 0.015.

In conclusion, in 2008 the total value of monthly child benefit represented 1.5 percent of the average gross wage of an unskilled labourer, multiplied by the total number of dependent children of all residents.

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194 ECSS, Art. 41 (b).
195 Ministry of Labour and Social Affairs (Cz) 2009, p. 28; Mácha 2001, p. 95.
196 ECSS Report (Cz) VI, Art. 41.
197 ECSS Report (Cz) VI, Art. 42.
198 Numbers and amounts from ECSS Report (Cz) VII. The exchange rate of the Czech Koruna on 1 January 2008 was €1.00 to CZK 26.52.

Duration of the benefit

The benefit is paid throughout the contingency.

3.10.5 QUALIFYING CONDITIONS

The only qualifying condition for entitlement to the child allowance is permanent residence in the territory of the Czech Republic.[199] For the purpose of the state social support benefits (to which the child benefit belongs), equal status as permanent residents is granted to foreigners with temporary residence, however, only 365 days after their registration in the territory of the Czech Republic.[200] No further qualification period is required, and the right to child benefit does not depend on participation in the pension scheme or health insurance system.

3.10.6 COMPARISON WITH THE INTERNATIONAL STANDARDS[201]

Matters of compliance

The definition of child allowance in the Czech legislation corresponds with the rules of ILO C102 and the ECSS – both ratified – that specify the contingency as 'responsibility for the maintenance of children as prescribed.'[202] This rather vague specification covers the Czech regulation regarding dependent children. The total cost of child benefits, representing 1.5 percent of the average wage of an unskilled labourer multiplied by the number of children of all residents, is equal to the requirements of ILO C102 and the ECSS, but does not meet any of the higher standards. Regarding the qualifying conditions, according to ILO C102, one year of residence may be required, whereas the ECSS allows for only six months of residence as a qualifying term. This means that, with regard to non-nationals, the requirements of ILO C102 are also fulfilled. Compliance with the ECSS on this point will be discussed in the following section. With regard to the duration of the benefit, the child allowance stops when the dependency of the child, according to the Czech legislation, has come to an end, which complies with the international provisions.

199 Act No. 117/1995 Coll. on State Social Support, Section 3.
200 Act No. 326/199 Coll. on Foreigners' residence in the territory of the Czech Republic.
201 For a detailed description of the international norms regarding family benefits, see section 2.14.
202 ILO Convention 102, Art. 40; ECSS, Art. 40, ECSS (Revised), Art. 45.

Problematic issues

To prove compliance with ILO C102 in respect of the personal coverage of family benefits, the Czech Republic has availed itself to the option of coverage of all residents whose means do not exceed certain limits.[203] Since the Czech child benefit is income tested, this is the only suitable option. The other options, coverage of prescribed classes of employees or economically active persons constituting at least a given percentage of all employees or residents, may not be used in combination with a means or income test. The problem here is that the only option that leaves room for an income test is not included in the provision of the ECSS: in Article 41 only the first two options of ILO C102, relating to employees and economically active persons, are replicated. As a consequence, under the ECSS income tested child benefit is not allowed. Strangely enough, no remarks were made on this point in the conclusions on the application of the ECSS. The reason for this might be that, firstly, according to the ECSS, the total amount spent on family benefits is sufficient, and secondly, that in the Revised ECSS the third option has been restored, which indicates that a prohibition on income tested family benefits is not a matter of principle (any more). It must be recognised however, that since the amendments of 2008, the means test implies that the standard beneficiary is no longer entitled to child benefit. This has major implications regarding the assessment of the replacement rates of benefits, since in most cases child allowance has to be added both to the previous earnings and to the benefits. It remains to be seen how the Committee of Ministers will respond to this development.

The Committee of Ministers has remarked on the qualifying period of one year of residence for foreigners with temporary residence in the Czech Republic. Where ILO C102 allows for a period of one year of residence, under the ECSS a qualifying period of only six months of residence is allowed. In its last report, the Czech government defended this requirement by introducing a semantic difference between 'temporary residence' and 'ordinary residence'. It was argued that the provision in the ECSS refers to 'ordinary residence' only and that the Czech rule therefore complies with the ECSS, requiring no qualifying period for foreigners with the status of permanent residence. However, this unsubstantial argument is not convincing, since the international instruments do not give the lead for such a difference in any provision.

[203] ILO Convention 102, Art. 41; ILO C102 Report (Cz) 1999, Art. 41.

Summary of matters of compliance and problematic issues

Table VI. Family benefit (Cz) compared with the international standards

The Czech Republic is bound by the ECSS and ILO C102				
Family benefit	**ILO C102 (1952) / ECSS (1964)**	**ECSS Protocol (1964)**	**No higher standards**	**ECSS Rev. (1990)**
Material scope	✓	✓		✓
Personal scope	*ECSS*: An income test is not allowed.	An income test is not allowed.		✓
Benefit: amount	✓	Total child benefit expenditure is too low.		Total child benefit expenditure is too low.
Benefit: duration	✓	✓		✓
Qualifying periods	*ECSS*: 365 days for foreigners with temporary residence is not allowed.	365 days for foreigners with temporary residence is not allowed.		365 days for foreigners with temporary residence is not allowed.

✓ = compliance of national provisions with the international standards.

3.11 MATERNITY BENEFIT

3.11.1 INTRODUCTION

General introduction

Under the Czech legislation, maternity benefit comprises several elements. Firstly, there is medical care in connection with pregnancy and childbirth under the general health system. Then, there are two different cash allowances granted to women for reasons of pregnancy and maternity that are embedded in the compulsory sickness insurance system, however, requiring different qualifying conditions. A wage compensation is provided to female employees who have been transferred to a different job because the work they carried out previously is prohibited for pregnant women and mothers with a baby under nine months of age, or whose previous work would endanger their pregnancy or maternity. Maternity benefit is paid during maternity leave. The maternity benefit is usually payable for a period of 28 weeks of maternity leave, provided that the woman suffers loss of income from the work on which the benefit is based. In this study only medical care and maternity benefit during maternity leave is taken into

account. The compensatory benefit is left out of consideration, since this is, in fact, a surplus to the maternity benefit that is not catered for in the conventions.

Legislation

Act No. 187/2006 Coll. on Sickness Insurance determines the personal scope, conditions for recognising claims to the benefits, duration of the benefits, the method of calculation, and gives additional rules concerning specific groups of persons entitled to benefits, such as citizens who are registered as jobseekers. Furthermore, Act No. 48/1997 Coll. on Public Health Insurance regulates medical care in relation to pregnancy and maternity.

At the international level, the Czech Republic is bound by Part VIII on Maternity Benefit of both ILO C102 and the ECSS. ILO C130, covering medical care and sickness benefits, does not contain specific rules for maternity.

Administration and financing

As for the administration and financing, medical care in the case of pregnancy and delivery is covered by the public health insurance, and cash maternity benefits fall under the general sickness insurance. Therefore, it suffices here to refer the reader to section 3.5.1 concerning medical care, and section 3.6.1 concerning sickness benefit.

3.11.2 MATERIAL SCOPE

According the Czech regulations, the covered social events are pregnancy, childbirth, and their consequences.[204] As regards the cash benefit, these social events have to involve a loss of earnings. Although the Czech regulations do not explicitly define when there is a loss of earnings, it has been made clear that it only covers a complete stoppage of earnings due to absence from work. Finally, a benefit is also granted to employees who have taken a child into permanent care.[205]

3.11.3 PERSONAL SCOPE

For compliance with the conventions, the Czech Republic refers to the option of coverage relating to a percentage of all employees, and for medical benefit, also the wives of men in these classes. For cash benefits, all women participating in sickness

204 ECSS Report (Cz) IV, Art. 47.
205 MISSOC (Cz), 2007, maternity; Tröster & Vysokajová 2006, points 275–276.

insurance are covered, which means that all female employees are protected, because sickness insurance is compulsory for employees. Since sickness insurance is not open to employees who earn less than CZK 2,000 per month, employed women with such small labour contracts are not covered. Self-employed women are covered on a voluntary basis. The personal coverage of health care provided during pregnancy and maternity includes all women who have permanent residence in the Czech Republic or who work in the territory of the Czech Republic for an employer with the registered office in the territory of the Czech Republic.[206] The right to health care is ascribed on individual basis, entitlement on the basis of insurance of the spouse is not recognised in the Czech system.

3.11.4 BENEFITS

Benefits in kind

The general health system comprises pre-natal and post-natal care, including confinement care and hospital care. As mentioned in section 3.5.4, medical care was free of charge until out-patient fees were introduced in 2008 to combat the relatively high frequency of doctors visits by the Czech citizens and the excessive use of medication. Some exemptions are regulated for pregnancy related care, namely, the first three doctors visits or drug prescriptions after the confirmation of the pregnancy.[207] However, for emergency care and hospitalisation, the general rules apply, thus also imposing out-of-pocket payments for each day spent in hospital on pregnant women and their newborn babies.

Benefits in cash

Similar to sickness benefits, maternity benefits are periodical payments consisting of a fixed percentage rate of the daily assessment base. In the case of maternity, in 2008 the rate was 69 percent of the daily assessment base.[208] The daily base is, roughly, the average income subject to social security and state employment policy contributions per day of the claimant. The decisive period for calculation is usually the period of 12 calendar months before the calendar month in which the maternity leave starts. The daily assessment base is reduced if it exceeds prescribed amounts, which are the same as in respect of sickness benefits.[209] During the whole period of leave, the amount up to the first reduction

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[206] See section 3.5.3.

[207] ECSS Report (Cz) VI, Art. 10.

[208] In 2009 the rate was set at 70 percent, and in 2010 it was reduced to 60 percent, which is similar to sickness benefit.

[209] In 2009, the first reduction limit was CZK 786, the second reduction limit was CZK 1,178 and the third reduction limit was CZK 2,356 (website of the Ministry of Labour and Social Affairs).

limit is fully counted, of the amount between the first and second limit, 60 percent is counted, and of the amount between the second and the third reduction limit, 30 percent is counted. The amount of income exceeding the third reduction limit is not taken into consideration.[210] The standard beneficiary is a woman, which implies that child allowance is not taken into account.

Calculation example[211]

In 2008, the monthly average gross salary of a skilled worker (metal lathe operator) was CZK 24,757, which is the calculation base. Converted to the daily assessment base, the amount was CZK 814. In 2009, the reduction limits were fixed at CZK 786, of which 90 percent was counted, CZK 1,178, of which 60 percent was counted, and CZK 2,356, of which 30 percent was counted. The average daily assessment base of a skilled worker was reduced by the first and second limit; it did not exceed the third limit.

Reduced daily assessment base:		
(786 * 0.90) + (28 * 0.60)	=	CZK 725
Daily maternity benefit:		
60% of CZK 725	=	CZK 435
Monthly maternity benefit: 30 * 435	=	CZK 13,050

The average net salary of a skilled worker in 2008 was CZK 18,720. The ratio between the maternity benefit, which is not subject to taxation, and the average net income, was CZK 13,050 / CZK 18,720 = 0.697.

In conclusion, the replacement rate of the maternity benefit of a standard beneficiary, compared to the reference wage, amounted to 69.7 percent in 2009, however, based on wage data of 2008.

Duration of the benefit

Maternity benefits are paid out for a period of 28 weeks, starting no later than at the beginning of the sixth week before the anticipated date of childbirth. The period is extended to 37 weeks for women who have given birth to more than one child at the same time, and who are taking care of at least two of these children. The period is also extended to 37 weeks for women who are single

[210] ECSS (Cz) report V; website of the Ministry of Labour and Social Affairs.

[211] Amounts given in ECSS Report (Cz) VI and VII. According to Art. 65 of the ECSS, the calculation must be based on figures from the same year. At the time of writing (2009), the average wage of a standard beneficiary in 2009 was not yet available in the reports of the government. However, because it would not be expedient to make the calculations according to the old Sickness Insurance Act, the new calculation method with the new reduction limits have been taken into account. As a result, the example is based on the wages of 2008, but the benefit is calculated according to the rules and reduction limits of 2009. This means that the calculation is not accurately performed according to the international standards, but it can still serve as an indication of the ratio between previous income and the sickness benefit. The exchange rate of the Czech Koruna on 1 January 2008 was €1.00 to CZK 26.52.

mothers, widows, divorced and/or living on their own (without a spouse) for other legitimate reasons.[212] Medical care in relation to pregnancy, childbirth and their consequences is not subject to any time limit.

3.11.5 QUALIFYING CONDITIONS

The main condition for entitlement to maternity benefit for an employee is participation in sickness insurance for at least 270 days during the two years preceding the childbirth. A self-employed woman must have participated in sickness insurance for at least 180 days during the year preceding the birth. Other conditions are suspension of earnings from the employment in which the maternity benefit is granted, and a doctor's note confirming pregnancy. For medical care, no qualifying conditions are required, apart from permanent residence in the territory of the Czech Republic.

3.11.6 COMPARISON WITH THE INTERNATIONAL STANDARDS[213]

Matters of compliance

With regard to the definition of the risk covered, the Czech system provides for medical care in the event of pregnancy and delivery, including hospitalisation. Furthermore, cash allowances are paid to substitute for the loss of income due to these events. According to the Czech system, the suspension of earnings has to be total. This is all in keeping with the conventions. ILO C102 and the ECSS prescribe the contingency covered to include pregnancy and confinement and their consequences, and the suspension of earnings, as defined by national laws or regulations. The addition of the phrase 'as defined by national laws or regulations' leaves room for the governments to decide whether the loss of earnings may be total or partial. Neither the Protocol on the ECSS and the ECSS (Revised), nor ILO C102 and ILO C183, add other elements to the material scope. On this point, therefore, the Czech system complies with all instruments.

The personal scope regarding cash benefits, covering all women employees, is also in line with the ratified international standards. A more extensive coverage in respect of cash benefits is set by ILO C183, which demands protection of all employed women, including those in atypical forms of dependent work. The

[212] Website of the Czech Social Security Administration.

[213] For a detailed description of the international norms regarding maternity benefits, see section 2.15.

exclusion from sickness insurance of women who earn less than CZK 2,000 means that this Convention cannot be met. The requirement of the ECSS (Revised) that all employed women, including female apprentices, should be protected, is also be problematic for that reason, although here the possibility is given of excluding specific categories of employees, as long as they do not constitute more than 10 percent of all employees.

In respect of the level of the benefits, the example above shows that the maternity benefit amounts to 69.7 percent of the average net wage of a skilled worker. This percentage is fully sufficient, as the replacement rates prescribed by the conventions vary from 45 percent in ILO C102, to two thirds of the previous income in ILO C183. The duration of the cash benefit of at least 28 weeks is also more than sufficient in comparison with the international standards, since the longest given period, in both the ECSS (Revised) and ILO C183, is 14 weeks.

The qualifying period for entitlement to maternity benefits – which is 270 days of participation in sickness insurance during the preceding two years – is compatible with the intention of the conventions. All conventions contain the vague statement that 'a qualifying period considered necessary to preclude abuse' may be prescribed. It has been found from the preparatory works concerning ILO C102 that a qualifying period of ten months preceding the childbirth would be acceptable.[214] The Czech regulation falls within this guideline.

Problematic issues

Problematic in view of the conventions, is the personal scope regarding maternity medical care. According to ILO C102 and the ECSS, 'all women in prescribed classes of employees, which classes constitute not less than 50 percent of all employees, and, for maternity medical benefit, also the wives of men in these classes' should be protected. Where in ILO C183 the latter requirement is left out, the ratified standards require women who are not insured in their own right to be covered by their spouse's insurance, which demonstrates the special focus on maternity protection in the international instruments. The Czech system, however, does not provide for such derived rights. Although theoretically, and maybe even principally, this is not in line with the international standards, it does not result in a substantial conflict because all women with permanent residence in the Czech Republic are covered, as well as women who do not have permanent residence but who work for an employer with permanent residence. Still, a small coverage gap may exist, for instance, for the wives of employees who are not permanent residents but who work for an employer with permanent residence in the country.

[214] See section 2.15.4.

A more substantial problem concerns cost-sharing for maternity medical care. Since the amendments of the Health Insurance Act (valid as of January 2008), the fees for medication, doctors visits and prescriptions, hospitalisation, and emergency care which are levied on the patient, constitute an infringement of ILO C102 and the ECSS. According to all relevant international standards, medical care in the event of pregnancy, childbirth, or their consequences should be free of charge.[215] Although the fixed amounts may not be very high, imposing out-of-pocket payments is against the principles of maternity protection because of its discriminatory effect. The limited exemptions for pregnant women in the Czech regulations do not repair this deficit. In its report on 2007/2008, the government explained the rules on cost-sharing extensively, and concluded with the statement that '[i]n cases of pregnancy, childbirth and its consequences no participation on the costs of treatment provided is required.'[216] However, a thorough investigation of the regulations shows that this conclusion is not accurate. So far, the supervising bodies have not commented on this, but when they assess the rules, a critical observation will certainly follow.[217]

Summary of matters of compliance and problematic issues

Table VII. Maternity benefit (Cz) compared with the international standards

The Czech Republic is bound by ILO C102 and the ECSS				
Maternity benefit	**ILO C102 (1952) / ECSS (1964)**	**ECSS Protocol (1964)**	**ILO C183**	**ECSS Rev. (1990)**
Material scope	✓	✓	✓	✓
Personal scope	No derived right to medical care for wives of insured persons.	No derived right to medical care for wives of insured persons.	Women who earn less than CZK 2,000 are not insured.	No derived right to medical care for wives of insured persons.
Benefit: amount / range	Out-of-pocket fees levied for maternity medical care.	Out-of-pocket fees levied for maternity medical care.	Out-of-pocket fees levied for maternity medical care.	Out-of-pocket fees levied for maternity medical care.
Benefit: duration	✓	✓	✓	✓
Qualifying periods	✓	✓	✓	✓

✓ = compliance of national provisions with the international standards.

[215] See section 2.15.3.
[216] ECSS Report (Cz) VI, p. 12.
[217] For a further discussion on the issue of cost-sharing, see section 6.2.3.

3.12 INVALIDITY BENEFIT

3.12.1 INTRODUCTION

Care for people with disabilities is provided through pension insurance, state social support, social assistance, and tax relief.[218] Under the socialist philosophy, the care was strongly focused on income compensation rather than on activation and rehabilitation. Since the late 1990s, the government has set up several labour market programmes and financial incentives to encourage the employment of persons with disabilities. Still, the relatively high unemployment rate among this population has increased over the years. It has also been reported that there are still relatively large numbers of persons with disabilities in institutions.[219] However, in this section only the element of income compensation will be assessed, which is part of the pension insurance that also covers old-age pensions. Therefore, at several points reference will be made to the section on old-age pension.

Legislation

With regard to legislation concerning invalidity insurance, the same legislation applies as in respect of old age: Act No. 155/1995 Coll. on Pension Insurance and Act No. 582/1991 Coll. on the Organisation and Implementation of Social Security. The Czech Republic does not have any special acts defining the rights and obligation of disabled persons.[220] Because the Czech system does not provide for a separate scheme for employment injury, this section concerns invalidity, irrespective of the cause of it.

At the international level, with regard to invalidity pensions the Czech Republic has ratified Part IX of ILO Convention 102, as well as of the European Code of Social Security. ILO Convention 128 has not been ratified in respect of invalidity.

Administration and financing

In connection with the administration and financing of the invalidity pensions, it is sufficient to refer the reader to the section regarding old age.

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218 Tröster & Vysokajová 2006, points 410–439; Biskup & Kotrusová 2002; website of the Ministry of Labour and Social Affairs.

219 Shima & Rodrigues 2009, p. 24.

220 Tröster & Vysokajová 2006, point 474.

3.12.2 MATERIAL SCOPE

Until 2010, the Czech invalidity pension scheme covered full and partial disability.[221] A person protected was fully disabled if their ability to perform continuous gainful activities had dropped at least by 66 percent due to their long-term unfavourable health condition. Additionally, a person was considered fully disabled if they were able to work only under completely extraordinary conditions due to their physical disability. Partial disability included a decrease of between 33 and 66 percent of the person's ability to work, due to their long-term unfavourable health condition. It additionally included a long-term unfavourable health condition that made the person's general living conditions considerably more difficult.[222]

From 2010, a new definition of disability has been in effect, abolishing the principle division between full and partial disability. The idea is to have one single type of disability in three degrees, depending on the percentage decrease in working capacity of the insured person. The first degree relates to a decrease in working capacity of between 35 and 49 percent. The second degree concerns a reduction of between 50 and 69 percent, while the third degree covers a reduction of 70 percent or more. It has been estimated that around 75 percent of insured persons who were categorised as partially disabled will fall within the first degree, which will result in a reduction in pension. The remaining 25 percent will be categorised in the second degree, which will not affect the level of the pension.

3.12.3 PERSONAL SCOPE

The personal coverage corresponds with the coverage of the old-age benefit. On the whole, all economically active persons are insured, either employed or self-employed. Otherwise, the reader should refer to the section 3.8.3 on old age.

3.12.4 BENEFITS

Amount of the benefit

Similar to the old-age benefit, invalidity benefit comprises two components – a flat rate basic part and a percentage sum depending on the previous income of the beneficiary and on the number of insured years. The percentage part is

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221 Tröster & Vysokajová 2006, points 410–439.

222 Act No. 155/1995 Coll. on Pension Insurance, sections 38 and 43; ECSS Report (Cz) IV, Arts. 53 and 54.

subject to a prescribed minimum. For third degree invalidity benefits, the percentage part amounts to 1.5 percent of the calculation base for each year of insurance; for second degree invalidity it is 0.75 percent for each year of insurance; and for first degree invalidity it amounts to 0.5 percent for each year of insurance.[223] The total number of insured years includes the time between the date on which the person qualified for invalidity benefit and the person's retirement age – the so-called 'additional period' that is, in fact, counted in advance. The additional period is not taken into account if the disability is caused by self-inflicted injury, or if it is the result of a wilful criminal offence of the beneficiary. The determination of the calculation base, the use of reduction limits, and the calculation of the total benefit work in a similar way as in relation to the old-age benefit.

Calculation example[224]

The average gross salary of a skilled worker (a qualified metal lathe operator) in 2008 was CZK 24,757, which is the calculation base. In 2008, the reduction limits were fixed at CZK 10,000 and CZK 24,800 respectively. The calculation base is only reduced by the first limit, because it does not exceed the second limit.

CZK 10,000 × 100%	=	CZK 10,000
(24,757 – 10,000) × 30%	=	CZK 4,427
Reduced calculation base	=	CZK 14,427

The percentage sum for thirty years of insurance is 30 years * 1.5 percent * CZK 14,427 = CZK 6,492.[225]
Together with the basic sum of CZK 1,700 and the family benefit for two children amounting to CZK 1,220, the monthly full invalidity benefit after 15 insurance years amounted to CZK 9,412. The average net salary of a skilled worker with a dependent spouse and two children in 2008 amounted to CZK 23,790. The ratio between the full invalidity benefit, which is not subject to taxation, and the average net income was CZK 9,412 / CZK 23,790 = 0.396.

In conclusion, in 2008 the replacement rate of the invalidity pension of a standard beneficiary, compared to the reference wage and calculated in a way as prescribed

223 Website of the Ministry of Labour and Social Affairs, Invalidity.

224 The calculation is based on data given in the ECSS reports (Cz) VI and VII, Art. 56. According to Art. 65 of ILO C102 and the ECSS, the wage of the skilled employee, the benefit and the family allowances must be calculated on the same time basis. However, in its reports on the ECSS, the government takes data from different years, namely, the wage from one year earlier than the reduction limits, the basic sum, and child benefit. In this example, this is corrected, resulting in a lower replacement rate than stated in the reports of the government. The exchange rate of the Czech Koruna on 1 January 2008 was €1.00 to CZK 26.52.

225 The calculation is based on 30 insurance years instead of 15 years, as prescribed in the ECSS, because according to the Czech rules, the period from the date of entitlement to the benefit until the retirement age is added to the number of 'real' insurance years. Thus, if a person becomes permanently incapable of work at the age of 29 and has paid contributions for only 5 years, for the calculation of their pension, the 35 years until their pensionable age will also be taken into account.

in Article 65 of the ECSS, amounted to 39.6 percent. Accumulation of the invalidity pension and earnings from work is allowed without limitations.

Duration of the benefit

Disability pensions are paid during the whole period of invalidity. Upon reaching the retirement age, the beneficiary can apply for an old-age pension if this is greater than the invalidity pension.

Adjustment to the cost of living

The benefits are regularly adjusted in the same way as the old-age benefits.

3.12.5 QUALIFYING CONDITIONS

Entitlement to an invalidity pension is conditional on the achievement of a prescribed insurance period. The required period for an insured person up to 20 years of age is less than one year; for a person between 20 and 22 years, it is one year, and so forth, up to five years before the occurrence of the disability for a person older than 28 years.[226] However, an insurance period is not required if the disability is caused by an industrial accident or occupational disease, or if the disability occurred before the insured person reached 18 years of age. The only condition for entitlement in these cases is the insured person's permanent residence in the territory of Czech Republic.[227]

Furthermore, for entitlement to a disability pension, the insured person should not be entitled to old-age pension on the day the disability occurs, and, if the person receives an early retirement benefit, they should not have reached the retirement age.[228]

3.12.6 COMPARISON WITH THE INTERNATIONAL STANDARDS[229]

Matters of compliance

The definition of invalidity in the Czech legislation corresponds with the rules of ILO C102 and the ECSS, as well as with ILO C128, which are similar on this point. All these instruments require benefit to be provided to a person

226 Act No. 155/1995 Coll. on Pension Insurance, Section 40.
227 ECSS Report (Cz) IV, Art. 57; website of the Ministry of Labour and Social Affairs.
228 Tröster & Vysokajová 2006, point 413.
229 For a detailed description of the international norms regarding invalidity benefits, see section 2.16.

protected who is unable to engage in any gainful activity, to an extent prescribed, and whose disability is likely to be permanent. The Czech system – providing a full benefit to a person who is not able to perform continuous gainful activities and whose working capacity has dropped by at least 70 percent – meets these regulations. However, the ECSS Protocol requires the prescribed pension to be paid in the case of a decreased working capacity of two thirds. The ECSS (Revised) envisages a broader concept of disability, not connected to loss of work or earnings, and is therefore left out with this overview. The Czech law additionally provides for a smaller pension in the case of loss of earnings capacity from 35 to 70 percent, which is not prescribed by the conventions, unless the disability is caused by employment injury or occupational disease.

The personal scope of the pension system is amply sufficient, covering all employees as well as self-employed persons, where only 50 percent coverage of all employees is required by ILO C102 and the ESCC. Additionally, the obligations of ILO C128 (75 percent), the ESCC Protocol (80 percent), and the ESCC Revised (80 percent of the economically active population) are satisfied. As regards the amount of the invalidity benefit, the calculation above shows that the amount of the benefit of a standard beneficiary – a man with a dependent wife and two children – was 39.6 percent of the average salary of a skilled worker in 2008. This percentage is just below the obligations of the ILO C102 and ECSS, which are similarly set on 40 percent if a qualifying period of 15 years of insurance has been reached. However, if a benefit is paid after only 5 years of insurance, as is the case in the Czech Republic, the replacement rate may be 10 points lower.[230] In view of this provision, the Czech invalidity benefit complies with the ratified instruments. The unratified norms are not met; the ECSS Protocol and ILO C128 both require 40 percent replacement rate in combination with a contribution period of 5 years, and the ECSS (Revised) requires a rate of 65. Since the benefit is granted throughout the contingency, the duration of the benefit is in compliance with all relevant standards. In conclusion, the same goes for the qualification period of 5 years of insurance.

Overall, the Czech Republic satisfies the obligations of the ratified instruments, and at some points also the unratified ones, in respect of invalidity. A point of concern however is the system of adjustment of the benefits to the cost of living and wage increase, which is influencing the replacement rate of the invalidity benefit negatively in the same way it does for the old-age benefit. Statistics provided by the government show that the replacement rate is declining

[230] ILO Convention 102, Art. 57 (3); ECSS, Art. 57 (3). See section 2.16.4.

steadily.[231] If no measures are taken, the replacement rate will certainly drop further below 40 percent. It is by virtue of the relatively short qualifying period that the minimum standards will remain to be met for some years.

Summary of matters of compliance and problematic issues

Table VIII. Invalidity benefit (Cz) compared with the international standards

The Czech Republic is bound by ECSS and ILO C102				
Invalidity benefit	**ILO C102 (1952) / ECSS (1964)**	**ECSS Protocol (1964)**	**ILO C128 (1967)**	**ECSS Rev. (1990)**
Material scope	✓	✓	✓	✓
Personal scope	✓	✓	✓	✓
Benefit: amount	✓	Replacement rate is less than 40 percent (in combination with a qualifying period of 5 years).	Replacement rate is less than 40 percent (in combination with a qualifying period of 5 years).	Replacement rate is less than 65 percent.
Benefit: duration	✓	✓	✓	✓
Qualifying periods	✓	✓	✓	✓

✓ = compliance of national provisions with the international standards.

3.13 SURVIVORS' BENEFIT

3.13.1 INTRODUCTION

Survivors' benefit

The pensions paid in the event of the death of a breadwinner include a pension for widows, widowers, and orphans. The widow(er)s' pension is granted for the duration of one year to all widow(er)s of an insured person who complied with the qualifying conditions, irrespective of the survivor's situation. This first year is considered as a period necessary for the surviving spouse to adapt to the new situation. Subsequently, a long-term benefit is available for widow(er)s with specified characteristics and in specified circumstances. Since all conventions impose a survivors' benefit to be paid throughout the contingency, for the

[231] ILO C102 Report (Cz) 2001–2006, Art. 56.

purpose of this study, only the long-term benefit, which becomes effective one year after the death of the insured person, is taken into account. All widow(er)s who are entitled to the long-term benefit do, in any case, receive a benefit during the first year as well.

Legislation

As part of the pension scheme, the statutory basis for survivors' pensions is the same as for old-age pensions. Act No. 155/1995 Coll. on Pension Insurance regulates the personal and material scope of the insurance, the qualifying conditions, and the duration and level of the benefits.

At the international level, the country is bound by Part X of ILO C102 and the ECSS. With the ratification of ILO C128 the part on survivors' benefits was not included.

Administration and financing

With regard to the administration and financing of the survivors' pensions, it is sufficient to refer the reader to the section regarding old age.

3.13.2 MATERIAL SCOPE

The contingency covers loss of income due to the death of a spouse or, in the case of a child, the loss of one or both parents.[232] The Czech system does not make a distinction between a widow and a widower, nor does it distinguish between whether the deceased parent was the father or the mother of the child. A widow(er) in the meaning of the Act on Pension Insurance must have been legally married to the deceased; cohabitation is not included. To fall within the scope of the Act, as of the second year after the spouse's death, the widow(er) must fulfil one of the following criteria:[233]

- takes care of a dependent child;
- takes care of a child dependent on the care provided by another person in levels II, III, or IV (medium, heavy, and total dependency);
- takes care of a parent or the parent of the deceased spouse, who shares the household with them and is dependent on the care provided by another person in levels II, III, or IV;

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[232] ECSS Report (Cz) IV, Art. 59; MISSOC (Cz), 2007, Survivors; Tröster & Vysokajová 2006, point 44.

[233] ECSS Report (Cz) VII, Art. 64; website of the Ministry of Labour and Social Affairs, pensions.

- is disabled with the third-degree disability; or
- has reached the retirement age for men, minus 4 years, or the retirement age, if the retirement age is lower.

The state of being a widow(er) ends upon entering into a new marriage. The entitlement to the widow pension shall arise again if any of the mentioned conditions is met within five years of the previous entitlement to the widow pension expiring.

An orphan under the pension system is a dependent child whose (adoptive) parent has died. According to the Act on Pension Insurance, a child is dependent until the completion of compulsory school attendance (up to 26 years of age, maximum). The state of being an orphan ceases to exist in the case of adoption.

3.13.3 PERSONAL SCOPE

The personal coverage corresponds with the coverage of the old-age benefit. By and large, the spouses and children of all economically active persons, either employed or self-employed, are insured. For further details, the reader should refer to the old-age section.

3.13.4 BENEFITS

Amount of the benefit

Just like the old-age and invalidity benefit, the survivors' pension consists of two parts: a flat rate basic part, and a percentage sum depending on the previous income of the deceased and on the number of insured years. For the widow(er)s' pension, the percentage sum amounts to 50 percent of the old-age pension, or the full invalidity benefit to which the deceased person was or would have been entitled. For the orphan's pension, the orphan is, for each parent, entitled to 40 percent of the old-age pension, or the full invalidity benefit to which the deceased person was or would have been entitled.

Calculation example[234]

In 2008, the percentage part of the old-age benefit to be paid to the deceased person for thirty years of insurance amounted to = 30 years * 1.5 percent * CZK 14,427 = CZK 6,492.[235]
The percentage sum of the widow(er)s' pension amounted to 50 percent of CZK 6,492 = CZK 3,246.
Together with the basic sum of CZK 1,700, the monthly old-age benefit amounted to CZK 4,946.
The percentage sum of the orphans' benefit amounted to 40 percent of CZK 6,492 = CZK 2,597.
Monthly orphans' benefit: basic sum + percentage sum = 1,700 + 2,597 = CZK 4,297.
Child benefits for two children (ages 6 – 15) = CZK 1220.
Widow(er)s' pension + orphans' pension (2 orphans) + child benefit (2 children):

CZK 4,946 + CZK 8,594 + CZK1,220 = CZK 14,760.

The average net salary of a single skilled worker with two children amounted to CZK 20,500.
The ratio between income after distribution of the benefits and the reference income (net salary with child benefits for two children): 14,760 / (20,500 + 1,220) = 0.678.

In conclusion, the replacement rate of the survivors' pension of the standard beneficiary, compared to reference wage, amounted to 67.8 percent in 2008. The accumulation of a survivors' pension and earnings from work is allowed, without limitation. Furthermore, if a widow(er) is, in addition to a survivors' pension, also entitled to an old-age or invalidity pension, the higher of the pensions will be paid out in full (both the basic and percentage amounts), plus one half of the percentage amount of the lower pension.

Duration of the benefit

The widow(er)s' and orphans' pensions are paid throughout the contingency. The contingency ceases to exist in case of remarriage of the widow(er) or, in the case of a child, with the adoption of the child, or after leaving compulsory school, or at the age of 26 years.

Adjustment to the cost of living

The benefits are being regularly adjusted in the same way as the old-age benefits.

[234] The calculation is based on data given in the ECSS reports (Cz) VI and VII, Art. 62. According to Art. 65 of ILO C102 and the ECSS, the wage of the skilled employee, the benefit and the family allowances must be calculated on the same time basis. However, in its reports on the ECSS, the government takes data from different years, namely, the wage from one year earlier than the reduction limits, the basic sum, and child benefit. In this example, this is corrected, resulting in a lower replacement rate than stated in the reports of the government. The exchange rate of the Czech Koruna on 1 January 2008 was €1.00 to CZK 26.52.

[235] See the calculation in the old-age section.

3.13.5 QUALIFYING CONDITIONS

A survivors' benefit is conditional upon the insurance period of the deceased spouse or parent. A widow(er) or orphan is entitled to a pension if the deceased person:[236]

a. was the beneficiary of an old-age or invalidity pension; or
b. had complied, as of the day of their death, with the conditions of the required insurance period to entitlement to a old-age or invalidity pension.

3.13.6 COMPARISON WITH THE INTERNATIONAL STANDARDS[237]

Matters of compliance

In the Czech system, survivors' pension covers loss of income due to the death of a spouse or parent of a dependent child, which corresponds with the international provisions. Of the relevant conventions, only the Revised Code includes widowers in the definition, as does the Czech legislation. As regards the definition of 'widow', the prescribed restrictions to eligibility for a widow(er)s' pension, as described in the material scope section, are in line with the conventions, since the benefit can be made conditional on the incapability of self-support of the widow, in accordance with national laws and regulations. However, it must be recalled in this respect, that the supervising committees give careful consideration to the discretion given to the governments regarding the incapability of self-support. The recently tightened rule of entitlement to a benefit only where the pensionable age will be reached within four years, may turn out rather strict.[238]

The personal scope of the survivors' insurance is amply sufficient, covering all employees as well as self-employed persons, where 50 percent coverage of all employees is required by ILO C102 and the ESCC, 80 percent by the ECSS Protocol, and 100 percent by ILO C128 and the Revised Code. As regards the amount of the benefits, the calculation shows that the survivors' pension of a standard beneficiary – a widow with two children – was 67.8 percent of the reference wage in 2008. This percentage is fully sufficient under the ratified instruments, as the prescribed replacement rates vary from 40 percent in ILO C102 and ECSS, to 45 percent in ILO C128 and the ECSS (Protocol), and 65

236 Website of the Ministry of Labour and Social Affairs, pensions.
237 For a detailed description of the international norms regarding survivors' benefits, see section 2.17.
238 For more details on the definition of 'widow', see sections 2.17.1 and 4.13.1.

percent in the Revised Code. Accordingly, the Czech survivors' benefit, granted throughout the contingency, complies with all relevant standards.

Overall, in respect of the death of a breadwinner, the Czech Republic satisfies the obligations of the ratified instruments, and for most part, the non-ratified ones also. The downward impact of the system of adjustment of the benefits to the cost of living does not, as yet, threaten the compliance with the conventions in respect of this contingency.[239]

Summary of matters of compliance and problematic issues

Table IX. Survivors' benefit (Cz) compared with the international standards

The Czech Republic is bound by ECSS and ILO C102				
Survivors' benefit	**ILO C102 (1952) / ECSS (1964)**	**ECSS Protocol (1964)**	**ILO C128 (1967)**	**ECSS Rev. (1990)**
Material scope	✓	✓	✓	✓
Personal scope	✓	✓	✓	✓
Benefit: amount	✓	✓	✓	✓
Benefit: duration	✓	✓	✓	✓
Qualifying periods	✓	✓	✓	✓
Common principles	✓	✓	✓	✓

✓ = compliance of national provisions with the international standards.

3.14 SUMMARY AND CONCLUSIONS

The Velvet Revolution in 1989 marked the end of the socialist Soviet system in Czechoslovakia and the beginning of serious economic and social reforms by the socio-liberal federal government. After the split of the Czechoslovakian federation in 1993, the initial focus on social reform became overshadowed by the political focus on economic progress. The reform of the social security system turned out to be a slow and lengthy process, not only because of economic restraint, but most importantly because of the weak coalition structure of the subsequent Czech governments and a series of minority cabinets. The reform steps that were taken, were motivated by internal factors such as historical background, demographic changes, and economic and political realities for the

239 The replacement rate has fallen from 81.8 percent in 2001, to 67.8 percent in 2008: ILO C102 Report (Cz) 2001–2006, Art. 62.

greater part, but were also influenced by international organisations and developments.

The international influence on social security reform mainly came from the ILO, the Council of Europe and, at a later stage, the European Union. First of all, shortly after regaining independence, the federal government strengthened the ties with the ILO. The ILO was consulted about the Scenario of Social Reform and three social security conventions were ratified. At that point, it was established that the proposed social security benefits would exceed the standards of the ILO conventions. Some years later, in view of EU accession and under pressure of the European Commission to ratify the human rights instruments of the Council of Europe, the Czech government accepted the Social Charter, followed by the ratification of the European Code of Social Security in 2004. Over the years, legislation has been kept in line with the Code and the relevant ILO conventions to a large extent. When the amount of the pensions dropped below the level set by ILO Convention 128, measures were taken to restore compliance within one year. Apart from that, as a principle all bills affecting social security provisions are examined with regard to inconsistencies with the international standards.

In accordance with the Constitution of the Czech Republic, international treaties are part of the Czech legal order and take precedence over national law. However, there is a lack of clarity about the status of many treaties because the Constitutional Court, following the Constitution before the Euro-amendment in 2002, makes a distinction between the legal status of 'normal' international treaties and human rights treaties. This puts the ILO social security conventions and the European Code in an unclear position, which may contribute to the fact that they have never been invoked before a court as yet. In general, these instruments are hardly being used in court proceedings, neither as a legal basis for a complaint, nor as a tool for interpretation of national legislation.

Under Vaclav Havel's presidency, the first federal government attached great value to the voice of civil society. In cooperation with the trade unions and employers representatives, a tripartite Council for Economic and Social Agreement was established for systematic social dialogue in society to maintain social peace. Within this Council, the ILO Working group was created in order to assist the government in fulfilling the obligations following from ILO membership, such as the reporting obligation on the application of the instruments. Under the neoliberal government after the elections of 1992, social dialogue lost value and the Council's competences were curtailed. Over the course of the years, its function has more or less stabilised, but with emphasis on consultation rather than cooperation.

Comparison of the Czech social security provisions with the accepted international standards shows that the Czech Republic complies with these standards in most respects. The *personal scope* of the different schemes stands out as particularly generous. On this point, the Czech regulations generally meet not only the ratified standards, but also the higher standards that are not ratified. Still, two remarks can be made. The first remark is that under the Czech legislation persons are insured on an individual basis, which sometimes causes a tension with the breadwinner concept of the conventions. The second remark concerns family benefits. The European Code does not leave room for a means test in relation to family benefits, whereas the Czech child benefits are only granted to families with an income up to 2.4 times the subsistence level. Thus, in spite of the broad personal scope of the schemes in general, some conflicts with the international standards still exist.

In respect of the *material scope*, a problematic issue is observed in relation to the international standards at one point only, namely, in relation to unemployment benefit. It has been brought up by the CEACR that the interpretation of 'suitable employment' may be too strict, since the Czech labour offices are not obliged to take into account the qualifications and skills of a jobseeker, or the length of their previous employment when offering a job, not even during the first months of unemployment.

With regard to the *level of the benefit*, the comparison shows several conflicts, some of which emerged as a result of economy measures in 2009 and 2010. The old-age pension no longer meets the level of Convention 128, and has even fallen below the minimum level of the European Code. Sickness benefit, unemployment benefit, and child benefit are just above the level of the ratified instruments, and in general, the level of all benefits show a downwards trend. Furthermore, the introduction of patient fees in 2008 has caused a conflict in relation to medical care in the case of pregnancy and childbirth. It has been shown that pregnant women are exempt from fees for the first three prescriptions only, and not from hospital fees, doctors visits, or emergency services, while under the international standards cost-sharing in the case of maternity medical care is not allowed.

The *duration of the different benefits* is largely in line with the ratified standards and, in most cases, also with those of the Protocol to the Code. However, in two cases a minor conflict with the ratified conventions has come to the fore. Firstly, sickness benefit is granted for a period of one year maximum, which is precisely the period required by Convention 130. Under the Czech scheme, if a new case of incapacity for work occurs within one year of the first day of the previous sick leave, the maximum period of one year for sickness benefit includes both periods of sick leave, whereas Convention 130 requires the benefit to be paid for one year

in each case of sickness. A similar problem is mentioned in relation to unemployment benefit, which must be paid for a period of 13 weeks within a period of 12 months according to the Code. In the Czech Republic the benefit is limited to five months within three years, except in the case of an unbroken period of employment of at least six months, in which case a new right arises.

Finally, as regards the *qualifying periods* required under the Czech social security schemes, two remarks can be made. First, since the amendments of the Pension Insurance Act of 2010, a reduced pension is granted only after the completion of 20 years of insurance, whereas both the Code and Convention 128 provide for such benefit to be granted after 15 years of contribution or employment. Secondly, for entitlement to a family benefit, a qualifying period of one year of residence is required for foreigners.[240] However, under the Code only six months of residence may be required.

[240] On the basis of EU coordination rules, this does not apply to citizens of other EU Member States.

CHAPTER 4

COMPARISON OF NATIONAL SOCIAL SECURITY LEGISLATION WITH INTERNATIONAL STANDARDS

– Estonia –

4.1 INTRODUCTION

In this chapter, the Estonian social security system will be examined and compared with the standards of the European Code of Social Security (ECSS), ILO Convention 102 (ILO C102) and, additionally, with the relevant higher standards.[1] In section 4.2, an overview of the Estonian social security system will be given, containing a brief description of the historical developments, the different influences during the reform process, the headlines of the actual social protection, the way of financing and the judicial review of social security issues. In section 4.3, the role of the social partners in social security matters will be discussed in connection with the obligations following from the conventions. Section 4.4 will deal with the effect of the international social security standards on the social security reform process. This will be discussed from different perspectives. The effect through ratification of standards, through the reporting obligations, through legislative practice and the incorporation of the standards into the national legal order, and through judicial practice will subsequently be examined. After that, the Estonian social security legislation will be studied and compared with the international standards. This will be done in the sections 4.5 to 4.13, each section covering one of the social risks, as dealt with in ILO C102. Each section will be concluded with a brief overview of the matters of compliance and the problematic issues pertaining to the risk at stake. In the last section of this chapter, a summary of the findings will be provided.

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[1] The main part of the research for this Chapter was finished mid 2009; the data used are, therefore, generally the most recent data available in that year. Changes in legislation that took place in 2009 and January 2010 that are directly relevant for the comparison with the international standards, are incorporated into the text in later stage. Regulations that became effective after January 2010 are not taken into account. On 1 January 2011, Estonia joined the eurozone. The exchange rate at that date was 15.6 Estonian Kroon for 1 euro.

4.2 SOCIAL SECURITY IN ESTONIA: AN OVERVIEW

4.2.1 HISTORICAL DEVELOPMENTS

Social security until 1991

Social security in Estonia has its roots in the period between the two world wars, when the country had attained its independence in 1918 after a long-lasting annexation to the Russian empire. At that time, one of the first international acts of the Republic of Estonia was to become a member of the League of Nations, and, shortly afterwards, of the ILO. During this period of independence, a pension and health insurance system were created that covered employees and their family members, according to the ideas of Bismarck and in line with the rest of Europe, although the insurance coverage was rather low compared to other European countries.[2] World War II marked the end of Estonia's short-lived autonomy, when it was first invaded by the Russians, then occupied by Germany, and at the end of the war, finally incorporated into the Soviet Union. Interesting in this respect is the fact that the annexation to the Soviet Union has never been *de jure* recognised by many Western countries.[3] Indeed, the Soviet leaders had brought Estonia and the other Baltic countries under Soviet reign through secret protocols and military pressure, which was considered to constitute a violation of basic international law principles, such as sovereignty and self-determination. Therefore, the incorporation of the Baltic States into the Soviet Union was judged to be illegal, and because no legal benefit can be derived from an illegal act, Estonia, Latvia, and Lithuania remained, in principle, separate states in the meaning of 'subjects of international law'. However, interesting as this discourse may be, in practice, all Estonian laws were abolished in favour of the Soviet rules and the Soviet social policy.

The Soviet system provided a state pension insurance based on employment, which made almost everybody entitled to a pension because unemployment was officially non-existent.[4] For collective farmers a separate scheme was established. Pensions were financed from the general state budget, which was funded through contributions paid by the state-owned enterprises. The system was characterised by low pensionable ages (55 for women and 60 for men), early retirement and other privileges for workers in specific occupations, and, in the event of invalidity, privileges for war-veterans and work injury victims. Invalidity pensions for disabled persons in general were not paid, as a result of a complete failure to acknowledge the existence of these persons, who were regarded as not fitting in

[2] Trumm & Ainsaar 2009, p. 155; Ginneken (ed.) 2008, pp. 21–22.
[3] Elsuwege 2008; Elsuwege 2003, pp. 377–378. See also: Vallikivi 2000.
[4] Saar 2008, pp. 424–425; Aidukaite 2006; Leppik & Võrk 2006, p. 29.

with the perception of the ideal state. Benefits were linked to former wages, which, in view of the socialistic ideals, did not display large differences and represented relatively high replacement rates. The latter, together with fixed minimum and maximum pensions, made the system strongly redistributive.

Sickness benefits were paid throughout the contingency, without a waiting period, or until permanent invalidity was determined.[5] The replacement rate depended on the work record of the sick person, amounting to 100 percent after eight years of employment. Unlike the current rules, a minimum and maximum income ceiling was introduced. Typical of the scheme was that workers who were not members of a trade union received only half of the sickness benefit they would receive otherwise.

Maternity benefits were part of family policy and based on citizenship. The benefit amounted to 100 percent of the previous income, with a fixed minimum, for the duration of 112 days, and without the requirement of a qualifying period. As regards family support in general, the emphasis was on services such as health care, education, and housing rather than on cash transfers. There were, nevertheless, lump sum birth grants, and targeted benefits for single mothers and large families. Mothers of ten or more children were awarded the title 'Mother Hero' and were authorised to wear a special badge with a gold star, which gave them several privileges including free public transport, special doctor services, and a supply of food. Paid child care leave was not introduced until 1982; in that year, mothers started to receive a flat rate allowance until their child reached the age of one, which, after some years, was extended to the age of 18 months, due to the pressure of declining fertility rates. Because the state proclaimed employment for all, the system did not provide for unemployment benefits.

From all these different provisions, some general characteristics of the Soviet social policy can be concluded.[6] In the first place, the state was the only actor in the field of social security, both in relation to the financing and the administration. As a result of this exclusive competence, social security benefits were considered as gifts from the state rather than entitlements on the basis of certain qualifying criteria. This, again, made people feel dependent and expectant that the authorities would take care of them. That feeling was strengthened by the fact that employees were not paying any contributions and by the emphasis on indirectly financed social security provisions in the form of low prices for goods and services. Thus, for the employee there was no link at all between work or contributions on the one hand, and benefits on the other. Furthermore, there was no legal system of adjustments of the benefits to price or wage indexes. An increase in benefits was

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5 Ginneken (ed) 2008, p. 22; Aidukaite 2006, pp. 264–266; Trumm 2006, pp. 2–3.

6 Barr 2004, pp. 5–6; Bernotas & Guogis 2003, p. 12.

decreed by the government on an ad hoc basis, and was emphasised as being a donation rather than a right. In respect of judicial review, disputes were mainly settled at the administrative level and not in court. A final characteristic was the involvement of the trade unions in the record keeping of insured persons as state institutions. The concept of independent unions advocating workers' rights, as known in western democracies, did not exist in the Soviet Union.

Although for the purpose of this study the Soviet era is described as a single period, in reality it knew periods of strict centralised control, as well as of relatively moderate political liberalisation. In 1985, in order to boost the weak economy, Gorbachev started his *perestroika,* an attempt to restructure the Soviet system, coupled with *glasnost*, a more open attitude towards flaws of communism in the past. A side-effect of his policy was a strong rise in nationalism in many Soviet states, not least in Estonia, leading to the collapse of the Soviet Union. In May 1991 the Supreme Soviet, which was the Estonian Parliament at the time, proclaimed the restoration of the independent Republic of Estonia, both *de jure* and *de facto*. This act was promptly followed by broad international recognition, leaving Moscow no other choice than accept the sovereignty of Estonia (and the other Baltic States) in September 1991.

After the revolution: 1991 onwards

The newly elected right wing government, established in September 1992, faced the task of rebuilding the democratic republic in all its aspects. This was not a simple task, all the more since the government consisted of very young members. The first Prime Minister, Mart Laar, was 32 years old, and many ministers were even younger. As Laar pointed out later: 'Like other young people, we did not know what was possible and what was not – so we did impossible things.'[7] Yet, this government faced the challenge of transforming a centrally planned socialist country into a modern democracy with an open market economy. The rapid introduction of Estonia's own currency in 1992, combined with large-scale privatisation and strict state budget control, marked the beginning of radical economic reform.[8] In the first flush of victory, people expected their living standards to rise quickly, and high standards were set. Unlike the Czech Republic, where left and right wing coalitions ruled in succession, Estonia had stable politics with the majority of voters embracing neo-liberal ideology. Higher living standards and greater individual freedom – values people had been deprived from for so many years – were considered top priority. It has been noted that many

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[7] Laar 2007, p. 4. He also mentioned in an interview with the Brussels Journal that: 'I am not an economist. I am a practical man. I had read only one book on economics. This was Milton Friedman's "Free to choose"', Laar 2005.

[8] Trumm & Ainsaar 2009, pp. 155–157; Saar 2008, p. 425.

Members of Parliament in these first years of independence had held a position in the former Soviet power structure, but this did not affect the stable neo-liberal sphere in politics, since even the left side of the political spectrum was (and is) rather rightist and strongly supported a free market economy.[9] Clearly, Estonia was determined to instantly free itself from the legacy of strict state control and extreme paternalism of the past and to devote itself to Western capitalism.

As a result of the focus on economic growth, social policy was given less attention.[10] It was thought that the feasibility of an extensive social security system with high-income replacement rates would depend on the success of economic reform and investments. 'First get rich, than get social' was a generally accepted credo in politics. Furthermore, it was presumed that economic growth would automatically lead to a reduction in poverty. The redistribution of resources through the introduction of universal elements in the social security system was not thought expedient by the right wing coalition parties. On the contrary, with the initiation of an undifferentiated proportional tax system[11] and removal of subsidies to former state companies, the government sought to create equal opportunities for everybody, leaving the responsibility for developing their capacities to the individuals. The speed of huge economic, political, and social changes, however, led to a decrease in the well-being of a large number of citizens. As a consequence, social policy became a somewhat more important issue during the late 1990s, but a clear overall view on social reform and an explicit consensus on the principles and goals of the entire social security system that had to be created, was lacking.[12] Instead, measures were taken in the shadow of the economic reform process and were directed by conflicting interests between social and political actors. For these reasons, the outcomes of social reforms have been disappointing for many people, especially for those who have not been able to keep up with the rapid changing society. It has been shown that the income differences in Estonia have risen sharply, with the elder cohort being 'the losers in the process of social transformation'.[13] The increasing income inequality and very low living standard of large groups of citizens have been identified as drawbacks of Estonia's economic success story.[14] Growing discontent with the social results of the reform process, especially with the very low level of minimum benefits, has led to increasing public and political debate on these issues.

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9 Adam, Kristan, Tomšič 2009, pp. 69–70.

10 Trumm & Ainsaar 2009, pp. 155–157; Saar 2008, pp. 425–426; Trumm 2006, p. 3; Trumm 2005, pp. 17–22; Bernotas & Guogis 2003, pp. 8–11; Lauristin 2003, pp. 2–3; Toots 2002, p. 2.

11 A proportional tax system, or flat rate tax, imposes the same percentage rate of taxation on everyone, regardless of income.

12 Only regarding pension privatisation was a longstanding but isolated consensus achieved. See, for instance: Müller 2006, p. 408.

13 Saar 2008, p. 437.

14 Trumm & Ainsaar 2009; Saar 2008; Bernotas & Guogis 2003; Lauristin 2003.

4.2.2 INTERNATIONAL INFLUENCES ON THE REFORM PROCESS

International influences verses internal factors

The impact of global actors on social policy in the new Republic of Estonia has been under scrutiny in several studies, although these studies are mostly focused on pension reform only.[15] In general, similar to the case of the Czech Republic, the influence of international organisations is put into perspective by Estonian scholars and policy makers.[16] Internal factors are highlighted as the main steering elements during the reform process, including the inter-war and Soviet legacies, demographic factors (such as ageing, declining birth rates, life expectancy, and ethnic minorities), the economic situation, labour market developments, social changes, and right wing governance. Still, different global actors have undeniably marked social reform in Estonia in several respects. The global financial institutions left their footprint on the pension system in particular, while the ILO and the Council of Europe have played an important role in the re-design of the entire social security system, a role that has been recognised in academic studies to date.

World Bank and International Monetary Fund

In the above-mentioned studies, it has been found by most authors that the World Bank (WB) and the International Monetary Fund (IMF) have determined the current pension system in Estonia, as in many other post-communist states. During the first years of independence, the government held regular consultations with the WB on economic policy and, in the late 1990s, also on some social policy issues. Toots recalls in this respect that the Estonian government established a Commission on Social Security Reform in 1997 to develop the new pension concept. He underlines that two of the five Commission members had strong ties with the WB, and one with the CoE.[17] Thus, the WB managed to use loyal national experts for policy implementation. Not surprisingly, in the Commission's Conceptual Framework of Pension Reform report, some clear influences of World Bank documents were to be found.[18] However, the

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15 Orenstein 2008, pp. 37–39; Leppik 2006, pp. 99–103; Trumm 2006, pp. 2–3; Kulu & Reiljan 2004; Tavits 2003; Agartan 2004, pp. 6–7; Toots 2002.

16 Leppik 2006, p. 99; Trumm 2006, p. 2; Tavits 2003, p. 655; information obtained by experts. Lindeman, Principal Analyst at the OECD and a former Senior Advisor of the WB, has also noted in relation to Estonia that 'the eventual three-pillar reform was a home grown product, although advice was occasionally sought from the World Bank and others.' Lindeman 2004, p. 12.

17 Toots 2002, pp. 2–3 (including footnote 2), 7–8.

18 Also: Leppik 2006, p. 99.

Commission did not copy all the Bank's guidelines, but included, for example, instead of a flat rate or means tested pension, the income related point system of the German pension scheme in its proposals. Moreover, it has been noted that the Commission was fundamentally against financial intervention of the World Bank, and that the Estonian government had rejected resources as well as Swedish expertise offered by the World Bank to assist in pension reform, because any dependency on international organisations was to be avoided.[19] Nevertheless, a seminar on pension reform policy organised by the WB was held in 1999.[20]

Simultaneously, from the early 1990s, the government held meetings with the IMF, on monetary policy especially.[21] The IMF arranged stand-by credits in the case of unexpected financial deficits, however Estonia has not, or has only incidentally, taken out such credits. In 1997 the IMF – known for its belief in private pension arrangements at that time – urged the government to speed up with privatisation of the pension system.[22] Remarkable indeed, the IMF shifted its position in 2000, in view of the high transition costs that many post-communist countries were facing. Accordingly, the Estonian government was advised to limit the size of the second pension pillar that just had been established along the lines of the IMF ideas. This put the government in the strange position that it had to defend the system to an organisation that had initially contributed to its design.

It may be concluded that the WB, and to a lesser extent the IMF, indeed influenced the set up of the three pillar pension system. At the same time, because Estonia had not taken any loans, it was free to adopt one idea and leave out another other. It also has to be borne in mind that the American neoliberal approach of these organisations closely responded to the rightist political sphere and Estonia's obvious commitment towards free market economy. This interplay of neoliberal approaches puts the influence of the WB into perspective, since the receptivity for the World Bank's input sprang from internal factors, primarily the dissociation from the socialist past.

International Labour Organization

After Estonia had restored its membership to the ILO in 1992 as a logical step following the renewed association with the United Nations, it was this global actor that was consulted first on social reform. Since the involvement of the WB and the IMF was initially focused on monetary reform and budget balancing

[19] Tavits 2003, p. 655.
[20] World Bank 1999.
[21] Leppik 2006, p. 102; Toots 2002, p. 6.
[22] Leppik 2006, p. 103.

only, the ILO was the obvious organisation to apply to with social issues. It is true, however, that in the early 1990s social security did not have priority. The practical support by the ILO and several seminars with ILO experts mainly concerned labour reform and tripartism, rather than social security reform. In fact, new labour law was heavily based on ILO conventions.[23] Cases in point are the Trade Unions Act, based on the Freedom of Association Conventions, and the Employee Trustee Act, based on ILO C135 and Recommendation 143, both on Workers Representatives.

Although social security was not high on the political agenda, the topic was not completely overlooked either, which is demonstrated by the fact that Estonia celebrated the ILO's 75th anniversary with an international conference on 'Social Security and Market Economy' in April 1994.[24] This conference explicitly underlined the importance of a sound social protection system and highlighted that after 75 years, social security had still remained part of the core ILO mandate. Discussions during this conference covered the organisation and financing of social protection, tripartism in social security, unemployment insurance, and employment problems of vulnerable groups. At the end of the conference, an ILO delegate and the Minister of Social Affairs signed a letter of intent on cooperation, which clearly showed Estonia's open attitude towards the ILO, also on social security questions. It has been argued in this respect that '[t]he main role of ILO in Estonian social policy was to strengthen the European way of social thinking and to soften the influence of US based monetary organisations.'[25] This may be true in relation to the pension reform, but in other areas such as labour law and unemployment insurance the impact of ILO ideas was more concrete than that.

