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Public Trust in the Regulatory Welfare State

Dr. A. Tollenaar*

Social security is by definition a mixture of public and private legal mechanisms. This mixture is expected to provide efficient, tailor-made solutions that still meet public interests like reliability, solidarity and equity. From the perspective of the individual citizen, this mixture of instruments might seem rather confusing. The central question of this contribution is therefore: what are the consequences of the mixture of public and private social security for public trust?

To answer this question, a model of the concept of 'public trust' must be constructed. This model contains four factors that might affect public trust. This model is then used to compare the social security for short-term disabled and sick employees in Germany and the Netherlands. The comparison focuses on the distribution of responsibilities and the criteria determining incapacity for work. The comparison shows that both countries score differently on the identified factors, meaning that it is likely that there is a difference in public trust in both countries.

1. Introduction

Social security is, by definition, a combination of public and private responsibilities and regulation.¹ *Private* social security is always the first safety net against the loss of income or poverty. Individual arrangements such as insurance and solidarity within a family or within a social group (charities) provide a certain protection against social risks. The instruments used are mainly contracts and gifts.² *Public* social security is subsidiary and provides income security where private instruments fail. The instruments in the public sphere are mainly benefits based on statutory acts.³

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¹ D. Pieters, *Social security: an introduction to the basic principles*, Kluwer Law International: Alphen aan den Rijn 2006, p. 137.

² J.B. Williamson & F.C. Pampel, 'Does the privatization of social security make sense for developing nations?' *International Social Security Review* 1998 (4), p. 3-31.

³ A. Tollenaar, 'Instrumentalisation of public interests: a legal perspective', in: G.J. Vonk & A. Tollenaar (eds), *Social security as a public interest: A multidisciplinary inquiry into the foundations of the regulatory welfare state*, Intersentia: Antwerp 2010.

The last two decades show a new balance between these two types of instruments. The modern approach is to use more private instruments to fulfil public goals. Public coverage decreases, leaving room for society and the market to provide a safety net. In the institutional framework one can observe the use of private instruments to create new incentives that are expected to enhance efficiency.⁴ These instruments are often derived from the school of New Public Management, and result in the contracting out of social services, or in creating a market to enhance competition between public and private providers.⁵

This contribution aims to explore the actual pathology of this public-private mixture in two modern welfare states and uses the perspective of the citizen. The question that will be addressed is: what are the consequences of the new balance between public and private social security for public trust?

The answer to this question first requires an exploration of the public and private regulation in the welfare state (section 2). Then a model for public trust will be developed (section 3). This model is meant as an instrument to assess the public-private mixture of welfare states and to identify potential threats therein for public trust. This model is then used to compare two systems of social security (section 4 and 5). Section 6 contains the concluding remarks.

2. The rise of the regulatory welfare state

A brief history of the welfare state

Western European welfare states show a similar history. In the era of industrialisation employees and employers founded mutual funds as a safety net against employment related risks like industrial accidents or unemployment. Relief for the poor was provided by churches.⁶ In that period the role of the state was subsidiary; it was first and foremost a private matter to organize social security. As Vonk & Katrougalos observe, the legal conceptualisation of social security emerged in the 19th century as an institutional answer to ‘the social question’ that dealt with the position of the powerful working class and the fear of social-

⁴ J. Pacolet & V. Coudron, ‘De Europese verzorgingsstaten: op zoek naar tendensen binnen een economische en sociaal-politieke samenhang’ *Belgisch Tijdschrift Voor Sociale Zekerheid* 2006 (4), p. 495-586.

⁵ M. Plantinga, J. De Ridder & A. Corrà, ‘Choosing whether to buy or make: The contracting out of employment reintegration services by Dutch municipalities’ *Social Policy and Administration* 2011(45), p. 245–263; S. Greß, ‘Regulated competition in social health insurance: a three country comparison’ *International Social Security Review* 2006 (3), p. 27-47.; R. Böckman, ‘The Private Health Insurance: Demarketization of a Welfare Market?’, *German Policy Studies* 2009 (1), p. 119-140.

⁶ M. Dupeyroux, *Ontwikkeling en tendenties van de stelsels van de sociale zekerheid der lidstaten van de Europese Gemeenschappen en Groot-Brittannië*, EGKS Luxemburg 1966.

ist revolution.⁷ This did not result in entitlements immediately, but merely in a facilitative role of the state to enable societal institutions, like churches and trade unions, to provide social security.

The role of the state increased as a response to failure of these private institutions. Churches only provided security for their members leaving large groups of paupers unprotected. The mutual funds went bankrupt in case of an incident, or were not reliable due to mismanagement.⁸ These apparent failures justified state interference. The Beveridge reports (1942) form an important milestone in this development. The state was given the responsibility for insurance against loss of income or poverty. Social security slowly transformed in a universal human right with the institutional framework of the International Labour Organisation and the Declaration of Philadelphia in 1944.

In this public welfare state, benefits and provisions were mainly based on acts and statutes. Social assistance became a right instead of a gift and anonymous public bureaucracies slowly crowded out the civil society organisations making these groups less and less relevant. In the words of Levi-Faur, one could call this a phase of nationalisation.⁹

The countermove emerged in the economic crisis of the last quarter of the 20th century. Public social security caused moral hazards: employers did not feel an incentive to invest in improving working conditions that might lower the risk of incidental accidents, and employees felt an incentive to claim for benefits.¹⁰ Public bureaucracies lacked the capacity to verify claims resulting in an even further abuse of social schemes.¹¹

The burst of the public welfare state seemed inevitable. In many Western European states, the solution was found in two mechanisms. On the one side the reaction was austerity: less public coverage and more repression for those relying on

⁷ G.J. Vonk & G. Katrougalos, 'The public interest and the welfare state: a legal approach', in: G.J. Vonk & A. Tollenaar (eds), *Social security as a public interest: A multidisciplinary inquiry into the foundations of the regulatory welfare state*, Intersentia: Antwerp 2010, p. 69.

⁸ P. Taylor-Gooby, *New Risks, New Welfare. The transformation of the European Welfare State*, Oxford University Press: Oxford 2004, p. 2.

⁹ D. Levi-Faur, 'The odyssey of the regulatory state. Episode one: the rescue of the welfare state' *Jerusalem Papers in Regulation & Governance*, Working paper No 39. 2011, p. 22.

¹⁰ A. Nentjes & E. Woerdman, 'Instrumentalisation of the public interest in social security: an economic perspective', in: G.J. Vonk & A. Tollenaar (eds), *Social security as a public interest: A multidisciplinary inquiry into the foundations of the regulatory welfare state*, Antwerp: Intersentia 2010; C.A De Kam & F. Nypels, *Afscheid van het paradijs: de herziening van de sociale zekerheid*, Amsterdam: Contact 1984.

¹¹ P. Spicker, *How social security works. An introduction to benefits in Britain*, Bristol: The Policy Press 2011, p. 245.

social security. The decrease of public coverage also meant a reshuffle of the rights and duties of employers and employees in labour law, creating new incentives that would prevent using public means.¹²

The second response was that of using 'market type mechanisms' meant as a tool to organize public coverage more efficiently.¹³ This development fits the school of New Public Management. Contracting out services and enhancing competition were thought to force agencies to act more efficiently.¹⁴ What emerged is what one could call the 'regulatory welfare state'.¹⁵

Public interests in the regulatory welfare state

To explore the regulatory welfare state, it is necessary to understand how public and private responsibilities are balanced. The regulatory welfare state is based on the notion that the state is responsible for the provision of social security for as far as public interests are involved.¹⁶ Public interests are those interests that go beyond the individual interests. In the hypothetical situation the market of supply and demand can serve these interests. Transactions will emerge, enlarging the welfare of the parties involved.¹⁷