European Union and Council of Europe

In the course of the late 1990s, the role of the ILO in Estonia significantly decreased. This was mainly due to the fact that the political focus shifted to Europe after the application to join the European Union (EU) in November 1995. However, it must be stressed in this respect that EU interference in the social field was limited to non-discrimination and coordination rules and, in a 'softer' way, labour policy.[26] Although social security was not a topic on the agenda, the Copenhagen accession criteria did include the obligation to guarantee human rights. In the annual reports on progress towards accession, the EU Commission

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23 Muda 1997; information obtained from experts; as an example, between 1992 and 1996 Estonia ratified eight labour conventions.
24 ILO 1994.
25 Toots 2002, p. 9.
26 For EU influence on labour policy and social policy in general during the accession period, see Barr 2004; Muda 1997; Muda 1996.

monitored which human rights conventions were ratified, and explicitly noted each year that the European Social Charter (ESC) – recognised as a human rights instrument – had not been ratified.[27] Estonia had already become a member of the Council of Europe (CoE) in 1993, and had consequently ratified the European Convention on Human Rights in 1996, showing its orientation towards Western Europe. A next step would be to ratify the ESC, which was heavily advocated by the CoE and considered a positive sign in view of EU accession. And, of course, since the EC Treaty referred to the ESC, ratification would show a readiness for the EU in a social respect. It should be kept in mind, however, that the ESC as such was not part of the *acquis communautaire*, and therefore its ratification could not be imposed as a requirement for EU membership. In spite of this, political pressure towards ratification was clearly felt.[28] As a result, the government from then on thought it expedient to concentrate on European instruments rather than on ILO standards. In this context, in 2000, the government chose to ratify the revised version of the Social Charter (ESC (Revised)), requiring compliance with the European Code of Social Security (ECSS), instead of with ILO Convention 102.

At the time of ratification of the ESC, it was not evident that the Estonian social security system complied with the ECSS. In fact, it was established that the rules on unemployment, old age, invalidity, and employment injury were not sufficient to meet its standards.[29] A possibility would have been to exclude Article 12 (dealing with social security) from ratification in order to avoid getting bound by the standards of the ECSS. Although this was considered as an option, it was not thought politically feasible.[30] As a matter of fact, ratification of the ESC (Revised) was made an issue in the elections, especially directed to the older population, since pensions would have to be raised in order to comply with Article 12. Exclusion of this provision would obviously have turned the older electorate, which would benefit from the increased pensions, against the ruling government. In general, the attitude of the government was rather ambiguous in respect of social security. On the one hand, as mentioned above, a clear overall plan was lacking, but on the other hand, a sufficient social security system was found necessary in view of EU accession. Therefore, it was decided to prepare for ratification of the ECSS. Because the Code gives clear and concrete legal norms for the different social security schemes, it could serve as a benchmark during the subsequent reform steps in relation to the whole range of social security provisions.[31] Accordingly, the unemployment insurance scheme was created in order to comply with the ECSS, and the levels of the pensions were also increased

[27] European Commission 1999, p. 12.
[28] Schoukens 2007, pp. 74, 90; Trumm 2006, p. 3; ILO 2002; information obtained from experts.
[29] ESCR Report (Ee) 2001–2002, p. 195; Leppik 1999.
[30] Leppik 2006, p. 100; information obtained from experts.
[31] Leppik 2001, pp. 7–9.

to be able to meet its requirements. The creation of an unemployment insurance was also stimulated because the absence of such an insurance scheme could be problematic in view of the coordination rules of the European Union.[32] Another specific measure that was taken to meet the obligations of the Code was the introduction of a fixed indexation formula for pensions. As a result of these changes, the government was able to ratify the ECSS in 2004, including the parts on pensions and unemployment. The only remaining deficiency was the absence of an employment injury scheme, and therefore Part VI on Employment Injury was excluded from ratification.

Considering all this, it may be concluded that the ECSS, and indirectly, ILO C102, have significantly, and in a very concrete way, influenced the Estonian social security reform, whereas the direct EU influence in this field was limited. On the other hand, the underlying objective to join the EU should be recognised as the driving force for ratification of the ESC, which again paved the way for acceptance of the Code.

4.2.3 MAIN FEATURES OF THE SOCIAL SECURITY SYSTEM

Social security as a fundamental right

Social rights in Estonia find their legal basis in the Constitution that was adopted shortly after the re-establishment of the independent Republic of Estonia. Article 28 of the Constitution reads:[33]

> Everyone has the right to the protection of health.
>
> An Estonian citizen has the right to state assistance in the case of old age, incapacity for work, loss of a provider, or need. The categories and extent of assistance, and the conditions and procedure for the receipt of assistance shall be provided by law.
>
> […]
>
> Families with many children and persons with disabilities shall be under the special care of the state and local governments.

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32 Tavits 1998, p. 9.

33 The Constitution of the Republic of Estonia, passed by a referendum held on 28 June 1992, entered into force 3 July 1992, Art. 28. For comments on the right to the protection of health, see Annus & Nõmper 2002.

It must be recognised that this formulation does not reflect a strong fundamental right to social security. The reference to state assistance implies a subsidiary task for the government and does not include the right to social insurance.[34] On the basis of these constitutional rights, five non-contributory schemes have been set up, some targeted and some universal: state unemployment allowances, state family benefits, social benefits for disabled people, and state funeral benefits. Additionally, three insurance schemes have been developed: health care insurance, a pension scheme, and an unemployment insurance scheme.[35] Estonia does not have a separate employment injury scheme, although the establishment of such a scheme has been under discussion for quite a number of years.[36] In sum, minimum income is guaranteed under the subsistence benefit scheme for Estonian residents whose family income after payment of fixed housing expenses does not reach the subsistence level established by Parliament.

Health care insurance

Health care insurance covers both benefits in kind and in cash: medical care, temporary incapacity for work benefits and paid maternity leave. In principle, the insurance is work-related, the contributions to be paid by employers and self-employed persons. However, the legislature has pointed out quite a number of categories of non-working persons to be covered as well, which makes the overall coverage of health insurance almost general. Insured persons have the right to choose their own family doctor, but they need to register themselves with this doctor, and registration cannot be changed until the next calendar year. In general, access to specialists is possible only with referral from the family doctor. Furthermore, patients are subject to co-payment for most medical services and pharmaceuticals. Cash benefits include sick pay on the basis of a medical certificate issued by the treating doctor, and care benefits for persons nursing a sick family member for up to 14 days. Next to this, a cash benefit is provided in the case of temporary incapacity for work due to pregnancy or childbirth. Finally, under the health insurance scheme, an adoption benefit is granted.

Pension scheme

The pension scheme consists of three pillars, the first pillar comprising a public insurance scheme for old age, invalidity and survivors' pensions. The second and third pillar cover supplementary private schemes for old age only. The first pillar pensions primarily include an employment-related pension, and secondly a flat

[34] See also Leppik and Võrk 2006, p. 33.
[35] For an overview of the Estonian social security system in English, see the website of the Ministry of Social Affairs; Trumm 2006, pp. 32–42; Leppik & Kruuda 2003; Pieters 2003, pp. 44–59; MISSOC (Ee).
[36] Nurmela & Karu 2009; Koppel & Aaviksoo 2007; Leppik 1999, p. 1.

rate national pension that serves as a minimum income for persons who are not entitled to a work-related benefit. The work-related pension, however, also consists of a flat rate element, the so-called 'base amount', which is supplemented with the work-related part. Due to pension reform, the work-related part is defined in two different ways: until 1998 this component was based on the number of service years of the insured person, and since 1998 it has been based on the total amount of paid contributions. Thus, up to 1998 each service year represents a fictitious income that is the same for everyone, while as from 1999, the real income serves as a calculation base. Both the national pension and the flat rate base amount, as well as the length of service component, constitute the solidarity element in the public pension system, providing redistribution from higher-income earners to lower-income earners. With the shift from a length of service part to an insurance component, the solidarity element obviously becomes smaller while the differentiation of pension amounts increases, all the more since there is no maximum pension.[37] In principle, all pensions are subject to income tax, but the tax exemption for pensions is set at three times the normal exemption, which means that the majority of pensions are not taxed in practice.[38]

Unemployment benefits

The unemployment insurance has existed since 2002 and provides an earnings-related benefit in the event of unemployment, with specific rules relating to insolvency of employers. For unemployed persons who do not qualify for the unemployment insurance benefit, there is the very modest means tested non-contributory unemployment allowance, designed to provide assistance in the case of insufficient economic resources. In fact, this allowance is only slightly higher than the subsistence level and constitutes not even one third of the fixed minimum wage.[39]

Family benefits

The Estonian State Family Benefits Act distinguishes nine different benefits, namely: childbirth grant, adoption grant, child benefit, child care benefit, benefit for a parent raising seven or more children, single parent child benefit, benefit for a child in guardianship or in foster care, benefit for the children of conscripts, and independent life grant.[40] All benefits are aimed at supporting families by

[37] Leppik & Võrk 2006, pp. 61–70; Ministry of Social Affairs (Ee) 2005A, p. 18; Kulu & Reiljan 2004, pp. 30–31; Raudla & Staehr 2003, p. 81.
[38] Leppik & Kruuda 2003, pp. 30, 33.
[39] Based on data of 2007.
[40] Until 1 January 2009 benefits also included a school allowance.

ensuring partial reimbursement of expenses relating to care, raising and education of the children.

Disability benefits

Apart from the pension scheme, disability protection is provided under the Social Benefits for Disabled Persons Act as a form of social assistance, however the benefits are not income tested. The purpose of the seven different benefits is to reinforce the ability of disabled persons to cope independently, and to support social integration and equal opportunities through partial compensation for the additional expenses due to the disability.[41] Benefits include, for example, the disabled child allowance, caregivers' allowance, and rehabilitation allowance.

Social assistance

In conclusion, there is the subsistence benefit scheme for Estonian residents whose income is below the subsistence level established by Parliament. The amount of the benefit depends on household composition and is calculated as the difference between the subsistence level and the disposable income of the household.[42] The benefit may be refused to a person of working age who does not work or study and who has repeatedly refused an offer of suitable work.

4.2.4 ADMINISTRATION AND FINANCING

Administration

The Ministry of Social Affairs is the competent body in the field of social security, which also includes health care.[43] As a matter of fact, the Ministry as it stands now was formed in 1993, through the merging of the former Ministry of Health, the Ministry of Labour and the Ministry of Social Welfare. Consequently, the Ministry is responsible for the coordination and supervision of institutions that carry out the administration of all branches of social protection, as well as for the planning of financial resources necessary to finance the different benefit systems. There are three institutions involved in the administration of the social protection schemes. Firstly, there is the Social Insurance Board (Sotsiaalkindlustusamet), which administers the pension insurance (covering old age, invalidity, survivors', and national pension), family benefits, social

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41 Social Benefits for Disabled Persons Act, passed on 27 January 1999, entered into force 1 January 2000, Art. 1 (2); Trumm 2006, p. 38.

42 In 2007 the subsistence minimum was fixed at EEK 2,341.

43 Leppik & Kruuda 2003, pp. 19–21; 104; website of the Ministry of Social Affairs.

benefits for disabled persons, and funeral grants. Secondly, the Estonian Health Insurance Fund (Eesti Haigekassa) manages the health insurance scheme through seven regional branches. Thirdly, the Estonian Unemployment Insurance Fund (Eesti Töötukassa) runs the unemployment insurance scheme. Its tasks include the registration of jobseekers, the provision of employment services to employers and jobseekers, and the payment of state unemployment allowances and unemployment insurance benefits to the unemployed. The latter two organisations are autonomous public legal bodies operating in the area of responsibility of the Ministry of Social Affairs. None of the three institutions refer on their websites or in their publications to the ECSS. On the website of the Ministry, however, the obligations arising from international social security agreements are mentioned, such as preparing and participating in international cooperation, for example, in the work of the committees of the European Union and the Council of Europe, and the reporting obligations on the application of the ESC and the ECSS.

Financing

The pension and health insurance schemes are primarily financed by contributions paid by the employer, the self-employed persons, and, on behalf of specific categories of non-working persons, by the state.[44] The contributions consist of 33 percent of the employee's gross wage, to be paid solely by the employer or the self-employed, or of a fixed amount established by the government in the event of contributions paid by the state. It must be noted that in Estonia the insurance contributions are called 'social tax' and collected by the Tax Office. The Tax Office, however, deposits these amounts into the separate insurance funds that are kept strictly separate from the state budget, and therefore they are actually to be considered as insurance contributions. In this chapter the term 'social tax' will be used according to the Estonian practice. Of the social tax, 20 percent is allocated to the pension insurance, and 13 percent to the health insurance. Certain costs in relation to the pension insurance are paid from the state budget, such as the administrative costs and the national pensions. Some costs regarding health care that fall outside the scope of the health insurance, such as emergency care for uninsured persons, ambulance services, and public health programmes, are also financed from the state budget. Unemployment insurance is financed from compulsory contributions paid by both employees and employers. In conclusion, family benefits, state unemployment allowances, social benefits for disabled persons, and social subsistence benefits are financed from the state budget. All contributory benefits are subject to a non-progressive

44 Leppik & Kruuda 2003, pp. 22–26, 111–116; MISSOC (Ee), 2007.

income tax of 21 percent, with an annual basic exemption of EEK 27.000 (2008), while the non-contributory benefits are not taxed.[45]

4.2.5 JUDICIAL REVIEW OF SOCIAL SECURITY MATTERS

Disputes on administrative acts are primarily governed by the Administrative Procedure Act.[46] If a person is dissatisfied with an administrative decision, an objection shall be filed with the administrative body that issued the challenged decision within thirty days. Subsequently, the applicant (and third persons) may file an action against the decision of the administrative body with one of the two administrative courts.[47] However, this action does not prevent the execution or issue of the administrative act at stake. The second level courts are the so-called circuit courts, of which two of the three courts deal with administrative cases. Finally, parties and third persons have the right to appeal against a judgment of a circuit court to the Supreme Court in case the circuit court has applied a provision of substantive law incorrectly or has materially violated a provision of court procedure.[48]

4.3 THE ROLE OF THE SOCIAL PARTNERS

4.3.1 DEVELOPMENT OF THE ESTONIAN SOCIAL DIALOGUE

Transition from state unions to trade unions

Similar to the Czech Republic, the role of the trade unions under the Soviet regime was to communicate the ideas and wishes of the Communist Party to the workers, and, to monitor on behalf of the Party, productivity, behaviour and morale at the workplace.[49] Additionally, the trade unions were liable to manage the social security funds and to pay out the different benefits. Because the unions were important tools for the Party to implement the communist programmes, membership of a union was obligatory, at least in practice. At the end of the 1980s, influenced by Gorbachev's *glasnost*, the trade unions started to shake off

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45 The exchange rate of the Estonian Kroon on 1 January 2011, when Estonia joined the eurozone, was €1.00 to EEK 15.64.

46 Administrative Procedure Act, passed on 6 June 2001, entered into force 1 January 2002. An administrative act includes a delay or omission of an act, Art. 72(3).

47 Code of Administrative Court Procedure Act, passed on 25 February 1999, entered into force 1 January 2000, Art. 3. See also Ministry of Justice 2005; Estonian Institute 2002.

48 Code of Administrative Court Procedure Act, Art. 52.

49 Muda 2009, p. 117; Philips 2006, p. 1; Grosse & Sootla 2005, pp. 9–11; Philips & Eamets 2003.

their role as representatives and executive organs of the Soviet power. They left the All-Union Central Council of Trade Unions – the umbrella organisation for the branch unions in the Soviet Union – and created the autonomous Confederation of Estonian Trade Unions in April 1990. At the founding congress, new principles for future activities and an action plan were adopted. The main aim of the independent trade unions would be to represent and protect the interests of workers through tripartite negotiations, active participation in employment policy, and through consulting and training their members. Indeed, the first national agreement between the new Confederation and the government, which dealt with social security, was already signed in February 1991, three months before Parliament would proclaim the independence of the Estonian Republic.[50] Another important action of the newly established Confederation was to take the initiative to the government to become a member of the ILO.

The transition from state union to trade union from the inside out may seem very successful, and in some ways it was. The existing unions were not disbanded, but obtained their autonomy and renewed their reason for existence. However, the reverse side of a transition without a clear breaking point is that the implementation of the new paradigms had to be secured by the same persons who had previously worked for the Soviet regime and who had been formed by the Communist vision on workers' representation.[51] In a country where the vast majority of people had turned their backs on everything that reminded them of the Soviet past, and where they were not willing to join any movement, the lack of a visibly fresh start is likely to have contributed to confusion about the role of the trade unions and, for many people, to an attitude of hostility. Two decades later, the unions are still associated with the Communist Party and party dictation. Moreover, many people are still not willing to commit themselves to any movement, let alone to pay contributions. As a result, union density has drastically declined from about 90.6 percent in 1991, to 31.6 percent in 1995.[52] Since then, it has decreased steadily, a trend that has been intensified by the recent economic crisis. In 2009 union membership amounted to only 7.6 percent.[53]

Procedures of social dialogue

In spite of this downward trend and the rather weak position of the trade unions, social dialogue has still developed after the transition period. First of all, annual tripartite negotiations are held at a national level on issues such as minimum wage, social partnership, job creation, and social security. From 1992 until 2003,

[50] Philips 2006, p. 1.
[51] Grosse & Sootla 2005, p. 10.
[52] Eamets 2008, p. 62, figures relate to union membership as percentage of all employees.
[53] Nurmela 2009A.

sixteen tripartite collective agreements were concluded, most importantly on minimum wages.[54] From the employers' side, the only employers' organisation, which covers 32 branch associations and 33 large enterprises, takes part in social dialogue. In 2004, the relationship between the government and the social partners dampened because of a conflict about the unemployment insurance contributions.[55] Since then, it seems that the interest of the government in social dialogue has waned, and no national agreements have been concluded since.[56] The Regulation of Tripartite Consultations prescribing that 'the schedule of subsequent consultations was settled at the previous consultation and the decisions are made on the principle of consensus' provides no guarantee for improvement on this point.[57] The second and more common form of social dialogue takes place through bipartite negotiations, mostly at enterprise level but also at national level. Coverage of enterprise agreements is not very high – in the private sector around 13 percent of the employees in 2007.[58] Accurate overall information on collective agreements is lacking, as is a surveillance or inspection system. As a result, these agreements are often treated as voluntary instruments and observance of the agreements is rather facultative.[59]

Apart from collective agreements, cooperation between the social partners takes place in tripartite councils and several boards.[60] Two important boards in the field of social security, namely, the supervisory boards of the Health Insurance Fund and the Unemployment Insurance Fund, are positively valued in terms of social dialogue.[61] The most prominent tripartite council is the Social and Economic Council of Estonia, established in 1999 by the Minister of Social Affairs on the basis of a ministerial regulation. It was meant to be an expert network for analysing social and employment policy developments and consulting the government and social partners on tripartite and employment issues.[62] However, the impact of the Council has been limited, which is reflected by the fact that the Council does not have any decision-making power, its function is not clearly defined, and the management is entrusted to an official of the Ministry of Social Affairs who does not have any political

[54] Kallaste 2003, p. 23.
[55] Philips & Eamets 2005.
[56] Karu & Nurmela 2008; Karu & Nurmela 2007; information obtained from the Estonian Trade Union Confederation (EAKL). In 2008, an agreement was concluded on the new Employment Contract Act, but under pressure from the economic recession, the government failed to keep this agreement.
[57] Philips 2006, p. 6.
[58] Eurofound 2008.
[59] Nurmela 2009B, p. 4; Nurmela & Karu 2009, p. 2.
[60] Kurtyka 2006, pp. 26–27; Kallaste 2003; Rychly & Pritzer 2003.
[61] Grosse & Sootla 2005, pp. 18–19.
[62] Eamets 2008, pp. 64–65; Philips 2006; Grosse & Sootla 2005, pp. 17–18; Kallaste 2003, pp. 10, 20.

influence. Moreover, it was reported in 2009 that the Council had not met since 2004.[63]

Another tripartite Council particularly relevant for this study is the ILO Council, which was actually the first tripartite council in Estonia, already established in May 1992, a few months after the membership of the ILO had been restored.[64] The objective of the Council is to assist the government in fulfilling the obligations following from the ILO membership, for instance, by monitoring and discussing ILO documents, principles and conventions, to exchange information with the ILO, to assess legislation on conformity with the ratified instruments, and to assist with the reporting obligations on the application of conventions, including the ESC and ECSS of the Council of Europe. Again, the Council is a purely advisory and consultative body, without any competence to take binding decisions. Typical of the position of the Council is that in relation to a study on tripartite commissions in Estonia, none of the interviewed persons (who all had high positions in the sphere of social dialogue) mentioned its existence.[65] Also typical is the fact that the Council meets on an irregular basis and was not in session in 2007 and 2008.[66] It seems fair to conclude that the purely informative and consultative councils are not very influential.

4.3.2 PARTICIPATION RELATING TO INTERNATIONAL SOCIAL SECURITY STANDARDS

Considering the ill-founded position of the ILO Council and its weak status in practice, it is not surprising that participation of the social partners in obligations following from membership of the ILO and the CoE, and from the ratified social security instruments, is limited.[67] One of the tasks of the Council is to assess the possibility and expediency of ratifying newly adopted, as well as longer existing, instruments in the field of labour and social security. Without a unanimous proposition of the Council, the government will not decide to prepare a bill on ratification of the treaty at stake. On the other hand, such a proposition will not guarantee positive action of the government. It goes without saying that when the Council does not meet for several years, new ratifications are not to be expected. Secondly, there are the reports on the application of the ILO

63 Rannanpaa 2009.
64 Philips 2006; Philips & Eamets 2005, p. 2; Kallaste 2003, p. 10.
65 Grosse & Sootla 2005, p. 18.
66 Information obtained from members of the ILO Council in September 2008.
67 Since there is no written information on these issues, this paragraph is exclusively based on information obtained from experts (from the Trade Union Confederation, Employers Organisation, Ministry of Social Affairs, Parliamentary Social Committee).

Conventions and the CoE instruments. The government is obliged to distribute copies of the reports to the social partners to enable them to express their opinions and comments. It is not clear whether this happens systematically, but in any case it has been confirmed that annual reports on the ECSS have been received by the social partners. However, they are not subject to discussion within the ILO Council, and both the trade union confederation and employers' organisation have reported that they hardly make use of their right to comment on the reports. The trade unions, because of a constant lack of time caused by a shortage of financial resources, and the employers, because application of the Code is not really an area of their interest. In general, the ILO convention on labour issues, particularly on the right to organise and collective bargaining, is more the focus of attention of the social partners than social security instruments. In this respect, it is found that the government does not take the comments and proposals of the social partners seriously unless it fits in with the government's social policy.

4.4 THE INTERNATIONAL SOCIAL SECURITY STANDARDS WITHIN THE ESTONIAN LEGAL SYSTEM

4.4.1 RATIFICATION OF INTERNATIONAL STANDARDS

Estonia became a member of the ILO in 1921, at the start of the first period of independence. During that period 21 conventions were ratified, all in the field of labour law.[68] In 1992, shortly after restoration of independence, the country rejoined the ILO. Subsequently, from 1992 to 1996, eight conventions were ratified of which five were core conventions, namely on forced labour, freedom of association and the right to collective bargaining, and on equal remuneration. Then, in the period of 2000 to 2007, another eight conventions were accepted, including C138 on Minimum Age that involved the *ipso jure* denunciation of four older conventions on minimum age of specific groups of workers. One convention was denounced in 2007 without ratification of the more modern equivalent. Thus, Estonia is currently bound by 32 ILO labour conventions, which is not much in relation to other EU Member States.[69]

As regards the CoE instruments, it has been mentioned above that Estonia ratified the ESC (Revised) in 2000, and included in its ratification Article 12 on

68 ILOLEX; For a comparison of Estonian labour law with ILO conventions, see: Muda 1997; Muda 1996.

69 For a ratification chart, see the ILO website.

social security. The choice for the revised Charter was not specifically inspired by its new rights compared to the ESC of 1964, as Estonia left aside the most far-reaching of them – namely the right to protection against poverty and social exclusion, and the right to housing – and it also did not accept the collective complaints procedure. Rather, it sprang from the idea that the ESC (Revised) was a more modern European instrument that would better connect with the EU requirements.[70] Another argument was that the revised Charter requires the social security system to meet the standards of the ECSS instead of ILO C102. The Code was considered more in line with the European approach towards social security, whereas the ILO Convention was found rather outdated. Furthermore, in general, the social security conventions were not well-known, and it was thought that global rules on social security, to be applied in developing countries as well as in European countries, would not suit an acceding member of the EU. Apparently the fact that the ECSS is almost a copy of ILO C102 could not change this perception.

As a result of foregoing deliberations, the ECSS was signed in the same year the ESC (Revised) was ratified. At that time, however, it was established that the rules on unemployment, old age, invalidity, and employment injury, were not in compliance with the ECSS requirements.[71] Although, according to the assessment, immediate ratification would have been possible on the basis of the minimum number of parts that have to be accepted, the government postponed its ratification for two reasons.[72] In the first place, it was politically undesirable to ratify the ECSS only on the basis of the minimum number of parts in consideration of EU accession, as well as in view of the previous election promises. Secondly, as a result of the delay, extra reporting obligations on the non-accepted parts were avoided. Meanwhile, the government had the time to bring the social security system into compliance with the ECSS by introducing a fixed indexation formula (2000/2002), setting up an unemployment insurance (2002), annually increasing the pension benefits (as of 2002), and by exempting pregnant women (from the 12th week of pregnancy) from fees for home visits by doctors. As a result, Estonia was ready for a generous ratification of the ECSS in 2004, with the only exemption being the part on employment injury. Thus, in respect of the nine social risks, the government is bound by the following standards:

70 Information obtained from experts.
71 See section 2.2.
72 Information obtained from experts.

Table X. Social security standards ratified by Estonia

Medical care	ECSS, Part II
Sickness benefit	ECSS, Part III
Unemployment benefit	ECSS, Part IV
Old-age benefit	ECSS, Part V
Employment injury benefit	–
Family benefit	ECSS, Part VII
Maternity benefit	ECSS, Part VIII
Invalidity benefit	ECSS, Part IX
Survivors' benefit	ECSS, Part X

As a matter of fact, since Estonia was able to fulfil the obligations of the ECSS, it would have been possible to additionally ratify ILO C102 and possibly also one or two social security conventions providing higher standards, such as C130 on medical care or C183 on maternity. However, this was not considered expedient. It has been stressed in this respect by several parties concerned, that the importance of the ILO, as such, is beyond dispute, but that practicalities are the main obstacles to the ratification of specific instruments. Most importantly, the burden of the reporting obligations is found too heavy. Because Estonia is only a small country, the personnel capacity of the relevant ministries is not sufficient to cope with the additional paperwork. As an example, in the early 1990s, when Estonia became part of a whole list of UN conventions, the responsible departments had proved to be unable to meet the attendant reporting obligations. The submission of the first report on the Convention of the Right of the Child, due in 1993, was only completed in 2002. This embarrassing experience has made the government more cautious in taking up new international obligations. Another critical point that has been expressed in this respect is the outdated supervision system, involving many physical documents instead of electronic templates, forms and questionnaires that could be filled in digitally and submitted online.

Estonia has not ratified the additional protocol to the ECSS. In relation to Article 12 paragraph 3 ESC, which requires Member States to 'raise progressively the system of social security to a higher level', ratification of the protocol would be a logical next step. However, apart from practical obstacles, it is not thought that the government is ready for new international commitments, certainly not if this would involve higher standards.[73] From other countries in the region,

[73] Information obtained from experts.

notably Sweden and Finland, politicians have learned that it is very difficult to cut down on social security rights if the system becomes too expensive. From a political perspective, it is much easier not to establish rights than to take away vested rights. In conclusion, it may not be expected that Estonia will become part of any other international social security instrument in the near future.

4.4.2 FULFILMENT OF THE OBLIGATION TO REPORT ON THE APPLICATION OF INTERNATIONAL STANDARDS

From 1995 to 2009 the Estonian government received 77 direct requests from the CEACR in reply to its regular reports on the 32 ratified labour conventions (until 2001, on 29 conventions).[74] Partly, these requests dealt with problematic issues in relation to the conventions, but for a greater part they were requests for more detailed information on specific provisions. Furthermore, in 2007 and 2008, almost all requests (10 out of 12) contained the observation that the government had failed to send in the reports; this had also happened during the 1990s, but more incidentally. It appears that the compilation of reports on the application of ILO conventions has not been given priority the last few years.

Another striking point is that Estonia seems to face some problems with the fulfilment of the obligation to submit newly adopted instruments to Parliament. Since 1994, the CEACR has been commenting on the omission of this point almost yearly until 2003, and then again in 2008.[75] The procedure in Estonia following the adoption of a new ILO or CoE instrument is as follows:[76] At the Ministry of Social Affairs, the new convention is examined and a position is taken on the expediency of ratification. If ratification is not found expedient, the Minister of Social Affairs brings forward their position to the government, and if the government agrees with non-ratification, no further action is taken. If the Minister finds it advisable to ratify, an act on the ratification of the instrument at stake is prepared and discussed with the Ministers of Justice and Foreign Affairs. Subsequently, the bill is brought up for approval at a government meeting. After adoption, it is sent to Parliament, that gives its consent without discussion. Thus, Parliament has a strict formal role in this matter, which is furthermore restricted to the situation that the government puts forward an instrument for ratification. Crucial actors are the ministers concerned and the government, while the social

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[74] For comparison: Hungary has ratified 58 conventions and received 143 direct requests in the same period; Greece 63 conventions, 108 direct requests; Czech Republic 61 conventions, 134 direct requests; Sweden 76 conventions, 137 direct requests; Germany 72 conventions, 108 direct requests. See ILO website, IOLEX database, universal query form.

[75] ILOLEX database, search on 'Estonia'.

[76] Vallikivi 2001, p. 4; Information obtained from experts.

partners are not systematically asked for their opinions. As a matter of fact, there has been a discussion of whether Parliament is indeed the competent body to decide on the acceptance of new conventions, or whether the government could settle these issues instead. The ILO has even been consulted on this assumed uncertainty, which, of course, confirmed that the Parliament is indeed the competent body in this matter. In view of this imbroglio, it was mentioned by an official of the Ministry of Social Affairs during an interview that a new procedure on the submission to Parliament of adopted instruments is currently under preparation at the Ministry.[77]

4.4.3 INTERNATIONAL STANDARDS AND LEGISLATIVE PRACTICE

In order to fulfil the obligations stemming from the international instruments, it is general practice in Estonia to assess new bills on compliance with the international standards before they are presented to Parliament. Usually, the explanatory report that is attached to every bill contains a part on international obligations. Furthermore, the existing rules, especially those on pensions and unemployment benefits, are regularly assessed in order to prevent the benefits from dropping below the requirements of the ECSS. In principle, international agreements will only be presented for ratification if the national legislation is in accordance with the treaty concerned. In practice, however, it still may happen that existing laws appear to be in conflict with certain international provisions. An example of such in the field of labour law is the Collective Labour Dispute Resolution Act, in which the right to strike is prohibited for all public servants. According to ILO C87, ratified in 1994, only public servants who exercise authority in the name of the state may be, under specific circumstances, denied the right to strike. This discrepancy was noted by the CEACR in 1997 and subsequently repeated many times.[78] In 2007, a complaint on this matter was even issued by the trade unions to the Committee of Freedom of Association.[79] The government agreed that the rules were too strict, and replied time after time that a new act on civil servants was under preparation in which the right to strike would be brought in line with the international requirements. Indeed, at the Ministry of Social Affairs a draft was prepared several years ago, but a complicating factor is that public servants come within the jurisdiction of the Ministry of Justice. It appears that different interests and opposing opinions by the two stakeholders have obstructed the solution of this lingering problem.

77 For a list of interviewees, see Appendix 2.

78 CEACR: Individual Direct Requests concerning C087 (Estonia) 1997, 1999, 2003, 2004, 2006; CEACR: Individual Observations concering C087 (Estonia) 2001, 2007, 2008, 2009.

79 ILO Freedom of Association Case (Estonia) No. 2543.

Although the continuing negative observations of the supervising ILO committees cause political pressure to bring this issue to an end,[80] the pressure is not strong enough to actually bring about new legislation.

As far as social security laws are concerned, these were assessed thoroughly on compliance with the ECSS before the government actually turned to ratification. It has been described above that several acts have been changed, for example, the levels of the pensions were significantly increased, an indexation system for pensions was established, and an unemployment insurance scheme has been created. Only after the legislation was found in compliance with the ECSS, was the instrument submitted to Parliament for ratification.

4.4.4 LEGAL STATUS OF INTERNATIONAL INSTRUMENTS

International instruments that are ratified by Parliament are part of the Estonian legal order and take precedence over national legislation. Article 123 of the Estonian Constitution reads:[81]

> The Republic of Estonia shall not enter into international treaties which are in conflict with the Constitution. If laws or other legislation of Estonia are in conflict with international treaties ratified by the Riigikogu, the provisions of the international treaty shall apply.

Furthermore, Article 3 of the Constitution sets out that 'generally recognised principles and rules of international law are an inseparable part of the Estonian legal system'. On the basis of this provision, even treaties not accepted by Estonia but that are subject to a large number of ratifications could be applied.[82] An example of this is a judgment of the Supreme Court (Criminal Review Chamber) dating back to 1995, in which the Court noted that the European Convention of Human Rights was an inseparable part of the Estonian legal system, while the Convention had not been ratified by then.[83] Thus, it may be stated that the Constitution is rather international law friendly. At the same time, the Constitution is less clear about the way treaties are to be applied. Articles 15 and 152 of the Constitution state that (lower) judges shall not apply any law or other legislation that conflicts with the Constitution, and that the Supreme Court is competent to declare conflicting rules invalid. However, the Constitution does not regulate the possibility for courts not to apply (lower courts) or to quash

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80 Information obtained by experts.
81 The Constitution of the Republic of Estonia, passed by a referendum held on 28 June 1992 (RT 1992, 26, 349).
82 See also Laffranque 2007, p. 7; Vallikivi 2002.
83 Constitutional judgment No. 1–1–34–95 (21 December 1995).

(Supreme Court) national laws or regulations if they are in conflict with a binding international rule. Nor does it refer to the applicability of treaties if the issue at stake is not covered by national law. Therefore, to find out what the position is of international law and specifically of international social security standards within the Estonian legal order, it is necessary to observe how they are implemented in practice.

4.4.5 INTERNATIONAL STANDARDS AND JUDICIAL PRACTICE

A study of the judgments of the Supreme Court shows that both lower courts and the Supreme Court make reference to international law in their rulings, as well as the parties and other participants in the proceedings.[84] For the greater part, these references concern the European Convention on Human Rights; the ILO Conventions and ESC (Revised) have only been brought up incidentally.[85] There have been no cases in which the ECSS has played a role. However, this is not due to reasons of principle, but because of a poor awareness of individual rights flowing from this treaty, not only among citizens in general, but also among lawyers. Furthermore, it has been explained in this context that the rules on administrative court procedures are extremely strict and complicated, which means that in general, people do not easily go to court regarding social security issues.[86] The fact that the ECSS has not been subject to any remark in proceedings so far does not mean that no further attention should be paid to its possible relevance in judicial practice. Rather, the converse is true, all the more since several infringements of the ECSS come to the fore in the following sections in which national rules are compared with the international standards. Because the Constitution gives precedence to international law in such cases, it is particularly relevant to see how this constitutional rule is implemented in practice in relation to other international agreements.

First and foremost, the Supreme Court has repeatedly confirmed that international agreements ratified by Parliament are part of the Estonian legal order and have priority over Estonian laws or other legislation.[87] As mentioned above, the Constitution does not contain provisions setting out the competence

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84 A limited number of judgments of the Supreme Court are published in English on its website. Apart from those cases, with the kind assistance of Ms K. Aule, other judgments of the Court that contain reference to international agreements have been examined. See also Vallikivi 2001.

85 Examples are: Constitutional Judgments 3–4–1–14–07 (ILO Convention 111), 3–4–1–4–98 (ILO Convention 108), 3–3–1–48–03 (ILO Convention 135), 3–4–1–7–03 (ESC Revised).

86 Information obtained from experts.

87 For instance: Constitutional Judgments 3–4–1–12–08 para. 21, 3–1–3–13–03 para. 31. Vallikivi 2001, footnote 19.

of the Supreme Court to repeal national rules that are in conflict with international law, nor does it regulate the applicability of treaties if the relevant rule does not exist in national law. In practice, however, the Court does establish such conflicts and consequently applies the international rule instead of the contested national regulation.[88] In a case where the European Convention on Human Rights and Fundamental Freedoms was invoked, the Court explained that this Convention is an inseparable part of the Estonian legal order.[89] Consequently, the rights and freedoms expressed in the Convention are also part of the legal order, which implies that the guarantee of those rights and freedoms is also the duty of courts, according to Article 14 of the Constitution.[90]

It must be recognised that in the greater part of cases, the international rule has been considered next to a constitutional rule and has merely been used to support the interpretation of the national law at stake on the basis of the Constitution. There have been no cases in which the Court has disregarded a national rule on the basis of an international agreement only. To give an example, according to an Estonian regulation, alien seafarers had to have a certificate of service record on Estonian ships to be allowed to work on a ship flying an Estonian flag, while this certificate was not necessary for Estonian seafarers. This kind of discrimination is against Article 1 of the ILO Seafarers' Identity Documents Convention (No. 108). The Constitutional Review Chamber of the Supreme Court argued:[91]

> As the referred Regulation of the Government of the Republic is in conflict with Convention No. 108, the implementation of the Regulation is in conflict with para. 123 of the Constitution. If Estonian laws or other legislation are in conflict with international agreements ratified by the Riigikogu, then, pursuant to second indent of Article 123 of the Constitution, the provisions of the international agreement shall apply.
>
> IV
>
> According to Article 12 of the Constitution everyone is equal before the law. The principle of equality before the law must also be applied to seafarers, referred to in the Convention.

Although the reasoning of the judgement is entirely based on ILO C108, the Court connected the infringement with the Constitution before it declared the Regulation unconstitutional. In another judgement, however, the Supreme Court

88 For instance: Constitutional Judgment 3–4–1–4–98 (ILO Convention 108), Constitutional Judgment 3–4–1–1–96 (Convention on the Rights of the Child).

89 Constitutional Judgment 3–1–3–13–03, para. 16.

90 Art. 14 of the Constitution reads: 'The guarantee of rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments.'

91 Constitutional Judgment 3–4–1–4–98, para. III and IV.

applied the Social Charter (Revised) in a case concerning the right to medical care.[92] The case was brought to court by an unemployed person who had, up to that point, been automatically insured by his wife's insurance, but who was affected as a result of an amendment to the Health Insurance Act (effective from 1 January 2003) which meant that dependent spouses were not longer covered by the insurance of the breadwinner. The Supreme Court referred to different provisions of the Social Charter, firstly to the 12th and 13th principles set out in Part I, which recognise that all workers and their dependants have the right to social security, and that anyone without adequate resources has the right to social and medical assistance. The Court then drew attention to Article 13 paragraphs 1 and 2, which elaborate on the latter principle. Moreover, Article 12 paragraph 3 was cited, which obliges the Parties 'to endeavour to raise progressively the system of social security to a higher level'. The Court recalled in this respect that, on the contrary, since 1 January 2003 entitlement to medical care had become stricter by no longer covering spouses of uninsured persons. On the basis of these arguments, the Court referred the matter back to the administrative court to reconsider whether the person had the financial capacity to pay insurance premiums. In this case, the Charter was not used to back up the interpretation of the Constitution, but was judged on its own merits. At the same time, in spite of its arguments, the Court did not go as far as considering the amendment of the Health Insurance Act unconstitutional.

The Social Charter has also been used by the Constitutional Review Chamber to interpret the Constitution, for instance, to define the concept of need.[93] The Court argued that the Constitution does not specify when a person is needy, and therefore, to interpret the Constitution, it is necessary to examine the international agreements to which Estonia has acceded. In this case, Articles 13 (1) and 12 (1) of the Social Charter were assessed, on the basis of which, the Court concluded that the amount of assistance 'must not be in manifest inconformity' with the minimum means of subsistence in the country.

Taking stock of all these cases, it may be concluded that, in principle, it would very well be possible to invoke (a provision of) the ECSS before a court, as has been done with ILO C108 and C135, and with the European Social Charter. The courts, and especially the Supreme Court, confirm the priority status of international agreements and incidentally apply treaties instead of national law. However, such application of international agreements other than the European Convention of Human Rights is rare. In general, íf international law is considered, it is in a way to support the interpretation of national legislation or to interpret the Constitution itself. Therefore, in practice it is not likely that the

92 Constitutional Judgments 3–3–1–65–03, para. III. See also Jõks 2005.
93 Constitutional Judgments 3–4–1–7–03, para. 20.

Court would apply the ECSS directly by passing over a national rule, although the Constitution provides for it.

The second conclusion that may be drawn relates to a more general problem with the application of international law, notably, that judges have a lot of freedom to decide whether or not refer to relevant treaties. Considering the limited number of cases in which the courts, including the Supreme Court, apply international instruments other than EU legislation, it is clear that international agreements are not systematically used as sources of law. There is a real risk of courts referring only to sources that are supportive of the arguments used in the judgments and ignoring sources that point in another direction.

4.4.6 APPRECIATION OF INTERNATIONAL 'CASE LAW'

Although, similar to the Czech system, the Estonian legal system is basically norm-based, it is generally recognised that an interpretation of norms is necessary to adapt the legal rules to changes in society.[94] Therefore, judgements of the Supreme Court are considered more and more as precedents and are used in lower court proceedings. As regards international case law, judgements of the European Court of Justice have proved useful tools for the creation of many aspects of the legal order as well. On a more ad-hoc basis, judgments of the European Court of Human Rights of the Council of Europe are also used in proceedings of the Supreme Court, and sometimes even recommendations of the Council of Europe.[95] In a case regarding e-voting, the Court referred to a recommendation of the Committee of Ministers on 'standards of e-voting' and argued:[96]

> Although the Recommendation of the Council of Europe is not a legally binding document, it summarises the understanding of the democratic states of Europe […], and it is thus an appropriate tool for interpreting the Constitution.

From this judgment it can be concluded that recommendations or resolutions of the CoE Committee of Ministers on the ECSS are also potential interpretation tools for the Court, although they have not been used to date. It must be noted that this kind of soft law has only been used as one argument for interpreting the Constitution, and certainly not as a fundamental argument forming the basis of the Court's decision.

94 Kuusik & Miil 2008, pp. 2–3; Lafranque 2007, p. 6.
95 For example, Constitutional Judgments No. 3–3–1–2–06 and 3–4–1–13–05.
96 Constitutional Judgment No. 3–4–1–13–05, para. 17.

4.5 MEDICAL CARE

4.5.1 INTRODUCTION

History

In the early 20th century before World War I, Estonia had a basic decentralised system of health care with private hospitals, municipal hospitals for poor people, and a limited number of state owned hospitals for mothers with children, mentally ill people, and for the treatment of specific chronic diseases, such as tuberculosis.[97] The first sickness insurance funds in Estonia were created – under Russian rule – by employees of large industrial enterprises in 1913.[98] After the First World War, when Estonia experienced a period of independence, these funds expanded their activities. Nevertheless, the insurance coverage was poor when compared to other European countries. Only 18 percent of the population was insured in the late 1920s, comprising mainly employees and their family members. The Russian occupation in 1939 marked a fundamental change in the Estonian health care system. The communist government abolished the insurance funds and introduced the 'Soviet Semashko health care model', named after its architect Nicolai Semashko, the Bolshevik People's Commissar of Public Health of the USSR from 1918 until 1930. This model was based on centrally planned health care, funded and controlled by the government, providing free care on the basis of citizenship rather than on insurance.

The next significant health care reform took place after the restoration of independence in 1991. Prepared even before the struggle for independence had been settled, this time the reform aimed at decentralisation and financing through compulsory social health insurance for workers. Two reasons were pointed out for establishing a Bismarckian type of health insurance system. Firstly, a contribution based insurance scheme would ensure a solidly funded health care system. Secondly, linking health insurance to work would give people incentives to participate in the formal labour market. In the course of the 1990s, the connection with labour slackened because of political pressure to include categories of non-working persons in health insurance, such as students and recipients of certain benefits.

The health care system covers medical care as well as sickness benefits. Benefits in kind include medical services, pharmaceuticals, and technical aids. Cash benefits are paid out in the case of temporary incapacity for work, and for a

97 Ginneken (ed.) 2008, pp. 21–22.
98 Koppel 2008, p. 19–23; Estonian Health Insurance Fund 2007, p. 5.

limited compensation for pharmaceuticals and dental care.[99] To carry out the insurance scheme, twenty-two independent public health insurance funds were created initially, both in counties and cities. However, to remedy a lack of coordination, in 1994 the Central Health Insurance Fund was set up under the supervision of the Ministry of Social Affairs in order to organise health insurance through the regional units.[100] Other trends of recentralisation were to be seen towards the end of the 1990s, resulting in the re-establishment of overall health care planning at the national level, under strict control of the Ministry of Social Affairs. At the same time, the Estonian Health Insurance Fund (EHIF), which was the strongest and most efficient fund with the best administrative capacity, was given the status of independent public organisation. As a consequence, the EHIF was no longer subordinate to the Ministry, although certain incorporated mechanisms ensure that the EHIF follows the national health policy framework. Additionally, health care providers became private entities operating under private law, which implied a shift in responsibility for health care performance, from the Ministry to the actual providers. It has been noted, however, that along with the privatisation of health services, no mechanisms were created to increase their public accountability and to ensure that autonomous providers follow national policy preferences.[101]

Legislation

The right to the protection of health is primarily secured by Article 28 of the Constitution of the Republic of Estonia.[102] The legal basis for the health care insurance scheme is set out in the Health Insurance Act 2002 (originally of 1991),[103] the Health Services Organisation Act of 2002 (originally of 1994),[104] and the Health Insurance Fund Act of 2000.[105] In the Health Insurance Act rules are laid down concerning medical care as well as sickness benefits. Regarding medical care, it regulates: personal coverage, qualifying conditions, duration of coverage, health insurance benefits in kind and in cash, lists of provided health care services and pharmaceuticals, maximum levels of cost-sharing for insured people, relationships between the EHIF and service providers, tax contribution rates, *etc*. The Health Services Organisation Act provides for the organisation of, and the requirements for, the provision of health services, and the procedures for

99 For an extensive overview of the system, see Leppik & Kruuda 2003, pp. 104–120; website of the Estonian Health Insurance Fund (*Haigekassa*).
100 Ginneken (ed.) 2008, pp. 33–35.
101 Ginneken (ed.) 2008, p. 35.
102 The Constitution of the Republic of Estonia passed by a referendum held on 28 June 1992.
103 Health Insurance Act, passed on 19 June 2002.
104 Health Services Organisation Act, passed on 9 May 2001.
105 Health Insurance Fund Act, passed on 14 June 2000.

management, financing and supervision of health care. Finally, the Health Insurance Fund Act regulates the legal status and functioning of the EHIF.

At the international level, Estonia is bound by the European Code of Social Security, Part II on Medical Care and Part VIII on Maternity.

Administration and financing

The general administration of health care and health policy falls under the responsibility of the Ministry of Social Affairs.[106] Initially, the Ministry of Health was the central player in the field of health care. However, in 1993 the Ministry of Social Affairs was created through the merger of three separate ministries: the ministries of Health, Social Welfare, and Labour. Consequently, within the Ministry of Social Affairs at present, there are three corresponding policy divisions. The general responsibility of the Ministry regarding health care includes the development and implementation of overall health policy and the supervision of health service quality and access. Several health agencies subordinate to the Ministry have various administrative tasks relating to health care. Additionally, the Ministry and its agencies are responsible for the financing and management of some public health services that are not covered by the health insurance system, such as ambulance services, emergency care for uninsured persons, and public health programmes.[107]

The Estonian Health Insurance Fund – the main purchaser and payer of health care services – is governed by a council of fifteen members: five representatives of the state, five representatives of organisations of insured persons, and five representatives of employers organisations.[108] The composition of this council meets the requirement of Article 71, sub 1 of the ECSS, which demands the involvement of representatives of the persons protected in the management of the insurance, where the administration is not entrusted to a government department. The main functions of EHIF include: contracting health care providers and covering the expenses of medical care of insured persons to these providers; paying sickness, maternity and care benefits in cash to insured persons; and paying compensation of pharmaceutical products on the basis of prescriptions issued to insured persons.

The obligatory health insurance scheme is mainly financed from social health insurance contributions in the form of earmarked payroll tax, the so-called 'social tax'. However, private sources of financing have increased over the years,

106 Ginneken 2008, pp. 23–28; Leppik & Kruuda 2003 pp. 104–106; Pieters 2003, pp. 44–45.
107 Ginneken 2008, p. 43.
108 Leppik & Kruuda 2003, pp. 105–106.

now comprising approximately one quarter of the budget. These private sources mainly consist of out-of-pocket payments of households.[109] The contributions are paid by employers and self-employed persons, amounting to 13 percent of the employee's wage. Of all insured persons, 45 percent are active contributors to the system. Of the other part, 52 percent are covered without payment, and for 3 percent of all insured persons, social tax is paid by the state.[110] In fact, health expenses of non-contributing persons are subsidised by the contributing categories. This reflects the principle of solidarity between insured persons, which is one of the underlying principles of the insurance system. The total expenditure on health care as a percentage of GDP was 5 percent in 2006, which is well below the EU average of 8.92 percent, and also below the average of the new EU members from 2004, which was 6.49 percent.[111]

4.5.2 MATERIAL SCOPE

According to Article 2 (1) of the Health Insurance Act, health insurance covers health care expenses for prevention and treatment of a disease, including medication and medical devices. This rather vague provision does not specify as regards the nature or cause of the disease, nor does it explicitly include pregnancy and confinement. At the same time, it does not exclude specific diseases or conditions requiring medical care either. In practice, pregnancy and childbirth are covered by the insurance. Therefore, the insurance meets the requirement of Article 8 of the ECSS which provides that '[t]he contingencies covered shall include any morbid condition, whatever its cause, and pregnancy and confinement and their consequences.'

4.5.3 PERSONAL SCOPE

Persons covered

According to the Health Insurance Act, health insurance is derived from the payment of social tax. Consequently, insured persons are all employees for whom the employer has paid (or has a duty to pay) social tax, and self-employed persons

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109 Ginneken 2008, p. 43; Leppik & Kruuda 2003, p. 111. In 2006, 62.5 percent of total health expenditure was financed from insurance contributions, and 23,8 percent from out-of-pocket payments. The remaining 13.7 percent was financed from general taxes (11.2 percent), private health insurance (1.1 percent) and other external sources (1.4 percent).

110 Vask 2007, p. 16.

111 WHO/Europe, European HFA Database 2008.

who pay social tax themselves.[112] In addition, social tax is paid by the state on behalf of certain categories of persons, including recipients of child-care allowance and caregiver's allowance, persons registered as unemployed, persons raising a child up to 3 years of age, and conscripts in compulsory military service.[113] Arising from the principle of solidarity, several categories of non-working persons are considered to be equal to insured persons, without payment of social tax. These categories include:

- pregnant women;
- children under 19 years of age;
- persons who receive a state pension granted in Estonia;
- persons with up to five years left until reaching pensionable age, who are maintained by their spouses who are insured persons; and
- students of up to 24 years of age who are enrolled in full-time study.

To determine whether the requirements of the ECSS are met in respect of the personal coverage of health insurance, Estonia makes reference to the option that not less than 50 percent of all residents must be insured.[114] Actually, for Estonia this is the only possible option, because the other two possibilities – coverage of employees or economically active persons – also require the spouses of the insured workers to be covered by the insurance. The Estonian social security system, however, is based on individual rights and does not recognise derived rights.[115] In 2008, the population of Estonia amounted to 1,340,415. The number of insured persons was 1,287,718. With 95.6 percent of the population insured, Estonia complies with this provision.[116] Not covered are certain categories of the inactive population, such as housewives, and persons working entirely in the informal economy.[117]

Individual basis

As mentioned above, every person is insured on the basis of their own right – the system is not based on the breadwinner's model. The insurance of an insured person does not cover their non-working spouse. The only exception is a dependent spouse who is within 5 years of their pensionable age; they are considered equal to insured persons. Additionally, since 2002 it is possible to enter into a voluntary insurance contract with the Health Insurance Fund.

[112] Ginneken 2008, pp. 62–63; Leppik & Kruuda 2003, pp. 26–27, 117–120; ECSS Reports (Ee) I-IV, Art. 9; website of the Estonian Health Insurance Fund.
[113] ECSS Reports (Ee) I-IV, Art. 9 B; MISSOC (Ee), 2010; Karu & Roosaar 2007.
[114] ECSS, Art. 9(c). For an explanation of the different options, see section 2.9.2.
[115] ECSS, Art. 9 paras. a and b.
[116] ECSS Report (Ee) IV, Art. 9.
[117] Eamets 2008, p. 53.

Eligible for voluntary insurance are persons who have been insured by the EHIF for at least 12 months immediately prior to voluntary insurance, and persons who are dependent upon an insured person.[118]

4.5.4 BENEFITS

Range of care

Health services are covered by the insurance if they are included in the list of medical services of the Estonian Health Insurance Fund (EHIF) and if the provision of a specific service is therapeutically justified.[119] However, insurance covers most medical examinations, medical treatments and the maintenance of wellbeing of an insured person. The costs are paid by the EHIF to the relevant health care institution (which may be state, municipal or private owned) or private physician on a contractual basis. Services compensated by the EHIF include:[120]

- out-patient consultations by family doctors and specialists, including home visits;
- hospital care, including nursing and pharmaceuticals;
- health examinations and procedures, for in-patients and out-patients;
- pharmaceutical supplies, to a prescribed extent;
- preventive health check-ups; and
- pre-natal care, confinement care and post-natal care.

Services that are excluded from the list include cosmetic surgery, alternative therapy, and certain rehabilitation services.[121] Dental care for adults has been excluded from the benefits package since the introduction of the new Health Insurance Act in 2002; only for persons under 19 years of age is it provided free of charge.[122] The insurance covers the costs of adult emergency dental care, under the condition that the dental care provider is contracted by the EHIF. Furthermore, the insurance partly compensates dental care services to specific categories of insured persons, such as persons receiving an old-age pension or a pension for incapacity to work, insured persons of at least 63 years of age, pregnant women, and mothers of children of under one year of age. However,

[118] Ginneken 2008, p. 66; Leppik & Kruuda 2003, p. 118.
[119] Health Insurance Act, Art. 29 (1).
[120] Leppik & Kruuda 2003, pp. 26, 109–110; ECSS Reports (Ee) I-IV, Art. 10; website of the Estonian Health Insurance Fund. For a detailed overview, see Ginneken 2008, pp. 135–178.
[121] Leppik & Kruuda 2003, p. 110.
[122] Ginneken 2008, pp. 176–177.

the future of these compensations is uncertain because of economic measures during the current recession.

Pharmaceuticals

The health insurance system covers, to a prescribed extent, pharmaceuticals for out-patient treatment which are entered in a list of medicinal products composed by the Minister of Social Affairs.[123] The list also gives the reference price for each medicine. The insured person buys the medicine for a discounted price, and afterwards the EHIF compensates the pharmacies the difference between the reference price and the amount paid by the patient. The rate of discount varies according to the age and diagnosis of the person. If the price of a drug exceeds its reference price, the patient has to pay the difference.

Cost-sharing

According to the Health Insurance Act, one of the basic principles for the provision of health care is limited cost-sharing by insured persons.[124] Nevertheless, out-of-pocket payments are levied for almost all services. Cost-sharing requirements for out-patient care are as follows: for home visits by a family doctor and ambulatory specialist care, a fee of EEK 50 maximum is charged. In view of ratification of the ECSS, as of 2004, pregnant women from the 12th week of pregnancy and children of under two years of age are exempt from payment of the fee. However, the uninsured first 12 weeks of pregnancy were still subject to comments by the supervising committee, as a result of which, the law was changed again in July 2009 exempting pregnant women from the payment of the fee from the moment pregnancy is medically confirmed. Visits to a family doctor are free of charge for all insured persons. In respect of in-patient care, hospitals can charge EEK 25 per day for up to a maximum of 10 days per bout of illness, and 15 percent of the cost of nursing care. Intensive care, hospitalisation of children (minors), and hospitalisation relating to pregnancy and delivery are exempt from the co-payment rules.

Out-patient prescription pharmaceuticals are subject to a co-payment of EEK 50 per prescription, plus a certain percentage of the price of the drug. The standard compensation rate by the EHIF is 50 percent, up to a maximum of EEK 200 per prescription. For patients suffering from certain chronic diseases, such as hypertension, bronchial asthma, and cardiac insufficiency, the prescription fee is

[123] Leppik & Kruuda 2003, pp. 110; ECSS Reports (Ee) I-IV, Art. 10; website of the Estonian Health Insurance Fund.

[124] Health Insurance Act, Art. 2 (2).

EEK 20, and compensation by the EHIF amounts to 75 percent. Prescriptions in relation to a number of severe and chronic diseases, such as cancer, mental disorders, and Parkinson's disease, are subject to a compensation rate of 100 percent. Finally, three categories of patients are entitled to a compensation rate of 90 percent instead of 75 percent: children aged between 4 and 16 years, and disabled and retired persons. In total, it has been calculated that in 2000, half of the pharmaceutical expenditures were paid directly by patients.[125]

Since the introduction of co-payments in 1995, their proportion of total expenditure on health care has increased steadily from 7.5 percent in 1995, to 23.8 percent in 2006, and is expected to grow further in the coming years.[126] There are several reasons to explain this trend, such as the availability of more expensive drugs and an increasing number of different drugs, the growth of the private health sector, and the increase in fees.[127] Moreover, the government raised the Value Added Tax on pharmaceuticals in 2009 as an economic measure to balance the public spending in order to be able to fulfil the Maastricht criteria for joining the Euro-zone in 2011.[128] The impact of rising co-payments has resulted in a higher share of health care expenses as a proportion of household expenditure. Although the fees may not seem very high, it must be borne in mind that the normal fee for a drug prescription or specialist visit of EEK 50 represented more than 6 percent of the monthly income in the lowest decile in 2003.[129] Surveys show that the average share of co-payments as a proportion of total household expenditures has increased from approximately 3 percent in 2000, to 6 percent in 2006.[130] And, for instance, in 1995, 0.3 percent of households had health expenditures higher than 40 percent of their budget after buying their food, while in 2002, it was 1.6 percent of households.[131] The studies also show that the burden of these expenses is increasingly weighing on the shoulders of lower-income households, and even more so if these households include persons of pensionable age, or disabled or chronically ill persons. It has been concluded that this growing out-of-pocket expenditure may hinder health access for low-income population groups.[132]

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125 Leppik & Kruuda 2003, p. 115.

126 Ginneken 2008, p. 43; according to the WHO Statistical Information System the rates amounted to 10.2 percent in 1995, and 24 percent in 2006.

127 Ginneken 2008, pp. 43, 68–73; Leppik & Kruuda 2003, p. 114.

128 Läänelaid & Aaviksoo 2009, p. 2.

129 Habicht & Habicht 2008, p. 244.

130 Ginneken 2008, pp. 200–201.

131 Habicht & Habicht 2008, p. 244.

132 Läänelaid & Aaviksoo 2009, pp. 1, 8; Wendt 2009, pp. 334–335; Ginneken 2008, pp. 191 (concerning medicines), 176 (concerning dental care), p. 208; Habicht & Habicht 2008, pp. 259, 262; Leppik & Kruuda 2003, p. 99.

Duration of the benefit

Health care is provided to the insured persons during the whole period of illness and is not time limited. Uninsured pregnant women who are treated as insured persons are covered for medical care until three months after the date of delivery.

4.5.5 QUALIFYING CONDITIONS

Conditional for health insurance is permanent residency or residency on the basis of a temporary residence permit. In some cases a waiting period is required, consisting of a prescribed period starting at the day of employment.[133] The period depends on the basis of entitlement to health insurance of the person concerned. The prescribed period for persons working under a contract of employment or service for a term exceeding one month, and for public servants as well as for self-employed persons, is fourteen days. For persons who are treated as insured persons and for whom the state pays social taxes, no waiting period is set.

In fact, a qualifying period of fourteen days of work or payment of social tax is set as a condition for insurance for certain categories of insured persons. This period is prescribed in order to give the employer and the insurance fund time to process the insurance application.[134] According to the ECSS, it is allowed to prescribe a qualifying period necessary to preclude abuse.