The history of the welfare states shows that private transactions are unable to provide sufficient security for all, causing the state to interfere. The first public interest is therefore that social security has to provide *protection*; a decent standard of living. This notion of protection is supported with two other public inter-

¹² A. Tollenaar, 'Instrumentalisation of public interests: a legal perspective', in: G.J. Vonk & A. Tollenaar (eds), *Social security as a public interest: A multidisciplinary inquiry into the foundations of the regulatory welfare state*, Antwerp: Intersentia 2010.

¹³ P. Taylor-Gooby, *New Risks, New Welfare. The transformation of the European Welfare State*, Oxford: Oxford University Press 2004, p. 3; J. de Ridder, 'Instrumentalisation of public values in social security: a public administration perspective', in: G.J. Vonk & A. Tollenaar (eds), *Social security as a public interest: A multidisciplinary inquiry into the foundations of the regulatory welfare state*, Antwerp: Intersentia 2010.

¹⁴ R Böckman, 'The Private Health Insurance: Demarketization of a Welfare Market?', *German Policy Studies* 2009 (1), p. 119.

¹⁵ G.J. Vonk, 'Social Security as a Public Interest, a Multidisciplinary Inquiry into the Foundations of the Regulatory Welfare state', *European Journal of Social Security* 2010 (1), p. 2 - 16.

¹⁶ B. Bozeman, *Public values and public interest. Counterbalancing economic individualism*, Washington: Georgetown University Press 2007; T.B. Jørgensen & B. Bozeman, 'Public Values: An Inventory' *Administration & Society* 2007 (39), p. 354-381.

¹⁷ A. Nentjes & E. Woerdman, 'Instrumentalisation of the public interest in social security: an economic perspective', in: G.J. Vonk & A. Tollenaar (eds), *Social security as a public interest: A multidisciplinary inquiry into the foundations of the regulatory welfare state*, Antwerp: Intersentia 2010.

ests: *participation* and *reliability*. Public welfare supports its beneficiaries to participate, to earn an income and become independent from public support. In the early days of the public interference this notion was underlined in dogmatic pamphlets, such as the *Rerum Novarum*, in which the Catholic Church emphasised that the ‘man in the household’ should be enabled to take his responsibility for his family. Reliability is the other side of the coin: if the citizen has a valid claim on support, it is important that this claim can be realized. This calls for specific regulation ensuring the strength of the supporting mechanisms, like the cover ratio of the insurance fund.¹⁸

These public interests form the core of the welfare state but do not prescribe the organisation of social security.¹⁹ After all: protection, participation and reliability can be organized in either a public or a private environment, using public or private instruments. There are nevertheless two major restrictions that are constitutional or intrinsic to social security. One is the restriction that the welfare state has to aim for *solidarity* within a society. In Germany this is seen in article 20 of the constitution, which states that the Republic of Germany is a social federal state - this includes solidarity.²⁰ A second restriction is that it has to ensure *equality*; equal treatment of everyone in similar circumstances.

The last two public interests which guide the discussions on the regulatory welfare state are related to the institutional framework. The interests that come to mind are principles related to the *rule of law* and of *good governance*. The rule of law has a legal connotation and contains the general principle that public bodies have to apply and are restricted by legislation. Good governance has a wider meaning, and includes principles like transparency, ~~and~~ effective & efficient adjudication.²¹

Regulatory welfare state: a tense relation between public and private regulation

The public interests of social security are flexible with regard to the design of the welfare state. One could think of statutory acts providing agencies with cer-

¹⁸ M.H.D. van Leeuwen, ‘Trade Unions and the Provision of Welfare in the Netherlands, 1910-1960’ *The Economic History Review* 1997 (50), p. 764-791; A. Knotter, B. Altena & D. Damsma, *Labour, social policy and the welfare state*, Amsterdam: Stichting beheer IIS 1997.

¹⁹ G.J. Vonk, ‘Social Security as a Public Interest: A Multidisciplinary Inquiry into the Foundations of the Regulatory Welfare State’, *European Journal of Social Security* 2010(12); G Esping-Andersen, ‘After the Golden Age? Welfare dilemmas in a global economy’, in: G Esping-Andersen (ed), *Welfare states in transition: national adaptations in global economies*, Thousand Oaks: SAGE 1996, p. 1-30.

²⁰ S. Muckel, *Sozialrecht*, München: C.H. Beck 2009, p. 28.

²¹ J. Graham, B. Amos & T. Plumptre, *Good Governance in the 21st Century*, Ottawa: Institute On Governance 2003, p. 3; D. Levi-Faur, ‘The odyssey of the regulatory state. Episode one: the rescue of the welfare state’ *Jerusalem Papers in Regulation & Governance*, Working paper No 39. 2011, p. 22.

tain competences.²² This mode of realising public interests in the welfare state is likely to provide legal certainty and equality in transparent legal procedures. The disadvantages of public regulation are also known: bureaucracies seem to lack the capabilities to respond to the individual needs of the citizens. Esping-Andersen furthermore points out the fact that public protection is often ‘frozen’ in a past socio-economic order that no longer obtains nor is capable of responding to new risks.²³

An alternative mode of regulation is that of privatising and market type mechanisms. Contracting out with private actors and enlarging the role of private parties are then the instruments used.²⁴ These instruments have their known threats as well, known as market failures.²⁵ Adverse selection, meaning that those with a higher risk of incapacity to work will not find access to the labour market, might harm interests like solidarity and equality.

As a concluding remark one could say that public regulation will give reason for more private (market type) instruments and private regulation will cause a public correction. This forms the expected pathology of the regulatory welfare state: a continuous struggle between two opposite spheres, resulting in an even more complex regulatory reality.

3. A model of public trust

The question is then how the citizen sees this complex regulatory reality. In other words, how does the regulatory welfare state affect public trust? Public trust is seen as trust of the citizen (the trustee) in the regulatory system and the actors within that system that have to make decisions and provide social security. In the literature on public trust, one can distinguish four factors that are relevant to public trust.

The first factor is that of predictability. This is the approach Luhmann uses.²⁶ Everyone has expectations or beliefs on the way the government protects rights.

²² A. Tollenaar, ‘Instrumentalisation of public interests: a legal perspective’, in: G.J. Vonk & A. Tollenaar (eds), *Social security as a public interest: A multidisciplinary inquiry into the foundations of the regulatory welfare state*, Antwerp: Intersentia 2010.

²³ G Esping-Andersen, ‘After the Golden Age? Welfare dilemmas in a global economy’, in: G Esping-Andersen (ed), *Welfare states in transition: national adaptations in global economies*, Thousand Oaks: SAGE 1996, p. 1-30.

²⁴ J. de Ridder, ‘Instrumentalisation of public values in social security: a public administration perspective’, in: G.J. Vonk & A. Tollenaar (eds), *Social security as a public interest: A multidisciplinary inquiry into the foundations of the regulatory welfare state*, Antwerp: Intersentia 2010.

²⁵ C.N. Teulings, A.L. Bovenberg & H.P. van Dalen, *De Calculus van het publieke belang*, Den Haag: Ministerie van Economische Zaken 2003.

²⁶ N. Luhmann, *Trust and power*, Chichester: Wiley 1979.