4.5.6 COMPARISON WITH THE INTERNATIONAL STANDARDS[135]

Matters of compliance

Regarding the material and personal coverage, there are no problems of compliance with any of the international standards. Insurance covers any condition requiring medical care, whatever its cause, including preventive care. Furthermore, with about 96 percent of the population being insured, even the stipulations of the ECSS (Revised) are fulfilled. Pertaining to the range of care, it stands out that dental care for adults has been excluded from the package. This is not a problem in relation to the only ratified instrument, the ECSS, and it also complies with the ECSS Protocol that requires only basic dental care for children

133 ECSS Reports (Ee) I, Art. 11; Leppik & Kruuda 2003, p. 26.
134 Information obtained from experts.
135 For a detailed description of the international norms regarding medical care, see section 2.9.

to be covered. However, according to the higher standards – i.e. the ECSS (Revised) and ILO C130 – dental care for adults must be included to a greater extent. Furthermore, ILO C130 and ECSS (Revised) require the provision of prosthetic and orthopaedic appliances, which are not covered by Estonian health insurance. Since health care is provided without a time limit, the duration of the benefit is in accordance with all relevant standards. Worth mentioning in this respect is that an employer is allowed to dismiss an employee after a period of incapacity for work of four months.[136] Since health insurance is derived from the payment of contributions by the employer, insurance ends after the termination of the employment contract. However, as long as the person is registered as unemployed with the Unemployment Insurance Fund, the state takes over the payment of the insurance contributions and the person continues to be insured for health care.

The amendment of the Health Insurance Act in 2009, containing the exemption of pregnant women for out-of-pocket payments from the moment that the pregnancy is medically confirmed instead of after the twelfth week of pregnancy, has resolved an existing conflict with the ECSS. As shown above, the ECSS does not allow for cost-sharing in the case of pregnancy.

Problematic issues

In respect of the level of benefit, a close look should be taken at the rules on cost-sharing. The ECSS gives a rather vague provision on this matter, pointing out that 'the rules concerning such cost-sharing shall be so designed as to avoid hardship'.[137] During the preparatory process of the final text of ILO C102, a maximum share of co-payment of one third was suggested, but no consensus was reached. In the ECSS Protocol, the provision about cost-sharing is more developed and specific, setting the maximum share of out-of-pocket payments at 25 percent per kind of care – i.e. by general practitioners, hospital care, and pharmaceutical supplies. Only for conservative dental care is a co-payment of one third allowed. The ECSS (Revised), on the other hand, gives a more general and flexible rule again, composed on the basis of ILO C130, requiring the rules on cost-sharing not only to avoid hardship, but also not to 'render medical and social protection less effective.'[138] As shown above, in Estonia the overall percentage of out-of-pocket payments in relation to total health expenditure was 23.8 percent in 2006, and subject to an increasing trend. It has also been noted that approximately half of the costs of pharmaceuticals are paid out-of-pocket,

136 Employment Contract Act, Art. 88 (1).
137 ECSS Art. 10 (2). See section 2.9.3.
138 ECSS (Revised) Art. 10 (2); ILO C130, Art. 17: 'not to prejudice the effectiveness of medical and social protection'.

and that the increasing co-payments may hinder access to medical care for lower-income groups. Of course, it is hard to point out exactly when these payments will cause hardship. Nevertheless, considering these figures, an ongoing increase of out-of-pocket payments may imply an infringement of the rules of the ECSS in the near future, if it is not yet so in relation to pharmaceuticals.

Regarding the qualifying period, there is reason to wonder whether the waiting period of two weeks is 'necessary to preclude abuse', taking into account the fact that it only applies to employees and the self-employed, comprising not even half of all insured persons. For all other insured persons, no such waiting period exists. It seems fair to question whether such a period is necessary to preclude abuse if it does not apply to insured persons as a general rule. Moreover, the period is not meant to prevent abuse, but is prescribed for administrative reasons only.

Summary of matters of compliance and problematic issues

Table XI. Medical care (Ee) compared with the international standards

Estonia is bound by the ECSS				
Medical care	**ILO C102 (1952) / ECSS (1964)**	**ECSS Protocol (1964)**	**ILO C130 (1969)**	**ECSS Rev. (1990)**
Material scope	✓	✓	✓	✓
Personal scope	✓	✓	✓	✓
Benefit	The out-of-pocket payments may cause hardship. The relatively heavy financial burden on low-income households is against the principle of collective financing.	The out-of-pocket payments may cause hardship. The relatively heavy financial burden on low-income households is against the principle of collective financing.	The out-of-pocket payments may cause hardship and hinder the effectiveness of medical protection. The relatively heavy financial burden on low-income households is against the principle of collective financing.	The out-of-pocket payments may cause hardship and hinder the effectiveness of medical protection. The relatively heavy financial burden on low-income households is against the principle of collective financing.
Benefit: duration	✓	✓	✓	✓
Qualifying periods	14-day waiting period may not be necessary to preclude abuse.	14-day waiting period may not be necessary to preclude abuse.	14-day waiting period may not be necessary to preclude abuse.	14-day waiting period may not be necessary to preclude abuse.

✓ = compliance of national provisions with the international standards.

4.6 SICKNESS BENEFIT

4.6.1 INTRODUCTION

Legislation

The legal basis for a sickness benefit is the Health Insurance Act, covering both health care as well as cash benefits. This act regulates which persons are covered by the insurance, what the conditions for entitlement are, which kinds of benefits there are, and the amount and duration of the benefits that are given. Because the insurance is compulsory for employees as well as for self-employed persons, there is no provision for voluntary insurance.

At the international level, in respect of sickness benefit Estonia is bound through ratification by the European Code of Social Security, Part III.

Administration and financing

As part of the health insurance scheme, the sickness benefit is administrated by the EHIF. One of the tasks of the EHIF is to pay sickness, care, and maternity cash benefits to insured persons. Sickness benefits are financed from the health insurance budget, which is mainly funded by earmarked social tax. Expenses for sickness benefits account for approximately 12 percent (2007) of the EHIF's budget.[139] The share of sickness benefit expenses has been steadily increasing over the years, mainly due to the growth of the average earnings, as well as the number of days of incapacity for work.

4.6.2 MATERIAL SCOPE

A sickness cash benefit is paid to an insured person in the case of temporary incapacity for work, if earnings subject to social tax are not received due to sick leave.[140] The benefit is paid on the basis of a medical certificate for sick leave, issued by the treating doctor in the case of disease or injury making the person unable to continue to perform his or her professional activity, quarantine, or the temporary transfer of a pregnant woman to another job. Since Estonia does not have a special employment injury scheme, the insurance also covers the loss of income due to occupational diseases and employment injuries.

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139 Estonian Health Insurance Fund 2007, pp. 26, 55.

140 Health Insurance Act, Art. 50; ECSS Reports (Ee) I-IV, Art. 14.

4.6.3 PERSONAL SCOPE

As regards cash benefits, the compulsory health insurance scheme covers all employees for whom the employer has a duty to pay social tax, as well as all self-employed persons who pay social tax themselves.[141] To determine whether the requirements of the ECSS are met in respect of the personal coverage of sickness insurance, Estonia refers to the provision that 'prescribed classes of the economically active population, constituting not less the 20 percent of all residents' must be insured.[142] According to the EHIF database, in 2008 the population of Estonia amounted to 1,340,415, including 639,932 insured employees and 18,147 insured self-employed persons. Therefore, the proportion of protected residents amounted to 49.1 percent of the total population.[143]

4.6.4 BENEFITS

Amount of the benefit

Sickness benefits are periodical payments, calculated per calendar day, usually consisting of 70 percent of the average daily income of the insured person, which was subject to social tax.[144] Until 1 July 2009, the replacement rate was 80 percent. The average daily income is calculated on the basis of the beneficiary's gross wage in the preceding calendar year. For employees, no ceiling is set for the amount of earnings to be taken into account, nor for the amount of the benefit. In the case of self-employed persons, the business income is subject to social tax up to a ceiling of 15 times the minimum wage per month, which is also the maximum amount taken into account for the calculation of the benefit.[145] The sickness benefit is subject to income tax. In 2008, the tax rate was 21 percent, with a basic exemption of EEK 2,250 per month.

For assessment of conformity of the level of the benefit with the requirements of the ECSS, Estonia makes reference to the provision that the sickness benefit plus family benefits for two children must be the given percentage (45 percent) of the average salary of a skilled manual male employee, being the standard beneficiary, plus family benefits.[146] For the determination of the average salary of a skilled

141 ECSS Reports (Ee) I-IV, Art. 15; Leppik & Kruuda 2003, p. 27.
142 ECSS, Art. 15(b).
143 ECSS Report (Ee) IV, Art. 15.
144 Health Insurance Act, division 5; MISSOC (Ee), 2010; website of the Ministry of Social Affairs.
145 In 2007, the minimum wage was EEK 3,600; accordingly, the ceiling for self-employed persons' income subject to social tax was EEK 54,000 per month.
146 ECSS Report (Ee) IV, Art. 16; ECSS Art. 16 in connection with Art. 65.

manual male employee, the option chosen is to take into account 125 percent of the average earnings of all the insured persons, which is taken as the reference wage.[147]

Calculation example[148]

In 2008, the reference wage (125 percent of the average earnings of all insured persons) was EEK 14,715. Child benefit for two children was EEK 600.

Monthly benefit: 0.7 × EEK 14,715	=	EEK 10,300
Benefit for 2 children aged 6 to 15	=	EEK 600
Sickness benefit incl. child benefit	=	EEK 10,900

The reference wage of a skilled worker with a dependent wife and two children, supplemented with child benefit, amounted to EEK 14,715 + EEK 600 = EEK 15,315. The ratio between the sickness benefit and the reference wage was EEK 10,900 / EEK 15,315 = 0.712

In conclusion, the replacement rate of sickness benefit of a standard beneficiary in 2008 (but calculated according to the regulations of 2009), compared to the reference wage, amounted to 71.2 percent.

Duration of the benefit

The first three days of sick leave are unpaid. Until 2009, there was only one unpaid day, which has been extended as part of the economic measures taken to combat the recession.[149] Furthermore, under the new legislation, the employer is responsible for the sick pay from the fourth until the eighth day, consisting of 70 percent of the employee's wage. As from the ninth day of sick leave, the Health Insurance Fund takes over the payment of the sickness benefit. The benefit is paid until the end of the leave indicated on the sick leave certificate, or until the day on which permanent incapacity for work is determined. However, a maximum of 182 consecutive calendar days during one illness is set, with a maximum of 250 days per calendar year.[150] Relevant in this respect is the provision in the Employment Contracts Act that an employment contract may be terminated by the employer if 'the employee's state of health does not allow

147 ECSS Art. 65 (6) sub c.
148 The calculation is based on amounts of 2008, taken from ECSS Report (Ee) IV. However, the percentage of the sickness benefit is based on the amendment of 2009 of the Health Insurance Act, namely, 70 percent of previous income. Therefore, the replacement rate differs from the rate given in ECSS Report (Ee) IV. The exchange rate of the Estonian Kroon on 1 January 2011, when Estonia joined the eurozone, was €1.00 to EEK 15.64.
149 Läänelaid & Aaviksoo 2009; Nurmela 2009C.
150 ECSS Report (Ee) IV, Art. 18; Health Insurance Act, Arts. 56–57. In the case of tuberculosis, a maximum of 240 days per illness is given.

for the performance of duties over four months.'[151] With the termination of the contract, entitlement to the sickness benefit ends. Thus, although under the Health Insurance Act the benefit may be granted for 182 days, in connection with the Employment Contracts Act the benefit this period is shortened to 120 days. Until 2009, the termination of a contract after four months of sickness was not common practice. However, this may change in view of economic downturn.

The benefit will not be paid in the following situations: if the illness is caused by the intent of the person; if the illness is caused by intoxication by alcohol, drugs or toxic substances; if the insured person disregards the treatment prescribed by a doctor, as a result of which the recovery is hindered; if the person fails to appear at a doctor's consultation without good reason; and if the person returns to work.[152]

4.6.5 QUALIFYING CONDITIONS

Apart from the necessary certificate for sick leave, a sickness benefit for employees is subject to the same conditions as count for medical care – i.e. a qualifying period of fourteen days. This period is prescribed for administrative reasons, to give the employers and the insurance fund enough time to process the insurance application. Furthermore, a permanent residency or residency on the basis of a temporary residence permit is required.

4.6.6 COMPARISON WITH THE INTERNATIONAL STANDARDS[153]

Matters of compliance

As for the contingency covered, in principle, the Estonian sickness insurance covers any morbid condition involving loss of earnings, which complies with the international standards. The personal coverage of 49.1 percent of all residents also meets the requirements of ECSS (20 percent), ILO C102 (20 percent), the ECSS Protocol (30 percent), and ILO C130 (all employees).[154] As far as the ECSS (Revised) is concerned, Estonia could successfully refer to the option of protection of 80 percent of the total economically active population.[155] The level

151 Employment Contracts Act of 1 July 2009, Art. 88 (1) 1).
152 ECSS Report (Ee) III, Ar. 18; Health Insurance Act, Art. 60 (1).
153 For a detailed description of the international norms regarding sickness benefit, see section 2.10.
154 ECSS, Art. 15; ILO C102, Art. 15; ILO C130, Art. 19; ECSS Protocol, Art. 15.
155 ECSS (Revised), Art. 14.

of the benefit with a replacement rate of 71.2 percent is far above the minimum standards (45 percent), and even meets the level of the ECSS (Revised) (65 percent).[156] A remarkable feature of Estonian sickness benefit is the absence of any ceiling, where all international standards give room for fixing a maximum benefit, or for taking into account the previous earnings up to a specific maximum amount. Moreover, the amount of the benefit does not vary during the course of the contingency. Apart from the sickness benefit, ILO C130 and the ECSS (Revised) provide, under certain circumstances, for a funeral benefit – requirements that Estonia has failed to meet since 2009.[157] The duration of 182 days (26 weeks) in each case of illness corresponds with the minimum duration set out in the ECSS and ILO C102. It does not comply with the ILO C130, ECSS Protocol, and ECSS (Revised), providing for a duration of not less than 52 weeks in each case of illness, or, in the two latter instruments, not less than 78 weeks in any consecutive period of three years.[158] The waiting period of three days for each case of sickness conforms with the standards, all allowing for a waiting period of three days.

Problematic issues

There are four points that deserve a closer look regarding conformity with the international standards. The first matter has been noted by the CEACR, and was included in the Resolution on the application of the ECSS 2008 of the Committee of Ministers in the form of a request for additional information, and was highlighted again in 2009 and 2010.[159] The Committee started its comment by recalling the provision of the Health Insurance Act that an insured person does not receive a benefit if a doctor states that the illness has been caused by intoxication by alcohol, drugs or toxic substances. Then, it considered that, according to Article 14 of the ECSS, a sickness scheme must 'cover incapacity for work resulting from any morbid condition, whatever its cause.' The Committee concluded that 'refusal to pay sickness benefit when the morbid condition was caused by intoxication by alcohol, drugs or toxic substances would be allowed under Article 68*f* only where such intoxication resulted from the wilful misconduct of the person concerned, whose acts were of sufficient gravity and of a deliberate nature.' In its next report, the Estonian government replied that there was a decision of the Supreme Court on the same matter, and that this particular provision would be upgraded in view of that decision and the comment of the Committee. In response to this repeated

[156] ECSS, Art. 16; ILO C102, Art. 16; ILO C130, Art. 22; ECSS (Revised), Art. 15.
[157] Estonian State Funeral Benefits Act; website of the Ministry of Social Affairs.
[158] ECSS, Art. 18; ILO C102, Art. 18; ILO C130, Art. 26; ECSS Protocol, Art. 18; ECSS (Revised), Art. 18.
[159] Resolutions CM/ResCSS(2008)5, CM/ResCSS(2009)5, CM/ResCSS(2010)5.

remark, a draft amendment was prepared by the Ministry of Social Affairs in 2009 to resolve the conflict.[160] However, this draft was not approved by the government and, as a result, Estonian law continues to be in conflict with the Code on this point.

The second matter, which has not been referred to by the Committee of Ministers, concerns the duration of the benefit. Firstly, in Estonia, payment of the benefit is limited to 250 days per calendar year. This implies that when an insured person is the victim of two different diseases or accidents within one calendar year, this person may not get a benefit for the full minimum period in both cases. This is not in accordance with the ECSS, which allows a sickness benefit to be limited to 26 weeks during each bout of illness. The same problem has been described regarding the Czech Republic, who does not meet the standards of ILO C130 on this point.[161] Furthermore, there is the problem with the Employment Contracts Act that allows employers to dismiss employees after four months of sickness. In effect, this shortens the maximum period of sickness benefit to 17 weeks (120 days), and is therefore in conflict with the ECSS.

Thirdly, since 2009 there has been the issue of employers' liability for wage compensation during five days of sick leave. This problem has also been mentioned in relation to the Czech Republic, where, recently, a period of fourteen days of wage compensation by the employer has been introduced.[162] It has been explained that there is a tension between employers' liability for the provision of social security benefits and the principles on solidarity and state responsibility incorporated in the international standards. The same remarks are relevant to the Estonian case – for example, what happens if the employer is not able to pay or simply does not pay? And is the employer allowed to ask questions about the health situation of an applicant? If so, the measure will have a negative impact, especially on employees suffering from chronic disorders. Furthermore, it is not clear whether this requirement is sufficiently backed up by rules that guarantee that the sick employee actually receives the amount they are entitled to during these five days, and that they will not be subject to discrimination because of their poor health.

Finally, with regard to medical care, it can be questioned whether the qualifying period of fourteen days is indeed necessary to prevent abuse, since it does not apply to all insured persons, and it has been introduced for administrative purposes only.

[160] Information obtained from experts.
[161] See section 3.6.6.
[162] See section 3.6.4.

Summary of matters of compliance and problematic issues

Table XII. Sickness benefit (Ee) compared with the international standards

Estonia is bound by the ECSS				
Sickness benefit	**ILO C102 (1952) / ECSS (1964)**	**ECSS Protocol (1964)**	**ILO C130 (1969)**	**ECSS Rev. (1990)**
Material scope	✓	✓	✓	✓
Personal scope	✓	✓	✓	✓
Benefit: amount	From the 4th until the 8th day: no collective financing; no state responsibility; no participation of persons protected.	From the 4th until the 8th day: no collective financing; no state responsibility; no participation of persons protected.	From the 4th until the 8th day: no collective financing; no state responsibility; no participation of persons protected. Funeral benefit is not granted to the insured persons.	From the 4th until the 8th day: no collective financing; no state responsibility; no participation of persons protected. Funeral benefit is not granted to the insured persons.
Benefit: duration	Dismissal of sick employees after 4 months of sick leave: termination of the benefit is not allowed. Suspension of the benefit in the case of illness caused by intoxication is not allowed if the intoxication does not result from *wilful misconduct*.	Benefit is not provided for at least 52 weeks in *each case* of sickness. Dismissal of sick employees after 4 months of sick leave: termination of the benefit is not allowed. Suspension of the benefit in the case of illness caused by intoxication is not allowed if the intoxication does not result from *wilful misconduct*.	Benefit is not provided for at least 52 weeks in *each case* of sickness. Dismissal of sick employees after 4 months of sick leave: termination of the benefit is not allowed. Suspension of the benefit in the case of illness caused by intoxication is not allowed if the intoxication does not result from *wilful misconduct*.	Benefit is not provided for at least 52 weeks in *each case* of sickness. Dismissal of sick employees after 4 months of sick leave: termination of the benefit is not allowed. Suspension of the benefit in the case of illness caused by intoxication is not allowed if the intoxication does not result from *wilful misconduct*.
Qualifying periods	The 14-day waiting period may not be necessary to preclude abuse.	The 14-day waiting period may not be necessary to preclude abuse.	The 14-day waiting period may not be necessary to preclude abuse.	The 14-day waiting period may not be necessary to preclude abuse.

✓ = compliance national provisions with the international standards.

4.7 UNEMPLOYMENT BENEFIT

4.7.1 INTRODUCTION

History

Given the fact that unemployment was officially non-existent, no protection for the unemployed was provided under the Soviet period. After 1991, the transition to a new economic system caused a rapidly increasing unemployment rate, from 0.6 percent in 1990, to 14.2 percent in 2000.[163] In response to the emergence of the unemployment problem, a state unemployment allowance was introduced in 1991 by Government Decree. The allowance is a flat rate, income tested benefit funded by the state budget. In addition, an unemployment insurance scheme was set up in 2001, operating next to the state benefit.[164] Consequently, social protection against the risk of unemployment currently consists of both an earnings-related unemployment insurance benefit that is financed from statutory contributions, and a flat rate income tested state unemployment allowance, financed directly from the state budget. Under this two-tier system, the state unemployment allowance covers those who have worked for 180 days during the previous year, but who are not eligible for an unemployment insurance benefit due to insufficient contribution records, termination of the maximum period of insurance benefit, or a refusal of the offer of a suitable job. The rate of the allowance is so low, that it merely serves to guarantee a minimum subsistence level. In 2007, the average replacement rate of the allowance to average gross wages was approximately 9 percent.[165] The allowance is paid up to 270 calendar days maximum. Because of its residual role, the state unemployment allowance is commonly labelled unemployment assistance.[166]

In fact, there is a significant overlap between the unemployment assistance and social assistance schemes, despite the different function of each scheme. Many recipients of unemployment assistance also receive social assistance, for dependent family members or housing costs. Moreover, a considerable number of unemployed persons who do not qualify for unemployment assistance are recipients of social assistance. A merger of these two assistance schemes has been

163 Võrk 2007; Leppik & Võrk 2006, p. 25; Paas 2004, p. 39; Leppik & Kruuda 2003, pp. 5–12; Data from Statistics Estonia, age group 16 years until pensionable age. After 2000, the unemployment rate fell to 4.9 percent in 2007. For the age group 16–64, the percentage was 13.8 percent in 2000, and 4.8 percent in 2007. It should be noted, however, that '[T]he registered unemployment is about 3 times lower than the unemployment rate according to the Labour Market Survey', Leppik 2007, p. 1.

164 Vodopivec 2005, p. 619; Leppik & Kruuda 2003, pp. 37–39. Because of the minimum insurance record requirements, the first payments were made in 2003.

165 Nurmela 2009D; Võrk 2008, p. 37.

166 Leppik 2007, pp. 1–4; Vodopivec 2005, p. 3; Paas 2004, pp. 38–44; Vroman 2002, p. 2.

proposed, but no consensus has been reached on this matter. A complicating factor is that social assistance is administrated by local municipalities, while unemployment assistance is administrated at state level. In spite of extended cooperation between the labour market and social services, for the time being, these two schemes will continue to function separately.[167] For the purpose of comparison with the international standards, in the following sections the assistance part must be left aside, since it is a means tested flat rate allowance available for employees only. In principle, a means tested allowance could comply with the ECSS, but only if it would cover all residents.[168]

Legislation

The Labour Market Services and Benefits Act – in force as of 2006 – regulates labour market services and support with the aim to 'achieve maximum possible employment rates among the working population, and to prevent their long-term unemployment and exclusion from the labour market.'[169] It sets out definitions of, for instance, 'unemployed', 'jobseeker' and 'suitable job' and the content of the labour market services. Moreover, it stipulates the eligibility and payment of unemployment assistance, which was previously regulated by the Social Protection of the Unemployed Act. The legal basis for the unemployment insurance benefit is the Unemployment Insurance Act of 2002.[170] This act sets out rules regarding its personal scope, the insurance premiums, the conditions and level of the benefit, and the unemployment fund.

At the international level Estonia is bound, through ratification, by the European Code of Social Security Part IV on unemployment.

Administration and financing

The Estonian Unemployment Insurance Fund administrates the payment of unemployment insurance benefits in accordance with the Unemployment Insurance Act.[171] The Fund took up its activities in 2002, however, the payment of insurance benefits only started in 2003. At the highest level of the Fund is the Supervisory Board, composed of six members, two of which are appointed by the government, two by the trade unions, and two by the employers' confederation. Thus, the Fund complies with the requirement of participation in the management by the persons protected, as prescribed by the ECSS, Article 72. The

167 Leppik 2007, pp. 3–5.
168 ECSS, Art. 21(b).
169 Labour Market Services and Benefits Act (RT I 2005, 54, 430), Art. 1 (1). English version is available via the website of the Ministry of Social Affairs.
170 Unemployment Insurance Act (RT I 2001, 59, 359).
171 Website of the Unemployment Insurance Fund (*Eesti Töötukassa*).

Fund also provides annual reports with the necessary statistics, as required under Article 71.

Unemployment insurance is a compulsory insurance financed by contributions from employees and employers. Until June 2009, employees paid 0.6 percent of their gross wages, and employers 0.3 percent of the employees' payroll. However, under pressure of the strong economic downturn in that year, accompanied by rapidly increasing unemployment figures, the contributions were first raised to 2 percent for employees and 1 percent for employers, and as of August 2009, to 2.8 percent and 1.4 percent respectively.[172] These contributions are withheld from the employees' salaries by the employers.

4.7.2 MATERIAL SCOPE

Definition of the contingency

Unemployment insurance provides partial compensation for the loss of income to insured persons due to unemployment.[173] This definition excludes newcomers to the labour market, which is also expressed by the qualifying period required for registration as a jobseeker with the Labour Market Board. According to Article 2 of the Labour Market Services and Benefits Act,

> an unemployed person is a person who is not employed, has been registered as a job-seeker with a Labour Market Board Department, and is seeking employment. An unemployed person is deemed to seek employment if he or she complies with the Individual Action Plan, and is ready to accept suitable work and to promptly commence work.

The Individual Action Plan sets out the knowledge, skills, experience and wishes of the person, on the basis of which will be identified which support services they need for finding a job, and details the job seeking activities the jobseeker should undertake. Partial unemployment is not covered, since the unemployed must be available for full time work.[174] A person who is in full-time study, or who has reached the pensionable age, cannot be registered as unemployed.

Suitable employment

During the first twenty weeks after registration, a job is deemed suitable if it is not ruled out for health reasons, if transportation to work and back does not take

172 Website of the Unemployment Insurance Fund.
173 Unemployment Insurance Act, Art. 2.
174 MISSOC (Ee), 2008.

more than two hours a day and 15 percent of the monthly wages, and if it corresponds to the person's earlier work experience and education.[175] The wages must be at least 60 percent of the former average income, subject to social tax, but not less than twice the minimum wage. In calculating a person's average income, the first three months out of the six months before the registration of the person as unemployed is taken into account.[176] After twenty weeks, a suitable job is also understood as a fixed-term or short-term job where the salary, in full-time employment, is higher than the unemployment insurance benefit received by the person for the same period, but not less than the minimum monthly wage. Moreover, the job need not correspond to the education, profession or earlier work experience of the unemployed person, and no minimum number of working hours is required.

4.7.3 PERSONAL SCOPE

In general, all employees and public servants are covered by the unemployment insurance scheme; self-employed persons are not included. To demonstrate compliance with the ECSS, Estonia refers to the option that at least 50 percent of all employees must be protected. In 2008, 94 percent of the total number of employed persons (including the unemployed), were covered.[177]

4.7.4 BENEFITS

Amount of the benefit

The value of an unemployment benefit is connected to the insured person's previous income.[178] During the first 100 days (14 weeks), the benefit amounts to 50 percent of the beneficiary's previous average wage per calendar day, falling back to 40 percent from the 101st day of unemployment. For the calculation of the average wage per calendar day, remuneration (from which unemployment insurance premiums have been withheld) over the nine months of employment preceding the last three months of employment are taken into account. The total sum of wage payments during the nine months of employment is divided by 270, and the result is the average remuneration per calendar day. Remunerations paid over the last three months of employment are not taken into account, nor are the payments from which unemployment insurance premiums are not withheld.

175 Ministry of Social Affairs (Ee) 2005B.
176 Labour Market Services and Benefits Act, Art. 12 (3).
177 ECSS Report (Ee) IV, Art. 21.
178 Website of the Unemployment Insurance Fund; MISSOC (Ee), 2010; Leppik 2007, pp. 1–2; Kurtyka 2006, pp. 20–22.

The benefit is subject to a maximum, which is 50 percent or 40 percent, as the case may be, of three times the average wage per calendar day of all insured persons during the previous calendar year. This means that if the previous average wage of beneficiary is more than three times the average wage per calendar day in Estonia, the benefit will be calculated according to the latter. The minimum benefit value is the daily rate of unemployment assistance. Therefore, if the benefit is lower than the daily rate of unemployment assistance, a benefit equal to the daily rate of unemployment assistance is granted, amounting to EEK 32.90 per day in 2008.

For assessment of conformity of the level of benefits with the requirements of the ECSS, Estonia makes reference to the provision that the unemployment benefit plus family benefit for two children must be at least 45 percent of the average wage of a standard beneficiary, being a skilled manual male employee, plus family benefit.[179] For the determination of the average wage of a skilled manual male employee, the option chosen is to take into account 125 percent of the average earnings of all the insured persons, which is the reference wage.[180]

Calculation example[181]

In 2008, the reference wage (125 percent of the average earnings of all insured persons) was EEK 14,715. Child benefit for two children was EEK 600.

Monthly benefit: 0.5 × EEK 14,715	=	EEK 7,358
Benefit for 2 children aged 6 to 15	=	EEK 600
Unemployment benefit incl. child benefit	=	EEK 7,958

The reference wage of a skilled worker with a dependent wife and two children supplemented with child benefit amounted to EEK 14,715 + EEK 600 = EEK 15,315. The ratio between the unemployment benefit and the reference wage was EEK 7,958 / EEK 15,315 = 0.52.

In conclusion, the gross replacement in 2008 was 52 percent. Because according to the ECSS the minimum duration of the benefit must be 13 weeks, the subsequent benefit of 40 percent of previous income is no longer relevant for compliance with the ECSS. It is intriguing that the actual average benefit paid per month during the first 100 days in 2008 was much lower than the outcome of this calculation, namely, EEK 3,614.[182] This can be explained by the fact that

179 ECSS Report (Ee) III, Art. 22; ECSS Art. 22 in connection with Art. 65.
180 ECSS Art. 65 (6) sub c.
181 The calculation is based on amounts of 2008, taken from ECSS Reports (Ee) IV. The exchange rate of the Estonian Kroon on 1 January 2011, when Estonia joined the eurozone, was €1.00 to EEK 15.64.
182 Average in 2007. Website of the Unemployment Insurance Fund.

many recipients of unemployment insurance benefit previously received (or declared) only minimum wage or only slightly more.

Duration of the benefit

In respect of the duration of the benefit, Article 8 of the Unemployment Insurance Act reads:

> (1) An insured person has the right to receive an unemployment insurance benefit during the whole period when he or she is registered as unemployed, but not longer than:
> 1) 180 calendar days if the insurance period of the insured person is shorter than 56 months;
> 2) 270 calendar days if the insurance period of the insured person is 56–110 months;
> 3) 360 calendar days if the insurance period of the insured person is 111 months or longer.

If a person becomes unemployed for a second time within 12 months of the previous registration as unemployed, the same maximum duration counts. Thus, if a person is entitled to receive a benefit for 180 days, of which they 'use' only 140 days because they find a new job, but becomes unemployed again after four months, they will then receive a benefit only for the remaining 40 days. It should be noted that until 2012 no one will be entitled to 360 days payment of the benefits, since the law was adopted only in January 2002. The benefit is paid from the eighth day after the day of submission of the application for the benefit, which implies a waiting period of seven days.[183] In 2007, the average duration of unemployment insurance benefits was 162 days.

4.7.5 QUALIFYING CONDITIONS

Qualifying period

Preconditions for entitlement to the benefit include residency in one of the EU Member States, and registration as unemployed at the Labour Market Board. Furthermore, unemployment insurance contributions must have been paid for at least 12 months during the two previous years. Persons who have reached the pensionable age or who receive a pre-retirement pension do not qualify for unemployment benefit.

[183] ECSS Report (Ee) 2005/2006, Art. 24; Unemployment Insurance Act, Art. 11 (5).

Sanctions

A benefit is not granted if the person's last employment was terminated due to a breach of duties of employment, a loss of confidence, an indecent act, or an act of corruption.[184] Furthermore, registration as unemployed will be terminated if the jobseeker, without good reason, refuses suitable employment, or refuses to comply with their Individual Action Plan drawn up by the Labour Market Board.[185]

4.7.6 COMPARISON WITH THE INTERNATIONAL STANDARDS[186]

Matters of compliance

The contingency covered by the unemployment insurance system is full unemployment of a person who is ready to accept a suitable job, which is basically in line with all relevant international standards. The interpretation of suitable employment also concurs with these standards, since during the first twenty weeks, the health of the individual is taken into account, as well as the distance to work, former wages, work experience and education. These are the broadly accepted underlying principles of suitable employment in the international documents. As regards the personal coverage, Estonian unemployment insurance includes almost all employees, therefore it meets the requirements of all the relevant international instruments, both ratified and unratified.

In relation to the amount of the benefits, it has been reported that the unemployment benefit is below the standard given in ILO C102.[187] However, this observation was based on the unemployment assistance allowance, which was shown to be below the subsistence minimum in Estonia.[188] It was furthermore argued that most unemployed do not receive an insurance benefit: only 20 percent of newly registered unemployed people fulfilled the conditions for such a benefit in 2005, mostly because they had not paid unemployment insurance

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184 Unemployment Insurance Act, Art. 13; ECSS Report (Ee) II, Art. 24; Muda 2009, p. 127.

185 Labour Market Services and Benefits Act, Art. 7; ECSS Report (Ee) II, Art. 24.

186 For a detailed description of the international norms regarding unemployment benefit, see section 2.11.

187 Hardy& Butler 2007, pp. 64–65; Karu & Nurmela 2006.

188 It is, indeed, an underlying principle of this convention that a means tested cash benefit should guarantee at least the minimum of subsistence – see section 2.10.3.

contributions for at least 12 months during the previous 36 months.[189] Interesting in this respect is that the European Committee of Social Rights has repeatedly concluded that the situation in Estonia is in not in conformity with Article 12§1 of the Revised Charter on the ground that, among other things, the unemployment benefit and the minimum unemployment insurance benefit are manifestly inadequate.[190] The Committee has argued that the rates are below the poverty threshold, even when defined as 40 percent of median equivalised income and calculated on the basis of the Eurostat 'at-risk-of-poverty' threshold. Although these arguments are indeed relevant in practice and are certainly worth further study, they do not establish a conflict with ILO C102 or the ECSS. As shown above, the replacement rate of insurance benefit, calculated in accordance with the relevant provisions, amounted to 52 percent in 2008, which exceeds the 45 percent stipulated by ILO C102, ILO C168 and the ECSS; it even meets the ECSS (Revised), which requires 50 percent of previous income. The fact that many unemployed apparently do not have recourse to the insurance benefit does not cause an infringement of the ECSS, as long as the requirements regarding qualifying conditions are met. Another point that deserves our attention with regard to the level of benefit is the gap between the outcome of the calculation of the average benefit according to the ECSS, and the real average benefit according to empirical data. It may be concluded that Estonia complies with international standards in this respect, however severe question marks are raised as to the effectiveness of the benefit. This issue will be further discussed in section 6.4.

Regarding the duration of the benefit, the ECSS gives two options for the limitation of the duration, notably 13 weeks within a period of 12 months, or 13 weeks in each case of suspension of earnings. The period of entitlement of 180 days (minimum) within 12 months under the Estonian law exceeds the minimum norm of the ECSS. Additionally, the requirements of the ECSS (Protocol) (21 weeks) and ILO C168 (26 weeks) are met. The ECSS (Revised) requires a benefit be granted for the duration of 39 weeks. The qualifying period under the Estonian scheme is not particularly strict, and therefore fits the indefinite norm of the conventions not to be longer than necessary to preclude abuse. A waiting period of seven days in each case of suspension of earnings is the maximum provided for in ILO C102, ECSS, and ILO C168. Under the ECSS (Revised), the waiting period may not exceed six days within a period of twelve months.

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189 Karu & Nurmela 2006, p. 2. According to the Health Insurance Fund: 23 percent in 2007, 45 percent in 2009, ESCR Report (Ee) 2005–2007, p. 95.

190 ECSR Conclusions (Ee) 2006 and 2009, pp. 18–19.

One other point worth mentioning is the fact that the unemployment insurance contribution is paid by the employees for the greater part: 2.8 percent of their gross income, while employers pay 1.4 percent. According to the ECSS, the cost of the benefits shall be borne collectively in a manner which avoids hardship to persons of small means. It is specified that '[t]he total of the insurance contributions borne by the employees protected shall not exceed 50 percent of the total of the financial resources.'[191] However, it is furthermore set out that this may be calculated by taking all benefits together, except family benefits and employment injury benefits. Since the financing of sickness benefits and state pensions are totally borne by the employers, the greater part to be paid by the employees as regards the unemployment scheme will not cause a problem in light of the ECSS.

Problematic issues

The Committee of Ministers has repeatedly remarked in its conclusions on the annual reports on the application of the ECSS by the Estonian government with regard to the provision that a benefit is not paid if the person left their previous work 'due to a breach of duties of employment, loss of confidence, an indecent act or act of corruption.'[192] The Committee noted that this provision does not conform with the ECSS, since suspension of the unemployment benefit in those cases is allowed only 'where dismissal resulted from the criminal offence or wilful misconduct committed by the person concerned.'[193] The government replied on this comment in its next report by arguing that it was fully in compliance with the ECSS, because the provision at stake is used only in relation with disciplinary punishments.[194] Furthermore, it stated that if an insured person has no right to receive unemployment insurance benefit, he or she can still receive unemployment services and assistance benefit. The Committee was not satisfied with this answer and repeated that the Estonian legislation is not in line with the ECSS because the suspension of a benefit is allowed only when the dismissal can be qualified as wilful, which has to be distinguished from blameable.[195]

191 ECSS, Art. 70 (2).
192 CM/ResCSS(2008, 2009)5; Unemployment Insurance Act, Art. 6 (2) 2).
193 ECSS, Art. 68(e) and (f).
194 ECSS Report (Ee) III, pp. 9–10.
195 CM/ResCSS(2010)5. A similar comment was issued by the CEACR in respect of the British unemployment benefit, see Roberts 2006, p. 65.

Summary of matters of compliance and problematic issues

Table XIII. Unemployment benefit (Ee) compared with the international standards

Estonia is bound by the ECSS				
Unemployment benefit	**ILO C102 (1952) / ECSS (1964)**	**ECSS Protocol (1964)**	**ILO C168 (1988)**	**ECSS Rev. (1990)**
Material scope	✓	✓	✓	✓
Personal scope	✓	✓	✓	✓
Benefit: amount	✓	✓	✓	✓
Benefit: duration	Suspension of the benefit in the case of dismissal due to a breach of duties, where dismissal does not necessarily result from a *criminal offence or wilful misconduct* is not allowed.	Suspension of the benefit in the case of dismissal due to a breach of duties, where dismissal does not necessarily result from a *criminal offence or wilful misconduct* is not allowed.	Suspension of the benefit in the case of dismissal due to a breach of duties, where dismissal does not necessarily result from a *criminal offence or wilful misconduct* is not allowed	Benefit is not provided for at least 39 weeks. Suspension of the benefit in the case of dismissal due to a breach of duties, where dismissal does not necessarily result from a *criminal offence or wilful misconduct* is not allowed
Qualifying periods	✓	✓	✓	✓

✓ = compliance of national provisions with the international standards.

4.8 OLD-AGE BENEFIT

4.8.1 INTRODUCTION

History

The point of departure for Estonia's pension reform was the Soviet legacy that involved a pay-as-you-go, non-contributory pension system, financed from the state budget and covering all employees.[196] The statutory retirement age was 60 years for men and 55 years for women, with a lower age for persons with disabilities and prescribed occupations. The replacement rate of previous earnings was relatively high, ranging from 50 percent for higher income workers,

[196] Aidukaite 2006, p. 260; Leppik & Võrk 2006, pp. 29–30; Raudla & Staehr 2003, p. 69.

to 100 percent for workers with a lower income. Although eligibility for old-age pension was based on employment, everybody was entitled to the benefit, since unemployment was practically non-existent. Besides, the few people who did not work received a flat rate social assistance pension. The pensions were linked to previous wages, but differentials were limited because wages were generally at the same level.

In 1990, in light of oncoming independence, the Estonian government made preparations for a radical overhaul of the Soviet pension system, eager to shake off the Soviet heritage as quickly and as completely as possible. When the new Pension Act was drafted, even before independence was a fact, the Prime Minister specifically ordered 'that no paragraph of the new pension law should be a copy of the text of the Soviet Law.'[197] This new act firstly aimed to separate the Estonian pension system from the Soviet system, and secondly to increase pensions, both in relation to the level of the benefits and the coverage, which was broadened to include all residents. It set out a defined benefit pension scheme, financed by contributions, providing benefits which were related to the minimum wage, as well as to previous earnings, with the minimum level set at 85 percent of the minimum wage. Before the Act was adopted,[198] the government had already introduced a social tax of 20 percent of gross payroll to be paid by employers, and had taken measures to isolate the Social Fund from Soviet Union finances. As a matter of fact, because of the economic downgrade during the transition period, in addition to insufficient financial calculation regarding the new scheme, the new Pension Act turned out to be unaffordable and was therefore short-lived.[199] Within one year of its adoption, the Act was suspended and replaced by a resolution setting out flat rate state allowances, linked to the minimum wage, entailing a substantial benefit reduction. Although this was intended to be a temporary rescue measure with the sole purpose of dealing with the economic crisis, the initial Pension Act was never reintroduced.

The first democratically elected government took another step in pension reform by adopting the State Allowances Act of 1993. This act regulated a gradual increase of the pensionable age to 65 for men and 60 for women by 2003,[200] and a qualification period of 15 years of service, both for men and women. The benefits remained basically flat rate, with an additional link to the number of service years, and were adjusted according to the revenues from the fixed contribution

197 Leppik & Võrk 2006, p. 31.
198 Pension Act, adopted 15 April 1991.
199 Leppik & Võrk 2006, p. 32.
200 Leppik & Võrk 2006, pp. 34–35. An attempt to equalise the pensionable age of men and women at 65 had been frustrated at that time by female politicians.

rate of 20 percent of the employer's payroll.[201] This act was, again, considered to be a temporary arrangement for the duration of economic transition, as the government intended to reintroduce an earnings related pension within a few years, but it held out for seven years. During these years, it was subject to various changes, such as the uncoupling of the benefits from the minimum wage, and the new possibility for working pensioners to receive full pension benefits in addition to their income from work.

Meanwhile, the government had appointed a Social Security Reform Commission in 1997, and had assigned it the task of preparing a solid model for pension reform.[202] Within one month, the policy paper 'Conceptual Framework for Pension Reform' had been produced, and shortly afterwards was approved by the government. The paper described the existing problems of the pension scheme and gave objectives for a new system, but, first and foremost, it suggested that before drafting new legislation, a political agreement should be reached on the basic choices set out in the paper. The Reform Commission considered such a fundamental agreement at the political level of major importance, in view of the great number of pension reform proposals that had already been developed by that time without receiving sufficient political backup. Anticipating this agreement, that was not reached until 2001, but still following the main strategy of the framework paper, the State Pension Insurance Act was adopted in 1998 and completely implemented by 2000. In fact, the adoption of the Act was the first mature step regarding pension reform, which has been carried out largely according to the framework paper, notwithstanding several political changes.

By and large, the Commission had depicted in its paper a three pillar pension system:

- 1st pillar: a state-managed compulsory pay-as-you-go pension scheme, financed from social tax paid by the employer, granting benefits consisting of a flat rate basic amount, a service period related component and an insurance related component;
- 2nd pillar: a privately managed compulsory pension scheme, funded by contributions of employees and topped up on the cost of the 1st pillar scheme;
- 3rd pillar: a privately managed voluntary pension scheme, in the form of insurances or pension funds offered by insurance companies.

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201 The contributions were not linked to individual employees; the employer had simply to pay 20 percent of the total payroll, covering salaries of all their employees.

202 Leppik & Võrk 2006, pp. 48–49; Müller 2006, p. 405; NataliB 2004; Raudla & Staehr 2003, pp. 70–72.

The political agreement retained this framework, to the extent that the second pillar would be voluntary, while participation would be promoted by attractive switching conditions from the first (partly) to the second pillar. However, under pressure (especially) from the Trade Unions on the one hand, and financial institutions on the other, the coalition government finally agreed to compulsory participation in the second pillar for all new entrants to the labour market.[203]

In brief, for the first pillar, the changes have resulted in a pensionable age of 65 years for both men and women,[204] and entitlement to the benefit on the basis of social tax paid instead of years of service.[205] Furthermore, the pensions are calculated on a flat rate base, with a supplement depending on the amount of social tax paid during the entire career. The flat rate amount represents a solidarity element in the system, providing redistribution from higher income groups to lower income earners. The Pension Insurance Act also provides for a so-called 'national pension', granted to persons who do not meet the required qualification period, the amount of which is fixed by Parliament.

The second pillar, supplementary to the state pension, is, as mentioned before, obligatory for new entrants on the labour market, or more specifically, for people who were born in 1983 or later; for those born before 1983, participation is voluntary.[206] The scheme became operational in 2002, starting with the collection of contributions for the new individual savings accounts, and the first pensions were paid out in 2009. As a characteristic of a defined contribution system, the amount of the ultimate pension depends on the value of the accumulated contributions a person paid into their individual savings account plus the rate of return from the investment, minus management fees. The pension must be paid out, as a general rule, in the form of monthly annuities; only if the monthly amount is less than one quarter of the national pension (i.e. the minimum first pillar benefit), or exceeds it by three times, may a programmed withdrawal take place. Assessment on whether the second pillar may be taken into account to meet the requirements of the ECSS is carried out in the last part of this section.

The voluntary third pillar pension provides the participant with an addition to first and second pillar pensions, and aims to maintain a better living standard at pensionable age.[207] It has been estimated that the first and second pillar pensions together will, on average, account for about half of a person's former income

203 Leppik & Võrk 2006, pp. 53–57; Müller 2006, pp. 404–407; Raudla & Staehr 2003, p. 74.
204 To be gradually obtained in 2026.
205 Leppik & Võrk 2006, p. 69; website of the Ministry of Social Affairs.
206 Leppik & Võrk 2006, pp. 70–82; Raudla & Staehr 2003, pp. 73–75; website of the Ministry of Social Affairs.
207 Leppik & Võrk 2006, pp. 120–121; website of the Pensionikeskus (Pensionfund).

from work. According to research, however, a person's pension should be 65–70 percent of their previous income in order to maintain the established life standard. The government's advice, therefore, is to make use of all three pension pillars to be able to maintain that standard, and favourable tax treatment accommodates this objective. However, in 2007 only 18 percent of all employed persons had concluded a pension contract with an insurance company or with a voluntary pension fund.[208] Participation is not subject to a minimum age, although tax advantages apply only from 55 years of age. The savings may also be used in the case of total and permanent incapacity for work.

Legislation

The main act in the field of first pillar old-age pensions is the State Pension Insurance Act, which also comprises invalidity and survivors' pensions, as well as the national pension.[209] This act covers the definition of the state pension, the personal coverage, the organisation of the insurance, procedural matters, the qualifying conditions and procedure for entitlement, and rules for calculation and payment of the pension. In addition to this act, the Social Tax Act regulates the social taxes to be paid by the employers and the state. The activities of the second pillar pension funds are regulated by the Funded Pensions Act,[210] while the third pillar pensions are governed by the Investment Funds Act.[211]

At the international level, Estonia has ratified Part V concerning old age of the European Code of Social Security.

Administration and financing

The administration of the state pension system is carried out by the Estonian National Social Insurance Board (ENSIB), established in 1993 as a government agency under the Ministry of Social Affairs.[212] The main tasks of the ENSIB include the organisation and co-ordination of granting and payment of the state pensions, family benefits, social benefits and funeral grants. Data on all insured persons, including the social taxes paid on their behalf, are filed in the State Pension Insurance Registry. Communication with insured persons and beneficiaries is organised through four regional Pension Offices with local offices in the different counties and some cities. Within the Ministry, the Social Security Department is responsible for pension policy developments.

208 Tali 2007, p. 31.
209 State Pension Insurance Act, passed on 26 June 1998, entered into force 1 April 2000 (RT I 1998, 64/65, 1009; consolidated text RT I 2001, 9, 42).
210 Funded Pension Act, adopted 12 September 2001, entered into force 1 October 2001.
211 Investment Funds Act, adopted 14 April 2004, entered into force 1 May 2004.
212 Natali 2004B; Leppik & Kruuda 2003, p. 20; Pieters 2003, pp. 44–45; website of the Estonian Social Insurance Board.

The first pillar pension scheme is financed mainly through social taxes, of which 20 percent is allocated for the state pension insurance.[213] Social tax, which amounts to 33 percent of gross payroll in total (20 percent for pension insurance and 13 percent for health insurance), is paid by the employers and by the self-employed. Additionally, the state pays social tax on behalf of persons who receive unemployment benefit, persons raising a child of up to 3 years of age, and some other categories of non-active persons who are considered equal to insured persons. The cost of national pensions and pension supplements, as well as the administrative costs, are paid out of the general state budget. Furthermore, the state budget also covers any deficit of the pension insurance budget, in case the social tax revenues do not meet the cost of pensions.

As far as the financing of the second pillar pension is concerned, in 2001 the coalition agreed on the adoption of the so-called 'carve out and top up' approach, which means that from the social tax earmarked for pension insurance, 16 percent continues to finance the first pillar, and 4 percent is allocated to the second pillar, while an additional contribution to the second pillar of 2 percent is levied on insured employees.[214] Estonia is the only CEE country that has included this top up component in its financing strategy, which was considered necessary as an incentive to join the second pillar pension and, therefore, to increase the income level of pensioners. In fact, if an employee joins the second pillar and pays a contribution of 2 percent of their gross wage to their individual account, the state adds 4 percent out of the social tax that is paid by the employer as contribution to the state pension insurance. As a consequence, participation in the second pillar is, partly, at the cost of first pillar benefits.[215]

The participant themselves must choose one of the eighteen privately managed pension funds (in 2008), which are classified into three categories of investment strategy: lower-risk funds, which may invest only in fixed-interest instruments, medium-risk funds, and higher-risk funds, allowed to invest up to 50 percent of assets in equities. Each fund management company, mandatorily affiliated with a bank or an insurance company, is obliged to offer a lower-risk fund, but in addition, higher-risk funds may be created. In practice, seven high-risk funds and seven lower-risk funds, supplemented with four medium-risk funds, have been established.[216] The operational costs of the fund management companies are covered by management fees, the maximum rate of which are determined annually by the Minister of Finance, and which generally differs from 1.5 to 2.0 percent of the market value of the assets. The investment risks burden the

[213] MISSOC (Ee), 2008; Ministry of Social Affairs (Ee) 2005A, p. 9; Leppik & Kruuda 2003, p. 22; website of the Ministry of Social Affairs.
[214] Leppik & Võrk 2006, pp. 55, 72–74; Müller 2006, p. 406;.
[215] For the consequences of the transfer costs, see also: Raudla & Staehr 2003, p. 78.
[216] For the actual situation, see the website of the Pension Fund (*Pensionikeskus).*

individual participant, since there are no guarantees on absolute or relative rate of return.[217] The only guarantee the insured person enjoys is against breaches by the fund managers, such as violation of investment rules, for which the management company must pay contributions to a guarantee fund. To assert the interests of second pillar participants, the Financial Inspectorate has been assigned the task of supervising the pension funds.[218] The insured person can switch between funds at the start of every calendar year, however, the paid contributions are not redirected to the newly chosen fund, as a result of which, during a worker's career it is possible to accumulate contributions in different funds. It has been calculated that in 2050 more than two thirds of the average old-age pension will consist of second pillar benefit.[219]

The transfer of 4 percent of social tax from the first to the second pillar on behalf of second pillar participants causes a considerable gap in the financing of the pay-as-you-go first pillar pension system, even more so since the state pensions will not be less for persons who participate in the second pillar.[220] This gap is supposed to be filled by the surplus social tax revenues generated in recent years, and the stabilisation reserve.[221] However, these resources will run dry in the not too distant future and a long-term strategy for financing these transition costs is still lacking.[222] The recent economic recession has intensified the problem.[223] To reduce the financial burden of the public pension system, the government adopted a temporary measure in April 2009 that suspended the 4 percent state contributions from June 2009 until December 2010. In 2011, the state will resume contributing 2 percent, in 2012 the initial 4 percent will be contributed again, and as of 2013, the contribution gap will be gradually repaired through extra state contributions.

4.8.2 MATERIAL SCOPE

Since 2001 the pensionable age for men has been 63 years; for women the pensionable age is being gradually increased, and will be equal to that of men by

[217] Leppik & Võrk 2006, pp. 83–85; Raudla & Staehr 2003, pp. 55–76; website of the Ministry of Social Affairs. In 2003 67 percent of all participants opted for high-risk funds; of the younger participants, born after 1981, 85 percent joined high-risk funds: Raudla & Staehr 2003, p. 77.

[218] The Financial Inspectorate, established in 2002, is an independent legal authority for the inspection of banks, insurance and security companies.

[219] Raudla & Staehr 2003, p. 80.

[220] Estimates vary from 0.4 percent to 1.0 percent of the GDP annually, depending on the 2nd pillar participation rate: Fultz 2006, p. 9; Leppik 2006, p. 76; Paas 2004, p. 37; Pieters 2003, p. 59.

[221] Ministry of Social Affairs (Ee) 2005A, p. 9; Pieters 2003, p. 59.

[222] Leppik & Võrk 2006, pp. 118–120.

[223] Estonia.eu 2009.

2016.[224] Following the trend within Europe and under pressure of the economic crises, in December 2009 the Estonian government sent a draft law to the Parliament that sought to raise the retirement age to 65 years by 2026. This law was adopted in April 2010. The state pension is granted irrespective of engagement in any gainful activity by the pensioner. The Estonian law also provides for early retirement up to three years prior to the general retirement age, however, resulting in a permanently reduced old-age pension.[225] An early retirement old-age pension will not be granted as long as the applicant is employed. Additionally, for some categories of persons 'an old-age pension under favourable conditions' is available, which means that they can apply for a pension three or five years before reaching the prescribed pensionable age, depending on the specific category.[226] Eligible are, for example, parents who have raised three or more children and who meet specific conditions, and persons who participated in the cleanup of the accident at the Chernobyl nuclear power station. Lastly, so-called 'superannuated pensions' – also with advantageous conditions – are granted to workers in occupations which involve a loss or reduction of professional capacity for work before reaching pensionable age, such as police officers, emergency service workers, employees of penal institutions, and some mining and excavation workers.

4.8.3 PERSONAL SCOPE

Insured for a state pension are persons who, pursuant to the Social Tax Act, pay the pension insurance part of social tax, or for whom the social tax must be paid.[227] Consequently, all employees and self-employed persons are insured, as well as persons treated as insured persons, and persons for whom the state pays the social tax, including recipients of a child care allowance, caregiver's allowance, parental benefit, unemployment benefit, or conscripts in compulsory military service.[228] In its reports on the application of the ECSS, Estonia refers to the option that classes of the economically active population must be covered, constituting not less than 20 percent of all residents. On 31 December 2008, Estonia had 639,932 employees and 18,147 self-employed persons, while the population figure was 1,340,415. This implies that 49.1 percent of the total population was covered by the state pension insurance.[229]

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224 State Pension Insurance Act, Art. 7; ECSS Report (Ee) III, Art. 26.

225 Leppik & Kruuda 2003, p. 33; ECSS Report (Ee) III, Art. 26.

226 State Pension Insurance Act, Art. 9.

227 State Pension Insurance Act, Art. 3; ECSS Report (Ee) I, Art. 27.

228 The state pays social tax for ca 15 percent of all insured persons. It should be noted, however, that the amount of social tax paid by the state is relatively small, and ensures an annual pension insurance coefficient of only 0.1, which is 10 percent of the coefficient of a person earning an average wage; Ministry of Social Affairs (Ee) 2005A, p. 18.

229 ECSS Report (Ee) IV, Art. 27.

4.8.4 BENEFITS

Amount of the benefit

The old-age pension may consist of three different parts:[230]

- The basic amount, fixed by Parliament upon passage of the state budget, pursuant to the State Pension Insurance Act;
- The length of service part, taking into account periods of work until 31.12.1998, multiplied by the annual insurance coefficient (the value of one year of service) determined by the government; and
- The insurance component, taking into account insurance contributions as of 31.12.1998. This component is based on a personal coefficient, calculated by dividing the total amount of social tax that has been paid on behalf of the insured person by the average amount of social tax paid in the given calendar year. Consequently, the amount of social tax paid on the average wage in the course of one year will give a coefficient of 1.0. This 'personal coefficient is provided annually by the ENSIB, and the sum of these personal coefficients, multiplied by the insurance coefficient determined by the government,[231] defines the insurance component.[232]

According to the State Pension Insurance Act, the old-age pension shall not be less than the national pension rate, which thus serves as the minimum guarantee for old-age pension.[233] Thus, for persons who stopped working before 31 December 1998, the pension is the sum of the first two components only, whereas persons who started working after this date, receive a pension amounting to the sum of the first and third components. In the course of the next four decades, the length of service part will gradually disappear, until all persons who worked before 1999 have reached the pensionable age. The amount of the pension exceeding a certain amount is subject to income tax; in 2008 the exemption for pensioners amounted to EEK 5,250, and 21 percent income tax was levied on the exceeding part.

For the calculation of the old-age pension according to the ECSS, Estonia makes reference to the option that the benefit must amount to 40 percent of the average wage of an ordinary adult male labourer in manufacturing.[234] In its reports on the application of the ECSS, the government takes, for its calculation, the basic

230 ECSS Report (Ee) IV, Art. 28; website of the Estonian Social Insurance Board; Leppik & Kruuda 2003, p. 32.
231 This is the same coefficient as used for the length of service component.
232 It has been calculated that in 2002, 72 percent of the insured persons had an average personal coefficient of less than 1.0: Raudla & Staehr 2003, p. 82.
233 State Pension Insurance Act, Art. 12 (2).
234 Pursuant to ECSS Arts. 28 (a) and 66.

amount and the length of service components only. It must be recognised that this does not reflect the actual situation, because since 1999 the pensions have partly been based on insurance years as well. The following calculation example is based on service years only according to the calculation of the government, while in section 4.8.6, both service years until 1998 and insurance years from 1999 will be taken into account.

> *Calculation example*[235]
>
> The average net salary of the standard beneficiary (an unskilled adult male labourer in manufacturing) in 2007 was EEK 6,194, which is the reference wage.
> The first component of the old-age pension, the basic amount, was EEK 1,374.
> For the calculation of the second component, the monetary value of one year of service (annual factor) was fixed at EEK 54.43, and the personal coefficient is set at 1 for all service years. The pension according to the ECSS is based on a qualifying period of 30 years of service, thus the total amount of the length of service component was 30 × EEK 54.43 × 1 = EEK 1,633.
> Thus, the old-age pension of a standard beneficiary in 2007 amounted to: EEK 1,374 + EEK 1,633 = EEK 3,007 per month.
> The ratio between the old-age pension and the reference wage was EEK 3,007 / EEK 6,194 = 0.485 percent.
> Because the ECSS considers the standard beneficiary to be a man with a dependent wife of pensionable age, the Estonian government in its reports adds the amount of the national pension for the wife to the calculated pension.
> The national pension, which is at the same time the minimum old-age pension, amounted to EEK 1,573 in 2007.
> Thus, the total old-age pension of a standard beneficiary was: EEK 3,007 + EEK 1,573 = EEK 4,580, which represents 73.9 percent of the reference wage.

In conclusion, according to the Estonian government, the replacement rate of the old-age pension of a standard beneficiary compared to reference wage, amounted to 73.9 percent in 2007.

Duration of the benefit

Old-age pension is granted throughout the contingency, until the death of the beneficiary. There is one exception: payment is suspended during imprisonment and preventive custody. However, if the pensioner has dependents, part of the pension will be paid according to the number of dependents.[236]

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[235] The government in its report on 2007/2008 (ECSS Report (Ee) IV) used, for its calculations, data on different time bases, which is not in conformity with ECSS, Article 66. In this calculation example this is corrected: the average wage of a male labourer in manufacturing in 2007 is taken into account (source: ECSS Report (Ee) IV), as well as the basic amount, the annual factor, and the national pension of April 2007 (sources: ECSS Report II; website of the Estonian Social Insurance Board). The exchange rate of the Estonian Kroon on 1 January 2011, when Estonia joined the eurozone, was € 1.00 to EEK 15.64.

[236] Pension Insurance Act, Art. 46; in the case of one dependant, 25 percent of the pension will be paid, in the case of two dependants, 50 percent, and in the case of three or more dependants, 75 percent.