Harming these expectations will negatively affect public trust. From this perspective one could derive the expectation that transparent norms on the exact entitlements may play an important role for public trust. After all, expectations and beliefs are mainly based on clear cut rules and regulations on the substantive rights and obligations.²⁷

Clear rules and regulations alone are not sufficient for public trust. It is also a matter of institutionalised capability to realise these rights. This refers to what Craig Thomas (1998) calls 'fiduciary trust'.²⁸ Fiduciary trust refers to the confidence of the trustee that his rights and individual position is fully respected and taken into account. Fiduciary trust is a characteristic of individual relationships. For fiduciary trust, it is important that the actors in this relationship are aware of each other's competences and responsibilities. Fiduciary trust furthermore requires that there is a corrective mechanism if the other party in the relationship does not respect the interests of the trustee.²⁹ From this perspective two factors might play a role for public trust. Firstly, the extent to which the trusted actor has clear responsibilities. This would imply that the incentives and agenda have to be transparent. The second factor deals with the availability and complexity of procedures to correct the trusted actor.

The corrective mechanisms refer to a third perspective on trust: that of institutional-based trust. Some institutions enjoy a trust that is seldom questioned.³⁰ One may think of legal procedures or democratic decision-making. Institutions like these have a history-based positive effect on public trust. This becomes visible when the design of an institution is changed. When for example access in a legal procedure is made more difficult, this potentially has a negative effect on public trust. This results in the fourth factor of public trust: the extent to which procedures differ from trusted institutions like democratic procedures or known legal procedures.

The four identified factors form a descriptive model of public trust. The clarity of rules, the clarity of responsibilities, the availability of corrective mechanisms and the quality of these procedures are factors that potentially affect public trust.

The next step is to 'fill' this model: what are the exact variables that are meant with clarity of rules, responsibilities, corrective mechanisms and procedures? To answer this question, systems of social security in two countries have been com-

²⁷ R. Bachmann, *Trust and power as means of co-ordinating the internal relations of the organization – a conceptual framework*, Groningen: University of Groningen 2002.

²⁸ Craig W Thomas, 'Maintaining and Restoring public trust in Government agencies and their employees', *Administration & Society* 1998 (30), p. 166-193.

²⁹ Craig W Thomas, 'Maintaining and Restoring public trust in Government agencies and their employees', *Administration & Society* 1998 (30), p. 166-193.

³⁰ Craig W Thomas, 'Maintaining and Restoring public trust in Government agencies and their employees', *Administration & Society* 1998 (30), p. 166-193.

pared: Germany and The Netherlands. Both countries have a relatively high trust in the government and in the legal system,³¹ and are comparable in the sense that both countries are mainly occupational welfare states, meaning that the coverage of social security aims to protect the income of the employee.³²

The major distinction between The Netherlands and Germany is that in Dutch legislation the cause of sickness or disability is irrelevant and the coverage is extended to the so-called 'risque social' instead of only the 'risque professionnel'. In German law the cause of sickness or disability is a relevant factor for the type and amount of benefits. In Germany benefits are not only meant as an income protection, but also as a compensation of damages.³³ This distinction is relevant to understand the differences between the two states.

The comparison focuses on two elements of income security for employees who report illness or who become disabled. Particularly in this part of social security, one might find a mixture of public and private instruments, since it is founded on a private relationship between employer and employee. The two elements that are compared are firstly the distribution of responsibilities between the employer and the government (section 4) and secondly the assessment of medical facts (section 5).

4. Continued payment of salary and sickness benefits

What happens if the employee reports in sick? Is there an entitlement to continued payment of salary or a (public) benefits? The regulatory framework often contains a combination of both. The result is a shared responsibility of both the state and the employer.³⁴

³¹ According to the Eurobarometer 50% of the citizens in The Netherlands and 48% of the citizens in Germany answered that they 'tend to trust the national government', based on a survey in 2014. To compare: in Greece 16% tend to trust the government and in Belgium 43%. Trust in the legal system is 60% in Germany and 65% in the Netherlands (based on a survey in 2010). In the European Social Survey on 2012 these percentages are even higher: 70% for Germany and 80% for the Netherlands.