Adjustment to the cost of living

From April 2002, the periodical old-age pension were annually indexed.[237] The initial method of indexation, mainly based on the consumer price index, resulted in an increase in pensions that was slower than the significant increase in wages, which created, of course, a lower replacement rate.[238] As of April 2008, the value of the index has been changed, now depending for 80 percent on the yearly increase in social tax contributions and 20 percent on the consumer price index.[239]

4.8.5 QUALIFYING CONDITIONS

The minimum qualifying period for entitlement to old-age pension is a period of 15 years of pensionable service in Estonia, which stands for both length of service years calculated until 31 December 1998 and insurance years calculated from 1 January 1999.[240] As regards the length of service, all gainful activities subject to social tax are taken into account, as well as certain equalised periods, including periods of: military service, registration as unemployed, higher or vocational education, caring for a disabled person or child, and caring for a child of up to three years of age. The insurance period comprises years in which the person has earned at least 12 times the monthly minimum wage, or years in which social tax has been paid by the state.[241]

4.8.6 COMPARISON WITH THE INTERNATIONAL STANDARDS[242]

Matters of compliance

The newly fixed retirement age of 65 years is in accordance with the relevant international instruments, ratified or unratified. Additionally, Estonia has certain advantageous retirement rules for some occupations that are considered unhealthy or arduous, which complies with the requirements of ILO C128.[243]

237 ECSS Report (Ee) III, Art. 28.
238 For example: in 2007 the consumer price index increased by 6.6 percent, while the receipt of the pension insurance amount of social tax, reflecting the rise of wages, increased by 25.34 percent.
239 ECSS Report (Ee) III, Art. 28.
240 ECSS Report (Ee) I, Art. 29; Pension Insurance Act, Arts. 7, 28–30; Raudla & Staehr 2003, p. 73.
241 Largely similar to the equalised periods as regards service years.
242 For a detailed description of the international norms regarding old-age benefit, see section 2.12.
243 ILO C128, Art. 15 (3); for an in-depth study of Convention 128, see Korda (forthcoming), dissertation.

The personal scope of the first pillar pension system is also sufficient, covering all employees and self-employed persons, as well as certain non-active categories. ILO C128 and the ECSS (Revised) – neither of which have been ratified by Estonia – represent the highest international norm in this respect, requiring 75 and 80 percent of the economically active population to be covered respectively.

As regards the level of the benefit, the replacement rate for a standard beneficiary with a dependent spouse of 73.9 percent – as calculated by the government – amply meets the international standards, even those laid down in ILO C128 and the ECSS (Revised). As a rule, to comply with the requirements of the conventions, the benefit must be at least the fixed percentage of the gross wage of the standard beneficiary. Estonia, similar to the Czech Republic, takes the net wage as point of reference, which results in a higher replacement rate.[244] For the Czech Republic, this was accepted by the CEACR because pensions are only taxed from an amount exceeding the amount of the pension of the standard beneficiary, and, additionally, the state pays for the pensioner's health insurance. For Estonia, this matter has not been subject to an observation by the CEACR or the Committee of Ministers, but the situation is largely similar to that of the Czech Republic. Therefore, it does not seem to be in conflict with the international rules. However, in several other respects the calculations made by the government are questionable, and therefore certain remarks will be made as regards the level of the benefit in the next section.

Since the benefit is granted until the death of the beneficiary, the duration of the benefit is in compliance with all relevant standards. The Committee of Ministers – in its resolution on the application of the ECSS – requested additional information concerning the suspension of payment of the state pension during imprisonment of the beneficiary, specifically regarding which portion of the pension is granted to the dependants.[245] This question was asked in view of Article 68 (b) of the ECSS, which demands 'a portion of the benefit being granted to the dependants of the beneficiary.' Considering the specific rules on this subject given by the Pension Insurance Act, this matter does not seem to imply a conflict with the ECSS requirements.[246] Finally, as regards the qualifying conditions, the qualification period of 15 years of service or insurance meets the requirements of all the international standards.

Considering all this, it could be concluded that Estonia generously fulfils the international obligations as regards the state old-age pension. This is, however, in

[244] See, for example, Ministry of Social Affairs (Ee) 2005A, p. 15; Leppik 2006, p. 109.
[245] Resolution CM/ResCSS(2008)5; Resolution CM/ResCSS(2009)5.
[246] See Pension Insurance Act, Art. 46: In the case of one dependant, 25 percent of the pension will be paid, in the case of two dependants, 50 percent, and in the case of three or more dependants, 75 percent.

contrast with several observations concerning the living conditions of pensioners (for example, 39 percent of them were considered to be at risk of poverty in 2007).[247] Another case in point is the fact that the average old-age pension in 2007 amounted to EEK 3,129, which is only 75 percent of the calculated pension of the standard beneficiary, and 27.6 percent of the average wage. In addition to this, in several studies, the replacement rate of the pension in connection with the ECSS standard has been assessed taking into account the average wage of a single standard beneficiary, thus without adding the national pension of the spouse.[248] It has also been argued that, in the long run, the state pension will most likely drop below the required ECSS level.[249] Furthermore, according to the Committee of Social Rights that supervises the application of the Social Charter, Estonia does not comply with Article 12 paragraph 1 of the Charter that requires the government 'to establish or maintain a system of social security.'[250] The Committee found, among others, that the minimum old-age pension is manifestly inadequate. All these remarks call for a critical assessment of the calculations in the Estonian reports, which will be done in the next section. Furthermore, apparently compliance with the ECSS does not automatically mean that social protection is sufficiently guaranteed. This important observation will be further discussed in section 6.4.

Problematic issues

Clearly, several questions are to be raised with regard to the government's calculation of the replacement rate of old-age pensions. One point that deserves a closer look is the national pension for the dependent spouse that is included in the calculation. The Committee of Ministers asked in its resolution of 2009 whether the national pension is actually being paid to dependent spouses.[251] This question is relevant, because the amount may only be taken into account if it is paid unconditionally to all dependent spouses of insured pensioners. The government did not respond to this request in its next report, but in fact, the national pension in Estonia is subject to a qualifying period of 5 years of residence. This means that it is not in accordance with the ECSS to add the national pension into the calculation of the benefit of a standard beneficiary to the pension. As a result, the replacement rate in 2007 was much lower than the government stated in its report.

247 Statistics Estonia. For the age group of 16–64 years, the 'at-risk-of-poverty' rate was 15.1 percent. The 'at risk of poverty' threshold is 60 percent of the median equivalised yearly disposable income. Equivalised disposable income takes into account the number of household members.
248 Fultz 2006, p. 9; Leppik 2006, p. 100; Raudla & Staehr 2003, p. 80; Ministry of Social Affairs (Ee) 2005A, p. 16.
249 Information obtained by interviews.
250 ESCR Conclusions (Ee) 2009, pp. 18–19.
251 Resolution CM/ResCSS(2009) 5.

Another point that is worth questioning and that was also mentioned by the Committee of Ministers is the fact that the government takes into account the basic amount and the length of service component only, and thus leaves aside the insurance component.[252] This does not represent the actual situation, since the insurance component has played an increasing role in the course of the years, and will steadily decrease the replacement rate of the pension. For persons who reached the pensionable age in 2007, the insurance component covers 8 years – the years from 1999 until 2007. For the amount of the insurance part, the 'personal coefficient' is a determining factor. The annual personal coefficient is based on the ratio of the average earnings of the insured person in question in one calendar year, compared to the average wage of all insured persons in that same year. Because the labourer in manufactory, taken as the standard beneficiary, earns less than the average of all insured persons, their personal coefficient is smaller than 1. In fact, in 2007 the personal coefficient of the standard beneficiary was 0.67.[253] In relation to the service years, which are the years until 1999, the personal coefficient for all insured persons is 1, since it is based on the average wage only. Inevitably, the more insurance years instead of service years that are taken into account for the standard beneficiary, the lower the resulting amount of the total old-age pension.

Calculation example[254]

The average net salary of the standard beneficiary in 2007 was EEK 6,194, which is the reference wage.
The first component of the old-age pension, the basic amount, was EEK 1,374.
For the calculation of the second component, the monetary value of one year of service or insurance was fixed at EEK 54.43, and the personal coefficient was 1. Retiring in 2007, the beneficiary had 22 service years to be taken into account (1977–1998): 22 × EEK 54.43 × 1 = EEK 1,197.
The third component, consisting of the insurance years as of 1999, comprised 8 years (1999–2007) and the personal coefficient of the standard beneficiary was 0.67. Thus the amount of the third component is: 8 × EEK 54.43 × 0.67 = EEK 292.
The total amount of the pension is: EEK 1,374 + EEK 1,197 + EEK 292 = EEK 2,863.
The ratio between the old-age pension and the reference wage was EEK 2,863 / EEK 6,194 = 0.462 percent.

Although a replacement rate of 46 percent still meets the requirements of the ECSS, the calculation clearly shows that the pensions will decrease drastically when they are based on insurance years instead of service years. The implication will be that the replacement rate will drop below the level required under the ECSS if no measures are taken.

[252] Resolutions CM/ResCSS(2008)5, CM/ResCSS(2009)5; CM/ResCSS(2010)5.
[253] Gross wage of the standard beneficiary, EEK 7,574 (ECSS Report (Ee) IV), divided by the average gross wage, which was EEK 11,336 (website of the Estonian Statistics).
[254] Data based on ECSS Reports (Ee) III and IV and Estonian Statistics.

The last point that needs to be mentioned deals with the requirement that the wage and the benefit are calculated from the same point in time.[255] However, for the calculations in the reports, the government consistently takes the average wage of one year earlier than the year of the benefits (basic amount and the value of one year of service). For example, the average wage of the unskilled worker of 2006 was compared with the benefit of 2007. This incorrect comparison gives a higher result than when all the amounts are taken from 2006, as has been done in the calculation above. As a result, the government gave a replacement rate of 79.4 percent in its report in 2007 (including the national pension for the spouse), instead of 73.9 percent.

Privately managed 2nd pillar pension scheme

Although at the present time the first pillar pension fulfils the international standards, the converse will be true in future when insurance years with the accompanying personal coefficient will determine the level of the benefit instead of the service years. Then, the question will arise as to whether the second pillar pensions may be taken into account to prove compliance with the ECSS. It would therefore be useful to examine the compatibility of this private pension scheme with the international standards, all the more because Estonia is not the only EU country in which pensions in the form of savings accounts have become increasingly important.[256] In fact, this issue is closely connected with the global trend towards the privatisation of social security.

Relevant for compliance of any social security scheme with the ILO and CoE instruments are the provisions concerning the financing and administration of the benefits, which are of the same kind in all conventions.[257] Taking the ECSS as a basis, the first relevant provision is that the cost of the benefits, including the administration thereof, 'shall be borne collectively by way of insurance contributions or taxation or both in a manner which avoids hardship to persons of small means.'[258] It is fair to question whether the Estonian second pillar individual savings accounts are collectively financed, as the idea of individual savings accounts does not concur with the insurance principle of risk pooling. It must be kept in mind in this respect, that two thirds of the money deposited into the accounts comes from the state pension budget, which is funded by employers' contributions. Furthermore, because the contributions are set as a percentage of

255 ECSS, Art. 66 (2).

256 See, for instance, Orenstein 2008.

257 These principles on solidarity and state responsibility have been expained in section 2.5.

258 ECSS Art. 70 (1). The total share of insurance contributions paid by the employee shall not exceed 50 percent of the total of the financial recourses allocated to the protection of employees (and their wives and children), ECSS Art. 70 (2).

gross wages, persons with a minimum income only pay a small amount. From this perspective, the scheme may be considered as collectively financed and also to avoid hardship. At the same time, the question might remain as to whether the contributions can be called 'insurance contributions', since they are, in fact, payments deposited into the savings accounts of individual employees. However, the Committee of Experts that supervises the application of the conventions has not voiced any objections to the design as such of similar pension schemes consisting of individual savings accounts in other countries.[259] Rather than on the design of the system, emphasis has instead been placed on the rule that the method of financing shall not impose hardship on persons with lesser means.[260]

The second provision that must be respected in relation to the financing of benefits is that '[t]he Contracting Party concerned shall accept general responsibility for the due provision of the benefits provided in compliance with this Code.'[261] It has been made clear by the Labour Office that general responsibility 'would not necessarily bind the Member to meet any deficit occurring in the agency administering a scheme […], but it would oblige it to take measures to ensure that the benefits are duly provided.'[262] Examples of such measures would be that the Member could grant a subsidy to meet the deficit, but it could also secure the provision of benefits by arranging a loan or by raising the rates of contributions; the latter only being allowed on the basis of an actuarial report on the financial equilibrium of the scheme concerned. As shown above, the Estonian government does not accept any responsibility for the provision of the pensions. The only measure that has been taken is to prescribe a mandatory participation of the asset management companies in the Guarantee Fund to protect, to a certain extent, the second pillar participants from breaches by the fund managers. These cannot be considered as palatable measures in the light of the ECSS. The actual pension amounts to be paid after the agreed age of the employee is reached largely depend on the financial market. An economic recession, such as the recent one, can seriously reduce the saved amount, which can even result in a negative number.

Furthermore, the ECSS sets out certain principles in the matter of administration of the benefits, namely, that where the administration is not entrusted to the government, 'representatives of the persons protected shall participate in the management, or be associated therewith in a consultative capacity,' and that the

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[259] For instance, with regard to Mexico and Peru, which both have similar schemes, the Committee has raised questions concerning the amount of benefit and the participation of insured persons, but not regarding the creation of savings accounts as such.

[260] CEACR: Individual Direct Request concerning C102 (Portugal) 2007; CEACR: Individual Direct Request concerning C102 (France) 2007.

[261] ECSS Art. 70 (3).

[262] ILO Report V (a)(2) 1952, p. 231. See also section 2.5.

government 'shall accept general responsibility for the proper administration of the institutions and services.'[263] Looking at the situation in Estonia, none of these principles are satisfied in reference to the private asset funds that administer the Estonian employees' pension savings accounts, since neither the persons protected, nor the state, are involved in the management and administration of the funds.

Taking stock of these findings, it may be concluded that the Estonian second pillar pension scheme cannot be counted for the fulfilment of the ECSS standards. At the same time, in section 2.5 it has been asserted that a private scheme is not beyond the reach of the international standards, as long as the prescribed norms are met and the principles on solidarity and state responsibility are respected. In view of the growing importance of private pension schemes in many countries, this issue will be further discussed in section 6.2.3.

Summary of matters of compliance and problematic issues

Table XIV. Old-age benefit (Ee) compared with the international standards

Estonia is bound by the ECSS				
Pension benefit	**ILO C102 (1952) / ECSS (1964)**	**ECSS Protocol (1964)**	**ILO C128 (1967)**	**ECSS Rev. (1990)**
Material scope	✓	✓	✓	✓
Personal scope	✓	✓	✓	✓
Benefit: amount	Measures have to be taken to prevent the pensions from falling below 40 percent.	Measures have to be taken to prevent the pensions from falling below 45 percent.	Measures have to be taken to prevent the pensions from falling below 45 percent.	Replacement rate is less than 65 percent.
Benefit: duration	✓	✓	✓	✓
Qualifying periods	✓	✓	✓	✓

✓ = compliance of national provisions with the international standards.

[263] ECSS Art. 71 (1) and (2).

4.9 EMPLOYMENT INJURY BENEFIT

4.9.1 INTRODUCTION

General introduction

The Estonian social security system does not contain a separate scheme for employment injuries. At the time of writing, medical care, sickness benefits, incapacity for work pensions, and survivors' pensions in the event of work accidents and occupational diseases are provided according to the general schemes, as described in the particular sections. In addition, the employer responsible is required to pay compensation for health damage and other expenses to the victim or to their dependant family members under civil law.[264] According to the current rules, the purpose of compensation for damage is to place the injured person in a situation as similar as possible to that in which they would have been if no damage had been caused. In general, compensation is paid according to an agreement between the liable employer and the aggrieved person. If the extent of the damage cannot be established, the amount of compensation shall be determined by the court. Employers have the option of taking out insurance against these costs, but this is not often done because the premiums are subject to unfavourable tax rules.[265] If the employer is insolvent or liquidated and there is no legal successor, the obligation to compensate the damage is taken over by the State through the Social Insurance Board. This board also pays compensation for damage caused to the health of previous employees of former collectives that were reorganised during the agricultural reform after 1992, irrespective of a possible legal successor.[266]

It is expected that in the near future a compulsory work accident and occupational disease insurance will be established.[267] As a matter of fact, the expediency of such insurance has been subject to political debate since 1994, and was eventually included in the Coalition Programme for 2007–2011.[268] The European Social Charter has been mentioned as the legal basis for the insurance.[269] The proposed insurance scheme in which the employer will pay for the premiums is, above all, meant to improve the prevention of occupational accidents and diseases through the improvement of working conditions.

264 ECSS Report (Ee) on unratified parts, Art. 32; ECSS Report (Ee) I, Art. 32; Leppik & Kruuda 2003, p. 35.
265 Koppel & Aaviksoo 2007, p. 3.
266 ECSS Report (Ee) on unratified parts, Art. 32.
267 Koppel & Aaviksoo 2007, p. 1.
268 Estonian Government 2007, p. 7.
269 Koppel & Aaviksoo 2007, p. 3.

Furthermore, it aims to protect the employees' income levels after the occurrence of a work accident or occupational disease, and to ensure equal rights and benefit for these employees. It appears that a general consensus about implementing the scheme has been reached, both in society and the political arena, but there are still differing political views on whether the insurance system should be implemented publicly or privately.[270] Another sticking point is the coverage of employees who already are suffering from a work accident or occupational disease, since introducing a retrospective effect of the new system could be quite costly. Furthermore, the employers, who are cautiously supporting the insurance concept, argue that together with the implementation of an insurance scheme, the health insurance tax should be decreased by 1 or 2 percent. This idea, however, is not being endorsed by politicians and trade unions. So far, no draft has been developed as a basis for further discussion; it remains to be seen whether the government will succeed in implementing the intended employment injury insurance within its period of office, and whether the recent economic recession has not thwarted this plan.

The lack of a separate employment injury insurance does not automatically imply that Estonia does not meet the requirements of this part of the ECSS. Its obligations can also be fulfilled through the general provisions on health care and pensions. Therefore, in the following, it will be assessed whether the Health Insurance Act and the State Pension Insurance Act meet the standards of the ECSS in respect of employment injury.

Legislation

Medical services and sickness benefits are paid pursuant to the Health Insurance Act, and pensions for incapacity for work and survivors' pensions, in accordance with the State Pension Insurance Act. The employers' obligation with regards to compensation for cases that took place before 1 July 2002, is set out in the Occupational Health and Safety Act in relation to the Government Regulation No. 172.[271] For accidents that took place (or occupational diseases that occurred) after that date, the Law of Obligations Act of 2002 applies.[272]

At the international level, Estonia has not ratified any instrument on employment injury. Part VI of the ECSS, dealing with employment injury, is the only part that has been excluded from ratification.

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270 Koppel & Aaviksoo 2007, p. 4.

271 Government Regulation No. 172 of June 10, 1992: 'Temporary Procedure for Compensating for Damage Caused to Employees of Businesses, Institutions and Organisations by Injury in Performance of Duties or Other Health Damage'.

272 ECSS Report (Ee) on unratified parts, Art. 32.

4.9.2 MATERIAL SCOPE

Since social protection in the case of employment injury is covered by the general health insurance and pension scheme, the material scope of these schemes are relevant. This means that any morbid condition, incapacity for work, invalidity, and loss of support because of the death of the breadwinner, whether or not as a result of an employment injury or occupational disease, are covered. The definitions are specified in the corresponding sections.

4.9.3 PERSONAL SCOPE

For this particular risk, the ECSS requires the exclusive protection of prescribed classes of employees, constituting at least 50 percent of all employees, and, in respect of survivors' benefit, also their wives and children. Since in Estonia health insurance as well as pension insurance is coupled with the payment of social tax, in principle all employees are covered by the general health insurance and pension scheme. However, as a rule, the wives of ensured employees are not covered for survivors' benefit.

4.9.4 BENEFITS

Medical care

In the event of a work accident or occupational disease, the Estonian general health insurance compensates for treatment, including medication and medical devices, as described in section 4.5.4 on medical care.[273] Victims of employment injury are not exempt from the rules on cost-sharing. The costs for the medical services that are not covered by the insurance may (partly) be compensated by the liable employer, according to Article 130 of the Law of Obligations Act: 'the obligated person shall compensate the aggrieved person for expenses arising from such damage or injury, including expenses arising from the increased needs of the aggrieved person.'

Incapacity for work benefit

According to the ECSS, an employment injury benefit, either for temporary or permanent incapacity for work, must be at least 50 percent of the reference wage. In Estonia, the normal sickness benefit consists of 70 percent of the average daily income of the insured person, but in the event of employment injury, the benefit

[273] Section 4.5.4.

is set at 100 percent of the previous income.[274] Since the family benefit that has to be taken into account is similar during work and in addition to a benefit, the replacement rate in case of temporary incapacity for work is 100 percent.

If total or partial incapacity for work is likely to be permanent, a pension is paid in accordance with the pension scheme as described in section 4.12.4 on invalidity benefit. The replacement rate of an invalidity benefit has been calculated at 50.4 percent of the reference wage.[275] On top of this, the employer at fault has to pay a compensation 'for damage arising from a decrease in income or deterioration of the future economic potential of the aggrieved person.'[276]

Survivors' pension

In the event of death of an employee caused by a work accident or occupational disease, the normal rules for survivors' pensions apply. As shown in section 4.13.4, the replacement rate of survivors' benefit, in relation to the average net wage of an unskilled worker, is 53.1 percent.

In addition, the Law of Obligations Act provides: 'If a person whose death is caused bears, at the time of his or her death, an obligation arising from law to maintain another person, the person obligated to compensate for the damage shall pay the person reasonable monetary compensation corresponding to the maintenance payments which the deceased person would have paid to the person during the deceased person's presumed life-span.'[277] The damage is compensated through periodical payments, unless the nature of the damage makes it reasonable for the compensation to be paid as a lump sum.

Duration of the benefit

In accordance with the ECSS, medical care, sickness, invalidity, and survivors' benefits relating to employment injury or occupational disease, are to be paid throughout the contingency. The Estonian pension in the event of permanent incapacity for work, however, is transferred into an old-age pension when the beneficiary reaches pensionable age. Under the ECSS this is allowed in the event of 'normal' invalidity, but not in the event of employment injury, because of the lower minimum required replacement of the old-age pension (40 percent) compared to the employment injury benefit (50 percent).[278]

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274 Health Insurance Act, Art. 54 (1); ECSS Report (Ee) I, Art. 36.
275 Section 4.12.4; rate of the year 2007.
276 Law of Obligations Act, Art. 130.
277 Law of Obligations Act, Art. 129.
278 ECSS, Art. 38; Schedule to Part XI of the ECSS.

4.9.5 QUALIFYING CONDITIONS

In its reports on the application of the ECSS, the government has stated that medical care and sickness benefits are provided without any qualifying period.[279] However, as shown in the corresponding sections, a qualifying period of fourteen days of insurance is prescribed. In respect of permanent incapacity for work and survivors' pensions, the Pension Insurance Act has special provisions for employment injury that waive the generally required qualifying periods.[280]

4.9.6 COMPARISON WITH THE INTERNATIONAL STANDARDS[281]

Reasons for non-ratification

With regard to health care insurance, there are three problems in the event of employment injury. In the first place, not all medical services required by the ECSS are covered by the insurance, such as dental care for adults, nursing care at home, convalescent homes, and the provision and maintenance of prostheses. Secondly, the rules on co-payment by insured persons for home visits by a family doctor, in-patient care, and prescription pharmaceuticals, are in conflict with the ECSS, which does not allow any cost-sharing in the case of employment injury. Finally, under the ECSS, the only permitted qualifying condition for benefits in relation to employment injury is that the person protected was employed on the territory of Estonia at the time of the accident or the contraction of the disease.[282] Thus, no qualifying periods of insurance or employment are allowed.

As far as loss of income due to temporary or permanent incapacity for work is concerned, the personal coverage and the amount of the Estonian sickness benefit are in compliance with all international standards on employment injury. The amount of the permanent incapacity for work pension represented a replacement rate of 53.1 percent in 2007, and therefore just satisfied the minimum standards of the ECSS of 50 percent. The ECSS Protocol and the ECSS (Revised), as well as ILO C121, set out higher percentages, and are thus not met by the Estonian scheme. The duration of the invalidity pension is problematic because it is transferred into an old-age pension when the recipient reaches the pensionable age, which is not provided for in the international standards. The

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279 ECSS Report (Ee) on unratified parts; ECSS Report I, Art. 37.

280 State Pension Insurance Act, Art. 15(2).

281 For a detailed description of the international norms regarding employment injury benefit, see section 2.13.

282 ECSS Art. 37.

fourteen days qualifying period for the sickness benefit is not, just as for medical care, in conformity with the ECSS. For the invalidity pension, the qualifying periods do not apply in the case of employment injury, which complies with the international standards.

As regards the survivors' pension in the event of employment injury, the material scope of is in line with the international standards. With regard to the personal coverage, there is a conflict because Estonia does not recognise derived rights, which means that the wives of insured persons are not insured if they do not have insurance in their own right. This issue will be further discussed in section 4.13.6 on survivors' benefits. The replacement rate of the Estonian survivors' pension – also 53.1 percent of the reference wage – meets the standards of the ECSS (40 percent), the ECSS Protocol (45 percent), and, narrowly, that of ILO C121 (50 percent); only the requirement of the ECSS (Revised) (65 percent) is not met. The pension is paid as long as the applicant qualifies as a survivor in the sense of the State Pension Act – and the Act does not require the deceased person to have fulfilled a qualifying period – which complies both with the ECSS, as well as the higher standards.

Then an important question may be raised as to whether the obligation of the employer to supplement the benefits to a level that the damage is compensated can contribute to the fulfilment of the international requirements. Estonia has not ratified Part VI of the ECSS, mainly because it was considered that 'there is no separate occupational accident and occupation disease insurance system and the own contributions of the injured person cannot be excluded with regard to the medical care specified in Article 34.'[283] Apparently, the Estonian government assumed that the legal obligation of the employer to supplement the insurance system was beyond the reach of the ECSS. The reasons for this assumption were not given in the report, but were probably related to the common provisions of the ECSS, which require the benefits to be collectively financed by way of insurance or taxation, and the Member States to accept general responsibility for the due provision of the benefits.[284] Still, it is useful to have a closer look at employers' liability, since it touches the issue of privatisation of social security – an increasing trend in many European countries. The issue of privatisation has been dealt with in relation to the obligation for employers to continue the payment of wages during the first period of illness of the employee (sections 3.6.6 and 4.6.6), and in relation to the Estonian private pension scheme (section 4.8.6). A more general discussion on this matter will take place in section 6.2.3.

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283 ECSS Report (Ee) on unratified parts, p. 6.

284 ECSS, Art. 70 (1) and (3). These provisions are considered as general principles, and copied from ILO C102 in all the relevant instruments. See section 2.5.

4.10 FAMILY BENEFIT

4.10.1 INTRODUCTION

General introduction

Estonia's family benefit scheme is designed to ensure for families with children the partial compensation of expenses relating to the care, raising and education of children.[285] The scheme recognises nine types of family benefits: childbirth allowance, child allowance, child care allowance, single parent's child allowance, conscript's child allowance, foster care allowance, start in independent life allowance, adoption allowance, and parent's allowance for families with seven or more children.[286] Furthermore, tax incentives are offered to families with children in two different ways: deduction from income of the costs for education of the children, and a general deduction for every child up to the age of 17, starting from the second child in the family.

The allowances are subdivided into monthly, single, quarterly and yearly benefits. The Committee of Ministers noted that only the periodical (monthly) benefits that are paid throughout the contingency are relevant in respect of the application of the ECSS, which are the child allowance, the single parent's child allowance, and the foster care allowance only.[287] Therefore, in the following, only these three allowances are considered and joined together in the term 'child allowance'. The tax incentives are not taken into account, although they are valid throughout the contingency, because they are not periodical payments as such, and the ECSS does not provide explicitly for tax advantages.

Legislation

The family benefit scheme is regulated by the State Family Benefits Act that came into force in January 2002. The Act sets out, among other things, the purpose of the family benefits, the personal scope, the different kinds of benefits, the application procedure, and the method of calculation and payment of the benefits.

At the international level, Estonia is bound by the ECSS, Part VII on Family Benefit.

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285 State Family Benefit Act, Art. 1 (1).

286 Website of the Ministry of Social Affairs; website of the Social Insurance Board; Trumm 2006, pp. 36–38; Leppik & Kruuda 2003, pp. 35–37; ECSS Reports (Ee) I and IV, Art. 40. Until 2009, a school allowance was also granted.

287 Resolution CM/ResCSS(2008)5.

Administration and financing

The administration of family benefits is entrusted to the Social Insurance Board. The benefits are financed from the state budget.

4.10.2 MATERIAL SCOPE

For every child, a child allowance is paid from birth up to the age of 16. If the child is enrolled in a basic school, upper secondary school or vocational school, is in full-time study or, for medical reasons, in another form of study, entitlement to the benefit continues up to the age of 19. The allowance is then paid until the end of the school year.

4.10.3 PERSONAL SCOPE

According to the State Family Benefits Act, all permanent residents of Estonia, including family members and children who do not live in the family due to a period of study abroad, and aliens residing in Estonia with a temporary residence permit, have the right to receive family benefits.[288] The benefits are paid irrespective of employment of the parents or their financial situation.

In respect of the personal scope, the ECSS does not include the option of coverage of all residents.[289] Therefore, Estonia refers to the option that 'prescribed classes of the economically active population, constituting not less than 20 percent of all residents' must be covered.[290] This results in quite an affected calculation in which the government takes the total number of male residents in the economically active age group (15–64 years of age) as a starting point. Then, the percentage of this group in relation to all residents is calculated. The outcome of this sum, in 2008, was that 32.7 percent of the total population was protected. Although this percentage meets the ECSS requirement, at this point a defect in the specific ECSS provision comes to the surface, because, in fact all residents are covered, but that cannot be proved on the basis of the calculation options provided for in the ECSS.

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288 State Family Benefits Act, Art. 2.
289 For more information about the absence of this option, see section 2.14.2.
290 ECSS, Art. 41(b); ECSS Report (Ee) I and II, Art. 41.

4.10.4 BENEFITS

Amount of the benefit

The Estonian family benefits are calculated on the basis of the 'child allowance rate', established by Parliament for each budgetary year, and amounting to EEK 150 in 2007.[291] A new child allowance rate may not be less than the rate in force. The child allowance for the first and second children in a family is twice the child allowance rate, and for the third and consequent children in a family, it is six times the child allowance rate. The single parent's child allowance is twice the allowance rate, and the foster care allowance is six times the child allowance rate for each child. There is no limitation on the number of children as regards the benefits.

For the purpose of comparison with the conventions, the amount of child benefit must be assessed at a general level and not, as with other benefits, in relation to a standard beneficiary. To meet the standard of the ECSS, the total expenditure on child benefit has to be equal to, or more than, 1.5 percent of the gross salary of an unskilled worker, multiplied by the total number of (protected) children. In its reports, the Estonian government counted the total expenditure on all family benefits.[292] However, as mentioned above, the Committee of Ministers made clear that for compliance with the ECSS, only the child allowance, the single parent's child allowance, and the foster care allowance can be taken into account. If only these three benefits are taken into account, the following calculation can be made.

Calculation example[293]

In 2007, the expenditure on the three child allowances amounted to EEK 1,195,483,000.
The average gross salary of an unskilled worker in 2007 was EEK 7,574.
The number of dependent children of all residents in 2007 was 216,292.
The total monthly expenditure, divided by the number of children and the average salary, gives a percentage of the average salary of an unskilled worker:
1,195,483,000 (expenditure) / 12 (months) / 216,292 (children) / 7,574 (salary) = 0.061.

In conclusion, the total value of child benefits represented 6.1 percent of the average gross wage of an unskilled labourer, multiplied by the total number of dependent children of all residents in 2007.

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291 State Family Act, Art. 4 (2); ECSS Reports (Ee) I and III, Art. 42. Of the family benefits, only the child care allowance has a separate calculation base.

292 ECSS Reports (Ee) I, II, III, Art. 44.

293 Estonian Statistics; Amount of the salary and number of children are taken from ECSS Report (Ee) III. The exchange rate of the Estonian Kroon on 1 January 2011, when Estonia joined the eurozone, was €1.00 to EEK 15.64.

Duration of the benefit

Since the child allowances are paid at least to the age of 16, they are paid throughout the contingency.

4.10.5 QUALIFYING CONDITIONS

The only qualifying condition is residency in the territory of Estonia.[294] No qualification period is required, and the right to a child allowance does not depend on employment or participation in the pension scheme or health insurance system.

4.10.6 COMPARISON WITH THE INTERNATIONAL STANDARDS[295]

Matters of compliance

The definition of family benefit in the Estonian legislation corresponds with the ECSS and subsequent standards that specify the contingency as 'responsibility for the maintenance of children as prescribed.'[296] The personal coverage includes all residents, without a means test, which amply fulfils the international standards. The technical problem of calculation of the coverage under the ECSS seems to indicate a lack of flexibility of the international instrument, all the more since the option of coverage of all residents has been included in both ILO C102 and the ECSS (Revised). The absence of this option in the ECSS is problematic not only for Estonia, but also for many other European countries that have family benefits based on residence rather than on economic activity or employment.[297] On the other hand, it has been discussed in section 2.14.2 that the provision of a means tested family benefit was controversial, while the option of coverage of all residents in ILO C102 and the ECSS always goes together with the possibility of a means test. This issue is solved in the ECSS (Revised), which provides for the option of coverage of all residents, either with or without a means test.

The total cost of child allowances, representing 6.1 percent of the average wage of an unskilled labourer in accordance with the prescribed rules, meets the

294 State Family Benefits Act, Art. 2.
295 For a detailed description of the international norms regarding family benefit benefit, see section 2.14.
296 ECSS, Art. 40, ECSS (Revised), Art. 45.
297 See also Nickless 2003, p. 92.

requirements of the ECSS and the Protocol on this point, which both set out a minimum percentage of 1.5 percent, as well as of the ECSS (Revised), which prescribes a percentage of 3 percent. Residency as the only qualifying condition also complies with the ECSS, including the Revised, which allow six months of residence as a qualifying term.

Summary of matters of compliance and problematic issues

Table XV. Family benefit (Ee) compared with the international standards

Estonia is bound by the ECSS				
Family benefit	**ILO C102 (1952) / ECSS (1964)**	**ECSS Protocol (1964)**	**No higher standards**	**ECSS Rev. (1990)**
Material scope	✓	✓		✓
Personal scope	✓	✓		✓
Benefit: amount	✓	✓		✓
Benefit: duration	✓	✓		✓
Qualifying periods	✓	✓		✓
Common principles	✓	✓		✓

✓ = compliance of national provisions with the international standards.

4.11 MATERNITY BENEFIT

4.11.1 INTRODUCTION

General introduction

Under the Estonian legislation, maternity benefits comprise medical care in relation to pregnancy and childbirth, and cash benefits during maternity leave, both according to the general health care system. Therefore, this section should be read in connection with the section on medical care and sickness. On top of that, there is the parental benefit which is paid to one of the parents after the expiration of the maternity benefit, and which is based on the parent's previous earnings (100 percent of previous earnings). Together the maternity benefit and the parental benefit are paid for a period of 455 days.[298] Furthermore, wage compensation for temporary transfer to another job is provided until the start of maternity leave. In the following, the compensatory benefits and parental benefits

[298] Website of the Ministry of Social Affairs; Eamets 2008.

are left out of consideration, since these are, as a matter of fact, surplus to the maternity protection provided in the conventions.

Legislation

There is no specific act for social protection in the event of pregnancy and confinement. Medical care and cash benefits are both regulated by the general Health Insurance Act.

Administration and financing

As part of the health insurance scheme, the benefits are administered by the Estonian Health Insurance Fund. The fund is financed through health care contributions (social tax), amounting to 13 percent of an employee's payroll.[299]

4.11.2 MATERIAL SCOPE

According to the Health Insurance Act, the insured event in respect of maternity is 'the pregnancy and maternity leave of the insured person.'[300] The leave is granted on the basis of a certificate for maternity leave, issued by a doctor. Medical care in relation to pregnancy and delivery is not separately mentioned in the Health Insurance Act, but it is covered by the general health care system.

4.11.3 PERSONAL SCOPE

For compliance with the ECSS, Estonia refers to the option of coverage of all women in prescribed classes of the economically active population, the classes of which should constitute not less than 20 percent of all residents, and, for medical care, also the wives of men in these classes.[301] In fact, in Estonia all female employees, as well as self-employed women, are covered by the health insurance that provides for medical care as well as cash benefits.[302] The economically active population amounted to 50.2 percent of the total population in 2007. The wives of insured employees or self-employed persons are not covered if they are not individually insured. The Health Insurance Act, however, does provide for medical care of several groups of non-working women, such as parents of disabled children receiving a child care benefit, women raising children of up to

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[299] For more information, see section 4.5.1.
[300] Health Insurance Act, Art. 51 (2).
[301] ECSS, Art. 48(b); ECSS Report (Ee) I, Art. 48.
[302] See section 4.6 on sickness benefit.

3 years of age, and pregnant women who are not otherwise insured. For these categories of persons, the state pays social tax or they are considered to be equal to insured persons.[303] Previously, uninsured pregnant women were only covered for medical care from the twelfth week of pregnancy, but since an amendment of the Health Insurance Act in July 2009, they are covered from the moment of medical confirmation of pregnancy.

4.11.4 BENEFITS

Medical care

The health insurance pays for medical services if the services are entered in the list of medical services of the health insurance fund and the provision thereof is therapeutically justified.[304] The list of medical services is part of a Government Regulation and includes pre-natal care, obstetrical care, post-natal care, and hospital care, as prescribed by the ECSS.[305] As for the provision of services, no distinction is made between general morbid conditions or a birth-related need for care. Since 2009, pregnant women have been exempt from the fixed out-of-pocket payments for medical services and medicines.

Benefit in cash

The rate of a maternity benefit is 100 percent of the insured woman's gross earnings in the preceding calendar year, calculated on the basis of the average daily income for which social tax was paid.[306] Similar to the sickness benefit, no maximum limit is given for the amount of the benefit, or for earnings to be taken into account for the calculation of the benefit. For employees, a minimum benefit is fixed, which is based on the minimum monthly wage.

For assessment of the conformity of the level of the benefits with the requirements of the ECSS, Estonia makes reference to the provision that the maternity benefit must be at least 45 percent of the average salary of a standard beneficiary – a skilled manual male employee.[307] For the determination of the average salary of a skilled manual male employee, Estonia has availed of the option to take into account 125 percent of the average earnings of all the insured persons,[308] which

303 Health Insurance Act, Art. 5.
304 Health Insurance Act, Art. 29(1).
305 ECSS, Art. 49; ECSS Report (Ee) I, Art. 49. For more details, see section 4.5 on medical care.
306 Health Insurance Act, Arts. 54 and 55; ECSS Report (Ee) IV, Art. 50.
307 ECSS Report (Ee) IV, Art. 50; ECSS Art. 50 in connection with Art. 65.
308 ECSS Art. 65 (6) sub c.

was EEK 14,715 per month in 2007.[309] Since the gross replacement rate of the standard beneficiary's benefit was 100 percent, in 2007 the benefit amounted to EEK 14,715. The total amount of the benefit for the entire duration of maternity leave is paid as a lump sum at the beginning of the leave.

Duration of the benefit

Maternity benefit is paid from the date of issue of the certificate for maternity leave, without a waiting period. The benefit is paid out for the duration of the maternity leave, which is 140 calendar days.[310] Medical care in relation to pregnancy, childbirth and their consequences is not subject to any time limit.

4.11.5 QUALIFYING CONDITIONS

For employees and self-employed women a qualifying period of 14 days is set, both for medical care and for cash benefits.[311] Furthermore, for cash benefits, a leave certificate issued by a doctor is required.

4.11.6 COMPARISON WITH THE INTERNATIONAL STANDARDS[312]

Matters of compliance

With regard to maternity, the Estonian system provides for medical care in the events of pregnancy and childbirth, including hospitalisation. Furthermore, cash allowances are paid to substitute for the loss of income due to these events, which is in keeping with the conventions. ILO C102 and the ECSS prescribe the contingency covered to include pregnancy and confinement and their consequences, and suspension of earnings, as defined by national laws or regulations. Neither the Protocol on the ECSS and the ECSS (Revised), nor ILO C103 and ILO C183, add other elements to the Material scope; on this point, therefore, the system complies with all instruments.

The personal scope of the health insurance, covering all economically active women, is also in accordance with the minimum, as well as with the higher, norms. There is one point worth mentioning in this respect. As regards the

[309] ECSS Report (Ee) IV, Art. 50.
[310] Health Insurance Act, Art. 58; ECSS Report (Ee) I, Art. 52.
[311] See sections 4.5.5 and 4.6.5.
[312] For a detailed description of the international norms regarding maternity benefit, see section 2.15.

personal scope of medical care, the ECSS demands the wives of the prescribed classes of economically active population to be included.[313] The Estonian law does not recognise such derived rights, insurance is based on individual insurance only. However, as mentioned above, certain categories of non-working persons are considered equal to insured persons, including pregnant women. Until July 2009, this was limited to pregnant women from the twelfth week of pregnancy, which implied that women who were not individually insured and not considered equal to insured persons were not entitled to medical care during the first twelve weeks of their pregnancy. The Committee of Ministers in its Resolutions until 2008 repeatedly pointed out that:[314]

> Article 52 of the Code requires medical care to be provided throughout the contingency, which begins the moment the pregnancy is medically determined. This usually happens long before the 12th week, and from that moment onwards prenatal medical care provided to protected women should be free of charge without any cost-sharing on the beneficiary's part.

In response to this repeated comment, the Estonian government amended the Health Insurance Act on this point. As a consequence, since July 2009 all pregnant women have been insured for medical care from the date of medical confirmation of pregnancy. Although the fact remains that, strictly speaking, the wives of insured persons are not covered by their husbands' insurances, the amendment has brought the Estonian law in line with the ECSS in practice.[315] The amendment also solved another conflict with the ECSS, namely, the out-of-pocket payments for home visits by a family doctor and ambulatory specialist care until the 12th week of pregnancy, and also for prescribed pharmaceuticals. Since July 2009, pregnant women have been exempted from the rules on co-payment.

The amount of the maternity cash benefits, representing a replacement rate of 100 percent for a standard beneficiary, fulfils all international standards, varying from 45 percent in the ECSS, to two thirds of the previous income in ILO C183. The duration of the cash benefit of at least 20 weeks (140 days) is also more than sufficient compared to the conventions, since the longest given period, in both the ECSS (Revised) and ILO C183, is 14 weeks.

Problematic issues

There is one issue concerning maternity benefit, which is the fact that the total cash benefit for 140 days is paid as a lump sum at the start of maternity

313 ECSS Art. 48.
314 Resolution CM/ResCSS(2008)5.
315 The tension between the concept of derived rights in the international standards and individualisation of social security rights as a trend in many countries will be further discussed in section 6.2.2.

leave.[316] According to all international standards, the benefit must be a periodical payment. Although this issue constitutes a clear conflict, it has not been noted by the Committee of Ministers. The reason for this may be that neither in the Health Insurance Act, nor in the annual reports of the government, is this way of payment mentioned, and it appears to be a practice with which everybody is content.

Summary of matters of compliance and problematic issues

Table XVI. Maternity benefit (Ee) compared with the international standards

Estonia is bound by the ECSS				
Maternity benefit	**ILO C102 (1952) / ECSS (1964)**	**ECSS Protocol (1964)**	**ILO C183**	**ECSS Rev. (1990)**
Material scope	✓	✓	✓	✓
Personal scope	No derived right to medical care for the wives of insured persons.	No derived right to medical care for the wives of insured persons.	✓	No derived right to medical care for the wives of insured persons.
Benefit: amount / range	Maternity benefit is paid out as a lump sum instead of as periodical payments.	Maternity benefit is paid out as a lump sum instead of as periodical payments.	✓	Maternity benefit is paid out as a lump sum instead of as periodical payments.
Benefit: duration	✓	✓	✓	✓
Qualifying periods	✓	✓	✓	✓
Common principles	✓	✓	✓	✓

✓ = compliance of national provisions with the international standards.

4.12 INVALIDITY BENEFIT

4.12.1 INTRODUCTION

History

Under Socialist rule, protection against the risk of invalidity was regulated for all employed persons as well as for the agricultural sector, comprising all members of a kolkhoz.[317] The Soviet perception of invalidity was largely limited to a strict

[316] Information obtained from experts.
[317] Fulz 2002, pp. 14–16; Leppik 2002, pp. 93–98.

medical condition to be determined by a medical expert commission, not taking into consideration a person's inability to function and to cope with the requirements of a job as such. Sharp distinctions were made between disabled people on the basis of the cause of invalidity: war veterans and victims of work accidents were in a far more favourable position than those with congenital disabilities, who were generally put in state institutions or kept out of sight in their homes. Invalidity pensions were granted according to three degrees of invalidity: total incapacity for work with a need for permanent care, total incapacity for work without a need for permanent care, and partial incapacity for work. Disabled children were categorised into a separate group. Eligibility for the invalidity pension was subject to a qualification period depending on age and gender, varying from 1 year of service for a woman of 20 years of age, and 15 service years for a man over 60 years of age. The amount of the pension depended on the degree of invalidity, the former wage, and the cause of the invalidity. In practice, the maximum pension for a person classified as coming under the first category, whose invalidity was caused by a general illness, corresponded to 60–70 percent of the average wage, while the minimum pension for partial invalidity was 10 percent of the average wage.

In the new Pension Act that came into force in April 1991, even before independence was declared officially, the qualifying period for an invalidity pension was abolished and coverage was extended to all residents.[318] The benefits depended partly on previous earnings and on the minimum wage, and were paid regardless of earnings from work, while the categorisation as regards the degree of incapacity for work was maintained. However, the Act turned out to be unaffordable and existed for only seven months, to be replaced by a resolution of the Supreme Council setting the pensions at a flat rate. In 1995 a reform of the disability scheme was initiated, influenced by the growth of organisations of civil society, including organisations for the disabled. The first step was the adoption of the Act on Social Welfare, in which open, community-based care and rehabilitation was emphasised, and which was drafted in the light of, among other things, the European Social Charter. With the State Pension Insurance Act of 1998 (in force as of 2000), a contribution-related incapacity for work pension was introduced, with – harking back to the Soviet legacy – a qualification period depending on the age of the person. Persons of working age who do not fulfil the qualifying period are eligible for the national pension. Furthermore, the classification of invalidity into three categories has been changed into a classification of the degree of work incapacity into percentages; total work incapacity corresponds to 100 percent, and partial work incapacity may vary between 40 percent and 90 percent, in steps of 10 percentage points. The introduction of the term 'work incapacity' in the new Act intended to

[318] Leppik 2002, pp. 100–129.

reshape and modernise the old paradigm of invalidity into a more open definition that would not only take into account medical facts, but also the extent to which the person is active in their social context. At the same time however, this intention was stymied by the fact that the assessment of the degree of incapacity was still performed by medical experts and based on medical criteria only.

In addition to the incapacity for work pension according to the State Insurance Pension Act, the Social Benefits for Disabled Persons Act, in force as of 2001, gives right to several other benefits, such as a disabled child allowance, study allowance, rehabilitation allowance, and transport allowance. In this act, the term 'disability' is used, referring to the interaction between the person and their environment, and thus aiming more at integration and rehabilitation. It has been noticed that the concepts of both 'work incapacity' and 'invalidity' are focused on the inabilities of the person concerned, instead of following the developing international trend of especially taking into account the remaining abilities and functioning of the person.[319] For comparison with the international standards, the allowances on the basis of the Social Benefits for Disabled Persons will not be assessed, since these are granted only to specific persons in specific situations.

Legislation

In the case of invalidity, income protection is regulated by the State Insurance Pension Act. This act sets out the persons protected, the qualifying conditions, the different degrees of incapacity for work, the procedure of examination by medical experts, and the calculation of the invalidity pension.

At the international level, Estonia is bound by Part IX on Invalidity Benefit of the European Code of Social Security.

Administration and financing

As part of the pension insurance scheme, it is sufficient at this point to refer the reader to the section on old-age pensions. It should be noted, however, that the financing of national pensions, for persons with permanent work incapacity but lacking the required insurance period, and pensions for disabled children, are paid from the general state budget. Thus, since these benefits are not financed from earmarked social contributions, they do not come under the social insurance scheme.[320]

[319] Leppik 2002, pp. 141–142.
[320] Leppik 2002, p. 122.

4.12.2 MATERIAL SCOPE

An Estonian incapacity for work pension is available to persons between the age of 16 and the retirement age who are permanently incapacitated for work by at least 40 percent.[321] Total incapacity for work implies an incapacity of 100 percent, which means that the person is unable to earn any income in order to support themselves as a result of a serious functional impairment caused by an illness or injury.[322] A person with a partial incapacity for work is a person who is able to work, but who, due to a functional impairment caused by illness or injury, is not able to perform suitable work to the extent required by the general national standard of working time, which is 40 hours per week.[323] The extent of partial permanent incapacity may vary between 40 percent and 90 percent, as determined by a medical expert or an expert committee.

4.12.3 PERSONAL SCOPE

The personal coverage corresponds with the coverage of the old-age benefit. Overall, all economically active persons are insured, either employed or self-employed, which implies a coverage of 49.1 percent of all residents.

4.12.4 BENEFITS

Amount of the benefit

To calculate the incapacity for work benefit, the higher of the following two amounts is used as a calculation base:[324]

- the amount of an old-age pension calculated according to the person's actual pensionable length of service (until 31.12.1998) and pension insurance coefficients (after 31.12.1998);
- the amount of an old-age pension for a person with 30 years of pensionable length of service.

The amount of incapacity for work pension is the percentage corresponding to the declared percentage of loss of capacity to work of the calculation base, however it has to be at least the national pension rate. Thus, the (imaginary)

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321 State Pension Insurance Act, Art. 14; ECSS Report (Ee) I, Art. 54; Leppik & Kruuda 2003, pp. 28–29.
322 State Pension Insurance Act, Art. 14 (2).
323 State Pension Insurance Act, Art. 14 (3).
324 State Pension Insurance Act, Art. 18; ECSS Report (Ee) I; Leppik & Kruuda 2003, p. 29.

amount of old-age pension for the applicant at the moment of application is compared to the amount of old-age pension for a person with 30 years of pensionable service. Additionally, the higher of the two amounts is multiplied by the incapacity for work percentage, whereas the national pension rate serves as the minimum amount. Consequently, a person who is declared 100 percent incapacitated for work will receive a pension that is equal to, or higher than, the old-age pension of a person who has completed thirty service years, the calculation of which is shown in section 4.8.4 on old-age pension.

Calculation example[325]

The sample calculation of the incapacity for work pension for a standard beneficiary (an ordinary male labourer in manufacturing) in 2007, is based on the following data:
The average net wage of an ordinary male labourer in manufacturing was EEK 6,194
The old-age pension of a standard beneficiary amounted to EEK 3007[326]
Family benefit for two children was EEK 600, irrespective of income
The national pension rate was EEK 1,573
The incapacity for work pension of a standard beneficiary (man with dependent wife and two children) who was 100 percent incapacitated amounted to: (3007 + 600) / (6,194 + 600) = 0.531 of his previous net wage.
The pension of a standard beneficiary who was declared 40 percent incapacitated, and fulfilled the necessary qualification period, amounted to EEK (3007 × 0.4) + 600 = EEK 1,803, which represented a replacement rate of 26.5 percent.

In conclusion, in 2007, the replacement rate of an incapacity for work pension for the standard beneficiary who was 100 percent incapacitated was 53.1 percent.

Duration of the benefit

Incapacity for work pensions are paid throughout the contingency, however, if the person reaches the retirement age, the pension is transferred into an old-age pension. A person may be declared permanently incapacitated for work for a period of six months, one year, two years, or five years; after the established period, a re-examination can take place.[327]

Adjustment to the cost of living

The benefits are regularly adjusted in the same way as the old-age benefits.

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325 Data taken from ECSS Reports (Ee) III and IV. The exchange rate of the Estonian Kroon on 1 January 2011, when Estonia joined the eurozone, was €1.00 to EEK 15.64.
326 For the calculations of the old-age pension, see section 4.8.4.
327 State Pension Insurance Act, Arts. 16 (7) and 17 (3).

4.12.5 QUALIFYING CONDITIONS

Residents of Estonia between the age of 16 and the retirement age, who are declared permanently incapacitated for work by at least 40 percent, and who have completed the required qualifying period, are entitled to a work incapacity benefit.[328] The qualifying period may include the service years up to 1999, as well as the insurance years from 1999 onwards (calculated in the same way as is the case with the old-age pension requirements), and depends on the age of the applicant. For persons from 16 to 20 years of age, no qualifying period is required; from 21 to 23 years of age, one year of service should be completed; from 24 to 26 years of age, two service years, and so on, up to a qualifying period of 15 service years at the age of 63 years.[329]

4.12.6 COMPARISON WITH THE INTERNATIONAL STANDARDS[330]

Matters of compliance

The personal scope of the invalidity pension system is amply sufficient, covering 49.1 percent of all residents, where only 20 percent is required by the ECSS. Additionally, the obligations of the ECSS Protocol (30 percent), ILO C128 (75 percent of the whole economically active population) and ESCC Revised (80 percent of the whole economically active population) are satisfied. As regards the amount of the invalidity benefit, the calculations show that the benefit of a standard beneficiary – a man with a dependent wife and two children – amounted to 53.1 percent of the reference wage in 2007, provided that this beneficiary was 100 percent unable to perform gainful activity. This percentage meets the standard of the ECSS, and, narrowly, of the ECSS Protocol and ILO C128 (both 50 percent), but is below the stipulation of the ECSS (Revised) (65 percent).

Since the benefit is granted throughout the contingency, or until eligibility for an old-age pension, the duration of the benefit complies with all the relevant standards in this respect. The same goes for the qualification period of 15 service or insurance years as a maximum. Typical of the Estonian system is the differentiation in qualifying periods depending on the age of the applicant. Since the treaties do not contain a flexibility clause making it possible to take into account, for instance, the average qualifying period, the maximum requirement has to be taken as a perspective, which is still sufficient according to all standards.

[328] State Pension Insurance Act, Art. 14 (1); ECSS Report (Ee) I.

[329] State Pension Insurance Act, Art. 15 (1); ECSS Report (Ee) I.

[330] For a detailed description of the international norms regarding invalidity benefit, see section 2.16.

Problematic issues

At first sight, the definition of invalidity in the Estonian legislation seems in line with the ECSS, since it covers permanent incapacity for work of at least 40 percent, while the ECSS allows the Member States to prescribe to which extent incapacity for work is covered. Estonia makes a distinction between total incapacity, which covers incapacity for work of 100 percent, and partial incapacity, covering incapacity for work of between 40 and 90 percent. In the ECSS, a distinction is made between partial and total incapacity in respect of employment injury, but not regarding 'general' invalidity. For this contingency, the prescribed benefit must be provided in the case of incapacity for work to a prescribed extent. At this point, however, it should be recalled that the Labour Office has explained that payment of the benefit in respect of total incapacity alone does not satisfy the requirements of ILO C102 and the ECSS.[331] It has been made clear that the prescribed (full) benefit should also be provided in the event of incapacity for work at a rate of less than 100 percent. In the Czech Republic, for example, total incapacity is incapacity of 70 to 100 percent, and additionally, a reduced benefit is granted in the case of partial incapacity. In Estonia, a full benefit is granted in cases of 100 percent incapacity only. In the case of incapacity for work of 40 to 90 percent, a lower benefit is granted, corresponding to the degree of incapacity. In consideration of all this, the Estonian provision in the event of total incapacity for work appears to be too limited. On the other hand, the granting of a pro-rata benefit in the case of incapacity for work of only 40 percent is more than the international standards require. However, the structure of the ECSS does not allow counterbalancing an infringement at one point with a surplus at another. Only in exceptional cases may the Committee of Ministers (and/or the CEACR) help by way of an interpretation that allows such an exchange.[332]

As a result of the above, the amount of the benefit might also involve a conflict with the ECSS. The replacement rate of 53.1 percent refers, as has been shown above, to an incapacity for work of 100 percent. If an incapacity degree of 70 percent were taken as a reference, the replacement rate would be 39.8 percent, which is just below the international minimum standards. It could be argued, however, that considering the discretion given to the Member States, a degree of reduced capacity of 75 percent would be permissible; in that case, Estonia would, currently, just provide sufficiently high benefits, representing 42 percent of the

[331] See section 2.16.1.

[332] For example, resolution CSS(97)5 concerning Germany that prescribed a qualifying period of 35 years, but acknowledged additional, hypothetic, periods, namely, periods between the occurrence of the contingency and the sixtieth birthday of the insured person. The Committee agreed with the exceeding of the maximum qualifying period, taking into consideration the additional periods, and the fact that in practice, all persons belonging to the classes of protected employees were entitled to the benefit. See also Nickless 2003, p. 102.

wage of an unskilled labourer. Nevertheless, in the long-term, taking into consideration the probable decrease in old-age pensions, a problem will emerge with regard to the level of the invalidity pension.

Summary of matters of compliance and problematic issues

Table XVII. Invalidity benefit (Ee) compared with the international standards

Estonia is bound by the ECSS				
Invalidity benefit	**ILO C102 (1952) / ECSS (1964)**	**ECSS Protocol (1964)**	**ILO C128 (1967)**	**ECSS Rev. (1990)**
Material scope	Provision of the benefit only in the case of total incapacity for work is not sufficient.	Provision of the benefit only in the case of total incapacity for work is not sufficient.	Provision of the benefit only in the case of total incapacity for work is not sufficient.	Provision of the benefit only in the case of total incapacity for work is not sufficient.
Personal scope	✓	✓	✓	✓
Benefit: amount	✓	Replacement rate is less than 50 percent in the case of incapacity for work of 90 percent or less.	Replacement rate is less than 50 percent in the case of incapacity for work of 90 percent or less.	Replacement rate is less than 65 percent.
Benefit: duration	✓	✓	✓	✓
Qualifying periods	✓	✓	✓	✓
Common principles	✓	✓	✓	✓

✓ = compliance of national provisions with the international standards.

4.13 SURVIVORS' BENEFIT

4.13.1 INTRODUCTION

General introduction

On the death of a breadwinner, survivors' benefit is provided to the children and the widow(er). In fact, the death of a 'breadwinner' is not always the correct term in this context, because entitlement to the benefit does not depend on whether the beneficiaries were actually maintained by the deceased or not.[333] Additionally,

[333] State Pension Insurance Act, Art. 20 (1).

brothers, sisters, parents, grandchildren, divorced spouses, stepchildren, foster children, stepparents, and foster parents of a breadwinner may have the right to a benefit, subject to specific conditions.[334] Since the international standards only impose an obligation to provide a benefit to the widow and children of the deceased, the other family members and the conditions for entitlement are not taken into account in the following comparison.

Legislation

Income protection in the case of death of the breadwinner is regulated by the State Insurance Pension Act. This act sets out the persons protected, the qualifying conditions, and the calculation of the survivors' pension. The right to a survivors' pension is related to the rules concerning the maintenance of a spouse set out in the Family Law Act.[335]

At the international level, Estonia is bound by Part X on Survivors' Benefit of the European Code of Social Security.

Administration and financing

As the survivors' benefit is part of the pensions insurance scheme, reference is made at this point to the section on old-age pension.

4.13.2 MATERIAL SCOPE

The contingency covers the death of a provider, upon the understanding that entitlement to a survivors' benefit for the provider's children, parents and widow(er) does not depend on whether they were actually maintained by the provider or not. The Estonian law does not make a distinction between a widow and a widower, nor does it distinguish between whether the deceased parent was the father or the mother of the child. A widow(er) must have been legally married to the deceased; the Estonian legal system does not recognise cohabitation. Entitled to a survivors' benefit is the widow(er) who is:[336]

- not working and pregnant (from the twelfth week of pregnancy);
- not working and raising the deceased person's child, who is under 3 years of age;

[334] State Pension Insurance Act, Arts. 20, paras 2 and 3. These rights are mirror images of the duty of maintenance of these family members, as set out in the Family Law Act, Art. 21.

[335] Family Law Act, passed on 12 October 1994 and entered into force 1 January 1995: RT I 1994, 75, 1326.

[336] State Pension Insurance Act, Art. 20; ECSS Report (Ee) I, Art. 60.

- permanently incapacitated for work or of pensionable age, and whose marriage to the deceased person lasted at least one year.

Entitlement to a survivors' pension is suspended if the widow(er) is employed.[337] Furthermore, in the event of remarriage of the widow(er), entitlement to the pension ends after twelve months of remarriage.[338]

A child for the purpose of the benefit is a child under 18 years of age (under 24 years of age they are a full-time student), or a child who is older, but declared permanently incapacitated for work before the age of 18 (24) years.[339]

4.13.3 PERSONAL SCOPE

The personal coverage corresponds with the coverage of the old-age benefit. By and large, the spouses and children of all economically active persons, either employed or self-employed, are insured, which implies a coverage of 49.1 percent of all residents.

4.13.4 BENEFITS

Widow(er)'s pension

To calculate the survivors' benefit, the higher of the following two amounts is used as a calculation base:[340]

- the amount of the deceased person's old-age pension calculated according to the person's actual pensionable length of service (until 31.12.1998) and pension insurance coefficients (after 31.12.1998);
- the amount of an old-age pension for a person with 30 years of pensionable length of service.

Similar to the old-age and invalidity pension, the national pension rate serves as the minimum calculation base. The final amount of the benefit depends on the number of eligible family members: if one family member (spouse or child) is entitled, the pension amounts to 50 percent of the calculation base; in the case of

337 State Pension Insurance Act, Art. 43 (1).
338 State Pension Insurance Act, Art. 41 (3).
339 State Pension Insurance Act, Art. 20 (2) 1).
340 State Pension Insurance Act, Art. 21 (1); ECSS Report (Ee) IV, Art. 62; Leppik & Kruuda 2003, pp. 34–35.

two family members, 80 percent; and in case of three or more family members, the benefit is 100 percent of the calculation base.

Thus, the (imaginary) amount of old-age pension for the deceased provider of the widow(er) or child at the moment of application is compared with the amount of an old-age pension for a person with 30 years of pensionable service. Additionally, the higher of the two amounts is multiplied by the applicable percentage. Consequently, a standard beneficiary – a widow(er) with two children – receives a pension that is at least equal to the old-age pension of a person who has completed thirty service years. Because the calculation of the benefit is similar to that of an incapacity for work benefit (in the event of 100 percent incapacitation), it is sufficient at this point to refer the reader to the calculation example for an invalidity benefit in section 4.12.4, which shows a replacement rate of 53.1 percent in relation to the average net wage of an unskilled worker.[341]

Orphan's pension

The survivors' benefit for one child amounts to 50 percent of the calculation base. A child that loses both their parents, has the right to receive two survivors' pensions or national pensions, or a survivors' pension, as well as a national pension concurrently, depending on the qualifying periods of the parents.[342]

Duration of the benefit

The survivors' pension is paid monthly, and is granted during the period in which the beneficiary meets the criteria for eligibility as described in the material scope section, thus throughout the contingency.

Adjustment to the cost of living

The benefits are being regularly adjusted in the same way as the old-age benefits.

4.13.5 QUALIFYING CONDITIONS

Entitled to a survivors' pension are family members of a deceased person who had satisfied, by the date of their death, the qualifying period that would have been necessary for entitlement to an old-age pension or an incapacity for work

[341] ECSS Report (Ee) IV, Art. 62. As is the case in respect of old age and invalidity, Estonia makes reference to ECSS Art. 62(a) and Art. 66, taking the average wage of an ordinary adult male labourer (plus family allowances) as a basis.

[342] State Pension Insurance Act, Art. 41 (4).

pension. Thus, the qualifying period may differ from 1 year to 15 years, according to the age at which the provider died.[343]

If the deceased person did not satisfy the necessary qualifying period, survivors have the right to a national pension, under the condition that the breadwinner resided in Estonia at least one year prior to their death.[344]

4.13.6 COMPARISON WITH THE INTERNATIONAL STANDARDS[345]

Matters of compliance

The personal scope of the survivors' pension insurance – covering 49.1 percent of all residents – is amply sufficient according to all international standards, which are similar to the standards relating to invalidity. As regards the amount of the benefit, the calculations show that the benefit of a standard beneficiary – a spouse with two dependent children – amounted to 53.1 percent of the average salary of an unskilled worker in 2007. This percentage meets the standard of the ECSS, and, narrowly, of the ECSS Protocol and ILO C128 (both 50 percent), but is below the stipulation of the ECSS (Revised) (65 percent).

Since the benefit is granted throughout the contingency, the duration of the benefit is in compliance with all relevant standards in this respect. The same counts for the qualification period of 15 service or insurance years as a maximum.

Problematic issues

As regards the material scope, the Estonian insurance system provides for a survivors' benefit in the event of the death of a spouse or parent, which corresponds with the international provisions. However, on the interpretation of the term 'widow' in order to be eligible for a survivors' benefit, the Committee of Ministers in its Resolution of 2008 made a request to explain:[346]

> [W]hat social protection is available to a widow who is manifestly incapable of self-support because of her advanced age and the virtual impossibility of finding employment after many years of dependence on her husband, as well as to a younger

343 State Pension Insurance Act, Art. 20 (4). For more detailed information, see the sections on old age and invalidity.
344 Leppik & Kruuda 2003, p. 34.
345 For a detailed description of the international norms regarding survivors' benefit, see section 2.17.
346 CM/ResCSS(2008)5, p. 2 point V.

widow who was also dependent on her late husband and is caring for at least one dependent child older than 3 years of age.'

The ECSS leaves it to the countries to decide the meaning of a widow being 'incapable of self-support.'[347] However, the discretionary power is not unlimited. It was explained by the Labour Office at the adoption of Convention 102, that the conditions to qualify for a benefit may, for instance, be the care of dependent children, age or invalidity of the widow, or some other condition that would prove that the widow is incapable of self-support.[348] The above-mentioned question mark expressed by the CEACR and the Committee of Ministers follows from this interpretation, and makes clear that the supervising committees give careful consideration to the given discretion in this respect.[349] It remains to be seen what measures Estonia will take, if any, to do justice to this interpretation, since a broad explanation of incapability of self-support is in conflict with the far-reaching individualisation of social security rights. The tension between individualised social security rights and the conventions does not only exist in Estonia, but also in other countries. Therefore, this issue will be further discussed in section 6.2.2.

Summary of matters of compliance and problematic issues

Table XVIII. Survivors' benefit (Ee) compared with the international standards

Estonia is bound by the ECSS				
Survivors' benefit	**ILO C102 (1952) / ECSS (1964)**	**ECSS Protocol (1964)**	**ILO C128 (1967)**	**ECSS Rev. (1990)**
Material scope	The definition of a 'widow incapable of self-support' is too strict.	The definition of a 'widow incapable of self-support' is too strict.	The definition of a 'widow incapable of self-support' is too strict.	The definition of a 'widow incapable of self-support' is too strict.
Personal scope	✓	✓	✓	✓
Benefit: amount	✓	✓	✓	Replacement rate is less than 65 percent.
Benefit: duration	✓	✓	✓	✓
Qualifying periods	✓	✓	✓	✓
Common principles	✓	✓	✓	✓

✓ = compliance of national provisions with the international standards.

[347] ECSS Art. 60.
[348] ILO Report V (a)(2) 1952, pp. 130–131; 216–217. See also section 2.17.1.
[349] See also: Nickless 2003, p. 107.

4.14 SUMMARY AND CONCLUSIONS

After the collapse of the Soviet regime in 1991, the Estonian government started to radically reform its economy. The new free market economy was expected to give the people what they had been deprived of under the rule of Moscow: wealth and individual freedom. Changes in social security took place in the shadow of economic reform, and the protection against social risks was not on the political priority list. The strong desire to take part in the European Union gave rise to an increasing attention to international human rights instruments, including the European Social Charter. After having ratified the revised version of the Social Charter in 2000, the next step would be the acceptance of the European Code of Social Security. In order to meet the standards of the Code, the different parts of the social security system were compared with the standards of this instrument and several adjustments were made, such as an increase in pensions, the introduction of a fixed indexation formula for pensions, and the creation of an unemployment insurance scheme. As a result, Estonia was able to undertake a generous ratification of the Code in 2004, only leaving aside the part on employment injury. In accordance with the Estonian Constitution, the European Code is part of the Estonian legal order and takes precedence over national law. However, although several ILO Conventions as well as the Social Charter have been invoked before court, the European Code has not played a role in court proceedings so far.

In the meantime, renewed membership of the ILO in 1991 formed the basis for a rather wavering development in social dialogue. The first established tripartite council was the ILO Council, with the task of assisting the government in fulfilling the obligations following from ILO membership. More tripartite councils and boards have been created subsequently, thus substantiating the unique ILO principle of tripartism in social policy. However, the road from state paternalism to real social dialogue appears to be heavy going. The actual influence of the social partners is limited, and consultation of the workers' representatives by the government is often overlooked.

Comparison of the Estonian social security provisions with the standards given in the European Code of Social Security shows that Estonia, by and large, complies with these standards.[350] In fact, the *personal coverage* of the different schemes in relation to most of the ratified parts – namely, all employees and self-employed persons – exceeds the standards of the Code and complies even with the higher standards of the third generation ILO Conventions and/or the Protocol to the Code and the Revised Code. There is one exception, namely, in relation to maternity benefit. According to the international standards, the wives

350 For a summery, see Appendix 1.

of insured spouses should come under their spouse's insurance for medical care. However, because all pregnant women have been considered equal to insured persons since 2009, this conflict has been resolved in practice.

On the whole, the *material scope* also complies with the standards of the Code, as well as with the relevant higher norms, although there are a few issues in this respect. Firstly, as regards invalidity benefits, only total incapacity for work (100 percent) gives right to a full invalidity pension, whereas the Code prescribes that such a pension must also be provided in the case of incapacity for work to a lesser extent, to be prescribed by national regulations. Secondly, the definition of 'widow' for eligibility for a survivors' pension has been found to be too strict by the supervising Committee of Ministers.

In respect of the *level of the benefit*, there are several issues in relation to the European Code. One case in point is the regulation on out-of-pocket payments for medical care. According to the Code, cost-sharing is allowed only if the financial burden does not cause hardship, and it is totally prohibited for pregnancy related care. It has been shown in the Estonian case that health expenditure accounts for an increasing proportion of household expenditure, especially affecting low-income households that include pensioners and disabled or chronically ill persons. It is questionable, therefore, whether these rules on cost-sharing are in line with the Code. The obligation for pregnant women during the first twelve weeks of pregnancy to pay fees for home visits by a family doctor and ambulatory specialist care, which was in conflict with the Code, was repealed in 2009 in response of critical comments by the Committee of Ministers on this point. Another point of particular interest in respect of the level of benefits is the amount of the old-age pension. Although the replacement rate as set by the Code was still met in 2007, it has been made clear that it will steadily decrease and that it will drop below the minimum standard in future if no measures are taken.

As regards the *duration of the benefits*, the Estonian provisions are all in line with the Code, and in most cases, also with higher standards. The same counts for the *qualifying conditions*, although the qualifying period of fourteen days for health insurance, introduced for administrative reasons, is questionable. For employment injury and occupational diseases there are no specific provisions, and therefore Estonia has not (yet) accepted Part VI of the European Code.

PART III
CONCLUSIONS AND DISCUSSIONS

In this evaluative part, conclusions will be drawn and discussed in order to provide an answer to the main research question:

(a) What is the effect of international standards on social security legislation in the Czech Republic and Estonia, and what application problems arise?
(b) What do these application problems mean for the effectiveness of the international standards?

In Chapter 5, the effect of international standards on national social security legislation will be reviewed on the basis of the two country studies, providing answers to the first part of the research question. The different functions of the standards during the development of the social security systems will be examined and discussed, and the observed problems in relation to ratification and application of the standards will be pointed out.

In Chapter 6, the second part of the research question will be answered. How do the application problems at the national level reflect on the international standards? In other words, what are the implications of the research results for the effectiveness and adequacy of the standards? For this purpose, the results will be put in a broader perspective and discussed against the background of topical issues and stated criticism.

CHAPTER 5

THE EFFECT OF THE STANDARDS ON NATIONAL LEGISLATION

– Conclusions and Discussions (a) –

5.1 INTRODUCTION

This chapter will provide an answer to the first part of the main research question: 'What is the effect of international standards on social security legislation in the Czech Republic and Estonia, and what application problems arise?' On the basis of the country studies, the effect of the conventions on social security legislation will be assessed from three different angles.

First, the effect of the standards will be examined from the perspective of their functions (section 5.2). The functions of the international standards, or, in other words, the various ways in which the standards (can) work, determine their effect on national social security to a great extent. In fact, the more the different functions are employed or manifest, the greater the influence of the norms. To put it the other way around, if the norms do not work at all, if they do not have any function, they do not have any effect either. Therefore, an examination of the different ways the international standards have worked during the various stages of the reform processes in the two countries will clarify the effect of the standards on the development of national social security law. Apart from providing clarity, a clear typification of the different functions of the standards may also provide guidance to governments for using the conventions in future.

Secondly, the effect of the standards will be viewed from the perspective of ratification of social security conventions by ILO Member States. Obviously, first and foremost the effect of the standards depends on whether or not they are ratified. Conventions that are not ratified do not directly influence national legislation in most cases. Consequently, a determination of obstacles to ratification is of crucial importance. The observed obstacles to ratification of social security conventions in the two countries will therefore be listed and briefly discussed (section 5.3).

Thirdly, the effect of the standards will be assessed with regard to the observed application problems (section 5.4). The country studies have revealed several conflicts and problematic issues pertaining to the application of the conventions. Similar to the obstacles to ratification, these problems touch on the limitations of their effectiveness at the national level, and are thus worth a closer investigation.

Finally, a brief summary of the observed effect of international standards on national social security legislation in both countries will be provided (section 5.5).

5.2 THE EFFECT OF INTERNATIONAL STANDARDS ON NATIONAL SOCIAL SECURITY

5.2.1 INTRODUCTION

From the country studies, it appears that the social security instruments of the ILO and the Council of Europe have had an influence on the development of the social security systems in both countries. It has been made clear that both countries meet the minimum international standards for the greater part, and that this would have been less so if these standards had not been ratified. It is also true, however, that the concrete effects of international standards on national social security legislation are often difficult to determine. An important reason for this is that the standards have their impact in different ways and at different stages of the development of social security systems. The country studies disclose the various functions the international standards have served during the reform processes, and they show that specific functions have become apparent or operational at different moments.[1] An identification of these different functions contributes to a better insight into the concrete effects of the international standards on national legislation.

In general, international social security standards have different functions that all serve their one overarching goal: the promotion of social protection. Well-known functions are, for example, that they create a common minimum level of social security for all contracting parties, that they serve as a model or guide for national social security schemes, and that they prevent social security from falling below the level of the accepted standards.[2] In this section, the functions

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1 The term 'function' must be read in the sense of 'the way in which something works or operates'.

2 See, for instance, ILO 2008, p. vii; Kulke 2007, p. 127; Villars 1979, pp. 343–354; Kulke & López Morales 2007, pp. 91–92; Bartolomei de la Cruz, Von Potobsky, Swepston 1996, pp. 25–26; Deakin 2005, p. 47. See also section 1.1.2.

of the conventions that have come to the fore in the country studies and the analysis of ILO Convention 102, both evident and less obvious, will be identified, described and discussed.

As mentioned in section 5.1, the purpose of scrutinising these functions is twofold. First, a clear identification of the different functions illuminates their role during the reform processes in the Czech Republic and Estonia at the different stages of development of their social security systems. Secondly, it contributes to knowledge about, and insight into, the potential value of international standards for the development of national social security systems in general. It must be acknowledged in this respect that specific functions can be better deployed if they are clearly identified. After the presentation of a definition for each function (section 5.2.2), they will subsequently be examined and discussed in light of the two country studies (sections 5.2.3 to 5.2.7). Thereafter, the findings on the functionality of the international standards in different situations will be summarised (section 5.2.8).

5.2.2 TERMING THE FUNCTIONS

On the basis of the research, five functions can be identified, namely, the benchmark, preserving, counterbalancing, bridging, and harmonising functions. Although each function has specific features, they are closely connected to each other and sometimes they may even overlap. It will be shown that these functions were apparent or operational at different development phases of the social security systems. Sometimes they were also only latent or potentially present, depending on specific situations and national characteristics. Most functions may seem obvious, as such, for an international legal instrument setting out minimum standards. Still, for efficient use of the instruments, it is important to define these functions and to recognise their possible effects in different situations. The observed functions of the conventions in relation to the reforms of the social security systems in the Czech Republic and Estonia are the following:

1. *Benchmark function:* The international standards serve, usually before their ratification, as a guide for states at the creation or reconstruction of (parts of) their social security systems in order to reach the prescribed norms.
2. *Preserving function:* Once ratified, the international standards serve as a fixed minimum level of social security that has to be continuously respected by the legislature, executive bodies and the judiciary. Established rights cannot be curtailed to a level below the international norms.
3. *Counterbalancing function:* The international standards require solidarity, to a certain extent, and state responsibility for the administration and provision

of the benefits in accordance with the prescribed common principles.[3] As such, they serve as a counterbalance to political policy that is aimed at reducing state responsibility and shifting social risks from the public to the private sphere.

4. *Bridging function*: The principles on solidarity and state responsibility, as incorporated in the international standards, serve as a bridge between privatisation and solidarity. Where the privatisation of social security provisions takes place, compliance with these principles safeguards solidarity and state responsibility to a minimum extent, and thus creates a compromise between individual and collective responsibility for social risks.
5. *Harmonising function*: This traditional function of the international standards implies harmonisation of the social security systems of all contracting parties in the sense that they share the same floor for social security.

Going back to the introductory chapter of this study, it can be observed that the benchmark and the harmonising functions were recognised and intended at the creation of the standards.[4] The preserving function was not explicitly mentioned, but is a logical consequence of the acceptance of the standards. The counterbalancing and bridging functions were not relevant at that time, since they relate especially to neoliberal views involving a 'small' government and individual responsibility for social risks. As such, they can be regarded as new functions of the standards, relevant in a changed society.

5.2.3 BENCHMARK FUNCTION

An important outcome of the study is that the European Code of Social Security (European Code) – and implicitly, ILO Convention 102 – has served as a benchmark for the reform and creation of the different social security schemes, especially in Estonia.[5] When, after a period of rigorous economic reforms, it was finally recognised that the social security system would also have to be reconsidered, the existing Estonian provisions at the time were compared with the European Code. The outcome of the comparison was that the Estonian social security system exceeded the requirements of the Code in five branches, namely, medical care, sickness benefit, family benefit, maternity benefit, and survivors' benefit. The level of old-age pension was equal to the norm given in the Code, but was expected to fall below this norm shortly afterwards because of rising

[3] For a description of the principles on solidarity and state responsibility in the context of the social security instruments, see section 2.5.

[4] See section 1.1.2.

[5] See sections 3.2.2 and 4.2.2.

wages and insufficient pension adjustment rules. It was established that benefits in respect of invalidity, unemployment and employment injury were too low. Moreover, with regard to unemployment and employment injury, other criteria were also not satisfied, since specific schemes for these contingencies did not exist. To prepare for ratification, the discrepancies were addressed by taking the standards of the European Code as a benchmark. First of all, in order to be able to meet the part on unemployment, an unemployment insurance scheme was created that fulfilled the prescribed criteria. Secondly, the old-age and invalidity pensions were raised and an annual indexation was established in accordance with the Code. Lastly, several proposals for an employment injury scheme were produced, but none were actually adopted, because of strong opposition from employers. All this resulted in the ratification of eight of the nine parts of the European Code in 2004. In 2009, the benchmark function became visible again, when a remaining deficiency concerning health care for women during the first twelve weeks of pregnancy was rectified through an amendment to the Health Insurance Act in response to comments of the supervising committee on the application of the Code.

In the Czech Republic the international instruments have not been used as explicitly for social security reform as in Estonia. Although they were certainly taken into account after ratification in 1990, the proposed national provisions regarding most branches exceeded the international norms and therefore their benchmark function was less relevant. Furthermore, it must be borne in mind that the Czech Republic was not so devoted to the Western European free market economy as Estonia. Accordingly, the wish to become a part of the European Union was not as strong as in Estonia, and therefore compliance with the European standards as considered to be exemplified in the European Code was not an aim as such. Nevertheless, the international instruments have played a role in the subsequent reform steps, but because these reforms were mainly aimed at retrenchment, this will be discussed in relation to the preserving function in section 5.2.4.

It can be concluded that the benchmark function of the international standards becomes operational especially in relation to the creation or reconstruction of social security schemes. It has proved to be valuable for a country with a poor point of departure in terms of social security. In such a situation, the standards can serve as a concrete goal to be reached. The legal instruments provide clear examples for protection against the nine classic social risks and prescribe minimum norms for the formulation of a legislative framework for the necessary schemes. As such, this function of the social security conventions may be explicitly deployed by future EU Member States with a low level of social protection for the design of a social security system that fits in with the European context.

5.2.4 PRESERVING FUNCTION

When national social security rules are specified and enacted in accordance with the international norms and the standards concerned are ratified, their relevance does not end. Then, they no longer serve as a goal to be reached, but they subsequently serve as a fixed minimum level of social security – a floor that has to be continuously respected by the legislature, executive bodies and the judiciary. What is more, regular reports to the supervising committees have to be provided to prove that this minimum level is met, not only in the short, but also in the long run. In times of economic downturn especially, when governments cut down on public expenses, this preserving function becomes prominent. In the Czech Republic, this floor is provided by the norms of ILO Conventions 102, 130, and 128 (for old-age pensions), and the European Code. When the government ratified the ILO conventions in 1993, the norms were considered low and easy to meet. Nevertheless, in 2004 the Czech pensions fell below the given norms due to the fact that the annual adjustment of the pensions did not match the sharp increase of wages. In order to bring the law into compliance again with ILO Convention 128, measures had to be taken, and were taken indeed, to increase the pensions and solve the emergent inconsistency. Another example is the increase in 2010 of the qualifying insurance period for entitlement to old-age pension. It was the political wish to fix the period at 35 years, however, that would be in conflict with ILO Conventions 102 and 128 and the European Code. In view of these international obligations, the qualifying period was set at 30 years of insurance or 35 years if non-contributory periods are included, such as years of military service or caring for a child of under four years of age.[6]

In Estonia, as a response to the economic recession, in 2008 and 2009 several economic measures were taken that affected different benefits. For example, the pensionable age was raised to 65, and sickness benefit was reduced from 80 to 70 percent of previous wages. So far, the preserving function of the European Code has been effective, since no measures have been taken that have caused a conflict with the Code.

It must be said that, in general, it is very difficult to point out exactly in which cases the international standards have prevented or influenced certain economic measures, because a measure that has not been taken cannot be assessed. It requires specific inside information to get to know the underlying political reasons, which are, however, seldom made explicit. Nevertheless, sometimes the preserving role of the conventions can be recognised from the fact that certain norms are kept at a level just above the international standards. Examples are the

[6] See section 3.4.4.

old-age pension and the sickness benefits in the Czech Republic, as well as the old-age pension in Estonia, that have long been kept just slightly above the applicable minimum standards. While economic measures were taken at other points, such as a lengthy freeze on the reduction limit of the Czech sickness benefits, the required replacement rates of the benefits were usually maintained. In this respect, for the effectiveness of the preserving function, it is important that in both countries all bills in connection with social security legislation have to be assessed, and generally are assessed, on their compliance with the relevant international instruments before submission to Parliament.

It must be acknowledged that the international standards do not prevent the erosion of established rights in all cases. For example, since 2008 in the Czech Republic, the replacement rate of the old-age pension has fallen below the norms of the ratified ILO Convention 128, and even just below the minimum standards. In this particular case, the preserving function of the international standards has, to date, failed. It remains to be seen how the government will respond to the comments of the supervising committees that inevitably will be given in the next observations and resolutions.

Overall, it can be concluded that the preserving function is a constant feature of the international standards that becomes operational immediately after their ratification. Governments are compelled to keep legislation in line with the given norms and to assess the levels of the benefits. The supervision procedures that require regular reports on the application of the standards are effective instruments in this respect because they require continuous evaluation. In relation to economic measures especially, the standards call for attention to the internationally accepted minimum norms, and constitute a serious obstacle to a free fall of social protection. At the same time, it cannot be denied that the social security instruments are in between soft and hard law. Although they are binding legal instruments, hard sanctions cannot be imposed to enforce compliance. Moreover, governments are free to denounce their ratification when they feel too restricted in their austerity policies.[7] In this respect, an ageing population, in combination with the recent economic crisis, can be considered a true litmus test for the preserving function of the conventions. Time will show whether this function holds out in relation to, for example, the Czech and Estonian pensions.

5.2.5 COUNTERBALANCING FUNCTION

Both in the Czech Republic and Estonia, the ideas of the ILO and the Council of Europe about solidarity based social security, as well as the legal instruments

[7] This soft character of the conventions is subject to further discussion in section 6.3.

that give substance to these ideas, have counterbalanced neoliberal policy aiming at a reduction of state responsibility and a shifting of social risks from public to private responsibility. This counterbalancing function has been most operational in Estonia, where neoliberal governments have ruled in succession since independence, and where the market economy was expected to bring wealth and happiness.[8] Under the influence of the World Bank and the IMF, a three-pillar pension system was designed and emphasis was put on the importance of the compulsory private pillar. At the same time, Estonia had a strong ambition to join the European Union, which brought about pressure regarding the ratification of the European Social Charter and the European Code of Social Security. As a result of the government's commitment to these instruments, the prescribed standards were taken into account while determining the size of the different pillars. Accordingly, the public (first) pillar was designed in such a way that the internationally accepted minimum level of an old-age pension was met, in spite of the political inclination towards the private pillars. Moreover, in spite of the neoliberal preference for residual benefits, the political choice was made to follow in the footsteps of the Council of Europe (and implicitly of the ILO), by explicitly setting up a social security system in accordance with its standards, not aiming at creating a mere safety net, but also at income replacement during the occurrence of social risks.[9] Thus, the acceptance of the standards has counterbalanced the political trend towards a diminishing role of the state in social security.

As a member of the ILO from its outset, the Czech Republic had previous experience with social insurance, and social policy of the first government was initially in line with the ILO ideology.[10] The World Bank was consulted in relation to monetary questions, but was kept at a distance in relation to social policy areas. As a matter of fact, the retreat of the state from the field of social security by the privatisation of provisions, or by the creation of mainly residual schemes, was not under discussion. Nevertheless, the latest recession, on top of the burning problem of an ageing population, has caused more political interest in diminishing state responsibility, for instance, by strengthening the supplementary private pension scheme, imposing out-of-pocket payments for medical services, and introducing an income test for family benefits. In this respect, the international standards as guardians of solidarity and state responsibility may serve a counterbalancing function after all, since they call for political attention to be paid to the solidarity aspect of social security, and to state responsibility for the due provision of the benefits as prescribed. Private schemes that are not implemented in line with the international standards can

[8] See sections 4.2.1 and 4.2.2.
[9] See, for instance, Ministry of Social Affairs (Ee) 2000; Leppik & Võrk 2006, pp. 19–38.
[10] See section 3.2.2.

provide additional social protection, but cannot be counted for the fulfilment of the international obligations.

In general, it can be concluded that the counterbalancing function of the social security instruments becomes operational specifically in case of policy decisions to be taken in a political climate with a tendency to shift responsibility for social risks from the state to individuals, for instance, through the privatisation of (elements of) social security schemes. Moreover, the standards serve a balancing function in periods of economic downturn when strong economic measures are prepared to restrict public social security expenditure. They require policy makers to take into account the solidarity aspect of social security next to economic considerations. It must be recognised that, contrary to the preserving function, this function is more political than legal, and therefore highly dependent on the attitude towards international obligations of the incumbent government.

5.2.6 BRIDGING FUNCTION

Inextricably bound up with the counterbalancing function, is the bridging function. Both functions closely relate to the common principles on solidarity and state responsibility, as discussed in section 2.5. The bridging function can be explained best on the basis of the Estonian private pension scheme. It is often taken for granted that a private scheme does not comply with the conventions. Indeed, the assessment of the Estonian pension scheme in section 4.8.6 seems to confirm this assumption. At the same time, the study makes apparent the possibility for such schemes to meet the international obligations, in spite of their private character. It has been discussed that this can be achieved by implementing the private scheme in question with due regard to the principles on solidarity and state responsibility incorporated in the international standards. Compliance with these principles brings together two differing concepts: privatisation and solidarity. If the principles are respected, advantage can be taken of the stimulating features of the free market economy, while at the same time, a minimum degree of solidarity and state responsibility is guaranteed and the negative effects of competition for vulnerable groups in society remain limited. The role of the principles on solidarity and state responsibility in relation to privatisation will be further discussed in section 6.2.3.

In short, the bridging function of the international standards can become operational in relation to the privatisation of (elements of) social security schemes. The prescribed common principles are useful guidelines for the implementation of a private scheme to guarantee solidarity and state

responsibility, at least to a certain extent. The application of these principles in relation to a private scheme creates a compromise between individual and collective responsibility for social risks. In essence, they bridge the gap between solidarity-based social security on the one hand and the free market economy on the other. Through observance of the prescribed principles, individual responsibility for income replacement during the occurrence of a social risk will be accompanied by legal safeguards that confine the negative effects of the free market, such as excessively low, or even negative, pension remittances, and limited or no access to health care for lower-income groups.

5.2.7 HARMONISING FUNCTION

The establishment of a national floor for social security through ratification of international standards does not only imply a conservation of national social protection, it also means harmonisation of the social security systems of all contracting parties, in the sense that they all share the same floor; they all have to provide at least the given minimum level of social protection. Within the context of the European Union, it must be kept in mind that the European Commission is not allowed to propose any harmonisation in the field of social security. At the same time, the Lisbon Treaty does refer, in its social paragraph, to the European Social Charter, which, in turn, refers to the minimum norms of ILO Convention 102 or the European Code. This reference is rather ambivalent. On the one hand, Member States do not accept social security standards as part of the EU *acquis*, but on the other, they do accept such standards at a broader international level. This paradox can be explained in light of EU enlargement that was envisaged at the time of the establishment of the Treaty of Amsterdam. The reference to the Social Charter, and implicitly to ILO Convention 102, was seen as a measure to prevent social dumping.[11] Accordingly, the accession states were pushed to ratify this instrument.[12]

In spite of its ambivalence, the country studies of Estonia and the Czech Republic confirm the value of the reference to the Social Charter. After all, it has been established that the intention to join the European Union was the direct reason for the ratification of the Social Charter, which subsequently led to the acceptance of the European Code.[13] In the Czech Republic, the Code only slightly led to

11 See, for instance, Leppik 1999, p. 7.

12 See also Ginneken 2003, p. 6. Van Ginneken states that ILO Convention 102 'is some sort of passport for acceding countries to the EU.' Vaughan-Whitehead 2003, p. 162. Vaughan criticises the omission of European institutions to propose an alternative approach to the World Bank policy in the CEE region during the first years of reforms.

13 See sections 3.2.2 and 4.2.2.

higher standards, because several ILO conventions were in force already, but in Estonia, the link between the EU *acquis* and the Social Charter resulted in a serious upgrade of national social protection to at least the international minimum before the country entered the European Union. This resulted in a smaller gap between social protection in the new and old Member States.

Thus, it can be concluded that acceptance of the international standards has a harmonising effect on social security systems within the European Union, in the sense that they provide a minimum level of social protection to be complied with by all contracting parties. A common social protection floor contributes to the European single market as a level playing field. This seems all the more relevant in light of the severe cuts in social expenditure to combat the economic downturn in all EU Member States and in view of future EU accessions.

5.2.8 THE FIVE FUNCTIONS: A REVIEW

The description of the five observed functions of the international standards in the Czech Republic and Estonia shows that each function plays a role at different times and in different situations. Some of the functions are especially, and sometimes even exclusively, relevant in relation to the creation or extension of a social security system. This is particularly true for the benchmark function, as seen in the Estonian case, where the European Code has been used as an example for the design of the different schemes. With a poorly developed system as a point of departure, lacking important provisions such as unemployment insurance and adequate old-age pensions, the Code could serve as a practical goal to be reached. The international standards also give guidance at a later stage of development, notably, in case necessary provisions appear to be missing, as recently seen in relation to pregnancy related health care in Estonia.

During the (re)construction of a system, also the counterbalancing function is specifically relevant, preventing an excessively dominant role for the market in social protection. In Estonia, the call for attention to solidarity and state responsibility following from the obligations of the European Code has certainly tempered the political focus on individual responsibility for social risks and the privatisation of provisions, and it has led to a larger role of the state. For example, the fact that the size of the Estonian public pension pillar was made large enough to comply with the international standards can be attributed to the European Code as a counterbalance to the neoliberal political preference at that time. This counterbalancing function may be as relevant in relation to retrenchment policies, when commitment to the international standards compensate the

tendency towards the privatisation of social security provisions as a means of cutting public expenses.

The bridging function can be called upon to implement private provisions in such a way that the benefits of a free market can be enjoyed, while at the same time, the state retains its final responsibility by setting a strict (legal) framework that limits the negative effects of competition for the most vulnerable groups in society. This function was not deployed in relation to the Estonian private pension scheme, which has resulted in a problem fulfilling the obligations of the conventions. For the Czech Republic, who has severe problems with the level of pensions, the bridging function could contribute to the solution of existing conflicts if the private pension scheme would be implemented in accordance with the common principles incorporated in the international instruments. Because if implemented in such a way, the private scheme can be taken into account for the fulfilment of the ILO Convention 128 and the European Code.

The preserving function becomes operational once a certain instrument has been ratified. From then, it serves as a pebble in the shoe of the government, in the sense that the given standards provide for a minimum level of social protection that has to be continuously taken into account. This function is especially relevant in view of expenditure cuts, as it compels governments to respect the lower limit. For the Czech Republic, where social security was initially rather generous, but subsequently subject to severe economic measures, this function was (and still is) the most relevant of all functions.

The last function, the harmonising function, is of a different kind since it does not relate to one specific national situation. Instead, it concerns harmonisation between different countries. Because ILO Convention 102 and/or the European Code, with their inherent concept of a solidarity based social security system and their fixed legal floor for social protection, have been accepted by almost all EU Member States, they bring about harmonisation within the European Union in practice, whether intended or not. It has been brought to light in this study that the European Commission has put great pressure upon the accession states to accept the Social Charter and the European Code. Although this underhand policy is rather random and paradoxical to the claim of national autonomy in this field, it has been effective in terms of the promotion of communal minimum norms for social security at the EU level.

It is worth mentioning, in this respect, that the use of international instruments for the creation of a harmonised level of social protection has been envisaged

since the birth of the European Economic Community (EEC).[14] An ILO group of experts that studied the impact of the EEC on social protection (1956), considered that an alternative to legislative power in the social field would be to ensure international instruments for the protection of social rights. In their report, which was influential to the Treaty of Rome, the experts referred to the draft European Social Charter and several ILO conventions, and suggested general acceptance by European countries of such standards. On different occasions in later stages of the development of the European Union, this idea was reconsidered, but not accepted as yet.[15] This underlines the ambiguous character of the claim of national autonomy in the field of social security. It would contribute to transparency if a clear standpoint were taken, for example, by accepting the minimum social security standards at the EU level, which would be practically feasible, as demonstrated by the inclusion of the ILO Maritime Labour Convention (2006) into the EU *acquis* in 2009.[16] Then, the harmonising function of the international standards could be openly emphasised so as to provide a useful tool for social policy, especially in relation to the economic downturn and to forthcoming EU accessions. From the perspective of the international standards, it would imply a boost in terms of recognition and reputation of social security standards, which may have a positive effect on social protection inside as well as outside the European Union.

The study clearly shows that the different functions are apparent and operational in different situations and stages of development of the social security system concerned. It can also be concluded that the effect of the functions largely depends on national politics, especially on how serious the international obligations are taken. In principle, all functions automatically follow from the acceptance of the standards – they are just different ways in which the international instruments work. However, these different ways must be acknowledged and deployed to become operational and effective. If political will to apply the standards is absent, the implicit functions will be without effect. For example, the Czech or Estonian government may choose to let the pensions drop below the minimum level, and thus to ignore the preserving function of the standards. However, such a breach of international obligations is a desirable scenario for neither of the countries. The foregoing typification and analysis of the different functions can contribute to the practicability, and subsequently to the effectiveness, of the international standards.

[14] Schutter 2005, pp. 111–112.
[15] Schutter 2005, pp. 116–120.
[16] Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC.

5.3 OBSTACLES TO RATIFICATION OF INTERNATIONAL STANDARDS

5.3.1 INTRODUCTION

The possible effect of international social security standards in a specific country is not only determined by the reach of their functions, or by their (in)adequate application; it depends first and foremost on their being ratified or not. As the country studies show, not all social security instruments are ratified by the Czech Republic and Estonia. On the contrary, Estonia has only ratified the European Code and none of the higher ILO conventions, while the Czech Republic has additionally ratified two of the eight higher standards.[17] From the perspective of national social protection, it would be an improvement if more higher norms were accepted.

Ratification of standards is also of great significance from the international point of view, since conventions with a low ratification rate do not have as much persuasive power as those who enjoy a higher number of ratifications. Thus, identification of specific obstacles to ratification in different countries is important in view of the promotion of the standards in national situations, as well as in view of the image and status of the social security standards within the global community. In this light, the ILO has conducted an inquiry among its Member States in order to obtain information on the obstacles and difficulties encountered that might prevent or delay ratification of these conventions.[18] The most prominent obstacles following from this inquiry are: (a) Non-conformity of national legislation; (b) different societal values and political obstacles; (c) lack of financial resources; (d) lack of administrative and statistical capacity; and (e) lack of knowledge about the Conventions.[19] This section seeks to add to the ILO investigation by examining to what extent these findings apply also to the Czech Republic and Estonia, or whether the study may have disclosed other reasons. First, the different obstacles in both countries will be described. In the final paragraph it will be reviewed how the findings from the cases of the Czech Republic and Estonia relate to the findings of the ILO inquiry.

5.3.2 LACK OF KNOWLEDGE

First of all, during the research it became apparent that the social security conventions are very poorly known both in political circles and the ministries.

17 ILO Conventions 130 and 128.
18 ILO 2001C. For an in-depth study on obstacles for ratification, see Korda (forthcoming), dissertation.
19 ILO 2008, pp. 37–39.

For example, in the Czech Republic, in the department of the Ministry of Health, where legislation is assessed on compliance with international law, there was hardly any knowledge about the fact that the ILO conventions and the European Code contain parts on medical care. And in Estonia, even the interviewed member of the Social Committee of Parliament – the body that should prepare, among others, the submission of newly adopted ILO conventions – was not aware of the content of the social security conventions. Only a few experts at the Ministries of Social Affairs, notably those who are, in fact, assigned to assess national law in view of international obligations and to compose the regular reports on the application of the instruments, were familiar with the specific ILO conventions, and, slightly more common, with the European Code. As a result, the social security treaties are hardly ever publically discussed, and only exceptionally subject to a political debate. In both countries, only the European Social Charter was made subject to political debate at the time that it was put forward for ratification.

5.3.3 LEVEL OF THE BENEFITS

In respect of the material content of the social security systems in both countries, several conflicts with the international standards have become apparent. The most far-reaching conflicts do not relate to the personal coverage of the scheme or to the conditions for eligibility; it is the level of the benefits that constitutes the weakest part in comparison with the international standards. The amounts of the old-age pensions (both countries) especially, but also the unemployment benefits (Estonia) are not, or are only narrowly, sufficient to ratify any higher standard. This means that acceptance of higher standards for these risks would involve an increase in the benefits, which obviously constitutes an obstacle.

5.3.4 RELUCTANCE TOWARDS NEW INTERNATIONAL OBLIGATIONS

The country studies have additionally made clear that both Estonia and the Czech Republic comply with higher international standards than those that are actually ratified in respect of some social security branches, such as maternity and family benefits.[20] Furthermore, Estonia has not ratified any of the ILO conventions, although it is obvious that Convention 102 could easily be ratified in the wake of the European Code. These observations raise the question of why those standards are not ratified as well, since the norms are considered to be met. It has been recognised in this respect that the governments in both countries are

[20] For an overview, see Appendix 1.

reluctant towards new international commitments in the field of social security. Especially in the current period of economic restraint, politicians want to avoid new demarcations for possible economic measures in the future. For example, the Estonian government is not considering the ratification of the Protocol to the European Code, and in the Czech Republic, ratification of ILO C168 is not proposed, although ratification of these instruments may be possible on the basis of legislation in force to date. In fact, it is the preserving function of the international standards that deters the governments from taking up new obligations. Furthermore, because of the unfamiliarity with the international social security standards in general, including trade unions, lawyers and scholars, there is no pressure from society to accept higher international norms. Therefore, from the political perspective, nothing can be gained from putting the social security treaties on the political agenda.

5.3.5 ADMINISTRATIVE BURDEN

Another specified reason for reserve is the administrative burden that the ratification of conventions brings about. In Estonia it was stated several times during the research that this is considered the main obstruction to the ratification of ILO Convention 102. It was argued that for a small country like Estonia, the reporting obligations are relatively heavy because this has to be done by a very limited number of staff. It was also mentioned in this respect that the reporting method is very outdated, in the sense that the questionnaires cannot be filled in electronically, but that everything has to be prepared in hard copy. Of course these things may play a role, but the administrative burden could be put into perspective, because for the four-yearly reporting cycle regarding Convention 102, it would be sufficient to refer to the annual reports of the European Code, which are assessed by the same Committee. Nevertheless, for other instruments this argument holds out. The fact that the Committee of Experts on the Application of Conventions and Recommendations (CEACR) frequently has to remind the governments – also the Czech government – to submit their reports supports the complaint on the administrative burden. The practical remark about the outdated reporting method certainly deserves the attention of the ILO Office.

5.3.6 OUTDATED TERMINOLOGY AND DIFFERING POLITICAL PERCEPTIONS

There are two points that have been mentioned repeatedly in both countries in connection with the ILO conventions that, in fact, are inconsistent. One is that the ILO conventions are outdated on several aspects. Cases in point are the

determination of a standard beneficiary as a male worker with a dependent wife and two children, and the conventions are sometimes found to leave too little room for modern tools, such as privatisation or tax returns. At the same time, on several occasions the European Code of Social Security has been pointed out as more modern than the ILO conventions and more geared toward the European situation. For that reason, the CoE instruments were found more important than the ILO conventions. Obviously, this is a mere matter of image that is not based on real facts, since the European Code is a copy of Convention 102. However, this misconception points out that, in principle, acceptance of regional instruments may be more attractive or logical for countries than global treaties. This, as such, is an observation that is worth being kept in mind.

5.3.7 SUPERFLUOUSNESS OF CONVENTION 102 NEXT TO THE EUROPEAN CODE

The last argument I came across was that once the European Code is ratified, ILO Convention 102 becomes superfluous. This position certainly plays a role in Estonia. Looking purely at the normative value of the instruments, this point of view makes sense because both instruments duplicate each other. Still, there is more to it than that. Since its formation, the ILO has worked on its contribution to world peace, as put into words in the preamble of the Constitution: 'Whereas universal and lasting peace can be established only if it is based upon social justice.' In view of the creation of social justice, a whole range of labour and social security standards have been developed over almost a century, and the major contribution of the ILO to social justice is widely recognised. Crucial in this was the participation of the current 183 Member States. Without nations adopting as well as ratifying the developed standards, the Organisation could never have had so much impact worldwide as it actually did and still does. However justified certain points of criticism or concern may be, a withdrawal from active participation should be avoided. Unless, of course, the idea were supported that the ILO has played its part, an idea that has not been expressed in the studied countries.

5.3.8 RECAPITULATION OF THE OBSTACLES

The reasons for non-ratification encountered in the studied countries actually confirm four of the five obstacles identified by the ILO, namely, lack of knowledge, different societal values and political obstacles, lack of administrative capacity, and non-conformity of national legislation. Lack of financial resources was mentioned explicitly in neither of the countries. It is true that in Estonia I frequently heard the slogan 'first get rich, then get social' in relation to the

conventions, but that is rather a matter of political priority than of financial capacity. The issue that ILO standards are being ousted by the European Code (which is the case in Estonia) is not, as such, recognised by the ILO. In an analysis of the present state and practice of social security standards, the ILO refers to the European Code, but merely to point out the worldwide relevance of ILO Convention 102 as a model for regional instruments.[21] Of course, the value of Convention 102 as the key reference for the definition of the right to social security is worth being emphasised, but apparently the development of regional instruments on the basis of Convention 102 can affect willingness to ratify the ILO counterpart. In the case of Estonia, this does not actually affect social protection at the national level, but it does not contribute to the credibility and persuasiveness of the ILO Convention.

5.4 APPLICATION PROBLEMS

5.4.1 INTRODUCTION

After ratification, application of international standards is closely connected to the legal status of the instruments. It has been described in the previous chapters that the social security conventions are binding instruments taking precedence over national law in both the Czech Republic and Estonia.[22] As such, the legislative, executive and judicial bodies have to act and decide in conformity with these instruments. The country studies show that in general, the government and the legislature take them into account indeed, and that both countries comply with the ratified standards for the greater part. This outcome is no accident given the facts that, in principle, international agreements will not be ratified unless national legislation is in line with the requirements, and that in both countries, new bills are generally assessed on compliance with the international obligations. In fact, during the past two decades, the different functions of the conventions – as discussed in section 5.2 – have led to social security legislation that is generally in line with their prescribed norms. Still, on some points the international standards have not served their functions well. For example, certain standards were overlooked or ignored when the European Code was taken as a benchmark for the Estonian social security schemes, and at the creation of the private pension scheme the bridging function of the Code was not deployed. Moreover, the recent economic recession in combination with an ageing population has put the preserving function of the standards under great pressure in both countries. In some cases economic measures have been taken that constitute new conflicts with the ratified standards.

[21] ILO 2008, pp. 15–16.

[22] See sections 3.4.3 and 4.4.3.

In the table of Appendix 1, a systematic overview is provided of the norms prescribed in the different instruments and the actual situation in both countries described. It shows on which aspects of the nine social risks the two countries comply with the international standards, and on which points problems arise, or may arise, with the application of the ratified instruments. It also indicates where higher standards than those that are currently ratified are met, in view of possible future ratifications. In the following sections, the observed application problems are listed and briefly reviewed.

5.4.2 PROBLEMATIC ISSUES: MATERIAL SCOPE

In most cases, the contingencies are defined in accordance with the definitions given in the ratified instruments, both in the Czech Republic and Estonia. In the country studies three issues have been identified in which the covered risks are defined too strictly. Firstly, the interpretation of 'suitable employment' in the Czech legislation is found not to be in compliance with the unemployment part of the international standards, since the qualifications, skills and previous experience of a jobseeker do not have to be taken into account during the first three months of unemployment.[23] According to the Czech law, an unemployment benefit can be suspended if a jobseeker does not accept a job offered by a labour office, unless the job does not correspond to the jobseeker's state of health. This strict interpretation of a suitable job reflects a trend within the European Union, and is connected to the EU active labour market policies to get as many people as possible involved in the labour market. Because this is not an isolated Czech issue but also an issue in other countries, it will be further discussed in section 6.2.4.

The second issue deals with the definition of the term 'widow' in relation to the Estonian survivors' pension.[24] The Committee of Ministers has questioned the strict interpretation of a widow incapable of self-support that limits the scope of the pension to widows who are not working and pregnant, permanently incapacitated for work, or not working and raising the deceased person's child of under 3 years of age. Although the international instruments give discretionary power to the governments as to the determination of incapability of self-support, the Estonian law appears to be too strict.[25] This friction is closely related to the individual approach of social security rights. Where the conventions take the breadwinner model as a starting point, the Estonian social security system is built on individualised rights. The recognition of a 'dependent wife' is not

[23] See sections 2.11.1, 3.7.2 and 3.7.6.
[24] See sections 4.13.2 and 4.13.6.
[25] See section 2.17.1.

included in any of the insurance schemes. The survivors' pension is an exception in this respect, but the strict interpretation of the incapability of self-support of a widow reflects the individual approach. Since the breadwinner model – as incorporated in the international instruments – is in conflict with an individualisation of social security rights in many countries, and the model has often been subject to criticism, this friction will be further elaborated on in section 6.2.2.

The third issue concerns the definition of the Estonian invalidity benefit. According to the Pension Insurance Act, only 100 percent incapacity for work gives right to a full invalidity pension.[26] However, it has been explained in this respect that the invalidity benefit that meets the prescribed replacement rate has to be provided also in the event of incapacity for work of less than 100 percent.[27] At the same time, the Estonian law provides for a pro-rata benefit in the case of partial incapacity for work of between 40 and 90 percent, which is not required by the European Code. Although it could be argued that this compensates for the excessively strict requirements for a full invalidity pension, it must be recognised that the legal structure of the Code does not permit the counterbalancing of a conflict at one point with a surplus at another.

5.4.3 PERSONAL SCOPE

The personal coverage exceeds the ratified norms regarding all social security schemes in both countries. There are only two problematic points in this respect. First, in both countries the wives of insured persons are not insured for pregnancy related medical care on the basis of their husbands' insurance.[28] This friction has only minor consequences in practice, since all women residing in the Czech Republic and all pregnant women in Estonia are insured for medical care. Still, the problem is worth a closer look because it refers again to the discrepancy between the often criticised breadwinner model in the international instruments and the individualisation of social security rights as a trend in many countries.[29] The second problematic issue concerns the Czech family benefits.[30] The insurance covers families whose incomes exceed a prescribed amount, whereas the European Code does not allow for a means test. In view of the fact that more and more countries choose means tested child benefits, it is questionable whether this is a defensible limitation of the flexibility of the standards. This will be further examined in section 6.2.5.

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26 See sections 4.12.2 and 4.12.6.
27 See section 2.16.1.
28 See sections 2.15.2, 3.11.3, 3.11.6, 4.11.3, 4.11.6.
29 For a further discussion, see section 6.2.2.
30 See sections 2.14.2, 3.10.3 and 3.10.6.

5.4.4 LEVEL OF THE BENEFIT

Several issues pertaining to the level of benefits have come to the fore in both country studies. The most flagrant violation of the international standards concerns the old-age pensions in the Czech Republic.[31] As a result of economic measures, the pensions fell below the norms of ILO Convention 128, and even of the European Code, in 2008. An obligatory supplemental private pension scheme is under consideration, but as yet the subsequent governments have not been able to realise this intention. In Estonia, the level of the pension is still in line with the European Code, but because of the method of calculation, the replacement rate will steadily decrease and fall below the prescribed norm.[32] The well developed, private second pillar pension scheme is not implemented in line with the common principles on solidarity and state responsibility, as incorporated in the European Code, and therefore it cannot be counted for the fulfilment of its standards.[33] Inevitably, measures will have to be taken to prevent violation of the international standards on this point in the not too distant future. In view of the European wide tendency towards private pension schemes in combination with a retrenchment of the public schemes, this issue will be further examined in section 6.2.3.

Another problem found in both countries concerns the charge of out-of-pocket payments for medical services. In the Czech Republic, where so-called 'patient fees' were introduced in 2008, this is problematic in relation to pregnancy related care.[34] According to all international standards, medical care in the event of pregnancy and child birth has to be free of charge for all insured women. According to the Czech legislation, pregnant women are not exempt from these patient fees for several services, such as for hospital care, doctors' visits, and emergency services. In Estonia the same conflict existed, but this was resolved in 2009 in response to repeated critical remarks of the Committee of Ministers.[35] In spite of this, the study shows that the out-of-pocket payments in Estonia may constitute another problem. It has been noted that these payments have risen over the years, and that the burden of these expenses is increasingly falling on the shoulders of the lower-income groups, hindering their access to medical care. It is questionable whether such rules on cost-sharing can be considered to avoid hardship, as prescribed by the international standards.[36] The increase in out-of-pocket payments for medical care is closely related to the trend towards a shift

[31] See sections 3.8.4 and 3.8.6.
[32] See sections 4.8.4 and 4.8.6.
[33] See section 2.5.
[34] See sections 2.9.3, 2.15.3, 3.11.4 and 3.11.6.
[35] See sections 4.11.4 and 4.11.6.
[36] See section 4.5.6.

from public to private responsibility for social risks that is also visible in other countries. Therefore, this issue will briefly be reconsidered in section 6.2.3.

The last point to be mentioned here concerns the Estonian maternity benefit. The total benefit for (at least) 140 days is paid out as a lump sum, whereas it is a basic assumption in all international standards that the benefits should be provided through periodical (monthly) payments.

5.4.5 DURATION OF THE BENEFIT

Different types of conflicts have been noted in the country studies regarding the duration of sickness and unemployment benefits. In the Czech Republic, both benefits are not provided for the required number of weeks in *each case* of occurrence of the risks, which may cause a conflict in the event of several spells of loss of earnings in succession with only short intervals in between.[37] In Estonia, the sickness and unemployment benefits are in conflict with the rules concerning suspension of benefits, as prescribed in the European Code.[38] According to these rules, a benefit may be suspended if the contingency has been caused by the wilful misconduct of the person concerned. The Estonian sickness benefit, however, is not granted if the illness is caused by intoxication by alcohol, drugs or toxic substances, and the unemployment benefit is not paid if the person left their previous work due to, among other things, a breach of duties. The Committee of Ministers has made critical remarks on both rules, arguing that the suspension of a benefit is allowed only when the intoxication or dismissal can be qualified as wilful, which has to be distinguished from blameable.

Another friction as to the duration of benefits deals with the Estonian sickness benefit.[39] Although, according to the Unemployment Insurance Act, the benefit is paid for 26 weeks of sick leave, which meets the requirements of the European Code, the Employment Contract Act allows employers to dismiss sick employees after four months of incapacity for work. Dismissal implies stoppage of the sickness benefit. Thus, sickness insurance does not guarantee a benefit for the minimum required duration of 26 weeks, which is in conflict with the Code.

The last issue to be mentioned in this respect concerns the employers' liability for the payment of sick employees during the first period of sick leave, in the Czech Republic during the first two weeks, and in Estonia from the fourth to the eighth

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37 See sections 3.6.4, 3.6.6 and 3.7.4, 3.7.6.
38 See sections 4.6.4, 4.6.6 and 4.7.4, 4.7.6.
39 See sections 4.6.4. and 4.6.6.

day.[40] The introduction of such employers' liability fits in with the trend towards a smaller state and an increase in the individualisation of responsibility for social risks. The question arises however as to whether the measure is in line with the common principles on solidarity and state responsibility prescribed by the international instruments. Because this question touches on the broader issue of privatisation, it will be discussed in section 6.2.3.

5.4.6 QUALIFYING PERIODS

Before the recent economic crisis, the qualifying periods for almost all benefits easily met the international standards. Only one conflict was pointed out by the Committee of Ministers, namely, that the Czech law requires one year of residence in order to qualify for family benefits, where the European Code allows the requirement of six months of residence. As part of a package of economic measures in view of the economic crisis and an ageing population, the Czech government extended the qualifying requirements for old-age pensions in 2010. This has caused a new conflict with the conventions, because a reduced pension is only granted after the completion of 20 years of insurance, whereas the European Code and ILO Convention 128 provide for a reduced pension after 15 years of contribution or employment.[41]

5.4.7 CONCLUSIONS ON THE APPLICATION PROBLEMS

The observed application problems differ in terms of practical impact and origin. Some conflicts with the international standards have a major practical impact for the beneficiaries, for example, the low old-age pensions, the extensive out-of-pocket payments for medical care, or the loss of sickness benefit after dismissal during sick leave. Other conflicts may have less impact on the actual social protection of insured persons, such as the requirement of one year of residence for entitlement to family benefit instead of six months, and the absence of a derived right to medical care for the wives of insured persons. Yet, none of the conflicts involve a mere technical problem without any impact. In all cases it would contribute to the actual social protection of the insured persons, or to a broader coverage of the scheme involved, if the problematic issues were brought in line with the international standards.

Examining the underlying reasons for the different application problems, it appears that the observed issues can be classified into three categories. The first

[40] See sections 3.6.4, 3.6.6 and 4.6.4, 4.6.6.
[41] See sections 3.8.5, 3.8.6.

cluster of problems can be traced back to economic reasons. They all emerged in the course of time as a result of economic measures. The second category involves issues that relate to changed societal perceptions since the formulation of the standards in the mid-twentieth century. The entrance of women into the labour market, the individualisation of social rights, and an increasing emphasis on self-responsibility for social risks are cases in point. The third category contains issues that cannot be connected (on the basis of this study) to an underlying reason and/or have a rather technical nature.

Table XIX. Underlying reasons for the observed application problems

Economic reasons	Changed perceptions	Unclear / technical reasons
Excessively low old-age pension (Cz, Ee) Cost-sharing for medical care (Cz, Ee) Means tested family benefit (Cz) Dismissal during sick leave (Ee) Excessively long qualifying period for entitlement to reduced pension (Cz) Employers' liability for sickness benefit (Cz, Ee)	Excessively strict interpretation of 'widow' (Ee) Excessively strict interpretation of 'suitable employment' (Cz) No recognition of derived rights (Cz, Ee) Excessively strict suspension rules (Ee) Cost-sharing for medical care (Cz, Ee) Employers' liability for sickness benefit (Cz, Ee)	Excessively strict interpretation of total incapacity for work (Ee) Lump sum maternity benefit (Ee) Benefit per calendar year instead of in each instance of sickness or unemployment (Cz) Excessively long qualifying period for entitlement of family benefit (Cz)

The underlying cause of some problematic measures, notably, concerning cost-sharing and employers' liability, can clearly be traced back to changed perceptions, especially to a shift from public to individual responsibility, but are also explained by economic reasons. Therefore, they are present in both clusters. The clustering shows that an economic downturn hampers the effect of the conventions on national legislation. None of the issues in the first cluster existed when ILO Convention 102 and/or the European Code were ratified, but later emerged as a result of a package of economic measures taken over the course of time. Thus, it can be concluded that an economic recession puts severe pressure on the preserving function of the conventions. Most issues in the second cluster (except the last two) already existed before the ratification of the conventions. Here, the benchmark function of the conventions has fallen short, most importantly, because of a lack of clarity of certain norms through accessible and unambiguous interpretations of the supervising bodies. The issues in the last category have minor practical consequences for insured persons and rather seem to be overlooked by the legislature. The implications of the various application problems for the effectiveness of the conventions will be further discussed in Chapter 6.

5.5 CONCLUSIONS

The international standards served different functions during the different stages of the social reform processes in the two countries. They served as a *benchmark* for the reform and creation of the different social security schemes, especially in Estonia. After ratification, they had a *preserving* function by providing a fixed minimum level of social security to be respected by the legislature, the executive bodies, and the judiciary. The international standards, with their inherent principles on solidarity and state responsibility, also *counterbalanced* neoliberal policy aiming at a reduction of state responsibility and a shifting of social risks from public to private responsibility. The very same principles may serve as a *bridge* between private social security provisions, such as private pension schemes, and the ideal of solidarity based insurance schemes. Implementation of a private scheme along the lines of the prescribed principles on solidarity and state responsibility creates a compromise between individual and collective responsibility for social risks. Finally, the establishment of a national floor for social security through ratification of the international standards implies harmonisation of the social security systems of all contracting parties – they all share the same floor. The effect of the different functions largely depends on national politics, most importantly, on how serious the international obligations are taken. In both countries, the international standards have well served their different functions during the different stages of social reform, but they have not been effective in all cases.

As a matter of fact, the existence of several points of non-compliance with the international standards points towards a weak functioning of the standards at different points. For example, in spite of their preserving function, the Czech government allowed the pensions to drop below the required level, and notwithstanding their benchmark function, the Estonian legislature was excessively strict in its definition of a widow to be entitled to a survivors' benefit. What is more, it has been noted that the preserving function even obstructs possible ratification of higher standards. The counterbalancing function has not prevented a rise in out-of-pocket payments for medical services, the introduction of employers' liability for sick pay, or an increasing role for private pensions at the cost of public schemes. The bridging function has not resulted in a private pension scheme in Estonia that can be counted for the fulfilment of the international standards. In conclusion, all those conflicts together erode the harmonising function of the standards. Moreover, the established obstacles to ratification of social security standards stand in the way of their application.

Does this lead to the conclusion, after all, that the standards are obsolete, and that the effect of the international standards on national legislation is trivial and

not worth recognition? Certainly not. It still holds that the standards have worked well on many points, with a higher level of social security as a result. Although the international instruments may not be perfect and may indeed have their shortcomings, the country studies show that they have contributed to social protection in both the Czech Republic and Estonia. Through their different functions, they have impacted on national social security legislation in various ways, not the least by providing an internationally accepted minimum level of social security to be reached and maintained.

In view of the future, it can be stated that the promotion of the international standards within the context of the European Union would not only advance national social security legislation, but would also strengthen a common floor for social security, which is particularly relevant in view of the economic downturn and future EU accessions. Promotion of the standards would include addressing the obstacles to ratification and solving the observed application problems. Paying systematic attention to the norms at the EU level and putting pressure on Member States to respect the norms, not only before, but also after EU accession, would seem to be a prerequisite in this respect.