³² G. Bonoli, 'Classifying Welfare States: a Two-dimension approach' *Journal of Social Policy* 1997 (26), p. 351-372; E. Immergut, 'Between state and market: sickness benefit and social control', in: M. Rein & L. Rainwater (eds), *Public/private interplay in social protection: A comparative study*, N.Y.: Sharpe 1986, p. 57-98.

³³ S. Klosse, *Menselijke schade: vergoeden of herstellen?*, Antwerpen: Maklu 1989.

³⁴ A. Nentjes & E. Woerdman, 'Instrumentalisation of the public interest in social security: an economic perspective', in: G.J. Vonk & A. Tollenaar (eds), *Social security as a public interest: A multidisciplinary inquiry into the foundations of the regulatory welfare state*, Antwerp: Intersentia 2010.

Germany

The German Civil Code (*Bürgerliches Gesetzbuch, BGB*) contains the principle 'no work, no pay'. This principle has an exception in article 326 II: if the employee is unable to work due to sickness, the employer is obliged to continue paying the wages for the first six weeks.³⁵ This right to continued payment of wages is regulated in the *Entgeltfortzahlungsgesetz*. After six weeks of sickness the employee is entitled to the (public) statutory health insurance funds (*Krankenkassen*).

The main goal of the *Entgeltfortzahlungsgesetz* is to consolidate employees' income security when unable to work due to sickness. The act transfers the responsibility and liability for employees' income security to their employer. The cause of sickness is not relevant.³⁶ Only if the sickness is caused by an accident and a third party can be held liable for said accident, ~~does an~~ employer ~~have~~ a right of recourse against the third party. The employee has to cooperate and to support the execution of this right.

The responsibility for continued payment during sickness forms a serious financial risk for employers with few employees. To cover this risk there is a public compensation scheme for these small companies. For employers with fewer than 30 employees the *Aufwendungsausgleichsgesetz (AAG)* provides the opportunity to reclaim 80% to 100% of the *Entgeltfortzahlung* at the public *Krankenkasse*.

The *Entgeltfortzahlung* is an important transfer of income security of employees to the private sphere. The importance is underlined by the fact that about 90% of the income for sick and disabled employees rests upon the employers in the form of *Entgeltfortzahlung*. The remaining, 10% of the costs of income security is based on the public *Krankenversicherung*.³⁷

The Netherlands

In The Netherlands, employees who are unable to work due to sickness, are entitled to sickness benefits, under the rules laid down in the sickness benefit act (*Ziektewet, ZW*). Under this act, the entitlement to sickness benefits only exists if there is no right to payment of wages (art. 29 ZW). Under the Civil Code (*Burgerlijk Wetboek, BW*) the employee has the right to continued payment of 70% of the last earned wages for the first two years (104 weeks) of sickness (art. 7:629 BW). In practice this percentage is often higher, depending on the agreements with trade unions in the collective labour agreements. In any case, the

³⁵ A. Junker, *Grundkurs Arbeitsrecht*, München: Beck 2009, p. 528.

³⁶ J. Schmitt, *Entgeltfortzahlungsgesetz und Aufwendungsausgleichsgesetz*, München: Beck 2007, p. 2.

³⁷ A. Junker, *Grundkurs Arbeitsrecht*, München: Beck 2009, p. 155.

public safety net of the *Ziekwet* functions only as a safety net in case the employer is incapable of continuing to pay wages (for example due to bankruptcy).

It goes without saying that the obligation to continue paying wages form a huge risk for the employer. The employer can decide to take out insurance for this risk with a private insurance company. There is no public interference with this insurance, except for the fiscal incentive that the employer can deduct the contributions from corporate taxes.

The transfer of the risk of loss of income to the employer was initially believed to provide an incentive for the employer to invest in improving working conditions and reducing absenteeism.³⁸ The fact that the employer has to pay the bill was expected to form an incentive for the employer to carefully monitor the reasons for sickness and to ensure a quick reintegration of the employee. In addition, the legislation also contains an entitlement for the employee that the employer would take re-integrative measures to enable him to work. An employee can enforce this right in civil law proceedings.