CHAPTER 6

THE INTERNATIONAL STANDARDS UNDER REVIEW

– Conclusions and Discussions (b) –

6.1 INTRODUCTION

While investigating the application of the conventions and their impact on national social protection, it appeared that their functions have not been effective in all cases. As recalled in the previous section, during the study several conflicts between national provisions and the international standards came to the fore. Many of these problematic issues relate to points of criticism as reflected in the introductory chapter of this book.[1] Critics have found that the social security conventions do not keep up with new developments in social security because their language and concepts are out of date, sometimes even discriminatory, and not tailored to post-industrial society. Another point of criticism is that they do not have legal power. Furthermore, the conventions are found to prescribe excessively low benefits to be relevant in the European Union, and are found not to contribute to social protection for all.

Indeed, the concept of a male breadwinner, for example, does not concur with the insurance schemes in both the Czech Republic and Estonia, where men and women are insured on an individual basis. Also, other concepts such as 'suitable employment' and 'widow' turn out to be difficult to interpret and apply in the context of current developments, and the study discloses a tension between the international standards and the privatisation of social security provisions. And, of course, there is the problem that in spite of the ratification of the standards, matters of non-compliance exist and persist. Other problems relate to the question of whether the actual provisions indeed contribute to the standards of living for everyone.

In this chapter, these problematic issues will be discussed in the context of global and/or European developments in the field of social security, and will be reviewed

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1 Section 1.1.4.

in light of the objectives of, and controversy regarding, the international standards. By relating the application problems in the two countries to topical developments and the above-mentioned criticism, the discussions seek to contribute to the forming of an opinion on the usefulness of international social security standards for the evolution of welfare states sixty years after the creation of the flagship Convention 102. In fact, the discussions deal with the last part of the research problem: What do the observed application problems mean for the effectiveness of the conventions in the EU context? The following three sections will subsequently deal with the questions of whether the international standards are still suitable for application in present day welfare states (section 6.2), whether they are effective legal instruments (section 6.3), and whether they indeed contribute to social protection for everyone (section 6.4). In the last section, some conclusions will be drawn on the effectiveness of the conventions.

6.2 DO THE INTERNATIONAL STANDARDS KEEP UP WITH NEW DEVELOPMENTS IN SOCIAL SECURITY?

6.2.1 INTRODUCTION

In the interviews with national experts in both the Czech Republic and Estonia, it was asserted several times that the international instruments are outdated at certain points, and doubts were expressed as to the applicability of the standards in view of modern developments and techniques in social security. That the Czech Republic and Estonia are no exceptions in this respect is clearly demonstrated by a report discussed at the ILO Conference of 2001 (celebrating the 50th anniversary of Convention 102) entitled 'Social Security: Issues, Challenges and Prospects.'[2] As a result of the Conference, a resolution was adopted under the name 'Social Security: Standards for the XXIst Century.'[3] The Member States recognised that social security systems are facing multiple, fundamental challenges relating to globalisation, unemployment, population ageing, new financing techniques, and atypical employment relations, among others. A discussion subsequently ensued on the role of the conventions in addressing these challenges.[4] This section aims to contribute to this discussion on the basis of the two country studies, and to seek answers as to the suitability of the conventions for the development of social security systems at the present time.

2 ILO 2001B; see also Pennings & Schulte 2006; Langford 2007; Maydell and Nußberger 1996.
3 ILO 2002.
4 ILO 2008.

Looking at the list of conflicts between the national provisions and the international standards, it is striking that many of the problems relate to new developments indeed. Some problems follow from the individualisation that takes place in all aspects of society, and also in the field of social security, while the conventions take the male breadwinner as a starting point. These issues will be discussed in the following section. Section 6.2.3 will deal with the identified conflicts that are connected with the global tendency towards the privatisation of social security provisions, or, in other words, with the shift from public to private responsibility for social risks. In section 6.2.4 a reflection will be made on the tension between the international standards and present day labour market policy, developed under pressure of rising unemployment rates. Some consequences of the high level of flexibility envisaged by the international standards exactly in order to avoid application problems will be discussed in section 6.2.5. Finally, in section 6.2.6, conclusions will be drawn on the durability and adaptability of international social security standards.

6.2.2 THE MALE BREADWINNER MODEL VERSUS INDIVIDUALISED SOCIAL SECURITY

The male breadwinner: an outdated concept

It has been discussed in Chapter 2 that ILO Convention 102 takes the male breadwinner model as a starting point.[5] This particular characteristic of the international standards is often mentioned to illustrate the idea that they have become outdated, and is indicated by several countries as constituting one of the main obstacles to ratification.[6] In the Czech Republic and Estonia this is also considered to be a drawback of the instruments. It is true of course, that this concept, which stems from the 1950s, no longer corresponds to the current socio-economic reality in many post-industrial countries, including the EU Member States. The labour force participation of women has increased considerably since the adoption of Convention 102 and, consequently, entitlement to social security provisions has become more and more individualised. On some points, from our present day perception, this male breadwinner model can even be deemed to be discriminatory, for instance, in the case of the restriction on the payment of survivors' benefits to widows instead of to spouses, either female or male.

The problem with this out-of-date concept was acknowledged by the ILO in the 2001 Resolution, which referred to the increased participation of women in the

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5 Section 2.2.3. This concept is also used in the higher standards with the exceptions of Conventions 168 (1988) and Convention 183 (2000).

6 ILO 2008, p. 38; Nußberger 2007, p. 110.

labour force and the changing roles of men and women. It was expressly stated that 'social security and social services should be designed on the basis of equality of men and women'.[7] However, it must be recognised that modernisation of the conventions, although considered necessary, seems an unfeasible task for the time being.[8] Therefore, it is worthwhile examining this controversy more closely and to see whether it actually hampers the application of the standards, or gives cause to specific flaws in social protection. First, the male breadwinner as a standard beneficiary will be discussed, then the discriminatory effect of the male breadwinner in relation to survivors' benefit will be examined, and finally the assumption of derived rights as a consequence of the breadwinner model will be reconsidered in light of the current individualisation of social rights.

The male breadwinner as a standard beneficiary

In our Western society, fewer and fewer women are financially dependent on their husbands. Men and women have a shared responsibility for the household income in most cases. Although it is still true that, in general, women earn a smaller part of the income than men, the idea of women being housewives and caring for the children creates an image of impracticability, at least in relation to Western societies. Inevitably, the predominance of the notion of the man as the sole breadwinner in the mid-twentieth century – as reflected in Convention 102 – has made way for the two-earner model. Obviously, the designation of the male breadwinner with a dependent wife and two children as a standard beneficiary does not connect to this reality, but does that make it obsolete by definition? The function of the standard beneficiary in the conventions is to provide a fixed point of departure for the calculation of the benefits. It makes it possible for the Member States and the supervising bodies to compare the benefits provided in the countries with the given norms, taking the same elements as a basis. From the perspective of a fair comparison, it is not so important who is taken as a standard, but, first and foremost, that a standard is prescribed. In view of the level of social protection, the choice of a male breadwinner as a standard is logical, since the average wages of men are higher than those of women, even after the revolutionary rise of women in the labour market.[9]

More problematic in this respect is the inclusion of two children in the definition of the standard beneficiary. For comparison of the benefit actually provided and the given norm, child allowances for two children have to be added to both the reference wage (of the male breadwinner) and the calculated benefit. Because the benefit is, of course, lower than the reference wage, child allowances make up a

[7] ILO 2001A, p. 3 (point 9).
[8] Pennings 2007A, p. 140–141.
[9] See also Pennings & Schulte 2006, pp. 46–47.

greater part of the benefit than of the wage. Thus, the higher the child allowance, the lower the actual replacement rate of the benefit itself needs to be to obtain the same result. In the last decade, the real average childbirth per woman in the European Union has been around 1.5.[10] The inclusion of child allowance for two children in the calculation of a standard beneficiary's benefit does not reflect the current situation, and gives a result that is higher than what the average benefit actually is. For example, the replacement rate for a Czech standard beneficiary with two children who receives a sickness benefit is 59.9 percent, and if child allowance for 1.5 children were to be calculated, this would be 59.5 percent. At this point, the out-dated interpretation of a standard beneficiary has a (slightly) eroding effect on the norms.

Discriminatory effect of the male breadwinner concept on survivors' benefit

The concept of the male breadwinner is not exclusively used in relation to the calculation of the benefits. It is also reflected in the parts on survivors' benefit in Convention 102 and the European Code, which provide for a benefit for widows, and not for widowers.[11] Of course, Member States are free to provide widowers' pensions as well, but the fact that the conventions do not include widowers in their definition does not reflect present ideas. What is more, nowadays such distinction between men and women as regards entitlement to a benefit is considered discriminatory. Equal treatment of men and women is recognised as a fundamental right, and has been taken up in human rights instruments, such as the International Convention for the Protection of Political and Civil Rights (1966). In this Convention the principle of equality extends to the field of social security. The restriction in Convention 102 of survivors' benefits to widows only is clearly not in line with this principle.

Notwithstanding this conflict, the provision does not cause discrimination in practice, because governments are additionally bound by anti-discrimination rules in human rights instruments. For example, in the Netherlands until 1988 only widows were entitled to a survivors' benefit. On the basis of Article 26 of the International Convention on Civil and Political Rights, the Dutch Central Appeal Court decided then that the Survivors Act was discriminatory. Subsequently, a new act was adopted under which widowers were also entitled to the benefit.[12] This example illustrates that the discriminatory effect of the out-of-date male breadwinner idea of the conventions is corrected by other (human rights) treaties. In addition, within the European Union, equal treatment of men

[10] Eurostat 2008, fertility statistics '00-'05.

[11] See section 2.17.1.

[12] For more information on this issue, see PenningsB 2006, pp. 91–92.

and women in matters of social security is also regulated.[13] Accordingly, in the Czech and Estonian social security legislation, the principle of equal treatment has been taken into account. In both countries, survivors' benefits are granted to both widows and widowers. It must be acknowledged though, that the discriminatory nature of the provision as such, certainly does not contribute to the popularity of the ILO conventions, which are often considered obsolete because of this male breadwinner concept.

Derived rights as a consequence of the breadwinner model

Another aspect of the conflict between the assumption of the male breadwinner as incorporated into the international standards and our modern societies, concerns derived social security rights as a consequence of the breadwinner model. Indeed, in both countries social security rights are ascribed on an individual basis only. The idea of entitlement of a person to certain benefits on the basis of their spouse's insurance is not included in either of the schemes, except, due to the nature of the risk, in relation to survivors' benefit. In contrast, Convention 102 provides for derived rights for wives of protected (male) breadwinners in relation to several benefits. To be precise, this is the case not only in relation to survivors' benefit,[14] but also to maternity protection[15] and health insurance, although, with regard to the latter, an alternative option of coverage of at least 50 percent of all residents has been left open as well.[16]

This alternative option is used by the Czech Republic and Estonia to prove compliance with the ratified standards in relation to health care. However, in relation to maternity protection, the international instruments do not provide for this alternative. This means that the wives of insured persons who are not insured individually must still be covered for medical care, based on their derived rights. This reflects the special focus on maternity protection of the ILO from its outset. Both in the Czech Republic and Estonia, women are insured on the basis of their individual rights, in the Czech Republic on the basis of

13 Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

14 According to Art. 61, the persons protected shall comprise the 'wives and the children of breadwinners' in prescribed classes of employees or of the economically active population, constituting, respectively, 50 percent of all employees or 20 percent of all residents.

15 According to Art. 48, for maternity medical benefit the persons protected shall comprise all women in prescribed classes of employees or of the economically active population, constituting, respectively, 50 percent of all employees or 20 percent of all residents, and 'also the wives of men in these classes'.

16 According to Art. 9, the persons protected shall comprise prescribed classes of employees or of the economically active population, constituting, respectively, 50 percent of all employees or 20 percent of all residents, 'also the wives of men in these classes', or prescribed classes of residents, constituting not less than 50 percent of all residents.

residency, and in Estonia on the basis of contributions. Consequently, strictly taken, the personal coverage of health insurance in relation to childbirth is not in line with the international obligations. In practice, however, this constitutes only a marginal problem, because in both countries almost all women are actually insured.[17] Only a small coverage gap may exist in the Czech Republic, namely, for the wives of employees who are not permanent residents but who work for an employer with permanent residence in the country.[18] In Estonia, the non-acceptance of derived rights regarding maternity protection caused a deficiency until 2009.[19] This conflict with the international standards was solved by providing all pregnant women with an individual right to health care on the basis of a doctor's certificate.

As such, the idea of extra protection for women in relation to pregnancy and childbirth is generally supported, as shown by the rather recent adoption of a new elaborate Convention on this matter.[20] However, the Czech and Estonian cases raises the question of whether extensive protection has to be reached by way of derived rights per se. It has been pointed out that the health insurance (in relation to childbirth) covers about 96 percent of all residents in Estonia, and almost 100 percent in the Czech Republic, which is much more than required by the Code. The group of women that are not covered is much smaller than the group that would not be insured if health insurance covered 50 percent of all employees, including their wives, which, however, would be in line with the Code. It would have added to the flexibility of the standards if another option for coverage was given in respect of maternity protection, as was done in relation to health care. It is interesting to see that the European Code (Revised) additionally provides for an individual entitlement to pregnancy related health care for all economically active women. One cannot deny that the obligation of ensuring derived rights will become more and more problematic in view of the general tendency towards the individualisation of social security rights.

A similar problem appears in relation to survivors' benefits. The benefit for a widow under the international standards is based on the insurance of the deceased breadwinner. The term 'breadwinner' implies that entitlement is not unconditional. The conditions are incorporated in the definition of the risk as 'the loss of support', and are further explained by the addition that the entitlement of the widow is made conditional 'on her being presumed incapable of self-support.'[21] It is left to the countries to decide on the meaning of the widow

17 See sections 3.11.6 and 4.11.6.
18 Within the framework of the European Union, this situation falls under the scope of the Regulation No. 883/2004 on the coordination of social security systems.
19 See section 4.11.6.
20 Convention 183 on Maternity Protection, 2000.
21 Convention 102, Art. 60. See 2.17.1.

being incapable of self-support, but it has been made clear by the ILO that the discretionary power is not without limits.

In Estonia, the Pension Insurance Act provides for a survivors' benefit if the surviving spouse (widow or widower) is permanently incapacitated for work, is of pensionable age, is unemployed and more than 12 weeks pregnant, or is unemployed and raising a child of the deceased of under three years of age.[22] The Committee of Ministers, following the comments of the CEACR, has questioned the Estonian interpretation of incapability of self-support, indicating that social protection should also be available to a widow who is unable to support herself because of her advanced age and the impossibility of finding a suitable job after many years of dependency on her husband, and to a younger widow who cares for a dependent child who is older than three years of age.[23] In short, the Committee has found the Estonian interpretation of the term widow, in relation to entitlement to a survivors' benefit, too strict. In the Czech Republic, the interpretation is a bit wider, also including a spouse caring for a disabled child, parent or parent-in-law, and for a dependent child who is older than three years. Furthermore, a surviving spouse who has reached the retirement age for men, minus four years, is granted a pension. Although these rules meet the objections of the Committee with regard to the Estonian situation to a certain extent, in the Czech Republic the question also remains as to whether a woman who has always been dependent on her husband, and who becomes a widow at the age of, for instance, 50 years, will be able to support herself.

The rather strict conditions for survivors' pension in the two countries reflect the generally accepted idea nowadays that each person is responsible for their own life. In fact, the concept of a survivors' benefit for a spouse as such, does not exactly coincide with the individualisation of social security rights, since it concerns a derived right by definition. It is understandable, therefore, that when such benefit is nevertheless provided, the conditions are made more stringent, especially in countries where individualisation is a standard in many aspects of society. In this light, it can be seen that the observations of the Committee of Ministers more or less equilibrate the development towards individualisation by protecting persons who have not been able to keep pace with the changing society and to take part in the labour market, and thus, who do not qualify for social security benefits of their own account. Such protection may be all the more relevant in countries where a sufficient safety net is not available, such as in Estonia. At the same time, the requirement of ensuring derived rights in relation to both maternity protection and survivors' pension may become more and more problematic in view of the apparently irreversible individualisation of our present society.

22 See section 4.13.6.
23 CM/ResCSS(2008)5, p. 2 point V.

6.2.3 THE INTERNATIONAL STANDARDS VERSUS PRIVATISATION

Tension between solidarity and the free market

One of the topical issues in the field of social security worldwide is privatisation.[24] In many countries, private old-age pension schemes have been introduced, employers have been made responsible for the payment of their sick employees, and the share of out-of-pocket payments for medical services is growing. This is also true for the two countries under review. The comparison of private elements in their social security systems with the international standards has revealed, without exception, certain tensions. What is more, these tensions often stand for flaws in social protection. For example, it has been shown that the gradual (partial) replacement of public pensions in Estonia by the private scheme risks insufficient income level in old age.[25] It has also been pointed out that the shift from state responsibility for sickness benefit to employers' liability in both countries may bring about discrimination against employees who do not enjoy good health.[26] Furthermore, the study shows that the charging of extensive out-of-pocket fees for medical services in Estonia can cause hardship for the most vulnerable groups in society, and may hinder access to health care.[27]

These concrete examples from the country studies make clear that the marketisation of social security provisions calls for caution. Although privatisation measures as described above are generally accepted and considered necessary in times of economic pressure and in view of population ageing, they should not be taken at the expense of the most vulnerable groups. To protect these vulnerable groups, a set of principles on solidarity and state responsibility has been incorporated into ILO Convention 102 and the subsequent social security instruments. After all, it is precisely the unemployed, the sick, the elderly, and the young who are most in need of social protection, and for whom social security has been developed in the first place. The conventions are indeed the instruments to secure a minimum level of social protection, necessary not only in times of industrialisation, but just as much in our post industrial service society of today, which relies heavily on the free market economy. For the well educated who enjoy good health, physically and mentally, it is not so difficult to put aside some money for a pension individually and voluntarily, but the converse is true for people in poor health or with little education. For them, the

[24] In the context of this study, privatisation must be understood as 'any measure through which responsibility for the provision of benefits is transferred from the public to the private sphere and/or through which the benefits (partly) depend on market forces'.

[25] See section 4.8.6.

[26] See sections 3.6.6 and 4.6.6.

[27] See section 4.5.6.

privatisation of social security provisions easily brings about a decline in social protection. Unsurprisingly, the privatisation of (parts of) social security schemes causes tension with the international standards at a fundamental level.

The principles on solidarity and state responsibility as a bridge between privatisation and solidarity

In spite of the established tension, the international standards do not rule out private social security provisions. In fact, ILO Convention 102 is designed so as to leave flexibility to Member States with regard to the organisation of their social security systems.[28] This high degree of flexibility has become all the more important in view of modern techniques and new preferences, such as privatisation, that were not yet employed in the industrial period in which the Convention was developed. Through several flexibility clauses and the incorporation of the principles on solidarity and state responsibility, the use of other types of social security schemes than the Bismarckian insurance model predominant at that time has been anticipated. The principles include financial solidarity, general responsibility of the state for the provision of predictable benefits, and the representation of different stakeholders in the management of the scheme concerned.[29] Indeed, as explained in section 5.2.6 identifying the bridging function of the conventions, the coexistence within a social security system of public as well as private schemes can be in conformity with the international standards, as long as the common principles are observed. By implementing private provisions in accordance with these rules, solidarity will be maintained at least to a minimum extent. While free-market forces are contrary to solidarity in essence, the acceptance of the common principles builds a bridge between these two poles. On the one hand, private schemes can take advantage of competition and relieve the public budget, while on the other, the common principles on solidarity and state responsibility safeguard the effective protection of insured persons and limit the negative effects of the free-market economy on the final individual remittances. To examine the bridge function of the common principles more closely in practice, in the following sections the private elements in the social security systems of the Czech Republic and Estonia will be reviewed as actual examples.

Private pensions and the common principles on solidarity and state responsibility

It has been shown that in the not too distant future, the Estonian public pension pillar will no longer be able to fulfil the international obligations on its own, and that the Czech pensions fell below the required level in 2008. This makes the

[28] See section 2.4.
[29] For an explanation of the principles on solidarity and state responsibility, see section 2.5.

question of whether private schemes can also be taken into account for the fulfilment of the international standards urgent. The assessment of the Estonian private scheme on its compliance with the international standards had a negative result, because the scheme has not been implemented along the lines of the common principles.[30] Two main problems have been pointed out in this respect. First, the persons protected are not involved in the management of the funds, which is required if the scheme is not administered by the state. Secondly, the government does not take responsibility for the provision of the benefits, for instance, by setting out a minimum remittance or investment rate.

A comment of the ILO Committee of Experts on the Peruvian private pension scheme that is also based on individual savings accounts, similar to the Estonian scheme, may shed light on this issue that is of importance for other countries as well. The Committee of Experts recalled in its comment that the rate of pensions provided by the private system could not be determined in advance, since it depended on the capital accumulated in the individual accounts, and particularly on the earnings from these accounts.[31] Additionally, the Committee requested to know what measures the government had taken with a view to preserving the rights of insured persons where the return on investments would be negative. The government replied that an act had been adopted regulating a minimum level of profitability, thus guaranteeing a minimum return. In response, the Committee asked for actuarial studies on the financial balance of the public and private funds. This response seems to imply that the government may have fulfilled its obligation if the actuarial studies showed that the public and private schemes together guaranteed the required pensions (40 percent of the reference wage to a person who has completed 30 years of contribution). The Committee noted in this respect that the average profitability from all private funds would not necessarily guarantee a real return capable of providing effective protection for insured persons. In other words, a calculation of future pensions on the basis of average investment rates would not be sufficient.

This discussion makes clear that a government takes responsibility for the due provisions of the benefits in accordance with the conventions if the insurance funds are obliged by law to guarantee a minimum investment rate, and if it is established through actuarial studies that this minimum investment rate yields the prescribed amount after 30 insurance years. In Estonia, there has been no regulation in this respect, nor is there any form of representation of insured persons. As a result, Estonia has to keep its public pensions at the level provided by the European Code, and cannot take into account the additional private pensions.

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30 See section 4.8.6.

31 CEACR: Individual Observation concerning C102 (Peru) 2007.

For the Czech Republic, where discussions on the supplemental private scheme are currently ongoing, it would be a challenge to see whether the new supplementary scheme could be implemented in a way that is in line with these fundamental principles. This would imply the creation of a scheme that leaves room for the trend of making people more responsible for their own lives and for the advantages of competition and other market forces on the one hand, but that meets the principles on solidarity and state responsibility, on the other. Such implementation would relieve the pressure on the public schemes to meet the ratified norms of ILO Convention 128 and the European Code, while, at the same time, preventing pensions from falling below the given level. Thus, compliance with the common principles makes it possible to combine two clashing phenomena: privatisation, and solidarity based social security.

Employers' liability and the principles on solidarity and state responsibility

Another private element in social security recently introduced in both countries is the liability of employers for the payment of their sick employees during the first period of their sick leave. In Estonia, it covers the first five days, and in the Czech Republic, the fourth until the fourteenth day of sick leave.[32] Compliance of these measures with the international standards depends, again, on whether they are implemented in accordance with the common principles on solidarity and state responsibility. For example, does the government safeguard the actual provision of the payments? Are the employers legally obliged to take up insurance for this risk? Is possible discrimination of employees with a history of medical problems sufficiently prevented (in theory as well as in practice)? In what way are the different interests represented in the management?

To gain better insight into this issue, it is useful to take a look at other countries where employers are responsible for the payment of sickness benefits and the reactions on this form of privatisation of the supervising committees. For example, in the Netherlands, the employer is responsible for the payment of sickness benefit in the form of the continuation of wages for a period of 104 weeks, and in Germany, during the initial period of six weeks. The Committee of Ministers of the Council of Europe has repeatedly criticised the Dutch system as not being in line with the common principles. Accordingly, it questioned the government about:[33]

> [T]he possible negative effects of the reforms making employers liable under certain conditions for the payment of the sickness and disability benefits, which could result in particular in the abandonment of the participatory management of the social

[32] See sections 3.6.4 and 4.6.4.
[33] Resolution CSS(2000)2 on the application of the ECSS t/m Resolution CSS(2007)11.

> security schemes and the risk of discrimination against workers with a history of medical problems[.]

At the same time, the German rule has not elicited any comments. From this, it could be concluded that the international standards do not allow for long periods of employer responsibility, but that the idea as such is not rejected in principle.[34] However, it must be noted that the committees in their comments on the Dutch system never actually referred to the length of the period.[35] Another important difference between the Dutch and the German systems is that in Germany, small employers are obligatorily insured for the risk, which may limit discrimination against those with poor health. Considering the Committee's concern about discrimination, this aspect seems to come first, together with the requirement of participatory management.

The discussion makes clear that when the common principles on solidarity and state responsibility are not respected, a problem will emerge with the application of the conventions. For the Czech and Estonian governments, this implies that accompanying measures are necessary, which guarantee that benefits will be granted without discrimination, and which provide a strong role for trade unions and adequate participation of the representatives of the persons protected. Perhaps it would help to study more thoroughly the implementation of the German employers' liability, since that could give useful 'best practice' information. It would, however, be of particular value if the supervising committees would provide a framework for proper implementation of this form of privatisation, all the more so since it appears to have become a trend in many countries.

Cost-sharing for medical care and the principles on solidarity and state responsibility

In both countries, the shift from collective towards individual responsibility also concerns out-of-pocket-payments in relation to medical care. Although cost-sharing for medical care is allowed under the conventions, it is also stipulated that the rules concerning cost-sharing may not cause hardship.[36] In fact, the general principle of financial solidarity that applies to all benefits is explicitly stressed in relation to medical care, which reflects the importance of accessible and affordable health care. Both countries impose out-of-pocket payments for

[34] This is also the conclusion in Nickless 2003, p. 124. Nickless adds: 'contracting parties will have to wait for further decisions of the Committee of Ministers before they can establish what is an acceptable period of continued payment of wages during sickness.'

[35] My colleague B. Hofman is working on a study of the Dutch system in relation to the international standards.

[36] See section 2.9.3.

medical services, such as doctors visits, hospital stays, and medicines. In the Czech Republic, modest patient fees are primarily levied to influence the behaviour of health care users – for instance, to reduce the number of doctors visits and the excessive use of medication.[37] Financial reasons are only secondary. It is different in Estonia, where out-of-pocket payments are an important means of financing health care, constituting almost a quarter of total health expenditure and subject to an upward trend.[38] In relation to this matter, it has been noted that the burden of out-of-pocket payments is increasingly falling on the shoulders of lower-income households, especially if these households include pensioners or persons with a health condition, and that it may hinder health access for these lower-income groups. As an example, the normal co-payment for a specialist visit represents more than 6 percent of the monthly income of a person in the lowest docile of income categories.[39] In spite of the fact that the condition that cost-sharing may not cause hardship is very vague, it cannot be denied that the Estonian rules are at least problematic in view of the principle of financial solidarity.[40]

As shown before, another problem regarding cost-sharing exists in the Czech Republic, namely, in relation to maternity protection. According to the conventions, as a matter of principle, cost-sharing may not be required for medical care concerning pregnancy and delivery.[41] This has been repeatedly and unambiguously confirmed by the CEACR to different countries.[42] In the Czech legislation, several exemptions to the general rules on co-payment for pregnancy related care are made, but for some services the normal rules apply. To meet the international standards, the exemptions should be extended to all situations involving pregnancy related care. In Estonia the same conflict existed until 2009, when the law was changed in order to meet the requirements of the European Code.

37 See section 3.5.4.
38 See section 4.5.4.
39 Habicht & Habicht 2008, p. 244.
40 The CEACR has made the following statement in this respect in relation to the Northern countries: 'The preparatory work throws no light on what may be regarded as constituting hardship in this connection. […] At the same time, the fact that there is provision to meet any hardship suffered by persons of limited means by the intervention of public assistance would undoubtedly be pertinent to any conclusion on the question whether the requirements of the Convention were fully met.' ILC: Interpretation of a decision concerning C102 (Northern Committee for Social Policy) 1962.
41 See sections 2.9.3 and 2.15.3.
42 For example, CEACR: Individual Direct Request concerning C102, (Netherlands) 1989; ILC: Interpretation of a decision concerning C102 (Northern Committee for Social Policy) 1962; CEACR: Individual Direct Request concerning C102 (Italy) 1990.

Privatisation: possible but complicated

The fact that, under conditions, private social security provisions may also be taken into account for the fulfilment of the international standards extends their applicability. At the same time, it must be recognised that the option of private social security is only a second best alternative from the perspective of the international standards. For all contingencies, the given rules are, first and foremost, tailored to public insurance schemes based on either employment or residency, or to tax based schemes with or without means testing, into which the principles on solidarity and state responsibility are automatically incorporated. The need for flexibility in order to make it possible for more countries to ratify the standards and to anticipate to new developments in social security, has meant that private schemes, and even voluntary (private) schemes, are not excluded from the scope of the conventions. Especially given the current period of economic constraint and the strong belief in the competitive power of the market economy, this flexibility proves its value: where the public schemes are not sufficient (any longer) to fulfil the international obligations, private provisions can be taken into account, providing that the principles on solidarity and state responsibility are respected. In fact, the international standards accommodate a compromise between privatisation and solidarity, which can be particularly valuable in a neoliberal political climate bringing about a diminution of state responsibility for social risks. In spite of this, the conflicting natures of privatisation and solidarity do not make it easy to capitalise on this. The necessary role of the state as the ultimate guarantor of the benefits (in whatever way) and the required participation of persons protected in the management of the scheme concerned do not fit very well with the concept of privatisation. Although possible, the design of a private scheme that meets the requirements of the international standards is a complicated matter that needs careful consideration.

6.2.4 SUITABLE EMPLOYMENT VERSUS EU ACTIVE LABOUR MARKET POLICY

Another observed tension with the international standards concerns the concept of a suitable job in the Czech Republic.[43] According to Convention 102 and the European Code, the contingency to be covered by an unemployment benefit is defined as suspension of earnings due to inability to obtain suitable employment. In relation to the concept of suitable employment, the Committee of Ministers supervising the application of the European Code has questioned its definition in the Czech Employment Act. Although the Code does not provide for an

[43] See sections 3.7.2 and 3.7.6.

explanation of the term 'suitable' in this context, the preparatory documents of Convention 102, and several direct requests of the CEACR, shed light on this matter.[44] The documents make clear that at least during the first 13 weeks of unemployment, jobs should be offered with due regard to the skills, qualifications, acquired experience and length of service of the jobseeker. In contrast to this interpretation, the Czech law does not take into account all these features, but only requires the jobseeker's state of health to be in accordance with the job. Although it has been stated at the Ministry of Social Affairs that the Czech Labour Offices do consider the qualifications and experience of the person concerned in practice, the law gives room for deviation and for the development of a more restrictive policy.

Since the restriction of unemployment benefits is a topical issue in many countries, it is good to put the Czech case into a broader context. In view of financial challenges, an ageing population, and the advent of neoliberal policy, pro-active employment strategies have been developed within the European Union.[45] In line with these strategies, EU Member States have broadly adopted activation policies, including the 'Work First' model, based on the idea that any job is better than none to improve the sustainability of their social security systems. As a result, entitlement to unemployment benefits has been made more and more conditional upon the willingness to work, even regardless of skills, qualifications, professional experience or personal circumstance.[46] In a way, this policy changes the risks and burden of an unstable labour market with high unemployment rates from a collective risk to a risk of the individual jobseeker for the greater part. What is more, there is a tension between this work-first approach and the right to work as laid down in human rights instruments, such as the Universal Declaration of Human rights, the International Covenant on Economic, Social and Cultural Rights, and the European Social Charter, which include the right of everyone to decide freely to accept or choose work.[47] The European Committee of Social Rights has made several critical comments in relation to the suspension or withdrawal of a benefit after the refusal of a job by the beneficiary on the basis of both Article 1 (the right to work) and Article 12 (the right to social security) of the Social Charter.[48] For instance, it has been concluded that an obligation to accept any reasonable job from the occurrence of

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44 See sections 2.11.1 and 3.7.6.

45 See, for instance, *Jobs, Jobs, Jobs, Creating More Employment in Europe,* Report of the Employment Taskforce Chaired by Wim Kok, November 2003.

46 An exponent of such policy is the 'work first' model as applied in the USA and also in the UK, assuming that any job is a good job, and that the best way to succeed in the labour market is to join it; see, for instance, Bruttel & Sol 2006.

47 Universal Declaration of Human Rights, Art. 23 para.1; ICESCR, Art. 6; CESCR 2005, para. 6; ESC, Art. 1 (2). See also Vandenhole 2006, p. 8.

48 For instance, concerning Denmark (ESC Conclusions 2004), Belgium (ESC Conclusions 2004), Czech Republic (ESC Conclusions 2004), Norway (ESCR Conclusions 2006) and

unemployment does 'undermine the adequate coverage of the unemployment risk for which every worker has contributed during his working activity.'[49] It appears that the comments of the Committee of Ministers on the Czech regulations follow this approach.

At the same time, the freedom to work must be considered in light of the principles of proportionality and necessity. This implies that the right to freely accept or choose work is not an absolute right, but that it cannot go hand in hand with unreasonable limitations.[50] It must be stressed that neither the European Committee of Social Rights, nor the ILO Committee of Experts, oppose active employment strategies as such. In fact, the ILO has developed active labour market policies as well, with the objective of removing disincentives to job creation and job seeking.[51] However, the conventions draw the boundaries of these policies by prescribing an initial period of at least 13 weeks, during which the jobseeker is not obliged to accept any unsuitable job. If the job offered does not accord with the skills, qualifications, acquired experience and length of service of the jobseeker, the jobseeker may decline the offer without losing the right to unemployment benefit. These boundaries should be respected while giving effect to active labour market policies. That this does not necessarily hinder employment participation, may be demonstrated by the Estonian case, where the law is in accordance with the European Code on this point, and where, at the same time, the employment rate was among the highest ten countries within the European Union in 2007 (before the economic recession).[52] The fact that the Estonian definition of suitable employment is neatly connected to the ILO vision can be explained by the strong influence of the ILO on Estonian labour law in the 1990s and the benchmark function of the Code as discussed above.

6.2.5 FLEXIBILITY OF THE INTERNATIONAL STANDARDS: A COMPROMISE

ILO conventions are meant to be accepted and applied all around the globe. Therefore, they have to be designed in such a way that they are within reach of developed as well as developing countries. Moreover, they have to withstand the test of time and changing social values. Considering the facts that countries such

Cyprus (ESCR Conclusions 2004). See also CEACR: Individual Direct Request concerning C102 (Denmark) 2005.

[49] ESCR Conclusions (Denmark) 2006, under Art. 12.

[50] See also Ashiakbor 2005.

[51] ILO Committee on Employment and Social Policy, Geneva, March 2003, Doc. GB.286/ESP/1(Rev.).

[52] Eurostat, Employment Rates.

as Peru and Brazil, as well as Denmark and Japan, have ratified Convention 102, and that almost 60 years after its adoption still new ratifications take place, it may be concluded that the objective of designing a flexible instrument has been achieved, at least for the most part. This achievement is even more remarkable since Convention 102 contains concrete norms for a wide range of social security benefits. Although a set of strict legal norms with a high degree of flexibility seems self-contradictory, in this Convention these two features are indeed combined.

The norms are flexible in multiple respect.[53] In the first place, a state that ratifies the convention has to accept the general parts, but is not obliged to include all nine social security branches in its ratification. Ratification of other branches may take place at a later stage, according to the socio-economic situation in the country in question. The Czech Republic and Estonia have used this flexible feature by leaving aside the part on employment injury benefit that could be met in neither of the countries. The Convention also provides for flexibility with regard to the type of schemes, since the given norms can be reached through universal schemes, social insurance schemes with earnings-related or flat rate components, or both, through social assistance schemes, or even through private and voluntary schemes. This has made it possible for the Czech Republic and Estonia to ratify the standards on the basis of Bismarckian type of insurance schemes (for example, the pension schemes), as well as universal schemes (for example, the Czech health care scheme). Additionally, as discussed in section 6.2.3, it is possible to include private pension schemes and other private elements. Furthermore, the levels of the benefits are fixed at a percentage of national average wages, which, of course, vary by country. This makes it possible for countries with lower gross domestic income, such as Estonia and the Czech Republic, to meet the fixed level of benefits as much as the richer EU Member States.

Then, there is a choice regarding the personal coverage of the schemes. For most branches, a Member can choose to protect 50 percent of all employees, or economically active persons constituting at least 20 percent of all residents, or all residents whose means do not exceed prescribed limits. Since in both countries employees as well as self-employed persons are covered by several insurance schemes, these different options are indeed used. In relation to maternity and family benefits, the flexibility has been shown to fall short: the last option of coverage of all residents is left out, which constitutes a problem with the application of these parts of the conventions.[54] It can be argued that leaving out

[53] See section 2.4.

[54] See sections 2.14.2 and 2.15.2; For a discussion of the problems with the part on maternity benefits, see section 6.2.2 concerning derived rights in both countries; for family benefits see section 3.10.5 concerning the income related child benefit in the Czech Republic.

this option is not just an omission, but is based on the idea that the application of a means test does not coincide with the need and nature of the particular risk. A means test in relation to family benefit, as applied in the Czech Republic benefit, demonstrates the value of this underlying argument, since even the Czech 'standard beneficiary' does not qualify for child benefit. This way, the benefit may overshoot its purpose. In any case, it has been established that the child benefit in the Czech Republic and health insurance in both countries do not connect with the two available options for personal coverage, as provided in the conventions.

Another form of flexibility is the absence of definitions concerning frequently used vague concepts, such as a 'qualifying period as may be considered necessary to preclude abuse', 'suitable employment', benefits shall be 'borne collectively […] in a manner which avoids hardship to persons of small means', or 'the Member shall accept general responsibility for the due provision of the benefits.' As discussed in Chapter 2, for many norms, no consensus could be reached because of the differing opinions and practices in the countries involved with the drafting of Convention 102. All these undefined terms give great discretionary power at the national level, which obviously adds to the flexibility of the instrument, because changing customs and values can be reflected in the interpretation of the norms. At the same time, there is also a risk that the actual norms are watered down by their vagueness. The country studies make the reality of this risk apparent at several points. For example, the Estonian definition of the term 'widow' for the purpose of survivors' benefit has been questioned by the supervising committee, and the interpretation of 'suitable employment' in the Czech Republic has been deemed too strict. Furthermore, it is hard to assess when there is an instance of hardship. For example, it is difficult to establish whether the out-of-pocket payments for medical care in Estonia do actually cause hardship, although it affects access to health care for low-income households. In these cases, the vagueness of the international provisions detracts from effective protection. It is up to the supervising bodies to monitor the proper application of the provisions at stake and give substance to the undefined norms.[55]

Taking all this into account, it can be concluded that in Convention 102 a certain balance has been struck between the provision of concrete norms on the one hand, and the creation of sufficient flexibility on the other. At some point, the flexibility may water down the effectiveness of the norms, however less flexibility would bring about (even) fewer ratifications. At the same time, greater flexibility with wider options and more undefined terms would imply (even) less effective standards.

[55] See section 6.3.3.

6.2.6 CONCLUSIONS

After the foregoing discussions on the different problems with the international standards in relation to modern developments in social security, an answer should be formulated as to their durability and adaptability. It has become clear that the conventions are outdated at specific points indeed. The male breadwinner concept is not in tune with our current socio-economic reality, and has a discriminatory side-effect in relation to survivors' benefits. The assumption of a standard beneficiary having two children is also not in line with the current situation, resulting in slightly lower benefits than intended by the standards. Additionally, the requirement of derived rights in relation to several benefits is problematic in view of the general tendency towards the individualisation of social security rights. The study shows that most of these points do not cause (significant) application problems in practice. In fact, abandoning the male breadwinner concept in relation to the calculation of benefits would bring about lower minimum benefits. The most important problem is that the outdated concepts damage the credibility and popularity of the international standards.

It must be kept in mind, however, that the male breadwinner model is only problematic in the developed countries, with a high participation of women in the (formal) labour market and low birth rates. In developing countries and emerging economies this model is still relevant as it contributes to the protection of women, and therefore also of children. Since women and children are most often exposed to poverty in less developed countries, they need better protection. Deleting the breadwinner model in the international standards would involve less social protection for those vulnerable groups worldwide.

As regards the widespread privatisation measures, it has been established that the international standards leave room for such methods of financing. The fact that the standards set out restrictions regarding the shift from public to private responsibility for the provision of the benefits does not relate to their (in) adaptability to modern developments, but rather to the principles on solidarity and state responsibility, upon which the standards are based. It could be questioned, of course, whether these principles are still a prerequisite for social security. However, this is a fundamental question that does not apply more to the present time than it did 60 years ago when Convention 102 was adopted. On the contrary, in view of the free market economy and increasing differences between rich and poor, and considering the ageing population within the European Union, solidarity and state responsibility may even have gained in importance when it comes to social protection of those who are not able to deal with the hard rules of the free market.

The different flexibility clauses in the conventions not only make it possible for them to be applied in different types of welfare states (for example, in terms of Esping Andersen,[56] either conservative or liberal), but they also leave room for different stages of development of social security systems. The use of certain open norms and the discretionary power given to the Member States provide for flexibility with regard to the interpretation of the norms, in which new trends may be reflected. It is the task of the supervising committees to monitor this process and to prevent vague norms from losing value.

Thus, on the basis of the country studies, it can be concluded that the international standards retain their applicability in a changing society with new developments in the field of social security. Furthermore, they are still suitable to contribute to the protection against vulnerability and contingency, not only by setting out minimum norms, but also by safeguarding a minimum extent of solidarity and redistribution. At the same time, it must be recognised that the use of certain outdated concepts causes some application problems, slightly erodes the norms at one point, and certainly does not contribute to the popularity of the conventions in the developed world.

6.3 ARE INTERNATIONAL SOCIAL SECURITY STANDARDS EFFECTIVE LEGAL INSTRUMENTS?

6.3.1 INTRODUCTION

There is no doubt that ratified ILO social security conventions, as well as the European Code of Social Security, are hard legal instruments, imposing legally binding obligations on Member States. At the same time, their soft character cannot be denied either. After all, the creation and content of international law basically rests on 'the consent to be bound.'[57] Participation is voluntary, and observance of the social security conventions cannot be enforced in the end, due to the absence of a (functioning) court and to the possibility of denouncing ratifications. Hepple paraphrases this controversy by referring to social rights as 'paper tigers, fierce in appearance but missing in tooth and claw.'[58] In the following sections, it will be discussed whether tooth and claw are indeed missing from the international (section 6.3.2), as well as the national (section 6.3.3), perspective. In section 6.3.4 the legal power of the treaties will then be assessed.

[56] Esping Anderson 1990.
[57] Vienna Convention on the Law of Treaties 1969, Arts. 9–18.
[58] Hepple 2002, p. 238.

6.3.2 THE SOFT LEGAL CHARACTER OF THE INTERNATIONAL STANDARDS

The first feature responsible for the soft character of binding international social security instruments is the absence of a court and consequently the lack of hard sanctions in cases of infringement.[59] The supervising committees may express their 'deep concern' after many years of inconsistency, but that is as far as they actually go. It is exactly this soft way of sanctioning that creates the image of paper tigers. This has to be put into perspective though, since the application of, and compliance with, international law is a complicated matter in general, and the enforcement of social rights in particular.[60] For example, a sanction imposed by the European Court of Human Rights does not always effectively solve the problem either, as it can take many years before the state concerned takes proper action. More importantly however, this study shows that the international standards are taken seriously even without the threat of sanctions. After ratification, in both countries the instruments are treated as binding law, and their legal power has not been up for discussion. In the Czech Republic, this has been underlined, for example, by instantly repairing the gap between the norm of Convention 128 and the actual level of the pensions in 2004, and in Estonia by extending health insurance to pregnant women from the moment the pregnancy is established in 2009. At the same time, there are issues that have not been solved even after several requests of the supervising committee, such as the excessively strict interpretation of the term 'widow' in Estonia. In these cases, the supervising committee cannot do more than to refer repeatedly to these issues and request the government to take appropriate action.

The absence of a court has also consequences for the interpretation of the standards. Where a court provides case law as a basis for interpretation, the supervising committees of the ILO and the Council of Europe do not have such a clear competence at this point.[61] Their conclusions do not refer to previous conclusions or formulate general rules, but apply to the specific case under review only. It must be added in this respect that the CEACR sometimes formulates an 'interpretation', in which it expresses its opinion on issues of general interest. Yet, these interpretations are hardly known or used, at least in the two studied countries. As such, due to their limited competence, the supervising committees

[59] As mentioned in section 2.8, according to the ILO Constitution, disputes can be brought before the International Court of Justice of The Hague, but this possibility is not called upon in practice.

[60] For a discussion on the supervision and enforcement of international social security standards, see Korda & Pennings 2008; Dijkhoff & Pennings 2007, pp. 151–155; Gomez Heredero 2007, pp. 56–58; Hepple 2002, pp. 238–257.

[61] Korda & Pennings 2008, pp. 137–139; For an in-depth study on interpretation matters, see Pennings 2007A.

only play a modest role in the clarification of vague terms or ambiguous provision. This lack of authoritative interpretations at the international level can certainly be considered a drawback of the supervision procedure. How, for instance, should the Estonian government know the exact meaning and scope of 'a widow being capable of self-support', or 'so designed as to avoid hardship'? There is no binding case law to turn to, which makes it difficult to implement the standards in a correct way on the one hand and easy to water down their protecting value on the other.

The second soft feature is the possibility of denouncing a treaty, or parts of it, every five (CoE) or ten (ILO) years after it has entered into force for the country concerned. This means that a commitment towards standards is not necessarily forever. In the case of a changing situation or policy, if a government finds the treaty obligations too burdensome, it can free itself from its commitment. Still, it must be acknowledged that states do not easily withdraw from international obligations in view of the loss of face involved. In fact, none of the normative social security instruments of the ILO and the Council of Europe have ever been annulled by any state, and so far, only once has a state denounced a single part of such a treaty.[62]

The positive side of missing teeth, which may even counteract its drawbacks, must not be overlooked. This concerns the underlying idea of 'consent to be bound.' The facts that no hard sanctions are to be feared and that there is always the escape of denunciation, make it easier for states to take on commitments. Why are EU Member States, to date, unwilling to incorporate minimum social security standards into the EU *acquis,* while, at the same time, accepting the standards of the ILO and Council of Europe? Precisely because of the looser tie and the emergency exit of denunciation. Simultaneously, if a state voluntarily accepts certain standards, it will also be inclined to accept the observations of the supervising bodies. The two country studies can be considered exemplary on this point, as they show that the comments are taken seriously, and that established frictions have been solved in most cases so far.

[62] The Netherlands denounced Part VI of the European Code of Social Security in 2009. Simultaneously, it ratified the Revised European Code, obviously to show its good intentions. This act did not have any direct consequences since the Revised Code needs another ratification to become effective. It must be noted that non-normative social security conventions have been subject to more denunciations, namely, Convention 48 on Maintenance of Migrants' Pension Rights (1935) has been denounced by four countries (among which is the Netherlands), and Convention 118 on Equality of Treatment (Social Security) (1962) was denounced by the Netherlands in 2004. Whether denunciation of treaties is considered necessary also depends on whether national courts ascribe direct effect to international provisions.

6.3.3 THE EFFECTIVENESS OF THE INTERNATIONAL STANDARDS IN THE NATIONAL LEGAL ORDER

Binding legal instruments with limited impact

The actual effect of an international legal instrument does not only depend on how it is used by policy makers, but also on its status within the national legal order. An instrument that is not recognised as a binding source of law within the country will be used as a permissive guideline only. According to the constitutions of both the Czech Republic and Estonia, international agreements accepted by Parliament are part of the national legal order and take precedence over national law.[63] In both countries, ILO conventions and the treaties of the Council of Europe are subject to approval by Parliament for their ratification, and are therefore binding instruments with a higher rank than national legislation. Accordingly, the public bodies, either legislative or executive, have to act in conformity with these instruments, and judges have the power as well as the obligation to assess their application and to take them into account in their opinions and decisions.

Indeed, ILO conventions and Council of Europe instruments are used in court proceedings in both countries, however this concerns treaties other than those on social security. Neither the social security conventions of the ILO, nor the European Code of Social Security, have been subject to any attention in actual cases in the two countries.[64] This can be explained firstly by the fact that people do not easily go to court for social security disputes. In the Czech Republic this is mainly due to distrust in judiciary in general, and in Estonia to the extremely formal requirements involved in taking a social security matter to court and the related high costs. Secondly, the European Code and the ILO social security conventions are not well known, either by judges, or by other lawyers.[65] Furthermore, it must be kept in mind that the transition from socialism to democracy meant that an independent judiciary had to be built up from scratch, and that knowledge of, and experience with, international law was totally absent. It may be expected that judicial practice on this point may change over time, under pressure of globalisation.

Comparing judicial practice in the two countries, it becomes clear that the Czech judiciary is much more burdened with the socialist legacy of textual positivism

63 See sections 3.4.3 and 4.4.3.
64 See sections 3.4.5 and 4.4.5.
65 Virginia Leary thoroughly examined this issue thirty years ago, and raised the problem that provisions of ratified conventions which have the force of law in a national system often remain unknown to judges, administrators, and individuals, Leary 1982, pp. 137–149, 168. From the country studies is appears that the situation has not changed a lot since.

and formalism than is the case in Estonia. This has as a consequence that Czech judges generally stick to domestic law for their decisions, rather than also considering applicable international law.[66] At the same time, the Constitutional Court tries to change the guarding attitude of lawyers towards all sources of law other than written domestic law, and makes use of international law more often. It is typical of Estonia, who has shaken off the Soviet legacy as much as possible, that judges are more open-minded towards new ways of judicial construction and interpretation of law. However, in Estonia international law is also not being used systematically, but almost exclusively to substantiate arguments that are primarily based on the Constitution. This selective approach means that international law is not taken into consideration if it could generate opposing or undesired arguments. Furthermore, if international law is taken into account, it mostly concerns a human rights treaty, such as the European Convention of Human Rights or the Convention on the Rights of the Child.

The position of international 'case law'

Considering the cautious approach towards international instruments as national sources of law in the Czech Republic, it is not surprising that the case law of international courts and decisions of supervising bodies are considered with even more aversion. As a matter of fact, only the Constitutional Court occasionally takes into account case law of the European Court of Human Rights in its preparation of judgments, but this practice is criticised by lawyers in general, and is not copied by the lower courts.[67] The indisposition towards decisions of an international court finds even more expression when it comes to the opinions of the supervising bodies of the ILO and the Council of Europe, operating outside the framework of an institutionalised court. Indeed, it was shown that in a case concerning the right to strike in which the complaint was partially based on decisions of the ILO Committee on Freedom of Association, the Constitutional Court argued that although these positions may be used by the Court as an inspiration for comparative argumentation, they can 'in no way be a referential norm.' A bit less averse is the attitude of the Estonian Supreme Court, who regularly uses judgments of the European Court of Human Rights, and on rare occasions, also opinions of other supervising bodies. For instance, the Court referred to a recommendation of the Committee of Ministers recognising that although it is not a legally binding document, it is an appropriate tool for interpreting the Constitution.[68]

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66 This does not include legislation of the European Union, which holds a different position within the legal order and which is more accepted and well-known.

67 See section 3.4.6.

68 See section 4.4.6.

Direct applicability of the international standards

So far, the social security instruments have never been invoked before a court in either of the two countries, but this is not a matter of principle. As a matter of fact, in both countries the constitutional framework gives room for direct applicability. The question may be raised as to whether it would be desirable for citizens to invoke the social security conventions before courts. This matter can be viewed from different perspectives. First of all, it must be acknowledged that such practice would certainly strengthen the legal power of these instruments. Of course, first, some obstacles need to be overcome by a national judge in such a case, namely, the issue of whether or not the invoked provision must be attributed direct effect and if so, the provision must be correctly interpreted.[69] However, if these obstacles were tackled, the application of the instrument in a specific case (by the national court in last instance) could have a substantial impact on social security in practice. For example, a pregnant woman in the Czech Republic who has to pay a fixed fee during her pregnancy-related stay in hospital could go to court on the basis of the European Code, which prohibits cost-sharing for medical care in the case of pregnancy and confinement. If, in the end, the Constitutional Court ascribed direct effect to the invoked provision and decided that levying such fees is in conflict with the Code, the government would be compelled to abolish the fees and bring the national law in compliance with the international instrument. This would do justice to the special focus on maternity protection in several treaties. Moreover, it would demonstrate the hard legal character of the European Code and make the government more alert to the observance of international obligations in the field of social security.

Yet, there is another side to this, which already has been touched upon in the previous section, and that can be explained best on the basis of an example from the Netherlands. In the Netherlands, the European Code, as well as ILO social security conventions, have been invoked before court several times.[70] In one case, the court, after awarding direct effect to the provision at stake, found that the Dutch law was in conflict with Part VI of the Code.[71] The government was compelled by this decision to bring the law in accordance with the Code. However, the measure that was taken did not involve a change in national law, but resulted in the denunciation of Part VI of the European Code in 2009. This is, of course, not an appropriate outcome of the invocation of an international

69 For more information on this issue, see Dijkhoff & Pennings 2007, pp. 166–172.

70 Pennings 2006B; Pennings 2007A.

71 Central Appeals Court (Netherlands) 8 September 2006 concerning the issue of cost-sharing in relation to the European Code of Social Security Part VI on Employment Injury. For a detailed discussion of this case, see De Vries 2007, pp. 93–96; Gomez Heredero 2007, pp. 61; Pennings 2007B, pp. 19–20. For an English translation of the case, see Pennings 2007A, pp. 253–258.

provision, and it confirms their weakness in legal terms as discussed in section 6.3.2. In fact, neither at the international, nor at the national level can these instruments eventually be considered hard law.

6.3.4 CONCLUSIONS

What can be concluded as regards the alleged toothlessness of international social security standards? At least, I think it is fair to put this issue into perspective. The soft character follows from the nature of international law, existing merely by the grace of the consent of the contracting parties to be bound. Willingness to take part in an agreement brings about willingness to observe the standards and to take into account the outcomes of a supervision procedure. Only in exceptional cases do states withdraw from their obligations. At the same time, the soft character of the treaties has a great advantage, namely, that it does entice governments to take on international commitments. When it comes to the legal effectiveness of the standards through national courts, there is much to gain. Although in the studied countries the treaties are binding law and take precedence over national law, as yet none of the social security instruments have been invoked before a court, and judges have a guarded attitude towards international law in general.

All in all, from a legal point of view the conventions are rather weak indeed. Infringements of the standards remain unsanctioned at the international level and national courts are, as yet, reluctant to accept the consequences from the legal status of the instruments. However, it is precisely this soft legal character that makes them strong from the policy perspective. Where social security standards are barred from the EU *acquis*, they are accepted at the international level.

6.4 DO THE INTERNATIONAL STANDARDS CONTRIBUTE TO SOCIAL PROTECTION FOR ALL?

6.4.1 INTRODUCTION

One of the points of criticism, as reflected in section 1.1.4, is that the social security conventions, in contrast with their objective, do not contribute to social security protection for everyone. This criticism has two dimensions. First, it questions whether the benefits as defined by the conventions provide a sufficient level of social protection, or, in other words, whether they indeed contribute to a rise in standards of living. Secondly, it reflects doubts on whether the conventions

lead to protection for everyone, which is connected, not to the level of the benefits, but to the personal scope of the standards. In the following two sections, these different dimensions will be examined on the basis of the country studies. Then, in section 6.4.4, the role of the European Social Charter in this respect will be discussed, and in section 6.4.5 some conclusions will be drawn on the question of whether the conventions contribute to social security protection for all.

6.4.2 THE INTERNATIONAL STANDARDS AND THE RAISING OF STANDARDS OF LIVING

In the country studies several difficulties with the international standards have become visible in relation to the level of the benefits. This is not very surprising, considering that due to the transition from a centrally planned to a free-market economy all post-socialist states had to overcome major economic challenges. Even where the Czech government initially considered the standards rather low compared to the specified benefits, in the course of the years some benefits approached or even surpassed the danger zone of the minimum norms, in particular, the old-age pensions.[72] At the same time, it has been established that owing to the benchmark and preserving functions of the international standards, the benefits in the two countries meet the required standards for most contingencies, and that the levels of several benefits would have been lower if the international standards had not been ratified.

An important question relating to the level of the benefits is whether compliance with the social security conventions guarantees a sufficient level of social protection.[73] It seems relevant in this respect to look at the 'at-risk-of-poverty' rates of the two studied countries, since one would expect that compliance with the standards would protect against poverty. However, statistics show that the Czech Republic scored the lowest 'at-risk-of-poverty' rate within the European Union in 2008, also among the elderly, while Estonia belonged to the group of countries with the highest poverty rates,[74] in spite of the fact that the benefits in Estonia met the requirements of the European Code, while in the Czech Republic the old-age pensions fell just below the prescribed level. This indicates that a direct link between poverty and (non)compliance with the international minimum standards cannot be assumed, at least not in all cases. The reason for the high poverty rate in Estonia can be found in the rate of inequality of income distribution in Estonia, while in the Czech Republic this is again the lowest

72 See section 3.8.6.

73 Lamarche points out in this respect that social security is one way to provide social protection and that the need for social protection is answered by all kinds of mechanisms managed by a variety of public and private actors. Lamarche 2002, pp. 129–130.

74 Eurostat News Release 10/2010, 18 January 2010, 'Living conditions in 2008'.

within the EU.[75] The Estonian case proves that compliance with the principle of solidarity and state responsibility as incorporated in the international standards, is no guarantee for income distribution to the extent that it results in a relatively low poverty rate. Thus, it may indeed be questioned whether the social security conventions are proper instruments combating poverty, or, to put it in the words of the Declaration of Philadelphia, to 'achieve the raising of standards of living' and to 'provide a basic income to all in need of such protection.'[76]

6.4.3 THE INTERNATIONAL STANDARDS AND SOCIAL SECURITY PROTECTION FOR EVERYONE

The fact that a high poverty rate can go together with a proper application of the international standards rather follows from the norms for personal coverage of the schemes. According to the conventions, if an insurance scheme is based on employment, only 50 percent of all employees have to be covered, or 20 percent of all residents. This means that the part of the population not covered can fall into poverty without conflicting with the international standards. Both in the Czech Republic and Estonia, most insurance schemes cover all employees and self-employed persons. Persons who are (or were) not economically active cannot rely on the protection provided by the conventions. For them, it is dependent on other factors whether or not they fall into poverty, such as the support of family members, community provisions, and the social safety net provided by the government.

Here, the normative approach of the conventions takes its toll. These instruments define the specific legal obligations of the committed States necessary in order to realise the right to social security. Such 'perfect obligations' are necessary to make the prescribed right a reality, therefore they need to be fully realisable in practice. The fact that the social security standards have to be fully achievable requires a compromise: the norms must be low enough so as to be within reach of all interested states. As a consequence, the value of the international standards as perfect legal obligations to be fully realised has a disadvantage at the same time, namely, that they have to be low enough to be practicable. The human rights approach, on the other hand, is less curtailed by a demand for practicability. This approach starts from a generally addressed claim to social security for everyone that does not necessarily have to be fully realised.[77] Rather, the claim holds an ethical statement that draws attention to the need for fulfilment of the

75 Eurostat table 'Inequality of income distribution'.
76 Annex to the Constitution of the ILO: Declaration of Philadelphia III (a) and (f).
77 For a discussion of these two approaches, see Sen 1999; Langford 2007, pp. 32–33; Bartolomei de la Cruz, Potobsky, Swepston 1994, pp. 127–129.

right to social security, and allows for an ambitious goal to be progressively realised. In fact, this approach is also incorporated into the ILO Income Security Recommendation No. 67, a precursor of ILO Convention 102.[78]

The limitations of the normative approach, resulting in the so-called 'coverage gap', has also been acknowledged by the ILO.[79] As a response to this gap, it launched the 'Global Campaign on Social Security and Coverage for all' in 2003. Furthermore, the possibility of developing a new Convention to complement the existing social security instruments has been explored. This Convention would have the character of a human rights instrument, not containing concrete norms, but providing for a universal right to a basic benefit package for everyone.[80] Furthermore, it would be designed in such way as to serve as a tool for the progressive application of Convention 102. For the European region, however, a useful instrument that already serves such a complementing role is the European Social Charter. Its complementary function is threefold, first, in relation to the personal coverage, secondly, in relation the level of the benefits, and thirdly, in relation to a progressive fulfilment of the universal right to social security.

6.4.4 THE COMPLEMENTARY FUNCTION OF THE EUROPEAN SOCIAL CHARTER

Contrary to Convention 102, in the Social Charter social security and social assistance are dealt with separately. Where, under Convention 102, social assistance can be used as a form of social security, Article 13 of the Charter provides for adequate social assistance as a safety net for 'any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme.' In this way, the protection gap under the social security instruments is filled by the Social Charter.

The second way the Charter complements the social security instruments relates to the level of the benefits. Article 12, paragraph 1 of the Charter obliges countries 'to establish or maintain a system of social security.' The Committee of Social Rights has explained in relation to the Estonian case, that this paragraph implies:[81]

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78 See section 2.1.1.

79 ILO 2001B, pp. 26–27; ILO 2008, pp. 19–22; Bartolomei de la Cruz 1996, p. 192.

80 ILO 2008, p. 47; Korda (forthcoming), dissertation. As yet, the creation of such a new instrument does not appear to be feasible.

81 ESCR Conclusion (Ee) 2006.

> [T]hat social security benefits are adequate, which means that […] their level should be fixed such as to amount to reasonable proportion of the previous income and it should never fall below the poverty threshold defined as 50 percent of median equivalised income and as calculated on the basis of the Eurostat at-risk-of-poverty threshold value.

The difference with the European Code and ILO Convention 102 is that the Charter links the benefits to what is considered the poverty threshold. Thus, under the Charter, social security benefits must always be subject to a minimum level. Moreover, if benefits are, nevertheless, below this level, adequate social assistance must be available. This is complementary to the Code and Convention 102, providing for social security benefits at a fixed percentage of previous income, irrespective their actual level and without the additional condition of a safety net.

Then there is the third complementary function to be mentioned, which is phrased in Article 12 paragraph 3, containing an obligation on the Member States to 'endeavour to raise progressively the system of social security to a higher level.' Indeed, this goes further than the preserving function of the normative instruments. States not only have to make sure that the prescribed norms regarding the different social security branches are continuously met, but they also have to work on the extension of their systems – for instance, through ratification of the Protocol to the European Code, or the strengthening of the safety net. Sticking to the minimum norms is not sufficient in view of the Social Charter; a progressive fulfilment of the human right to social security for all must be pursued.

Coming back to the Czech Republic and Estonia, it was established above that the level of benefits is in line with the standards of the European Code for the most part. At the same time, it is true that the Committee of Social Rights supervising the Social Charter has concluded in relation to both countries that the levels of their minimum pensions and unemployment benefits are 'manifestly inadequate.'[82] In addition, regarding the right to social assistance, the Committee has concluded that the minimum benefits are inadequate for single persons.[83] The combination of the two instruments with their specific approaches (normative and universal) that are simultaneously valid, means that the governments are being urged to work on the creation and maintenance of a social security system providing for income replacement at a prescribed level in times of loss of income due to social risks, and at the same time, to provide for social assistance as a safety net at a level above the poverty threshold.

82 ESCR Conclusions (Ee) 2009, Art. 12 (1); ESC Conclusions (Cz) 2009, Art. 12 (1).
83 ESCR Conclusions (Ee) 2009, Art. 13; ESC Conclusions (Cz) 2009, Art. 13.

Additionally, the Social Charter presses states not to settle for the achieved social security provisions, but to continuously develop the system towards a higher level of social protection.

6.4.5 CONCLUSIONS

The case studies show that the social security conventions have contributed to social protection as a result of the different functions they serve. At the same time, it has been found that a social security system in compliance with the conventions does not necessarily prevent a substantial number of citizens being left unprotected against contingency and vulnerability. This is inherent in the normative approach of the conventions that involve concrete legal norms to be applied in full by countries at different stages of development, and that are not focused on objectives to be attained in future. The human rights approach, on the other hand, involves a commitment towards the realisation of social security for everyone. This universal approach does not entail a perfect obligation, but a general address that draws attention to the right in view of its fulfilment. A combination of these two approaches is necessary to achieve an adequate level of social protection to everyone, guaranteeing replacement income as well as ensuring a minimum income for everybody through redistribution of wealth. For the progressive development of social security in the European region, the social security instruments give normative substance to the human right of social security on the one hand, and the Social Charter fills the gaps that are inherent in the normative approach, on the other. Recognition of the interdependence of concrete legal norms as set out in the European Code and ILO Convention 102 and the human rights approach of the Social Charter is of major importance for the fulfilment of the right to social security for everyone as proclaimed by the Universal Declaration of Human Rights.

6.5 CONCLUSIONS ON THE EFFECTIVENESS OF THE INTERNATIONAL STANDARDS

The issue this book seeks to address is, at the end of the day, whether the social security conventions are effective instruments to promote social security at the national level. What can be concluded about the effectiveness of the conventions? Do they, 60 years after their creation, still achieve the intended results of:[84]

- clarity about the substance of the right to social security,
- guidance in the development of national social security systems,

[84] See section 1.2.2.

- promotion of a level playing field in respect of labour costs, and
- in the end, by all these means, promotion of the right to social security for everyone?

Or do the observed application problems confirm that the critics have a point and that the standards are weak and obsolete, at least within the European context?[85] To come to the answer, the four objectives will be subsequently reviewed.

Clarity about the substance of the right to social security

The study shows that the definitions of the different contingencies and the prescribed protection during the occurrence of these social risks have proved to be time resistant and still applicable. In fact, the social security systems in both countries largely coincide with the nine social risks dealt with in ILO Convention 102 and the European Code, which indicates a general consensus about the substance of the right to social security. Moreover, in both countries it was felt that a social security system that complied with the Code was a prerequisite to fitting in with the developed European welfare states. Applying the international standards, at some points unclear terms and concepts appeared to be subject to interpretation problems, which may water down the protecting value of the standards at stake. Cases in point are, for example, the terms 'to avoid hardship' or 'suitable employment'. The use of undefined terms in the conventions has been found to be a downside of their high flexibility. The supervising committees sometimes give a better insight into the meaning of such vague terms through their comments and requests. However, the role of the committees in this respect is open to improvement in terms of authority, clarity, generality, and publicity.

Guidance in the development of national social security systems

It has been demonstrated by the country studies that the international standards are still used as a template for the creation and design of social security systems. The guiding role of the conventions has been confirmed by the different functions they have served during different stages of development of the systems, as discussed in section 5.2. The supervision procedures are important instruments in this respect, firstly because governments are compelled to continuously take the international standards into account, and secondly because the supervising committees give some guidance on particular issues through their critical comments. The various flexibility clauses incorporated into the standards have contributed to their guiding capacity in both countries, since they provide directions in relation to universal as well as occupational insurance schemes, and

85 For the points of criticism, see section 1.1.4.

earnings related as well as flat rate benefits. The study has nevertheless disclosed that the flexibility clauses regarding the prescribed personal scope of maternity and family benefit seem to fall short for at least one of the countries. Although there may be fundamental reasons behind this, it hampers the application of the standards in practice and thus detracts from their steering role.

It has further been described that the conventions give guidance regarding the privatisation of social security schemes by providing a set of common principles on solidarity and state responsibility to be complied with. However, to date these guiding principles have not been followed by either of the countries in relation to the private pension scheme, despite the fact that this would solve the problem of the pensions falling below the international minimum level.

The international standards are based on certain concepts that are considered outdated and not reflecting the current socio-economic reality in developed countries, which hampers their guiding role. This is particularly so in relation to the idea of a male breadwinner and the phenomenon of derived rights for the wives of insured men. It has been discussed that these concepts still apply to less developed countries and, moreover, that they do not involve an erosion of social protection, rather on the contrary, but they do affect the popularity and accessibility of the international standards.

Promotion of a level playing field in respect of labour costs

Regarding the question of whether the conventions create a level playing field indeed, some remarks can be made on the basis of the two country studies. It has been shown that since ratification of the different social security conventions, both countries have kept their social security systems largely in line with the prescribed norms. Additionally, it has been demonstrated that if the countries had not accepted the international standards, their social security provisions would have been less protective at several points, and their systems would have shown larger mutual differences in terms of the number of schemes, as well as in the levels of benefits. Thus, the study confirms the converging role of the international standards and a harmonisation of the social security floor.

At the same time, a critical remark can be made concerning the soft legal character of the standards. The established minimum floor for social security at the national level is not as strong as might be necessary or desirable. Although the conventions are part of the national legal orders and take precedence over national legislation, it has been discussed that in practice there are several escape routes allowing countries to pass over the international obligations. In the first place, non-compliancy remains unsanctioned, and secondly, ratifications can be denounced. On the other hand, it has been emphasised that international law is

dependent on the consent of contracting parties to be bound by that law, and that only in exceptional cases do countries revoke their ratifications. Furthermore, in spite of the absence of legal sanctions, countries generally comply with the accepted standards in order to avoid loss of face in the international arena. In fact, it has been indicated that the soft character of the international standards makes them more attractive from a political point of view.

Promotion of the right to social security for everyone

Taking all this in consideration, it can be affirmed that the international social security standards contribute to social security for everyone, by setting out a clear legal framework for national social security systems and by providing a defined minimum level of protection, the observance of which is continuously monitored by the international organisations. In spite of the observed application problems, the cases of the Czech Republic and Estonia show that social protection has improved on several points because of the commitment to the standards on the one hand, and that this commitment has prevented a decline of social security provisions, on the other. At the same time, it has been recognised that in spite of compliance with the international standards, poverty rates can be high because the norms leave room for large sections of the population not being covered by the different social security schemes. To combat this coverage gap, commitment to the European Social Charter prescribing a progressive fulfilment of the right to social security is additionally necessary.

Imperfect, but effective

It has to be concluded that the answer to the last part of the research question, namely, what the observed application problems mean for the effectiveness of the international standards, might not be so straightforward as one would wish, since there are different sides to it. For sure, the study has provided proof that in present times the international standards indeed contribute to social security, both through pushing for more protection, and by preventing a regression. In this respect, the two studied cases can be considered exemplary, not only for future EU accession states starting from a poor point of departure in a social respect, but also for old Member States with more developed social security systems that are facing cuts in public expenditure. At the same time, in the study several weak points of the conventions have been identified that confirm stated points of criticism and hamper the application of the standards and thus, their effectiveness.

In the end, the value one would attach to the social security conventions highly depends on one's expectations and perspective. The international standards are not the one and only answer to insufficient social protection; their application as

such does not prevent high poverty rates, and commitment to the norms does not make international competition on labour costs disappear like snow in summer. What the present treatise shows is that the conventions, in spite of their shortcomings at different points, can play, and do play, a part in the development of national social security systems and in the establishment of a common social security floor. They may not be perfect, but they do contribute to national social security, and there is a broad consensus on the minimum standards they provide. From this perspective, I dare to conclude that despite the observed application problems, the conventions are effective instruments for promoting the fundamental right to social security within the framework of the European Union.

SUMMARY

INTRODUCTION

The Universal Declaration of Human Rights, adopted in 1948, was the first international instrument recognising the right to social security as a human right. Over the course of time, the content of the right evolved, resulting in the adoption by the International Labour Organisation (ILO) of Convention 102 on Minimum Standards of Social Security in 1952. This Convention defines the nine social risks that were generally accepted at the time. It sets out standards for medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit, and survivors' benefit. With the international social security standards, the ILO had the objective of promoting the right to social security for everyone, through:

- defining the right to social security;
- guiding nations in the creation or reconstruction of their social security systems;
- providing a basis for higher standards; and
- preventing (international) commercial competition on the account of workers.

ILO Convention 102 is generally considered the flagship convention pertaining to social security. With the adoption of this instrument, the ILO switched from its former way of standard setting, focussing on the insurance of specific categories of workers in specific fields of industry, to a method that aimed at social security for all. Furthermore, on the basis of Convention 102, new instruments providing higher standards have been developed, both by the ILO, and by the Council of Europe.

Within the context of the European Union, the right to social security is not regulated; the design of the national social security systems is left to the Member States, including the determination of the range of risks covered and the level of the benefits. Yet, in the Treaty of Amsterdam reference was made to the European Social Charter, and implicitly to ILO Convention 102, a reference now included in the Lisbon Treaty. The underlying idea was to provide a guideline for accession countries for their social policy and social security legislation. At the same time,

the international standards are subject to criticism at various levels. For example, they are argued to be out-of-date, lacking the flexibility needed for adapting social security systems to changed economic and societal conditions, not tailored to the post-industrial society, discriminatory, prescribing benefits that are too low for the European context, lacking legal power, and not contributing to social protection for all. These contradictory messages highlight the need for in-depth research on international social security standards within the context of the European Union. This book meets this need by providing a systematic study of the application of the international social security standards and their effect on social security legislation in two EU Member States that have been rethinking and reconstructing their social security systems over the past two decades. Furthermore, with a review of the research results against the background of current trends in social security, the study seeks to contribute to the discussion about the international social security standards and their possible value for the promotion of social security in the EU context.

The central question of this study is the following: (a) What is the effect of international standards on social security legislation in the Czech Republic and Estonia, what application problems arise, and (b) what do these problems mean for the effectiveness of the international standards? Situated within the field of social security law, the question implies legal research in two directions. The first part of the question addresses social security legislation at the national level, namely, how the law relates to, and is influenced by, international standards. The effect of international standards is assessed on the basis of a comparison of national social security law with the international standards. On the basis of the findings from the country studies, the second part of the research question involves a review of the international social security standards themselves, in terms of whether they are suitable and adequate to meet their objectives in present day European countries.

The structure of the book is as follows. First, in Chapter 2, an analysis of the international social security standards is provided to make clear their content and meaning. The following chapters contain the country studies of the Czech Republic and Estonia. Both chapters start with a description of the developments in social security after the establishment of the new republics, with a focus on international influences, followed by a systematic comparison of social security legislation with the standards as elaborated in Chapter 2. In Chapter 5, conclusions are drawn and reviewed from different perspectives on the effect of international standards on the national social security systems. Finally, Chapter 6 comprises conclusions and discussions on the applicability and adequacy of the international standards in the two countries.

INTERNATIONAL SOCIAL SECURITY STANDARDS

ILO Convention 102 is analysed as a starting point for the assessment of national legislation. The ILO principle of tripartism is one of the important concepts that are incorporated into the Convention. Other general features are the different flexibility clauses and the formulation of a set of common principles on solidarity and state responsibility that extents to all benefits. Furthermore, for each risk, the Convention prescribes concrete rules in relation to the material scope, the personal scope, the nature, level, and duration of the benefit, and the qualifying conditions. An elaborate supervision system for all ILO instruments, including the social security conventions, is firmly anchored in the ILO Constitution.

With regard to the *material scope*, the definitions of the nine contingencies are generally clear and unambiguous, although at some points they leave room for interpretation at the national level. Some terms are especially vague, such as 'suitable employment' or 'a widow presumed to be incapable of self-support', which makes it difficult to determine the exact scope of the risk concerned.

The Convention provides for different options in relation to the *personal scope* of social security schemes, which makes it applicable to countries with differing welfare system designs. For countries with systems that are based on the Bismarckian insurance concept, the option of coverage of categories of employees is most expedient, while states with social democratic welfare models may prefer the option of coverage of categories of the economically active population, or of all residents. The possibility in relation to most risks of covering all residents subject to a means test is especially useful for liberal welfare states providing universal means tested benefits as a last resort, when all other resources have been exhausted. Although the Convention first and foremost reflects the insurance methods applied in the 1950s, the given options for personal coverage are flexible enough to be applied in the present time as well.

The Convention also gives different options regarding the calculation of *benefits* in order to assess compliance with the prescribed norms. The norms consist of a fixed percentage of wages, which makes them attainable for highly, as well as less developed, countries. The benefits are calculated on the basis of the average wage of a 'standard beneficiary', defined, in respect of most risks, as a male worker with a dependent wife and two children. The calculation method varies according to the type of scheme, for example, an income related, flat rate, or universal scheme. It must be noted that the different methods of calculation and the determination of the wage of a standard beneficiary are very complex, and difficult to perform in practice. However, for a uniform application of the norms, and for the supervising bodies to compare the benefits provided in the countries

with the given norms, a fixed, but at the same time flexible, calculation method is necessary. The duration of the different benefits is formulated as 'throughout the contingency', but may often be limited to a prescribed number of days, weeks, months, or years, depending on the nature of the risk. Several flexibility clauses have been inserted at this point as well, allowing for a fixed duration per calendar year, or per instance of occurrence of the risk.

The *qualifying conditions* are different for each risk. In general, for short-term risks, such as sickness and unemployment, a period of contribution, employment or residence may be prescribed that is no longer than necessary to prevent abuse. The determination of the exact length of such a period is left to the national legislature, and the Convention does not provide much guidance on this point. For the long-term risks, for example, old age or invalidity, the Convention sets out specific maximum periods that may not be exceeded.

THE CZECH REPUBLIC

The Velvet Revolution in 1989 marked the end of the Soviet system in Czechoslovakia, and the beginning of serious economic and social reforms by the socio-liberal federal government. After the split of the Czechoslovakian federation in 1993, the initially developed Scenario of Social Reform became overshadowed by the political focus on economic progress. The reform of the social security system turned out to be a slow and lengthy process, not only because of economic restraint, but, most importantly, because of the weak coalition structure of the subsequent Czech governments and a series of minority cabinets. The reform steps that were taken were motivated by internal factors, such as historical background, demographic changes, and economic and political realities for the greater part, but were also influenced by international organisations.

The international influence on social security reform mainly came from the ILO, the Council of Europe and, at a later stage, the European Union. First of all, shortly after regaining independence, the federal government strengthened the ties with the ILO. The ILO was consulted about the Scenario of Social Reform, and three social security conventions were ratified (C102, C128, and C130). At that point, it was established that the proposed social security benefits would exceed the standards of the ILO conventions. Some years later, in view of EU accession and under pressure from the European Commission to ratify the human rights instruments of the Council of Europe, the Czech government accepted the Social Charter, which was followed by the ratification of the European Code of Social Security in 2004. Over the years, legislation has been

kept in line with the Code and the relevant ILO conventions to a large extent. When, in 2004, the amount of the pensions dropped below the level set by ILO Convention 128, measures were taken to restore compliance within one year. Apart from that, in principle, all bills affecting social security provisions are examined with regard to inconsistencies with the international standards.

In accordance with the Constitution of the Czech Republic, international treaties are part of the Czech legal order and take precedence over national law. However, there is a lack of clarity about the status of many treaties, which puts the ILO social security conventions and the European Code in an unclear position. This may have contributed to the fact that they have yet to be invoked before a court, and that these instruments are hardly used in court proceedings, either as a legal basis for complaint, or as a tool for interpretation of national legislation.

The comparison of the Czech social security provisions with the accepted international standards shows that the Czech Republic complies with these standards in most respects. However, several conflicts have been observed as well. In respect of the *material scope* of the different social security schemes, there is one problematic issue, namely, concerning unemployment benefit. It has been highlighted by the ILO Committee of Experts on the Application of Conventions and Recommendations that the interpretation of 'suitable employment' may be too strict, since the Czech legislation does not take into account the qualifications and skills of a jobseeker, or the length of their previous employment when offering a job, not even during the first three months of unemployment.

The *personal scope* of the different schemes stands out as particularly generous. On this point, the Czech regulations generally meet not only the ratified standards, but also the higher standards that are not ratified. Still, two remarks can be made. The first remark is that under the Czech legislation persons are insured on an individual basis. This sometimes causes a tension with the breadwinner concept of the conventions, because in respect of certain risks, it is required that the wives of insured persons are covered by their spouses′ insurance. The second remark concerns family benefits. The European Code does not leave room for a means test in relation to family benefits, whereas Czech child benefit is only granted to families with an income up to 2.4 times the subsistence level. Thus, in spite of the broad personal scope of the schemes in general, some conflicts with the international standards still remain.

With regard to the *level of the benefit*, the comparison shows several conflicts, some of which emerged as a result of economic measures taken in 2009 and 2010. The old-age pension no longer meets the level of Convention 128, and has even fallen below the minimum level of the European Code. Sickness benefit and child

benefit are just above the level of the ratified instruments, and, in general, the level of all benefits shows a downward trend. Furthermore, the introduction of patient fees for medical services in 2008 has caused a conflict in relation to medical care in the case of pregnancy and childbirth, since under the international standards, cost-sharing in the case of maternity medical care is not allowed.

The *duration of the different benefits* is largely in line with the ratified standards and, in most cases, also with one or more higher standards. However, in two cases a minor conflict with the ratified conventions has come to the fore. Firstly, sickness benefit is granted for a maximum period of one year, which is precisely the period required by Convention 130. Under the Czech scheme, if a new case of incapacity for work occurs within one year of the first day of the previous sick leave, the maximum period of one year for sickness benefit includes both periods of sick leave, whereas Convention 130 requires the benefit to be paid for one year in each case of sickness. A similar problem is mentioned in relation to unemployment benefit, which must be paid for a period of 13 weeks within a period of 12 months, according to the Code. In the Czech Republic the benefit is limited to five months within three years, except in the case of an unbroken period of employment of at least six months, in which case a new right arises.

Finally, as regards the *qualifying conditions* required under the Czech social security schemes, two conflicts with the international standards have come to the fore. First, since the amendments of the Pension Insurance Act of 2010, a reduced pension is granted only after the completion of 20 years of insurance, whereas both the Code and Convention 128 provide for such benefit to be granted after 15 years of contribution or employment. Secondly, for entitlement to a family benefit, a qualifying period of one year of residence is required for foreigners. However, under the Code, only six months of residence may be required.

ESTONIA

After the collapse of the Soviet regime in 1991, the Estonian government embarked upon radical economic reform. The new free market economy was expected to give the people what they had been deprived of under the rule of Moscow: wealth and individual freedom. Changes in social security took place in the shadow of economic reform, and the protection against social risks was not a political priority. The strong desire to take part in the European Union led to a greater focus on international human rights instruments, including the European Social Charter. After having ratified the revised version of the Social Charter in 2000, the next step would be the acceptance of the European Code of Social Security. In order to meet the standards of the Code, the different parts of

the social security system were compared with the standards of this instrument, and several adjustments were made, such as an increase in pensions, the introduction of a fixed indexation formula for pensions, and the creation of an unemployment insurance scheme. As a result, Estonia was able to undertake a generous ratification of the Code in 2004, only leaving aside the part on employment injury. None of the ILO social security conventions have been accepted. In accordance with the Estonian Constitution, the European Code is part of the Estonian legal order and takes precedence over national law. However, although several ILO Conventions on labour law, as well as the Social Charter, have been invoked before court, the European Code has not played a role in court proceedings to date.

The comparison of the Estonian social security provisions with the standards given in the European Code of Social Security shows that Estonia, by and large, complies with these standards. Still, several deficiencies have come to the fore as well. There are a few issues regarding the *material scope* of the different schemes. Firstly, as regards invalidity benefits, only total incapacity for work (100 percent) gives right to a full invalidity pension, whereas the Code prescribes that such a pension must also be provided in the case of incapacity for work to a lesser extent, to be prescribed by national regulations. Secondly, the definition of 'widow' for eligibility for a survivors' pension has been found to be too strict by the supervising Committee of Ministers.

The *personal coverage* of the different schemes in relation to most of the ratified parts – namely, all employees and self-employed persons – exceeds the standards of the Code, and complies even with the higher standards of ILO standards, and/or the Protocol to the Code and the Revised Code. There is one exception, namely, in relation to maternity benefit. According to the international standards, the wives of insured spouses should come under their spouse's insurance for medical care, while in Estonia everyone is individually insured. However, because all pregnant women have been considered equal to insured persons since 2009, this conflict has been resolved in practice.

In respect of the *level of the benefit*, there are several issues in relation to the European Code. A case in point is the regulation on out-of-pocket payments for medical care. According to the Code, cost-sharing is allowed, only if the financial burden does not cause hardship, and it is totally prohibited for pregnancy related care. It has been shown in the Estonian case that health expenditure accounts for an increasing proportion of out-of-pocket payments, which especially affects low-income households that include pensioners and disabled or chronically ill persons. It is questionable, therefore, whether these rules on cost-sharing are in line with the Code. The obligation for pregnant women, during the first twelve weeks of pregnancy, to pay fees for home visits by a family doctor and ambulatory

specialist care, which was in conflict with the Code, was repealed in 2009 in response to critical comments by the Committee of Ministers on this point. Another point of particular interest in respect of the level of benefits is the amount of the old-age pension. Although the replacement rate as set by the Code was still met in 2007, it has been made clear that it will steadily decrease due to the calculation method, and that it will drop below the minimum standard in future if no measures are taken.

As regards the *duration of the benefits*, the Estonian provisions are all in line with the Code, and, in most cases, also with higher standards. The same counts for the *qualifying conditions*, although the qualifying period of fourteen days for health insurance, introduced for administrative reasons, is questionable.

THE EFFECT OF THE INTERNATIONAL STANDARDS ON NATIONAL LEGISLATION

The country studies show that the international standards have influenced the social reform processes in both countries in various ways. In fact, during the different stages of the reform processes, the standards served different functions. They served as a *benchmark* for the reform and creation of the different social security schemes, especially in Estonia. After ratification, they had a *preserving* function, by providing a fixed minimum level of social security to be respected by the legislature, the executive bodies, and the judiciary. The international standards, with their inherent principles on solidarity and state responsibility, also *counterbalanced* (and may still counterbalance) neoliberal policy aiming at a reduction in state responsibility and a shifting of social risks from public to private responsibility. The very same principles may serve as a *bridge* between private social security provisions, such as private pension schemes and the ideal of solidarity based insurance schemes. Implementation of a private scheme along the lines of the prescribed principles on solidarity and state responsibility creates a compromise between individual and collective responsibility for social risks. Finally, the establishment of a national floor for social security, through the ratification of the international standards, implies *harmonisation* of the social security systems of all contracting parties – they all share the same floor. The effect of the different functions largely depends on national politics, most importantly, on how seriously the international obligations are taken.

The effect of international standards is not only determined by the reach of their functions, but it depends first and foremost on their being ratified or not. Several obstacles to ratification have come to the fore in both countries: lack of knowledge, the level of the benefits not being attained, reluctance towards new

international obligations, administrative burdens, outdated terminology and differing political perceptions, and the superfluousness of Convention 102 next to the European Code.

Furthermore, several conflicts of national legislation with the international standards have been established. Apparently, on these points the standards have not served their functions well, or they are difficult to apply. The problematic issues are categorised into three clusters. The first category of problems can be traced back to economic reasons; they emerged over the course of time as a result of economic measures. The second category involves issues that relate to changed societal perceptions since the formulation of the standards in the mid-twentieth century. The entrance of women into the labour market, the individualisation of social rights, and an increasing emphasis on self-responsibility for social risks are cases in point. The third category contains issues that cannot be connected (on the basis of this study) to a specific underlying reason, and/or have a technical nature.

Some conclusions on the effect of the international standards on national social security legislation can be drawn. First, the existing ratification obstacles and application problems show that the different functions of the standards fall short in some cases. Nevertheless, the country studies show that they still have contributed to social protection in both the Czech Republic and Estonia. Through their different functions, they have impacted on national social security legislation in various ways, not least by providing an internationally accepted minimum level of social security to be reached and maintained.

In view of the future, it can be concluded that the promotion of the international standards within the context of the European Union would not only advance national social security legislation, but would also strengthen a common floor for social security. This is particularly relevant in the light of the economic downturn and future EU accessions. Promotion of the standards would include addressing the obstacles to ratification and solving the observed application problems. Paying systematic attention to the norms at the EU level and putting pressure on Member States to respect the norms, not only before, but also after EU accession, would seem to be a prerequisite in this respect.

THE INTERNATIONAL STANDARDS UNDER REVIEW

As shown above, in the two studied countries the international standards are being properly applied at many points, and have contributed, and still contribute, to social protection. It has also been shown, however, that their functions fall

short on certain points, due to various reasons. Several of the observed problematic issues relate to the voiced criticism against the international social security standards as mentioned in the introduction. This prompts a review of the international standards in light of the noted controversy, and an assessment of whether their objectives are still met, 60 years after their creation.

One frequently voiced criticism is that the conventions are outdated and that they do not keep up with new developments in social security. The country studies confirm that they are indeed out-of-date on specific points. The male breadwinner concept, the standard beneficiary having two children, and the requirements of derived rights for the wives of insured men, do not concur with the socio-economic reality of our present day European welfare states. These outdated concepts detract from the credibility and popularity of the standards. Yet, it must be borne in mind that the conventions are global instruments, and that the situation is different in many less developed countries. Moreover, even in EU Member states, the wages of men are higher than those of women; taking the wage of men as a basis for the calculation of benefits stands for better protection.

In relation to new developments with regard to the design of social security schemes, the study shows that the international standards are flexible enough to be applied in different types of welfare states. Furthermore, they leave room for new methods of financing, such as privatisation, while, at the same time, safeguarding solidarity and state responsibility to a certain extent. However, the implementation of a private scheme in accordance with the international standards needs careful consideration and is not easy to accomplish. In fact, they have not been used by either of the countries in respect of the privatisation of their pension schemes, despite the fact that this would solve the problem of the pensions falling below the prescribed minimum level.

As regards the alleged lack of legal power of the international social security instruments, several remarks can be made. First, the standards are legally binding and part of the national legal order after their ratification in both countries. Still, in spite of the legal obligation, is has been shown that the standards are not respected in all cases, This indicates that, from a legal point of view, the conventions are rather week indeed. Although the conventions are part of the national legal orders and take precedence over national legislation, there are several escape routes, allowing countries to get out of the international obligations. In the first place, non-compliancy remains unsanctioned, secondly, ratifications can be denounced, and, thirdly, national judges have, thus far, been reluctant to use the standards in court procedures. At the same time, it has been found that only in exceptional cases do countries revoke their ratifications. Furthermore, in spite of the absence of legal sanctions, countries generally

comply with the accepted standards in order to avoid loss of face in the international arena. In fact, it has been indicated that it is precisely the soft legal character that makes the standards strong from a political perspective.

The criticism that the international standards do not achieve social protection for all touches, first and foremost, on the prescribed personal scope. According to the conventions, if an insurance scheme is based on employment, only 50 percent of all employees have to be covered, or 20 percent of all resident. This means that the part of the population not covered can fall into poverty without conflicting with the international standards. This coverage gap is inherent in the normative approach of the instruments. This approach involves concrete legal norms to be applied in full by countries at different stages of development, and does not focused on objectives to be attained in future. It is, rather, the human rights approach that involves a commitment towards the realisation of social security for everyone. Such a universal approach does not entail a perfect obligation, but it generally addresses the right to social protection. A combination of these two approaches is necessary to achieve social protection for everyone, guaranteeing replacement income, as well as ensuring a minimum income for everybody through redistribution of wealth. For the progressive development of social security in the European region, the conventions give normative substance to the human right of social security on the one hand, and it is the Social Charter that fills the gaps that are inherent in the normative approach, on the other.

Clear-cut conclusions on the effectiveness of the international standards are not easy to draw. Do they still achieve their intended objectives, 60 years after their creation? With regard to the clarity of the substance of the right to social security they should provide, the country studies show that the definition of the different risks have proved to be time resistant and, indeed, still applicable. Not only do both social security systems largely coincide with the prescribed nine social risks, it was also felt that a system that complied with Convention 102 and the European Code was a prerequisite to fitting in with the developed European welfare states. The frequent use of undefined terms in the conventions is considered a downside of their high flexibility, and the role of the supervising committees, in this respect, is open to improvement in terms of authority, clarity, generality, and publicity.

Regarding the objective of the international standards to provide guidance in the development of national social security systems, it can be concluded that they still serve their function. It has been demonstrated by the country studies that the standards are still fit to be used as a template for the creation and design of social security systems. It has further been described that they give guidance regarding the privatisation of social security provisions, by setting out principles on solidarity and state responsibility. It must be recognised, however, that these

directions do not seem very practicable. On some other points, the guiding function of the international standards is not found to be satisfactory, because certain concepts are used that do not reflect the current socio-economic reality in developed countries. This is particularly so in relation to the idea of a male breadwinner and the phenomenon of derived rights for the wives of insured men. It has been discussed that these concepts still may apply to less developed countries and, moreover, that they do not involve an erosion of social protection, rather, on the contrary. Still, the use of outdated concepts does affect the popularity and accessibility of the international standards.

Regarding the question of whether, indeed, the conventions create a level playing field, it has been shown that since ratification of the different social security conventions, both countries have kept their social security systems largely in line with the minimum prescribed norms. What is more, if the countries had not accepted the international standards, their social security provisions would have been less protective on several points, and their systems would have shown larger mutual differences in terms of the number of schemes, as well as in the levels of benefits. Thus, the study confirms the converging role of the international standards and a harmonisation of the social security floor. At the same time, a critical remark can be made concerning the soft legal character of the standards. The established minimum floor for social security at the national level is not as strong as might be necessary, or desirable.

In conclusion, the study has provided proof that the international social security standards contribute to social security for everyone, by setting out a clear legal framework for national social security systems, and by providing a defined minimum level of protection, the observance of which is continuously monitored by the international organisations. In fact, they both push for more protection, and prevent regression. In this respect, the two studied cases can be considered exemplary, not only for future EU accession states starting from a poor point of departure in a social respect, but also for old Member States with more developed social security systems, that are facing cuts in public expenditure.

At the same time, in the study several weak points of the conventions have been identified that confirm stated points of criticism and hamper the application of the standards and thus, their effectiveness. It must be recognised that the international standards are not the one and only answer to insufficient social protection; their application, as such, does not prevent high poverty rates, and commitment to the norms does not make international competition on labour costs disappear like snow in summer. The present treatise shows, however, that the conventions, in spite of their shortcomings on different points, can play, and do play, a part in the development of national social security systems and in the establishment of a social security floor within the framework of the European Union.

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APPENDICES

APPENDIX 1. SUMMARY OF COMPARISON OF NATIONAL LEGISLATION WITH INTERNATIONAL SOCIAL SECURITY STANDARDS

MEDICAL CARE

	Czech Republic (ratified: ILO C102, ECSS, ILO C130)	Estonia (ratified: ECSS)	ILO Convention 102 (1952) / ECSS (1964)	ECSS Protocol (1964)	ILO Convention 130 (1969)	ECSS Revised (1990)
Material scope	Costs of health care for maintaining or improving the insured person's health condition. Any disease or injury, regardless of its causes, and pregnancy, childbirth and its consequences are covered by the insurance.	Healthcare expenses for prevention and treatment of a disease, and for pregnancy and confinement and their consequences.	Any morbid condition, whatever its cause, and pregnancy and confinement and their consequences, requiring medical care of a preventive or curative nature.	Ditto.	Need for medical care of a curative nature and, under prescribed conditions, of a preventive nature.	Ditto.
Personal scope	– All permanent residents, and – Persons who are not permanent residents but who are employed by an employer who has a seat or permanent residence in the Czech Republic.	– All employees for whom the employer has the duty to pay social tax, and – All self-employed persons who pay social tax, and – Categories of persons for whom the State pays social tax, and – Categories of persons who are considered equal to insured persons (e.g. children up to 19 years of age).	– Prescribed classes of employees, constituting not less than 50% of all employees, and their wives and children, or – Prescribed classes of the economically active population, constituting not less than 20% of all residents, and their wives and children, or – Not less than 50% of all residents.	– Prescribed classes of employees, constituting not less than 80% of all employees, and their wives and children, or – Prescribed classes of the economically active population, constituting not less than 30% of all residents, and their wives and children, or – Not less than 65% of all residents.	– All employees, including apprentices, and their wives and children, or – Prescribed classes of the economically active population, constituting not less than 75% of the economically active population, including their wives and children, or – Not less than 75% of all residents.	– All employees, including apprentices, and their dependent spouses and their children, or – All economically active persons, and their dependent spouses and their children, or – All residents. – Possibility of excluding 5% of all employees, or of 10% of the economically active population or of all residents.

Benefit: range of care	– Preventive care; – General practitioner care, including home visits; – Specialist care in hospitals and outside; – Pharmaceuticals as prescribed by a doctor; – Hospitalisation; – Prenatal, confinement and postnatal care, and hospitalisation where necessary; – Dental care; – Medical rehabilitation; – Transport of patients; – Spa care. – Patient fees for medical services are required.	– Preventive care health checkups; – General practitioner care, including home visits; – Specialist care in hospitals and outside; – Pharmaceuticals as prescribed by a doctor; – Hospitalisation; – Prenatal, confinement and postnatal care, and hospitalisation where necessary; – Dental care for children. – Out-of-pocket payments for medical services are required.	– Preventive care; – General practitioner care, including home visits; – Specialist care in hospitals or outside; – Essential pharmaceutical supplies as prescribed by medical or other qualified practitioners; – Hospitalisation where necessary; – Prenatal, confinement and postnatal care, either by medical practitioners or qualified midwives, and hospitalisation where necessary. – Cost-sharing is allowed in cases of morbid conditions, but shall not cause hardship.	– The benefits enumerated in Convention 102 and also: – Dental care for children; – Necessary pharmaceutical supplies (whether or not prescribed by a doctor). – Cost-sharing is allowed in cases of morbid conditions to a fixed extent, but shall not cause hardship.	– The benefits enumerated in Convention 102 and also: – Dental care; – Medical rehabilitation, including prosthetic and orthopaedic appliances. – Cost-sharing is allowed, but shall not cause hardship and shall not prejudice the effectiveness of medical and social protection.	– The benefits enumerated in Convention 102 and also: – Dental care; – Medical rehabilitation, including prosthetic and orthopaedic appliances, and medical aids; – Transport of patients. – Cost-sharing is allowed, but shall not cause hardship and shall not prejudice the effectiveness of medical and social protection.
Benefit: duration	Throughout the contingency.	Ditto.	– Throughout the contingency, but in cases of morbid conditions the benefit may be limited to 26 weeks in each case; – The duration of benefits has to be prolonged as long as the beneficiary is entitled to sickness benefit or needs prolonged care.	Throughout the contingency, but hospital care may be limited to 52 weeks in each case or to 78 weeks in any consecutive period of three years.	Throughout the contingency, but may be limited to 26 weeks if the beneficiary ceases to belong to the categories of persons protected, provided that the benefit shall not cease as long as the beneficiary is entitled to sickness benefit or if the disease is recognised as entailing prolonged care.	Throughout the contingency.

Qualifying periods	No qualifying period.	– For employees and self-employed persons: 14 days of social tax; – For other insured persons: no qualifying period.	Possibility of prescribing a qualifying period as may be considered necessary to preclude abuse.	Ditto.	Possibility of prescribing a qualifying period, but such a period shall not deprive of the right to benefit.	Possibility of prescribing a qualifying period as may be considered necessary to preclude abuse.

SICKNESS BENEFIT

	Czech Republic (ratified: ILO C102, ECSS, ILO C130)	**Estonia (ratified: ECSS)**	**ILO Convention 102 (1952)/ECSS (1964)**	**ECSS Protocol (1964)**	**ILO Convention 130 (1969)**	**ECSS Revised (1990)**
Material scope	Temporary incapacity for work due to an illness, injury or quarantine and involving suspension of earnings.	Temporary incapacity for work on the basis of a medical certificate for sick leave and involving suspension of earnings.	Incapacity for work resulting from a morbid condition and involving the suspension of earnings.	Ditto.	Incapacity for work resulting from sickness and involving the suspension of earnings.	Ditto.
Personal scope	– All employees with a minimum income of a fixed amount (CZK 2,000 in 2009). – Self-employed persons can participate on a voluntary basis.	– All employees for whom the employer have to pay social tax, and – All self-employed persons who have to pay social tax.	– Prescribed classes of employees, constituting not less than 50% of all employees, or – Prescribed classes of the economically active population, constituting not less than 20% of all residents, or – All residents whose means during the contingency do not exceed prescribed limits.	– Prescribed classes of employees, constituting not less than 80% of all employees, or – Prescribed classes of the economically active population, constituting not less than 30% of all residents, or – All residents whose means during the contingency do not exceed prescribed limits.	– All employees, including apprentices, or – Prescribed classes of the economically active population, constituting not less than 75% of the whole economically active population, or – All residents whose means during the contingency do not exceed prescribed limits.	– All employees, including apprentices, or – Prescribed classes of the economically active population, constituting not less than 80% of the total economically active population. – Possibility of excluding 10% of all employees.

Benefit: amount	– Periodical payments, corresponding to 60% of the reference wage. – In the case of death of the beneficiary, a flat rate funeral grant.	– Periodical payments, corresponding to 71.2% of the reference wage. – In the case of death of the beneficiary, a flat rate funeral grant.	Periodical payments, corresponding to at least 45% of the reference wage.	Periodical payments, corresponding to at least 50% of the reference wage.	– Periodical payments, corresponding to at least 60% of the reference wage. – In the case of death of the beneficiary, benefit for funeral expenses.	– Periodical payments, corresponding to at least 65% of the reference wage. – In the case of death of the beneficiary, benefit for funeral expenses.
Benefit: duration	– Employer continues to pay (part of) the wage during the first two weeks of sickness, and – Sickness benefit is granted for 52 weeks maximum in one calendar year.	– Waiting period of three days; – Employer continues to pay (part of) the wage during the fourth until the eighth day of sickness, and – Sickness benefit is granted for 26 weeks in each case of sickness, or – 250 days maximum in one calendar year; – Employer is allowed to terminate the employment contract after 4 months of sickness of the employee, which implies cancelation of the sickness benefit.	– Throughout the contingency, but the benefit may be limited to at least 26 weeks in each case of sickness. – Possible waiting period of three days maximum.	– Throughout the contingency, but the benefit may be limited to at least 52 weeks in each case of sickness, or – To at least 78 weeks in any consecutive period of three years. – Possible waiting period of three days maximum.	– Throughout the contingency, but the benefit may be limited to at least 52 weeks in each case of sickness. – Possible waiting period of three days maximum.	– Throughout the contingency, but the benefit may be limited to at least 52 weeks in each case of sickness, or – To at least 78 weeks in any consecutive period of three years. – Possible waiting period of three days maximum.
Qualifying periods	Qualifying period of 14 days of employment.	Qualifying period of 14 days of payment of social tax.	Possibility of prescribing a qualifying period as may be considered necessary to preclude abuse.	Ditto.	Ditto.	Ditto.

UNEMPLOYMENT BENEFIT

	Czech Republic (ratified: ECSS, ILO C44)	Estonia (ratified: ECSS)	ILO Convention 102 (1952) / ECSS (1964)	ECSS Protocol (1964)	ILO Convention 168 (1988)	ECSS Revised (1990)
Material scope	Unemployment, defined as suspension of earnings, due to the absence of working activities in the case of a person protected who is registered as a job-seeker with a Labour Office for assistance to find suitable employment.	Loss of income due to unemployment.	Suspension of earnings, due to inability to obtain suitable employment in the case of a person protected who is capable of, and available for, work.	Ditto.	Total unemployment, defined as a loss of earnings due to inability to obtain suitable employment in the case of a person protected who is capable of, available for, and actually seeking, employment.	– Total unemployment, defined as absence of earnings due to inability to obtain suitable employment in the case of a person protected who is capable of, available for, and actually seeking, employment. – Unemployment, other than total, defined as a loss of earnings, due to a reduction of working hours and/or due to the inability to obtain suitable full-time employment while capable of, available for, and actually seeking, full-time employment.
Personal scope	– All persons with permanent residence in the Czech Republic who have been in employment or an equivalent labour relation, and	All employees, including public employees.	– Prescribed classes of employees, constituting not less than 50% of all employees, or – All residents whose means during the contingency do not exceed prescribed limits.	– Prescribed classes of employees, constituting not less than 55% of all employees, or – All residents whose means during the contingency do not exceed prescribed limits.	– Prescribed classes of employees, constituting not less than 85% of all employees, including public employees and apprentices, or	– All employees, including apprentices, or – Prescribed classes of the economically active population, constituting not less than 70% of the total economically active population;

	– All self-employed persons who are obliged to pay contributions for old-age pension and state employment policy.				– All residents whose means during the contingency do not exceed certain limits.	– Additional flexibility clauses.
Benefit: amount	Periodical payments, corresponding to 47.4% of the reference wage.	Periodical payments, corresponding to 52% of the reference wage.	Periodical payments, corresponding to at least 45% of the reference wage.	Periodical payments, corresponding to at least 50% of the reference wage.	– Periodical payments, corresponding to at least 50% of the reference wage. – After the initial period, possibility of applying special rules of calculation.	– In the case of total unemployment: periodical payments, corresponding to at least 65% of the reference wage. – In the case of partial unemployment: periodical payments constituting equitable compensation for loss of earnings, such that the sum of earnings and the benefit at least equals 65% of the reference wage.
Benefit: duration	– Benefit is granted for five months maximum or until the end of retraining; – For persons between 50 and 55 years of age, benefit is granted for eight months;	Benefit is granted for: – 180 days within a period of 12 months if the insurance period of the beneficiary is shorter than 56 months; – 270 days within a period of 12 months if the insurance period of the	– Where classes of employees are protected: at least 13 weeks within a period of 12 months (ECSS: or in each case of suspension of earnings). – Where all residents are protected and the benefit is subject to a means test,	– Where classes of employees are protected: at least 21 weeks within a period of 12 months or in each case of suspension of earnings. – Where all residents are protected and the benefit is subject to a means test,	– Initial duration of the benefit has to be at least 26 weeks in each spell of unemployment, or 39 weeks within a period of 24 months. – If unemployment is continuing beyond this initial period, the	– At least 39 weeks within a period of 24 months or in each case of unemployment. – Possible waiting period of three days in each case of unemployment, or six days within a period of 12 months.

	– For persons between 55 years and the pensionable age, benefit is granted for 11 months. – If a second spell of unemployment occurs within a period of three years, the benefit is granted only after an employment period of at least six months.	beneficiary is 56-110 months; – 360 days within a period of 12 months if the insurance period of the beneficiary is 111 months or longer. – Waiting period of seven days.	at least 26 weeks within a period of 12 months. – Where the duration of the benefit depends on the length of the contribution period, the average duration of benefit shall be at least 13 weeks within a period of 12 months. – Possible waiting period of seven days maximum.	throughout the contingency. – Where the duration of the benefit depends on the length of the contribution period, the average duration of benefit shall be at least 21 weeks within a period of 12 months. – Possible waiting period of three days in each case of suspension of earnings, or six days within a period of 12 months.	duration of benefit may be limited to a prescribed period and may be calculated in light of the resources of the beneficiary and their family. – Possible waiting period of seven days maximum.	
Qualifying periods	Qualifying period of 12 months of employment within three years prior to registration with the Labour Office.	Qualifying period of 12 months of payment of insurance contribution within two years prior to registration with the Labour Market Board.	Possibility of prescribing a qualifying period as may be considered necessary to preclude abuse.	Ditto.	Ditto.	Ditto.

OLD-AGE BENEFIT

	Czech Republic (ratified: ILO C102, ECSS, ILO C128)	Estonia (ratified: ECSS)	ILO Convention 102 (1952)/ECSS (1964)	ECSS Protocol (1964)	ILO Convention 128 Part III (1964)	ECSS Revised (1990)
Material scope	– The prescribed age for men and women without children or with one child is 65 years; – For women with two or more children, the pensionable age ranges from 62 to 64 years; – Possibility for early retirement after a prescribed number of insured years.	– The prescribed age is 65 years; – Possibility for early retirement under prescribed conditions.	– Survival beyond 65 years of age, or – ILO C102: a higher age may be prescribed with due regard to the working ability of elderly persons in the country; – ECSS: such higher age that the number of residents having reached that age is not less than 10% of the number of residents under that age but over 15 years of age.	– Survival beyond 65 years of age, or – Such higher age that the number of residents having reached that age is not less than 10% of the number of residents under that age but over 15 years of age, provided that where classes of employees are protected, the prescribed age shall be not more than 65 years.	– Survival beyond 65 years of age, or – A higher age may be prescribed with due regard to demographic, economic and social criteria; – If the prescribed age is 65 years or older, the age shall be lowered for persons who have been engaged in arduous or unhealthy occupations.	Ditto.
Personal scope	– All employees, and – All self-employed persons, and – Other prescribed categories of persons.	– All employees, and – All self-employed persons, and – Other prescribed categories of persons.	– Prescribed classes of employees, constituting not less than 50% of all employees, or – Prescribed classes of the economically active population, constituting not less than 20%, of all residents, or – All residents whose means during the contingency do not exceed prescribed limits.	– Prescribed classes of employees, constituting not less than 80% of all employees, or – Prescribed classes of the economically active population, constituting not less than 30% of all residents, or – All residents whose means during the contingency do not exceed prescribed limits.	– All employees, including apprentices, or – Prescribed classes of the economically active population, constituting not less than 75% of the whole economically active population, or – All residents, or residents whose means during the contingency do not exceed prescribed limits.	– All employees, including apprentices, or – Prescribed classes of the economically active population, constituting not less than 80% of the total economically active population, or – All residents. – Possibility of excluding 10% of all employees or all residents.

Benefit: amount	– Periodical payments, corresponding to 39.4% of the reference wage. – Annual adjustment of the pensions on the basis of price increase and increase of wages.	– Periodical payments, corresponding to between 46.2% of the reference wage. – Annual adjustment of the pensions on the basis of price increase and increase of social tax contributions.	– Periodical payments, corresponding to at least 40% of the reference wage. – Rates of periodical payments shall be reviewed according to substantial changes in the general level of earnings or cost of living.	– Periodical payments, corresponding to at least 45% of the reference wage. – Rates of periodical payments shall be reviewed according to substantial changes in the general level of earnings or cost of living.	– Periodical payments, corresponding to at least 45% of the reference wage. – Rates of periodical payments shall be reviewed according to substantial changes in the general level of earnings or cost of living.	– Periodical payments, corresponding to at least 65% of the reference wage. – Rates of periodical payments shall be reviewed according to appreciable changes in the general level of earnings or cost of living.
Benefit: duration	Throughout the contingency.	Ditto.	Ditto.	Ditto.	Ditto.	Ditto.
Qualifying periods	– A full benefit is granted after the completion of a qualifying period of 35 insurance years if non-contributory periods are included, or – After the completion of 30 years of insurance if no non-contributory periods are included. – A reduced benefit is granted after the completion of 20 insurance years and the attainment of 65 years of age.	A benefit is granted after the completion of 15 service years or insurance years.	– A full benefit has to be granted after the completion of a qualifying period of at least 30 years of contributions or employment, or 20 years of residence. – A reduced benefit has to be granted after 15 years of contributions or employment.	Ditto, with several flexibility clauses.	Ditto, with several flexibility clauses.	– A full benefit has to be granted after the completion of a qualifying period of at least 30 years of contributions or employment, or 20 years of residence; – A reduced benefit has to be granted after a period shorter than 30 years of contributions or employment, or 20 years of residence; – Several flexibility clauses.

EMPLOYMENT INJURY BENEFIT

	Czech Republic No ratifications	Estonia No ratifications	ILO Convention 102 (1952)/ ECSS (1964)	ECSS Protocol (1964)	ILO Convention 121 (1964)	ECSS Revised (1990)
Material scope			The following contingencies due to accident or disease resulting from employment: – A morbid condition; – Incapacity for work, involving suspension of earnings; – Total or partial loss of earning capacity, likely to be permanent; – The loss of support suffered by the widow or child as the result of the death of the breadwinner.	Ditto	The following contingencies due to accident or disease resulting from employment: – A morbid condition; – Incapacity for work, involving suspension of earnings; – Total or partial loss of earning capacity, likely to be permanent; – The loss of support as the result of the death of the breadwinner by prescribed categories of beneficiaries.	The following contingencies due to accident or disease resulting from employment: – The need for medical care; – Incapacity for work, involving suspension of earnings; – Total or partial loss of earning capacity, likely to be permanent; – In the event of the victim's death, the loss of support suffered by the spouse and children.
Personal scope			– Prescribed classes of employees, constituting not less than 50% of all employees, and in case of death of the breadwinner, also their wives and children; – The right to benefit of the widow may be made conditional on her being incapable of self-support.	– Prescribed classes of employees, constituting not less than 80% of all employees, in case of death of the breadwinner, also their wives and children; – The right to benefit of the widow may not be made conditional on her being incapable of self-support.	– All employees, including apprentices and other specified categories of workers, and in case of death of the breadwinner, the widow as prescribed, a disabled and dependent widower, dependent children of the deceased and other persons as may be prescribed;	– All employees, including apprentices, and in case of death of the victim the surviving spouse and children; – Prescribed classes of the economically active population, constituting not less than 80% of the total economically active population, and in case of death of the victim the surviving spouse and children;

						– The right to benefit of a childless surviving spouse may be made conditional on her/his being incapable of self-support.
Benefit: range of care and amount			– In respect of a morbid condition: medical care as enumerated under 'Medical Care', supplemented with other treatments; – Cost-sharing is not allowed; – In respect of incapacity for work or total loss of earning capacity likely to be permanent: periodical payments, corresponding to at least 50% of the previous wage of the standard beneficiary; – In respect of partial loss of earning capacity likely to be permanent: periodical payments, representing a suitable proportion of those specified for total loss of earning capacity;	– In respect of a morbid condition: medical care as enumerated under 'Medical Care', supplemented with other treatments; – Cost-sharing is not allowed; – In respect of incapacity for work or total loss of earning capacity likely to be permanent: periodical payments, corresponding to at least 50% of the previous wage of the standard beneficiary; – In respect of total and permanent loss of earning capacity where constant attendance is required: periodical payments, corresponding to at least 662/3% of the previous wage of the standard beneficiary;	– In respect of a morbid condition: medical care as enumerated in Convention 130, supplemented with other treatments and care at the workplace; – Where a general medical care scheme for employed persons is provided, cost-sharing is allowed, but shall not cause hardship; – In respect of incapacity for work or total loss of earning capacity likely to be permanent: periodical payments, corresponding to at least 60% of the previous wage of the standard beneficiary; – In respect of partial loss of earning capacity likely to be permanent: periodical payments, representing a suitable proportion of those specified for total loss of earning capacity;	– In respect of a morbid condition: medical care as enumerated under 'Medical Care', supplemented with other treatments; – Cost-sharing is not allowed; – In respect of incapacity for work or total loss of earning capacity likely to be permanent: periodical payments, corresponding to at least 65% of the previous wage of the standard beneficiary; – In respect of total and permanent loss of earning capacity where constant attendance is required: periodical payments, corresponding to at least 80% of the previous wage of the standard beneficiary;

			– In respect of the death of the breadwinner: periodical payments for the widow and dependent children, corresponding to at least 40% of the previous wage of the standard beneficiary; – Rates of long-term periodical payments shall be reviewed according to substantial changes in the general level of earnings or cost of living; – Possibility of converting periodical payments into a lump sum in specific situations.	– In respect of partial loss of earning capacity likely to be permanent: periodical payments, representing a suitable proportion of those specified for total loss of earning capacity; – In respect of the death of the breadwinner: periodical payments for the widow and dependent children, corresponding to at least 45% of the previous wage of the standard beneficiary; – Rates of long-term periodical payments shall be reviewed according to substantial changes in the general level of earnings or cost of living; – Possibility of converting periodical payments into a lump sum in specific situations.	– Where constant attendance is required, an increased or special benefit shall be granted; – In respect of the death of the breadwinner: periodical payments for the widow and dependent children, corresponding to at least 50% of the previous wage of the standard beneficiary, and a grant for funeral costs; – A minimum amount of periodical payments shall be prescribed; – Rates of long-term periodical payments shall be reviewed according to substantial changes in the general level of earnings or cost of living; – Possibility of converting periodical payments into a lump sum in specific situations.	– In respect of partial loss of earning capacity likely to be permanent: periodical payments, representing a suitable proportion of those specified for total loss of earning capacity, and where constant attendance is required, an increased or special benefit shall be granted. – In respect of the death of the breadwinner: periodical payments for the widow and dependent children, corresponding to at least 65% of the previous wage of the standard beneficiary, and a grant for funeral costs; – Rates of long-term periodical payments shall be reviewed according to substantial changes in the general level of earnings or cost of living; – Possibility of converting periodical payments into a lump sum in specific situations.

Benefit: duration			– Throughout the contingency; – In respect of temporary incapacity for work, a waiting period is possible of three days maximum in each case of suspension of earnings.	Ditto.	– Throughout the contingency, except in case of a childless surviving spouse; – A waiting period is allowed in case of incapacity for work if such was provided for at the time the Convention entered into force and reasons for such still exist.	– Throughout the contingency, except in case of a childless surviving spouse; – No waiting period is allowed.
Qualifying periods			No qualifying period may be prescribed.	Ditto.	Ditto	Ditto

FAMILY BENEFIT

	Czech Republic (ratified: ILO C102, ECSS)	Estonia (ratified: ECSS)	ILO Convention 102 (1952)/ECSS (1964)	ECSS Protocol (1964)	No higher standard	ECSS Revised (1990)
Material scope	Maintenance of dependent children. A child is considered dependent at least until the termination of compulsory education, and under specific conditions until the age of 26 years.	Maintenance of children until the age of 16 years, or until 19 years of age if enrolled in daytime education.	Responsibility for the maintenance of children (under school leaving age or under 15 years of age).	Responsibility for the maintenance of children (under 16 years of age, under school leaving age or under 15 years of age, provided that those who are continuing their education, working as apprentices or suffering from permanent incapacity, are protected until they reach 18 years of age).		Maintenance of children (under school leaving age, under 16 years of age, or, under prescribed conditions, over the age of 16 years who are continuing their education, working as apprentices or suffering from chronic illness or infirmity).
Personal scope	The dependent children of all residents, provided that the family's income during the contingency does not exceed prescribed limits.	All permanent residents, including family members and children who do not live in the family due to a study abroad, and aliens residing in Estonia with a temporary residence permit.	– Prescribed classes of employees, constituting not less than 50% of all employees, or – Prescribed classes of the economically active population, constituting not less than 20% of all residents; – *ILO C102*: or all residents whose means during the contingency do not exceed prescribed limits.	– Prescribed classes of employees, constituting not less than 80% of all employees, or – Prescribed classes of the economically active population, constituting not less than 30% of all residents.		– The children of all employees, including apprentices, or – The children of all economically active persons, or – The children of all residents, or – The children of all residents whose means during the contingency do not exceed prescribed limits. – Possibility of excluding a prescribed percentage of children.

Benefit: nature and amount	Periodical payments, the total value of which represents 1.5% of the average gross wage of an unskilled labourer multiplied by the total number of dependent children of all residents.	Periodical payments, the total value of which represents 6.1% of the average gross wage of an unskilled labourer, multiplied by the total number of dependent children of all residents.	– Periodical payments, and/or; – Provision of food, clothing, housing, holidays or domestic help. – The total value of the periodical payments shall represent at least 1.5% of the wage of an ordinary adult male labourer, multiplied by the total number of children of all residents; – *ILO C102*: or at least 3% of the said wage, multiplied by the total number of children of persons protected.	– Periodical payments, and/or; – Provision of food, clothing, housing, holidays or domestic help. – The total value of the periodical payments shall represent at least 2% of the wage of an ordinary adult male labourer, multiplied by the total number of children of all residents;		– Periodical payments for families, or – A combination of periodical payments, tax relief, benefits in kind or social services for families. – The total value of the benefits shall represent at least 1.5% of the gross domestic product, or – 3% of either the minimum wage or the wage of an ordinary labourer, multiplied by the total number of persons protected.
Benefit: duration	Throughout the contingency.	Throughout the contingency.	Where the benefit consists of a periodical payment: throughout the contingency.	Ditto.		Throughout the contingency.
Qualifying periods	– No qualifying period for permanent residents; – 365 days of residence for foreigners with temporary residence.	No qualifying period.	– *ILO C102*: Three months of contribution or employment, or one year of residence; – *ECSS*: One month of contribution or employment, or six months of residence.	One month of contribution or employment, or six months of residence.		– Where children of employees or economically active persons are protected, no qualifying period allowed. – Where children of all residents are protected, six months of residence.

MATERNITY BENEFIT

	Czech Republic (ratified: ILO C102, ECSS)	Estonia (ratified: ECSS)	ILO Convention 102 (1952) / ECSS (1964)	ECSS Protocol (1964)	ILO Convention 183 (2000)	ECSS Revised (1990)
Material scope	Pregnancy and childbirth, and their consequences, and the resulting loss of earnings.	– *For medical care:* Pregnancy and confinement, and their consequences. – *For cash benefits:* Pregnancy and maternity leave.	Pregnancy and confinement, and their consequences, and the resultant suspension of earnings.	Ditto.	Ditto.	Ditto.
Personal scope	*For medical care:* – All women who are permanent residents and women who are not permanent residents but who are employed by an employer who has a seat or permanent residence in the Czech Republic. *For cash benefits:* – All female employees with a minimum income of a fixed amount (CZK 2,000 in 2009); – Prescribed categories of women who are given equal rights as insured persons; – Self-employed women can participate on a voluntary basis.	*For medical care and cash benefits:* – All female employees for whom the employer has to pay social tax; – All self-employed women who have to pay social tax. *For medical care:* – All pregnant women who are not ensured otherwise.	– All women in prescribed classes of employees, constituting not less than 50% of all employees, and, for maternity medical benefit, also the wives of men in these classes; or – All women in prescribed classes of the economically active population, constituting not less than 20% of all residents, and, for maternity medical benefit, also the wives of men in these classes.	– All women in prescribed classes of employees, constituting not less than 80% of all employees, and, for maternity medical benefit, also the wives of men in these classes; or – All women in prescribed classes of the economically active population, constituting not less than 30% of all residents, and, for maternity medical benefit, also the wives of men in these classes.	– All employed women, including those in atypical forms of dependent work. – Possibility of excluding limited categories of workers.	*For medical care:* – All employed women, including female apprentices, and their female children, together with the dependent wives of employees, including apprentices, and their female children; or – All economically active women and their female children, together with all dependent wives of economically active men and their female children; or – All women residents. – Possibility of excluding a prescribed percentage of women.

						For cash benefits: – All employed women, including female apprentices; or – All women in prescribed classes of the economically active population, constituting not less than 80% of the total economically active population.
Benefit: amount	*For medical care:* – Medical care as listed under Medical Care, which includes prenatal, confinement and postnatal care by medical practitioners and hospitalisation where necessary. – Patient fees are levied for hospitalisation and emergency care. *For medical cash benefits:* – Periodical payments, corresponding to 69.7% of the reference wage.	*For medical care:* – Medical care as listed under Medical Care, which includes prenatal, confinement and postnatal care by medical practitioners and hospitalisation where necessary. – Benefit corresponding to 100% of the reference wage, paid out in one lump sum.	– Medical care, including at least prenatal, confinement and postnatal care, either by medical practitioners or by qualified midwives, and hospitalisation where necessary. – Cost-sharing is not allowed. – Periodical payments, on average at least 45% of the reference wage.	– Medical care, including at least prenatal, confinement and postnatal care, either by medical practitioners or by qualified midwives, hospitalisation where necessary, and pharmaceutical supplies. – Cost-sharing is allowed in relation to pharmaceutical supplies, but shall not exceed 25% on average, and shall not cause hardship. – Periodical payments, on average at least 50% of the reference wage.	– Medical care, including at least prenatal, confinement and postnatal care, either by medical practitioners or by qualified midwives, and hospitalisation where necessary. – Cash benefits at a level that ensures that the woman can maintain herself and her child in proper conditions of health and with a suitable standard of living; if the benefits are based on previous earnings, they shall amount to at least two thirds of the previous earnings.	– Medical care, including at least prenatal, confinement and postnatal care, either by medical practitioners or by qualified midwives, hospitalisation where necessary, and several other treatments and services. – Cost-sharing is allowed, but shall not cause hardship. – Cash benefits, on average at least 65% of the reference wage.

Benefit: duration	– Medical care is granted throughout the contingency; – Periodical payments are granted for a period of 28 weeks.	– Medical care is granted throughout the contingency; – Periodical payments are granted for a period of 20 weeks.	– Medical care has to be granted throughout the contingency. – Periodical payments have to be granted for at least 12 weeks, unless a longer period of absence from work is required by national laws or regulations.	Ditto.	– Medical care has to be granted throughout the contingency. – Maternity leave of at least 14 weeks, including a period of six weeks after childbirth. – Cash benefits have to be granted for at least 14 weeks, unless a longer period of absence from work is required by national laws or regulations.	– Medical care has to be granted throughout the contingency. – Cash benefits have to be granted for at least 14 weeks, unless a longer compulsory period of absence from work is required by national laws or regulations.
Qualifying periods	Participation in sickness insurance for at least 270 days during the two years preceding the childbirth.	Qualifying period of 14 days of payment of social tax.	Possibility of prescribing a qualifying period as may be considered necessary to preclude abuse.	Ditto.	Possibility of prescribing qualifying conditions that can be satisfied by a large majority of the women to whom the Convention applies; where a woman does not meet these qualifying conditions, she must be entitled to adequate social assistance benefits.	Possibility of prescribing a qualifying period as may be considered necessary to preclude abuse.

INVALIDITY BENEFIT

	Czech Republic (ratified: ILO C102, ECSS)	Estonia (ratified: ECSS)	ILO Convention 102 (1952) / ECSS (1964)	ECSS Protocol (1964)	ILO Convention 128 Part V (1964)	ECSS Revised (1990)
Material scope	– Reduction of ability to perform continuous gainful activities of at least 70%; – For a reduced benefit: reduction of ability to perform such activities by at least 35%.	– Inability to earn any income in order to support oneself as a result of a serious functional impairment caused by an illness or injury, which means incapacity to work to an extent of 100%; – Permanent incapacity for work to an extent between 40% and 90% is recognised as partial incapacity for work.	Inability to engage in any gainful activity, to an extent prescribed, which is likely to be permanent or persists after the exhaustion of sickness benefit.	Inability to engage in any gainful occupation, to an extent prescribed, which is likely to be permanent or persists after the exhaustion of sickness benefit. The prescribed extent of such inability shall not exceed two-thirds.	Incapacity to engage in any gainful activity, to an extent prescribed, which is likely to be permanent or persists after the expiry of a period of temporary or initial incapacity.	– Incapacity, which is likely to be permanent, or which persists after the expiry of a period of temporary or initial incapacity; – In the case of an economically active person, incapacity, to a prescribed extent, to work or earn; – In the case of a person not economically active, incapacity, to a prescribed extent, to engage in their usual activities; – Incapacity of a child, to a prescribed extent, resulting from congenital disability or from invalidity occurring before school leaving age.
Personal scope	– All employees; – All self-employed persons; – Other prescribed categories of persons.	– All employees; – All self-employed persons; – Other prescribed categories of persons.	– Prescribed classes of employees, constituting not less than 50% of all employees, or – Prescribed classes of the economically active	– Prescribed classes of employees, constituting not less than 80% of all employees, or – Prescribed classes of the economically active	– All employees, including apprentices, or – Prescribed classes of the economically active population, constituting not less than 75% of the	– All employees, including, under prescribed conditions, apprentices, or – Prescribed classes of the economically active

			population, constituting not less than 20% of all residents, or – All residents whose means during the contingency do not exceed prescribed limits.	population, constituting not less than 30% of all residents, or – All residents whose means during the contingency do not exceed prescribed limits.	whole economically active population, or – All residents, or residents whose means during the contingency do not exceed prescribed limits.	population, constituting not less than 80% of the total economically active population; or – All residents. – Possibility of excluding 10% of all employees or all residents.
Benefit: amount	– Periodical payments, corresponding to 39.6% of the reference wage. – Annual adjustment of the benefits on the basis of price increase and increase of wages.	– Periodical payments, corresponding to 53.1% of the reference wage in the case of 100% incapacity for work; – Reduced benefits in the case of partial incapacity for work. – Annual adjustment of the pensions on the basis of price increase and increase of social tax contributions.	– Periodical payments, corresponding to at least 40% of the reference wage; – If a benefit is paid after only 5 years of insurance, the benefit has to be at least 30% of the reference wage. – Rates of periodical payments shall be reviewed according to substantial changes in the general level of earnings or in the cost of living.	– Periodical payments, corresponding to at least 50% of the reference wage; – If a benefit is paid after only 5 years of insurance, the benefit has to be at least 40% of the reference wage. – Rehabilitation and re-employment facilities. – Rates of periodical payments shall be reviewed according to substantial changes in the general level of earnings or in the cost of living.	– Periodical payments, corresponding to at least 50% of the reference wage. – If a benefit is paid after only 5 years of insurance, the benefit has to be at least 40% of the reference wage. – Rates of periodical payments shall be reviewed according to substantial changes in the general level of earnings or in the cost of living.	– Periodical payments, corresponding to at least 65% of the reference wage. – If a benefit is paid after only 1 year of insurance, the benefit has to be at least 55% of the reference wage; – Additional flexibility clauses. – Rates of periodical payments shall be reviewed according to appreciable changes in the general level of earnings or in the cost of living.
Benefit: duration	Throughout the contingency or until an old-age benefit becomes payable if this is higher.	Until the attainment of the pensionable age.	Throughout the contingency, or until an old-age benefit becomes payable.	Ditto.	Ditto.	Ditto.
Qualifying periods	Insurance periods depending on the age of the applicant: from less than one year for a person	Service or insurance years depending on the age of the applicant: from no qualifying period for a	– A period of 15 years of contribution or employment, or 10 years of residence;	Ditto.	Ditto, with additional flexibility clauses.	– A period of 15 years of contribution, occupational activity or residence, including any period

	up to 20 years of age, to five years within ten years preceding the occurrence of the disability for a person older than 28 years.	person from 16 to 20 years of age, to 15 years for a person of pensionable age.	– A reduced benefit shall be secured at least to a person who has completed a period of five years of contribution or employment. – Additional flexibility clauses.			considered as such. – Additional flexibility clauses.

SURVIVORS' BENEFIT

	Czech Republic (ratified: ILO C102, ECSS)	Estonia (ratified: ECSS)	ILO Convention 102 (1952)/ECSS (1964)	ECSS Protocol (1964)	ILO Convention 128 Part IV (1964)	ECSS Revised (1990)
Material scope	– Loss of income due to the death of a spouse, or, in the case of a child, the loss of one or both parents. – For the purpose of the benefit, the spouse must have been legally married with the deceased, and – Taking care of a dependent child or a child who has attained majority and is incapacitated, or of an incapacitated parent living in the same household, or – Being disabled herself/himself, or – Having reached the retirement age for men minus four years.	– The death of a provider, upon the understanding that entitlement to a survivors' benefit of the provider's children, parents and widow or widower does not depend on whether they were maintained by the provider or not. – For the purpose of the benefit, the spouse must have been legally married with the deceased, and – Not working and pregnant (from the twelfth week of pregnancy), or – Not working and raising the deceased person's child under three years of age, or – Permanently incapacitated for work or of pensionable age and whose marriage to the deceased person had lasted at least one year.	– The loss of support suffered by the widow or child under school leaving age or under 15 years of age, as a result of the death of the bread-winner; – The definition of widow may include her being presumed to be incapable of self-support; and – A minimum duration of her marriage with the deceased breadwinner may be required.	Ditto, except the definition of child: under 16 years of age, under school leaving age or under 15 years, provided that those who are continuing their education, working as apprentices, or suffering from permanent incapacity, are protected until they reach 18 years of age.	– The loss of support suffered by the widow or child as a result of the death of the breadwinner. – Definition of a child: under school leaving age or under 15 years of age, whichever is higher, and a higher age for a child who is an apprentice or student, or who has a chronic illness disabling them from any gainful activity. – The definition of widow may include the attainment of a prescribed age, which may not be higher than the pensionable age. No age may be required where the widow is an invalid, or is caring for a dependent child of the deceased.	– The loss of support suffered by the spouse and children, as a result of the death of the breadwinner. – Definition of a child: under school leaving age, under 16 years of age, or over the age of 16 years and continuing their education, working as an apprentice, or suffering from a chronic illness or infirmity. – In the case of a surviving spouse, a minimum duration of the marriage may be required; and – The attainment of a prescribed age which may not be higher than the pensionable age. No age may be required where the spouse is presumed to be unfit for work, or where he/she has at least one dependent child.

Personal scope	– The spouses and children of all employees; – The spouses and children of all self-employed persons; – The spouses and children of other prescribed categories of persons.	– The spouses and children of all employees; – The spouses and children of all self-employed persons; – Other prescribed categories of persons of whom the deceased person was the breadwinner, such as divorced spouses, brothers and sisters, grandchildren, parents.	– The wives and children of breadwinners in prescribed classes of employees, constituting not less than 50% of all employees; or – Wives and children of breadwinners in prescribed classes of the economically active population, constituting not less than 20% of all residents; or – All resident women and children who have lost their breadwinner and whose means during the contingency do not exceed prescribed limits.	– The wives and children of breadwinners in prescribed classes of employees, constituting not less than 80% of all employees; or – Wives and children of breadwinners in prescribed classes of the economically active population, constituting not less than 30% of all residents; or – All resident women and children who have lost their breadwinner and whose means during the contingency do not exceed prescribed limits.	– The wives, children, and, as may be prescribed, other dependents: – of all breadwinners who were employees or apprentices; or – of breadwinners in prescribed classes of the economically active population, constituting not less than 75% of the whole economically active population; or – All widows, all children and all other prescribed dependents who have lost their breadwinner, who are residents and whose means during the contingency do not exceed prescribed limits.	– Surviving spouses and children of breadwinners who were employees or, under prescribed conditions, apprentices; or – Surviving spouses and children of breadwinners in prescribed classes of the economically active population, constituting not less than 80% of the total economically active population; or – All resident surviving spouses and children, or all surviving spouses and children who have lost their breadwinner, who was a resident.
Benefit: amount	– Periodical payments, corresponding to 67.8% of the reference wage. – Accumulation of a survivor's pension and earnings from work is allowed without limitations.	– Periodical payments, corresponding to 3.1% of the reference wage. – Annual adjustment of the pensions on the basis of price increase and increase of social tax contributions.	– Periodical payments, corresponding to at least 40% of the reference wage. – Rates of periodical payments shall be reviewed according to substantial changes in the general level of earnings or in the cost of living.	– Periodical payments, corresponding to at least 45% of the reference wage.; – Rates of periodical payments shall be reviewed according to substantial changes in the general level of earnings or in the cost of living	– Periodical payments, corresponding to at least 45% of the reference wage. – Rates of periodical payments shall be reviewed according to substantial changes in the general level of earnings or in the cost of living.	– Periodical payments, corresponding to at least 65% of the reference wage; – In the case of surviving spouses, under prescribed conditions, facilities designed to assist their settlement in an occupation.

	– Annual adjustment of the pensions on the basis of price increase and increase of wages.		– It may be provided that the benefit can be suspended or reduced, depending on gainful activity, earnings, or other means of the beneficiary.	– It may be provided that the benefit can be suspended or reduced, depending on gainful activity, earnings, or other means of the beneficiary.		– Rates of periodical payments shall be reviewed according to appreciable changes in the general level of earnings or in the cost of living.
Benefit: duration	Throughout the contingency or until an old-age benefit becomes payable if this is higher.	Throughout the contingency.	Throughout the contingency.	Ditto.	Ditto.	Throughout the contingency, or until replaced by invalidity or old-age benefits.
Quali-fying periods	A benefit is granted if the deceased person: – Was the beneficiary of an old-age or invalidity pension, or – Had completed the required insurance period for an old-age or invalidity pension, or – Died as a result of a work-related injury or an occupational disease.	A benefit is granted if the deceased person: – Was the beneficiary of an old-age or invalidity pension, or – Had completed the required insurance period for an old-age or invalidity pension.	– A full benefit has to be granted after the completion by the breadwinner of at least 15 years of contributions or employment, or 10 years of residence. – A reduced benefit has to be granted after the completion by the bread-winner of 5 years of contributions or employ-ment. – Additional flexibility clauses.	Ditto.	– A full benefit has to be granted after the completion by the breadwinner of at least 15 years of contributions or employment, or 10 years of residence; or a prescribed period of such residence by the widow. – A proportional reduced benefit has to be granted after the completion by the breadwinner of a qualifying period of 5 years. – Additional flexibility clauses.	– A full benefit has to be granted after the completion by the breadwinner of at least 15 years of contributions, occupational activity or residence, including any period considered as such; – A reduced benefit has to be granted proportional to the period of contribu-tions, occupational activity or residence in case of the completion of a qualifying period less than 15 years; – Additional flexibility clauses.

APPENDIX 2. LIST OF INTERVIEWED NATIONAL EXPERTS

CZECH REPUBLIC

Koldinská, Kristina – Senior lecturer at the Charles University Faculty of Law, Department of Labour Law and Social Law.
Kühn, Zdeněk – Judge at the Supreme Administrative Court; Associate Professor (human rights) at Charles University, Faculty of Law.
Machová, Kateřina – Ministry of Labour and Social Affairs, legal official (CoE matters).
Pokorný, Pavel – Ministry of Labour and Social Affairs, legal official (ILO matters).
Samek, Vít – Czech-Moravian Confederation of Trade Unions, Head of the Legal Department.
Tröster, Petr – Professor at Charles University Faculty of Law, Department of Labour Law and Social Law.
Wolfova, Aneta – Ministry of Health, legal official.

ESTONIA

Aule, Kristi – Adviser to the Constitutional Chamber, Supreme Court of Estonia.
Kaadu, Tiit – Ministry of Social Affairs, previously delegate of the Ministry at the annual ILO Conferences.
Kõiv, Tõnis – Member of the Parliament of Estonia, member of the Social Affairs Committee.
Leppik, Lauri – Professor of Social Policy at Tallinn University, Faculty of Social Sciences; Member of the European Committee of Social Rights (ECSR); Previously Advisor at the Social Insurance Board and the Ministry of Social Affairs.
Mälksoo, Lauri – Professor of International Law at University of Tartu; Adviser to the Chancellor of Justice of the Republic of Estonia.
Nettan, Agneta, Ministry of Social Affairs, Head of Financial Policy and Coordination, Social Security Department (written consultation).
Taliga, Harri – President of the Estonian Trade Union Confederation (EAKL).
Tammeleth, Tiia – Legal Secreatry of the Estonian Trade Union Confederation (EAKL).
Tavits, Gaabriel – Associate Professor of Labour Law and Social Security Law at University of Tartu.

APPENDIX 3. TEXT OF ILO C102, SOCIAL SECURITY (MINIMUM STANDARDS) CONVENTION, 1952

PREAMBLE

The General Conference of the International Labour Organisation,
Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Thirty-fifth Session on 4 June 1952, and
Having decided upon the adoption of certain proposals with regard to minimum standards of social security, which are included in the fifth item on the agenda of the session, and
Having determined that these proposals shall take the form of an international Convention,
adopts this twenty-eighth day of June of the year one thousand nine hundred and fifty-two the following Convention, which may be cited as the Social Security (Minimum Standards) Convention, 1952:

PART I. GENERAL PROVISIONS

Article 1

1. In this Convention--
   (a) the term prescribed means determined by or in virtue of national laws or regulations;
   (b) the term residence means ordinary residence in the territory of the Member and the term resident means a person ordinarily resident in the territory of the Member;
   (c) the term wife means a wife who is maintained by her husband;
   (d) the term widow means a woman who was maintained by her husband at the time of his death;
   (e) the term child means a child under school-leaving age or under 15 years of age, as may be prescribed;
   (f) the term qualifying period means a period of contribution, or a period of employment, or a period of residence, or any combination thereof, as may be prescribed.
2. In Articles 10, 34 and 49 the term benefit means either direct benefit in the form of care or indirect benefit consisting of a reimbursement of the expenses borne by the person concerned.

Article 2

Each Member for which this Convention is in force–
(a) shall comply with–
   (i) Part I;

(ii) at least three of Parts II, III, IV, V, VI, VII, VIII, IX and X, including at least one of Parts IV, V, VI, IX and X;
(iii) the relevant provisions of Parts XI, XII and XIII; and
(iv) Part XIV; and

(b) shall specify in its ratification in respect of which of Parts II to X it accepts the obligations of the Convention.

Article 3

1. A Member whose economy and medical facilities are insufficiently developed may, if and for so long as the competent authority considers necessary, avail itself, by a declaration appended to its ratification, of the temporary exceptions provided for in the following Articles: 9 (d); 12 (2); 15 (d); 18 (2); 21 (c); 27 (d); 33 (b); 34 (3); 41 (d); 48 (c); 55 (d); and 61 (d).
2. Each Member which has made a declaration under paragraph 1 of this Article shall include in the annual report upon the application of this Convention submitted under Article 22 of the Constitution of the International Labour Organisation a statement, in respect of each exception of which it avails itself--
   (a) that its reason for doing so subsists; or
   (b) that it renounces its right to avail itself of the exception in question as from a stated date.

Article 4

1. Each Member which has ratified this Convention may subsequently notify the Director-General of the International Labour Office that it accepts the obligations of the Convention in respect of one or more of Parts II to X not already specified in its ratification.
2. The undertakings referred to in paragraph 1 of this Article shall be deemed to be an integral part of the ratification and to have the force of ratification as from the date of notification.

Article 5

Where, for the purpose of compliance with any of the Parts II to X of this Convention which are to be covered by its ratification, a Member is required to protect prescribed classes of persons constituting not less than a specified percentage of employees or residents, the Member shall satisfy itself, before undertaking to comply with any such Part, that the relevant percentage is attained.

Article 6

For the purpose of compliance with Parts II, III, IV, V, VIII (in so far as it relates to medical care), IX or X of this Convention, a Member may take account of protection

effected by means of insurance which, although not made compulsory by national laws or regulations for the persons to be protected–

(a) is supervised by the public authorities or administered, in accordance with prescribed standards, by joint operation of employers and workers;
(b) covers a substantial part of the persons whose earnings do not exceed those of the skilled manual male employee; and
(c) complies, in conjunction with other forms of protection, where appropriate, with the relevant provisions of the Convention.

PART II. MEDICAL CARE

Article 7

Each Member for which this Part of this Convention is in force shall secure to the persons protected the provision of benefit in respect of a condition requiring medical care of a preventive or curative nature in accordance with the following Articles of this Part.

Article 8

The contingencies covered shall include any morbid condition, whatever its cause, and pregnancy and confinement and their consequences.

Article 9

The persons protected shall comprise–

(a) prescribed classes of employees, constituting not less than 50 per cent. of all employees, and also their wives and children; or
(b) prescribed classes of economically active population, constituting not less than 20 per cent. of all residents, and also their wives and children; or
(c) prescribed classes of residents, constituting not less than 50 per cent. of all residents; or
(d) where a declaration made in virtue of Article 3 is in force, prescribed classes of employees constituting not less than 50 per cent. of all employees in industrial workplaces employing 20 persons or more, and also their wives and children.

Article 10

1. The benefit shall include at least–
   (a) in case of a morbid condition–
      (i) general practitioner care, including domiciliary visiting;
      (ii) specialist care at hospitals for in-patients and out-patients, and such specialist care as may be available outside hospitals;
      (iii) the essential pharmaceutical supplies as prescribed by medical or other qualified practitioners; and
      (iv) hospitalisation where necessary; and

(b) in case of pregnancy and confinement and their consequences–
   (i) pre-natal, confinement and post-natal care either by medical practitioners or by qualified midwives; and
   (ii) hospitalisation where necessary.

2. The beneficiary or his breadwinner may be required to share in the cost of the medical care the beneficiary receives in respect of a morbid condition; the rules concerning such cost-sharing shall be so designed as to avoid hardship.
3. The benefit provided in accordance with this Article shall be afforded with a view to maintaining, restoring or improving the health of the person protected and his ability to work and to attend to his personal needs.
4. The institutions or Government departments administering the benefit shall, by such means as may be deemed appropriate, encourage the persons protected to avail themselves of the general health services placed at their disposal by the public authorities or by other bodies recognised by the public authorities.

Article 11

The benefit specified in Article 10 shall, in a contingency covered, be secured at least to a person protected who has completed, or whose breadwinner has completed, such qualifying period as may be considered necessary to preclude abuse.

Article 12

1. The benefit specified in Article 10 shall be granted throughout the contingency covered, except that, in case of a morbid condition, its duration may be limited to 26 weeks in each case, but benefit shall not be suspended while a sickness benefit continues to be paid, and provision shall be made to enable the limit to be extended for prescribed diseases recognised as entailing prolonged care.
2. Where a declaration made in virtue of Article 3 is in force, the duration of the benefit may be limited to 13 weeks in each case.

PART III. SICKNESS BENEFIT

Article 13

Each Member for which this Part of this Convention is in force shall secure to the persons protected the provision of sickness benefit in accordance with the following Articles of this Part.

Article 14

The contingency covered shall include incapacity for work resulting from a morbid condition and involving suspension of earnings, as defined by national laws or regulations.

Article 15

The persons protected shall comprise–
(a) prescribed classes of employees, constituting not less than 50 per cent. of all employees; or
(b) prescribed classes of the economically active population, constituting not less than 20 per cent. of all residents; or
(c) all residents whose means during the contingency do not exceed limits prescribed in such a manner as to comply with the requirements of Article 67; or
(d) where a declaration made in virtue of Article 3 is in force, prescribed classes of employees, constituting not less than 50 per cent. of all employees in industrial workplaces employing 20 persons or more.

Article 16

1. Where classes of employees or classes of the economically active population are protected, the benefit shall be a periodical payment calculated in such a manner as to comply either with the requirements of Article 65 or with the requirements of Article 66.
2. Where all residents whose means during the contingency do not exceed prescribed limits are protected, the benefit shall be a periodical payment calculated in such a manner as to comply with the requirements of Article 67.

Article 17

The benefit specified in Article 16 shall, in a contingency covered, be secured at least to a person protected who has completed such qualifying period as may be considered necessary to preclude abuse.

Article 18

1. The benefit specified in Article 16 shall be granted throughout the contingency, except that the benefit may be limited to 26 weeks in each case of sickness, in which event it need not be paid for the first three days of suspension of earnings.
2. Where a declaration made in virtue of Article 3 is in force, the duration of the benefit may be limited--
   (a) to such period that the total number of days for which the sickness benefit is granted in any year is not less than ten times the average number of persons protected in that year; or
   (b) to 13 weeks in each case of sickness, in which event it need not be paid for the first three days of suspension of earnings.

PART IV. UNEMPLOYMENT BENEFIT

Article 19

Each Member for which this Part of this Convention is in force shall secure to the persons protected the provision of unemployment benefit in accordance with the following Articles of this Part.

Article 20

The contingency covered shall include suspension of earnings, as defined by national laws or regulations, due to inability to obtain suitable employment in the case of a person protected who is capable of, and available for, work.

Article 21

The persons protected shall comprise–
(a) prescribed classes of employees, constituting not less than 50 per cent. of all employees; or
(b) all residents whose means during the contingency do not exceed limits prescribed in such a manner as to comply with the requirements of Article 67; or
(c) where a declaration made in virtue of Article 3 is in force, prescribed classes of employees, constituting not less than 50 per cent. of all employees in industrial workplaces employing 20 persons or more.

Article 22

1. Where classes of employees are protected, the benefit shall be a periodical payment calculated in such manner as to comply either with the requirements of Article 65 or with the requirements of Article 66.
2. Where all residents whose means during the contingency do not exceed prescribed limits are protected, the benefit shall be a periodical payment calculated in such a manner as to comply with the requirements of Article 67.

Article 23

The benefit specified in Article 22 shall, in a contingency covered, be secured at least to a person protected who has completed such qualifying period as may be considered necessary to preclude abuse.

Article 24

1. The benefit specified in Article 22 shall be granted throughout the contingency, except that its duration may be limited–

(a) where classes of employees are protected, to 13 weeks within a period of 12 months, or
(b) where all residents whose means during the contingency do not exceed prescribed limits are protected, to 26 weeks within a period of 12 months.

2. Where national laws or regulations provide that the duration of the benefit shall vary with the length of the contribution period and/or the benefit previously received within a prescribed period, the provisions of subparagraph (a) of paragraph 1 shall be deemed to be fulfilled if the average duration of benefit is at least 13 weeks within a period of 12 months.
3. The benefit need not be paid for a waiting period of the first seven days in each case of suspension of earnings, counting days of unemployment before and after temporary employment lasting not more than a prescribed period as part of the same case of suspension of earnings.
4. In the case of seasonal workers the duration of the benefit and the waiting period may be adapted to their conditions of employment.

PART V. OLD-AGE BENEFIT

Article 25

Each Member for which this Part of this Convention is in force shall secure to the persons protected the provision of old-age benefit in accordance with the following Articles of this Part.

Article 26

1. The contingency covered shall be survival beyond a prescribed age.
2. The prescribed age shall be not more than 65 years or such higher age as may be fixed by the competent authority with due regard to the working ability of elderly persons in the country concerned.
3. National laws or regulations may provide that the benefit of a person otherwise entitled to it may be suspended if such person is engaged in any prescribed gainful activity or that the benefit, if contributory, may be reduced where the earnings of the beneficiary exceed a prescribed amount and, if non-contributory, may be reduced where the earnings of the beneficiary or his other means or the two taken together exceed a prescribed amount.

Article 27

The persons protected shall comprise–
(a) prescribed classes of employees, constituting not less than 50 per cent. of all employees; or
(b) prescribed classes of the economically active population, constituting not less than 20 per cent. of all residents; or

(c) all residents whose means during the contingency do not exceed limits prescribed in such a manner as to comply with the requirements of Article 67; or
(d) where a declaration made in virtue of Article 3 is in force, prescribed classes of employees, constituting not less than 50 per cent. of all employees in industrial workplaces employing 20 persons or more.

Article 28

The benefit shall be a periodical payment calculated as follows:
(a) where classes of employees or classes of the economically active population are protected, in such a manner as to comply either with the requirements of Article 65 or with the requirements of Article 66;
(b) where all residents whose means during the contingency do not exceed prescribed limits are protected, in such a manner as to comply with the requirements of Article 67.

Article 29

1. The benefit specified in Article 28 shall, in a contingency covered, be secured at least–
   (a) to a person protected who has completed, prior to the contingency, in accordance with prescribed rules, a qualifying period which may be 30 years of contribution or employment, or 20 years of residence; or
   (b) where, in principle, all economically active persons are protected, to a person protected who has completed a prescribed qualifying period of contribution and in respect of whom, while he was of working age, the prescribed yearly average number of contributions has been paid.
2. Where the benefit referred to in paragraph 1 is conditional upon a minimum period of contribution or employment, a reduced benefit shall be secured at least--
   (a) to a person protected who has completed, prior to the contingency, in accordance with prescribed rules, a qualifying period of 15 years of contribution or employment; or
   (b) where, in principle, all economically active persons are protected, to a person protected who has completed a prescribed qualifying period of contribution and in respect of whom, while he was of working age, half the yearly average number of contributions prescribed in accordance with subparagraph (b) of paragraph 1 of this Article has been paid.
3. The requirements of paragraph 1 of this Article shall be deemed to be satisfied where a benefit calculated in conformity with the requirements of Part XI but at a percentage of ten points lower than shown in the Schedule appended to that Part for the standard beneficiary concerned is secured at least to a person protected who has completed, in accordance with prescribed rules, ten years of contribution or employment, or five years of residence.
4. A proportional reduction of the percentage indicated in the Schedule appended to Part XI may be effected where the qualifying period for the benefit corresponding to the reduced percentage exceeds ten years of contribution or employment but is less

than 30 years of contribution or employment; if such qualifying period exceeds 15 years, a reduced benefit shall be payable in conformity with paragraph 2 of this Article.

5. Where the benefit referred to in paragraphs 1, 3 or 4 of this Article is conditional upon a minimum period of contribution or employment, a reduced benefit shall be payable under prescribed conditions to a person protected who, by reason only of his advanced age when the provisions concerned in the application of this Part come into force, has not satisfied the conditions prescribed in accordance with paragraph 2 of this Article, unless a benefit in conformity with the provisions of paragraphs 1, 3 or 4 of this Article is secured to such person at an age higher than the normal age.

Article 30

The benefits specified in Articles 28 and 29 shall be granted throughout the contingency.

PART VI. EMPLOYMENT INJURY BENEFIT

Article 31

Each Member for which this Part of this Convention is in force shall secure to the persons protected the provision of employment injury benefit in accordance with the following Articles of this Part.

Article 32

The contingencies covered shall include the following where due to accident or a prescribed disease resulting from employment:

(a) a morbid condition;

(b) incapacity for work resulting from such a condition and involving suspension of earnings, as defined by national laws or regulations;

(c) total loss of earning capacity or partial loss thereof in excess of a prescribed degree, likely to be permanent, or corresponding loss of faculty; and

(d) the loss of support suffered by the widow or child as the result of the death of the breadwinner; in the case of a widow, the right to benefit may be made conditional on her being presumed, in accordance with national laws or regulations, to be incapable of self-support.

Article 33

The persons protected shall comprise–

(a) prescribed classes of employees, constituting not less than 50 per cent. of all employees, and, for benefit in respect of death of the breadwinner, also their wives and children; or

(b) where a declaration made in virtue of Article 3 is in force, prescribed classes of employees, constituting not less than 50 per cent. of all employees in industrial workplaces employing 20 persons or more, and, for benefit in respect of death of the breadwinner, also their wives and children.

Article 34

1. In respect of a morbid condition, the benefit shall be medical care as specified in paragraphs 2 and 3 of this Article.
2. The medical care shall comprise–
   (a) general practitioner and specialist in-patient care and out-patient care, including domiciliary visiting;
   (b) dental care;
   (c) nursing care at home or in hospital or other medical institutions;
   (d) maintenance in hospitals, convalescent homes, sanatoria or other medical institutions;
   (e) dental, pharmaceutical and other medical or surgical supplies, including prosthetic appliances, kept in repair, and eyeglasses; and
   (f) the care furnished by members of such other professions as may at any time be legally recognised as allied to the medical profession, under the supervision of a medical or dental practitioner.
3. Where a declaration made in virtue of Article 3 is in force, the medical care shall include at least–
   (a) general practitioner care, including domiciliary visiting;
   (b) specialist care at hospitals for in-patients and out-patients, and such specialist care as may be available outside hospitals;
   (c) the essential pharmaceutical supplies as prescribed by a medical or other qualified practitioner; and
   (d) hospitalisation where necessary.
4. The medical care provided in accordance with the preceding paragraphs shall be afforded with a view to maintaining, restoring or improving the health of the person protected and his ability to work and to attend to his personal needs.

Article 35

1. The institutions or Government departments administering the medical care shall co-operate, wherever appropriate, with the general vocational rehabilitation services, with a view to the re-establishment of handicapped persons in suitable work.
2. National laws or regulations may authorise such institutions or departments to ensure provision for the vocational rehabilitation of handicapped persons.

Article 36

1. In respect of incapacity for work, total loss of earning capacity likely to be permanent or corresponding loss of faculty, or the death of the breadwinner, the benefit shall be

a periodical payment calculated in such a manner as to comply either with the requirements of Article 65 or with the requirements of Article 66.

2. In case of partial loss of earning capacity likely to be permanent, or corresponding loss of faculty, the benefit, where payable, shall be a periodical payment representing a suitable proportion of that specified for total loss of earning capacity or corresponding loss of faculty.
3. The periodical payment may be commuted for a lump sum--
   (a) where the degree of incapacity is slight; or
   (b) where the competent authority is satisfied that the lump sum will be properly utilised.

Article 37

The benefit specified in Articles 34 and 36 shall, in a contingency covered, be secured at least to a person protected who was employed in the territory of the Member at the time of the accident if the injury is due to accident or at the time of contracting the disease if the injury is due to a disease and, for periodical payments in respect of death of the breadwinner, to the widow and children of such person.

Article 38

The benefit specified in Articles 34 and 36 shall be granted throughout the contingency, except that, in respect of incapacity for work, the benefit need not be paid for the first three days in each case of suspension of earnings.

PART VII. FAMILY BENEFIT

Article 39

Each Member for which this Part of this Convention is in force shall secure to the persons protected the provision of family benefit in accordance with the following Articles of this Part.

Article 40

The contingency covered shall be responsibility for the maintenance of children as prescribed.

Article 41

The persons protected shall comprise–

(a) prescribed classes of employees, constituting not less than 50 per cent. of all employees; or

(b) prescribed classes of the economically active population, constituting not less than 20 per cent. of all residents; or
(c) all residents whose means during the contingency do not exceed prescribed limits; or
(d) where a declaration made in virtue of Article 3 is in force, prescribed classes of employees, constituting not less than 50 per cent. of all employees in industrial workplaces employing 20 persons or more.

Article 42

The benefit shall be–
(a) a periodical payment granted to any person protected having completed the prescribed qualifying period; or
(b) the provision to or in respect of children, of food, clothing, housing, holidays or domestic help; or
(c) a combination of (a) and (b).

Article 43

The benefit specified in Article 42 shall be secured at least to a person protected who, within a prescribed period, has completed a qualifying period which may be three months of contribution or employment, or one year of residence, as may be prescribed.

Article 44

The total value of the benefits granted in accordance with Article 42 to the persons protected shall be such as to represent–
(a) 3 per cent. of the wage of an ordinary adult male labourer, as determined in accordance with the rules laid down in Article 66, multiplied by the total number of children of persons protected; or
(b) 1.5 per cent. of the said wage, multiplied by the total number of children of all residents.

Article 45

Where the benefit consists of a periodical payment, it shall be granted throughout the contingency.

PART VIII. MATERNITY BENEFIT

Article 46

Each Member for which this Part of this Convention is in force shall secure to the persons protected the provision of maternity benefit in accordance with the following Articles of this Part.

Article 47

The contingencies covered shall include pregnancy and confinement and their consequences, and suspension of earnings, as defined by national laws or regulations, resulting therefrom.

Article 48

The persons protected shall comprise–
(a) all women in prescribed classes of employees, which classes constitute not less than 50 per cent. of all employees and, for maternity medical benefit, also the wives of men in these classes; or
(b) all women in prescribed classes of the economically active population, which classes constitute not less than 20 per cent. of all residents, and, for maternity medical benefit, also the wives of men in these classes; or
(c) where a declaration made in virtue of Article 3 is in force, all women in prescribed classes of employees, which classes constitute not less than 50 per cent. of all employees in industrial workplaces employing 20 persons or more, and, for maternity medical benefit, also the wives of men in these classes.

Article 49

1. In respect of pregnancy and confinement and their consequences, the maternity medical benefit shall be medical care as specified in paragraphs 2 and 3 of this Article.
2. The medical care shall include at least–
   (a) pre-natal, confinement and post-natal care either by medical practitioners or by qualified midwives; and
   (b) hospitalisation where necessary.
3. The medical care specified in paragraph 2 of this Article shall be afforded with a view to maintaining, restoring or improving the health of the woman protected and her ability to work and to attend to her personal needs.
4. The institutions or Government departments administering the maternity medical benefit shall, by such means as may be deemed appropriate, encourage the women protected to avail themselves of the general health services placed at their disposal by the public authorities or by other bodies recognised by the public authorities.

Article 50

In respect of suspension of earnings resulting from pregnancy and from confinement and their consequences, the benefit shall be a periodical payment calculated in such a manner as to comply either with the requirements of Article 65 or with the requirements of Article 66. The amount of the periodical payment may vary in the course of the contingency, subject to the average rate thereof complying with these requirements.

Article 51

The benefit specified in Articles 49 and 50 shall, in a contingency covered, be secured at least to a woman in the classes protected who has completed such qualifying period as may be considered necessary to preclude abuse, and the benefit specified in Article 49 shall also be secured to the wife of a man in the classes protected where the latter has completed such qualifying period.

Article 52

The benefit specified in Articles 49 and 50 shall be granted throughout the contingency, except that the periodical payment may be limited to 12 weeks, unless a longer period of abstention from work is required or authorised by national laws or regulations, in which event it may not be limited to a period less than such longer period.

PART IX. INVALIDITY BENEFIT

Article 53

Each Member for which this Part of this Convention is in force shall secure to the persons protected the provision of invalidity benefit in accordance with the following Articles of this Part.

Article 54

The contingency covered shall include inability to engage in any gainful activity, to an extent prescribed, which inability is likely to be permanent or persists after the exhaustion of sickness benefit.

Article 55

The persons protected shall comprise–
(a) prescribed classes of employees, constituting not less than 50 per cent. of all employees; or
(b) prescribed classes of the economically active population, constituting not less than 20 per cent. of all residents; or
(c) all residents whose means during the contingency do not exceed limits prescribed in such a manner as to comply with the requirements of Article 67; or
(d) where a declaration made in virtue of Article 3 is in force, prescribed classes of employees, constituting not less than 50 per cent. of all employees in industrial workplaces employing 20 persons or more.

Article 56

The benefit shall be a periodical payment calculated as follows:
(a) where classes of employees or classes of the economically active population are protected, in such a manner as to comply either with the requirements of Article 65 or with the requirements of Article 66;
(b) where all residents whose means during the contingency do not exceed prescribed limits are protected, in such a manner as to comply with the requirements of Article 67.

Article 57

1. The benefit specified in Article 56 shall, in a contingency covered, be secured at least–
   (a) to a person protected who has completed, prior to the contingency, in accordance with prescribed rules, a qualifying period which may be 15 years of contribution or employment, or 10 years of residence; or
   (b) where, in principle, all economically active persons are protected, to a person protected who has completed a qualifying period of three years of contribution and in respect of whom, while he was of working age, the prescribed yearly average number of contributions has been paid.
2. Where the benefit referred to in paragraph 1 is conditional upon a minimum period of contribution or employment, a reduced benefit shall be secured at least--
   (a) to a person protected who has completed, prior to the contingency, in accordance with prescribed rules, a qualifying period of five years of contribution or employment; or
   (b) where, in principle, all economically active persons are protected, to a person protected who has completed a qualifying period of three years of contribution and in respect of whom, while he was of working age, half the yearly average number of contributions prescribed in accordance with subparagraph (b) of paragraph 1 of this Article has been paid.
3. The requirements of paragraph 1 of this Article shall be deemed to be satisfied where a benefit calculated in conformity with the requirements of Part XI but at a percentage of ten points lower than shown in the Schedule appended to that Part for the standard beneficiary concerned is secured at least to a person protected who has completed, in accordance with prescribed rules, five years of contribution, employment or residence.
4. A proportional reduction of the percentage indicated in the Schedule appended to Part XI may be effected where the qualifying period for the pension corresponding to the reduced percentage exceeds five years of contribution or employment but is less than 15 years of contribution or employment; a reduced pension shall be payable in conformity with paragraph 2 of this Article.

Article 58

The benefit specified in Articles 56 and 57 shall be granted throughout the contingency or until an old-age benefit becomes payable.

PART X. SURVIVORS' BENEFIT

Article 59

Each Member for which this Part of this Convention is in force shall secure to the persons protected the provision of survivors' benefit in accordance with the following Articles of this Part.

Article 60

1. The contingency covered shall include the loss of support suffered by the widow or child as the result of the death of the breadwinner; in the case of a widow, the right to benefit may be made conditional on her being presumed, in accordance with national laws or regulations, to be incapable of self-support.
2. National laws or regulations may provide that the benefit of a person otherwise entitled to it may be suspended if such person is engaged in any prescribed gainful activity or that the benefit, if contributory, may be reduced where the earnings of the beneficiary exceed a prescribed amount, and, if non-contributory, may be reduced where the earnings of the beneficiary or his other means or the two taken together exceed a prescribed amount.

Article 61

The persons protected shall comprise–
(a) the wives and the children of breadwinners in prescribed classes of employees, which classes constitute not less than 50 per cent. of all employees; or
(b) the wives and the children of breadwinners in prescribed classes of the economically active population, which classes constitute not less than 20 per cent. of all residents; or
(c) all resident widows and resident children who have lost their breadwinner and whose means during the contingency do not exceed limits prescribed in such a manner as to comply with the requirements of Article 67; or
(d) where a declaration made in virtue of Article 3 is in force, the wives and the children of breadwinners in prescribed classes of employees, which classes constitute not less than 50 per cent. of all employees in industrial workplaces employing 20 persons or more.

Article 62

The benefit shall be a periodical payment calculated as follows:
(a) where classes of employees or classes of the economically active population are protected, in such a manner as to comply either with the requirements of Article 65 or with the requirements of Article 66;
(b) where all residents whose means during the contingency do not exceed prescribed limits are protected, in such a manner as to comply with the requirements of Article 67.

Article 63

1. The benefit specified in Article 62 shall, in a contingency covered, be secured at least–
   (a) to a person protected whose breadwinner has completed, in accordance with prescribed rules, a qualifying period which may be 15 years of contribution or employment, or 10 years of residence; or
   (b) where, in principle, the wives and children of all economically active persons are protected, to a person protected whose breadwinner has completed a qualifying period of three years of contribution and in respect of whose breadwinner, while he was of working age, the prescribed yearly average number of contributions has been paid.
2. Where the benefit referred to in paragraph 1 is conditional upon a minimum period of contribution or employment, a reduced benefit shall be secured at least--
   (a) to a person protected whose breadwinner has completed, in accordance with prescribed rules, a qualifying period of five years of contribution or employment; or
   (b) where, in principle, the wives and children of all economically active persons are protected, to a person protected whose breadwinner has completed a qualifying period of three years of contribution and in respect of whose breadwinner, while he was of working age, half the yearly average number of contributions prescribed in accordance with subparagraph (b) of paragraph 1 of this Article has been paid.
3. The requirements of paragraph 1 of this Article shall be deemed to be satisfied where a benefit calculated in conformity with the requirements of Part XI but a percentage of ten points lower than shown in the Schedule appended to that Part for the standard beneficiary concerned is secured at least to a person protected whose breadwinner has completed, in accordance with prescribed rules, five years of contribution, employment or residence.
4. A proportional reduction of the percentage indicated in the Schedule appended to Part XI may be effected where the qualifying period for the benefit corresponding to the reduced percentage exceeds five years of contribution or employment but is less than 15 years of contribution or employment; a reduced benefit shall be payable in conformity with paragraph 2 of this Article.
5. In order that a childless widow presumed to be incapable of self-support may be entitled to a survivor's benefit, a minimum duration of the marriage may be required.

Article 64

The benefit specified in Articles 62 and 63 shall be granted throughout the contingency.

PART XI. STANDARDS TO BE COMPLIED WITH BY PERIODICAL PAYMENTS

Article 65

1. In the case of a periodical payment to which this Article applies, the rate of the benefit, increased by the amount of any family allowances payable during the contingency, shall be such as to attain, in respect of the contingency in question, for the standard beneficiary indicated in the Schedule appended to this Part, at least the percentage indicated therein of the total of the previous earnings of the beneficiary or his breadwinner and of the amount of any family allowances payable to a person protected with the same family responsibilities as the standard beneficiary.
2. The previous earnings of the beneficiary or his breadwinner shall be calculated according to prescribed rules, and, where the persons protected or their breadwinners are arranged in classes according to their earnings, their previous earnings may be calculated from the basic earnings of the classes to which they belonged.
3. A maximum limit may be prescribed for the rate of the benefit or for the earnings taken into account for the calculation of the benefit, provided that the maximum limit is fixed in such a way that the provisions of paragraph 1 of this Article are complied with where the previous earnings of the beneficiary or his breadwinner are equal to or lower than the wage of a skilled manual male employee.
4. The previous earnings of the beneficiary or his breadwinner, the wage of the skilled manual male employee, the benefit and any family allowances shall be calculated on the same time basis.
5. For the other beneficiaries, the benefit shall bear a reasonable relation to the benefit for the standard beneficiary.
6. For the purpose of this Article, a skilled manual male employee shall be--
   (a) a fitter or turner in the manufacture of machinery other than electrical machinery; or
   (b) a person deemed typical of skilled labour selected in accordance with the provisions of the following paragraph; or
   (c) a person whose earnings are such as to be equal to or greater than the earnings of 75 per cent. of all the persons protected, such earnings to be determined on the basis of annual or shorter periods as may be prescribed; or
   (d) a person whose earnings are equal to 125 per cent. of the average earnings of all the persons protected.
7. The person deemed typical of skilled labour for the purposes of subparagraph (b) of the preceding paragraph shall be a person employed in the major group of economic activities with the largest number of economically active male persons protected in the contingency in question, or of the breadwinners of the persons

protected, as the case may be, in the division comprising the largest number of such persons or breadwinners; for this purpose, the international standard industrial classification of all economic activities, adopted by the Economic and Social Council of the United Nations at its Seventh Session on 27 August 1948, and reproduced in the Annex to this Convention, or such classification as at any time amended, shall be used.

8. Where the rate of benefit varies by region, the skilled manual male employee may be determined for each region in accordance with paragraphs 6 and 7 of this Article.
9. The wage of the skilled manual male employee shall be determined on the basis of the rates of wages for normal hours of work fixed by collective agreements, by or in pursuance of national laws or regulations, where applicable, or by custom, including cost-of-living allowances if any; where such rates differ by region but paragraph 8 of this Article is not applied, the median rate shall be taken.
10. The rates of current periodical payments in respect of old age, employment injury (except in case of incapacity for work), invalidity and death of breadwinner, shall be reviewed following substantial changes in the general level of earnings where these result from substantial changes in the cost of living.

Article 66

1. In the case of a periodical payment to which this Article applies, the rate of the benefit, increased by the amount of any family allowances payable during the contingency, shall be such as to attain, in respect of the contingency in question, for the standard beneficiary indicated in the Schedule appended to this Part, at least the percentage indicated therein of the total of the wage of an ordinary adult male labourer and of the amount of any family allowances payable to a person protected with the same family responsibilities as the standard beneficiary.
2. The wage of the ordinary adult male labourer, the benefit and any family allowances shall be calculated on the same time basis.
3. For the other beneficiaries, the benefit shall bear a reasonable relation to the benefit for the standard beneficiary.
4. For the purpose of this Article, the ordinary adult male labourer shall be–
   (a) a person deemed typical of unskilled labour in the manufacture of machinery other than electrical machinery; or
   (b) a person deemed typical of unskilled labour selected in accordance with the provisions of the following paragraph.
5. The person deemed typical of unskilled labour for the purpose of subparagraph (b) of the preceding paragraph shall be a person employed in the major group of economic activities with the largest number of economically active male persons protected in the contingency in question, or of the breadwinners of the persons protected, as the case may be, in the division comprising the largest number of such persons or breadwinners; for this purpose, the international standard industrial classification of all economic activities, adopted by the Economic and Social Council of the United Nations at its Seventh Session on 27 August 1948, and reproduced in

the Annex to this Convention, or such classification as at any time amended, shall be used.

6. Where the rate of benefit varies by region, the ordinary adult male labourer may be determined for each region in accordance with paragraphs 4 and 5 of this Article.
7. The wage of the ordinary adult male labourer shall be determined on the basis of the rates of wages for normal hours of work fixed by collective agreements, by or in pursuance of national laws or regulations, where applicable, or by custom, including cost-of-living allowances if any; where such rates differ by region but paragraph 6 of this Article is not applied, the median rate shall be taken.
8. The rates of current periodical payments in respect of old age, employment injury (except in case of incapacity for work), invalidity and death of breadwinner, shall be reviewed following substantial changes in the general level of earnings where these result from substantial changes in the cost of living.

Article 67

In the case of a periodical payment to which this Article applies–

(a) the rate of the benefit shall be determined according to a prescribed scale or a scale fixed by the competent public authority in conformity with prescribed rules;
(b) such rate may be reduced only to the extent by which the other means of the family of the beneficiary exceed prescribed substantial amounts or substantial amounts fixed by the competent public authority in conformity with prescribed rules;
(c) the total of the benefit and any other means, after deduction of the substantial amounts referred to in subparagraph (b), shall be sufficient to maintain the family of the beneficiary in health and decency, and shall be not less than the corresponding benefit calculated in accordance with the requirements of Article 66;
(d) the provisions of subparagraph (c) shall be deemed to be satisfied if the total amount of benefits paid under the Part concerned exceeds by at least 30 per cent. the total amount of benefits which would be obtained by applying the provisions of Article 66 and the provisions of:
    (i) Article 15 (b) for Part III;
    (ii) Article 27 (b) for Part V;
    (iii) Article 55 (b) for Part IX;
    (iv) Article 61 (b) for Part X.

SCHEDULE TO PART XI. PERIODICAL PAYMENTS TO STANDARD BENEFICIARIES

Part	*Contingency*	*Standard Beneficiary*	*Percentage*
III	Sickness	Man with wife and two children	45
IV	Unemployment	Man with wife and two children	45
V	Old age	Man with wife of pensionable age	40
VI	Employment injury: Incapacity of work Invalidity Survivors	 Man with wife and two children Man with wife and two children Widow with two children	 50 50 40
VIII	Maternity	Woman	45
IX	Invalidity	Man with wife and two children	40
X	Survivors	Widow with two children	40

PART XII. EQUALITY OF TREATMENT OF NON-NATIONAL RESIDENTS

Article 68

1. Non-national residents shall have the same rights as national residents: Provided that special rules concerning non-nationals and nationals born outside the territory of the Member may be prescribed in respect of benefits or portions of benefits which are payable wholly or mainly out of public funds and in respect of transitional schemes.
2. Under contributory social security schemes which protect employees, the persons protected who are nationals of another Member which has accepted the obligations of the relevant Part of the Convention shall have, under that Part, the same rights as nationals of the Member concerned: Provided that the application of this paragraph may be made subject to the existence of a bilateral or multilateral agreement providing for reciprocity.

PART XIII. COMMON PROVISIONS

Article 69

A benefit to which a person protected would otherwise be entitled in compliance with any of Parts II to X of this Convention may be suspended to such extent as may be prescribed–

(a) as long as the person concerned is absent from the territory of the Member;
(b) as long as the person concerned is maintained at public expense, or at the expense of a social security institution or service, subject to any portion of the benefit in excess of the value of such maintenance being granted to the dependants of the beneficiary;

(c) as long as the person concerned is in receipt of another social security cash benefit, other than a family benefit, and during any period in respect of which he is indemnified for the contingency by a third party, subject to the part of the benefit which is suspended not exceeding the other benefit or the indemnity by a third party;
(d) where the person concerned has made a fraudulent claim;
(e) where the contingency has been caused by a criminal offence committed by the person concerned;
(f) where the contingency has been caused by the wilful misconduct of the person concerned;
(g) in appropriate cases, where the person concerned neglects to make use of the medical or rehabilitation services placed at his disposal or fails to comply with rules prescribed for verifying the occurrence or continuance of the contingency or for the conduct of beneficiaries;
(h) in the case of unemployment benefit, where the person concerned has failed to make use of the employment services placed at his disposal;
(i) in the case of unemployment benefit, where the person concerned has lost his employment as a direct result of a stoppage of work due to a trade dispute, or has left it voluntarily without just cause; and
(j) in the case of survivors' benefit, as long as the widow is living with a man as his wife.

Article 70

1. Every claimant shall have a right of appeal in case of refusal of the benefit or complaint as to its quality or quantity.
2. Where in the application of this Convention a Government department responsible to a legislature is entrusted with the administration of medical care, the right of appeal provided for in paragraph 1 of this Article may be replaced by a right to have a complaint concerning the refusal of medical care or the quality of the care received investigated by the appropriate authority.
3. Where a claim is settled by a special tribunal established to deal with social security questions and on which the persons protected are represented, no right of appeal shall be required.

Article 71

1. The cost of the benefits provided in compliance with this Convention and the cost of the administration of such benefits shall be borne collectively by way of insurance contributions or taxation or both in a manner which avoids hardship to persons of small means and takes into account the economic situation of the Member and of the classes of persons protected.
2. The total of the insurance contributions borne by the employees protected shall not exceed 50 per cent. of the total of the financial resources allocated to the protection of employees and their wives and children. For the purpose of ascertaining whether this condition is fulfilled, all the benefits provided by the Member in compliance with

this Convention, except family benefit and, if provided by a special branch, employment injury benefit, may be taken together.
3. The Member shall accept general responsibility for the due provision of the benefits provided in compliance with this Convention, and shall take all measures required for this purpose; it shall ensure, where appropriate, that the necessary actuarial studies and calculations concerning financial equilibrium are made periodically and, in any event, prior to any change in benefits, the rate of insurance contributions, or the taxes allocated to covering the contingencies in question.

Article 72

1. Where the administration is not entrusted to an institution regulated by the public authorities or to a Government department responsible to a legislature, representatives of the persons protected shall participate in the management, or be associated therewith in a consultative capacity, under prescribed conditions; national laws or regulations may likewise decide as to the participation of representatives of employers and of the public authorities.
2. The Member shall accept general responsibility for the proper administration of the institutions and services concerned in the application of the Convention.

PART XIV. MISCELLANEOUS PROVISIONS

Article 73

This Convention shall not apply to–
(a) contingencies which occurred before the coming into force of the relevant Part of the Convention for the Member concerned;
(b) benefits in contingencies occurring after the coming into force of the relevant Part of the Convention for the Member concerned in so far as the rights to such benefits are derived from periods preceding that date.

Article 74

This Convention shall not be regarded as revising any existing Convention.

Article 75

If any Convention which may be adopted subsequently by the Conference concerning any subject or subjects dealt with in this Convention so provides, such provisions of this Convention as may be specified in the said Convention shall cease to apply to any Member having ratified the said Convention as from the date at which the said Convention comes into force for that Member.
(Editors' Note: Provisions pursuant to Article 75 are contained in Conventions Nos. 121 (Article 29), 128 (Article 45) and 130 (Article 36).)

Article 76

1. Each Member which ratifies this Convention shall include in the annual report upon the application of this Convention submitted under Article 22 of the Constitution of the International Labour Organisation–
   (a) full information concerning the laws and regulations by which effect is given to the provisions of the Convention; and
   (b) evidence, conforming in its presentation as closely as is practicable with any suggestions for greater uniformity of presentation made by the Governing Body of the International Labour Office, of compliance with the statistical conditions specified in--
      (i) Articles 9 (a), (b), (c) or (d); 15 (a), (b) or (d); 21 (a) or (c); 27 (a), (b) or (d); 33 (a) or (b); 41 (a), (b) or (d); 48 (a), (b) or (c); 55 (a (a), (b) or (d); 61 (a), (b) or (d), as regards the number of persons protected;
      (ii) Articles 44, 65, 66 or 67, as regards the rates of benefit;
      (iii) subparagraph (a) of paragraph 2 of Article 18, as regards duration of sickness benefit;
      (iv) paragraph 2 of Article 24, as regards duration of unemployment benefit; and
      (v) paragraph 2 of Article 71, as regards the proportion of the financial resources constituted by the insurance contributions of employees protected.
2. Each Member which ratifies this Convention shall report to the Director-General of the International Labour Office at appropriate intervals, as requested by the Governing Body, on the position of its law and practice in regard to any of Parts II to X of the Convention not specified in its ratification or in a notification made subsequently in virtue of Article 4.

Article 77

1. This Convention does not apply to seamen or seafishermen; provision for the protection of seamen and seafishermen has been made by the International Labour Conference in the Social Security (Seafarers) Convention, 1946, and the Seafarers' Pensions Convention, 1946.
2. A Member may exclude seamen and seafishermen from the number of employees, of the economically active population or of residents, when calculating the percentage of employees or residents protected in compliance with any of Parts II to X covered by its ratification.

PART XV. FINAL PROVISIONS

Article 78

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 79

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.
2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.
3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratifications has been registered.

Article 80

1. Declarations communicated to the Director-General of the International Labour Office in accordance with paragraph 2 of Article 35 of the Constitution of the International Labour Organisation shall indicate–
   a) the territories in respect of which the Member concerned undertakes that the provisions of the Convention shall be applied without modification;
   b) the territories in respect of which it undertakes that the provisions of the Convention or of any Parts thereof shall be applied subject to modifications, together with details of the said modifications;
   c) the territories in respect of which the Convention is inapplicable and in such cases the grounds on which it is inapplicable;
   d) the territories in respect of which it reserves its decision pending further consideration of the position.
2. The undertakings referred to in subparagraphs (a) and (b) of paragraph 1 of this Article shall be deemed to be an integral part of the ratification and shall have the force of ratification.
3. Any Member may at any time by a subsequent declaration cancel in whole or in part any reservation made in its original declaration in virtue of subparagraph (b), (c) or (d) of paragraph 1 of this Article.
4. Any Member may, at any time at which the Convention is subject to denunciation in accordance with the provisions of Article 82, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of such territories as it may specify.

Article 81

1. Declarations communicated to the Director-General of the International Labour Office in accordance with paragraph 4 or 5 of Article 35 of the Constitution of the International Labour Organisation shall indicate whether the provisions of the Convention or of the Parts thereof accepted by the Declaration will be applied in the territory concerned without modification or subject to modifications; when the Declaration indicates that the provisions of the Convention or of certain Parts thereof will be applied subject to modifications, it shall give details of the said modifications.
2. The Member, Members or international authority concerned may at any time by a subsequent declaration renounce in whole or in part the right to have recourse to any modification indicated in any former declaration.
3. The Member, Members or international authority concerned may, at any time at which this Convention is subject to denunciation in accordance with the provisions of Article 82, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of the application of the Convention.

Article 82

1. A Member which has ratified this Convention may, after the expiration of the ten years from the date on which the Convention first comes into force, denounce the Convention or any one or more of Parts II to X thereof by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.
2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce the Convention or any one of Parts II to X thereof at the expiration of each period of ten years under the terms provided for in this Article.

Article 83

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications, declarations and denunciations communicated to him by the Members of the Organisation.
2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 84

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications, declarations and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 85

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 86

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides:
   a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 82 above, if and when the new revising Convention shall have come into force;
   b) as from the date when the new revising Convention comes into force, this Convention shall cease to be open to ratification by the Members.
2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 87

The English and French versions of the text of this Convention are equally authoritative.