Comparison

The obligation of continued payment of wages during sickness can serve many goals. One goal might be maintaining income security for the employee, which is, especially in the German situation, a relevant factor where the employer has to pay full salary for the first six weeks. Another goal is to lower the bureaucratic costs of assessing the claim of the sick employee. Since the employer is responsible, the claim has to be settled in the private relations between employee and employer first.

The obligation to continue paying wages in The Netherlands for two years forms an incentive for the employer to prevent sickness or disability. The private insurance market that covers this risk will even be stricter in enforcing these efforts, for example, in the form of higher premiums if the employer has many sick employees.

What does this comparison show concerning the model of public trust? The entitlements as such are rather clear: in Germany full salary during six weeks followed by Krankengeld, based on statutory acts. In The Netherlands the entitlement is at least 70% of the earned income, but this may be more depending on the collective labour agreement. It is however especially less clear regarding the right to re-integration what the entitlements of employees are. For this part the employer might feel an incentive to invest in changing working circumstances to

³⁸ Explanatory Memorandum of the Wet Terugdringing Ziekteverzuim (TK, 1992-1993, 22899, nr. 3), p. 19.

enable the sick employee to work again, but the employer might also calculate costs and conclude that these investments are unprofitable.

In Germany the smaller companies do not feel the incentive that is related to the *Entgeltfortzahlung*. For this category the responsibilities are not clear. For larger companies it is just as in The Netherlands: the employer is fully responsible for income security for the employee, insofar as the employer has a clear responsibility to do what it takes to provide income security.

With regard to corrective mechanisms, the shared responsibility during the first phase of sickness causes in both countries high thresholds, since the rights have to be enforced using ordinary court procedures. In Germany this ends after six weeks; in the Netherlands the employee has to enforce their rights in ordinary court procedures during the first two years of sickness.

Finally, the question whether or not the private part of social security crowds out trusted institutions remains. In Germany the private part is rather limited and the roles of the employer and Krankenkasse are rather clear. For the employee this means that it is rather easy, or at least clear, as to how he or she has to enforce the entitlements. Compared to this, the Dutch situation is a more serious threat to public trust, since an employee is in a mixed situation with the employer. An employer might hire company doctors or insurance companies to assess on his behalf. For the employee this results in a rather unclear situation of who he has to address and which procedures he then can use. This design uses institutions that do not have a trusted reputation. It is actually on the contrary; private law procedures are often associated with an abuse of powers. The employee is a one-shotter who has to enforce his rights in a procedure against a repeat-player (the insurance company hired by the employer) while the procedure as such does not compensate this inequality.³⁹

The next table summarizes the comparison on the four factors of public trust related to the first phase of continued payment of salary and sickness benefits.

³⁹ Marc Galanter, 'Why the "haves" come out ahead: speculations on the limits of legal change', *Law and Society Review* 1974 (1), p. 165-230.

Table 1. Public trust in the first phase of sickness

	Germany	The Netherlands
Clear rules	Yes: full salary during six weeks	Partly: salary depends on collective labour agreement, re-integration is not regulated
Clear responsibilities	Partly: small employers receive compensation and don't feel an incentive	Yes: for the first two years the employer is responsible
Corrective mechanisms	Yes: ordinary procedures against the employer, administrative procedures after six	No: high thresholds since corrective mechanisms are part of labour law
Trusted institutions	Yes: the employee has to deal with his employer and the public agencies	No: employees deal with employer, insurance companies, company doctors; procedures are not clear

5. Assessing incapability of work

Entitlements to continued payment of wages or to public benefits are based on the question of whether or not the employee is 'sick' and 'incapable of work'. These definitions need an assessment of medical facts by medical professionals. In this medical assessment, various public and private instruments seem relevant, such as the (contractual) relation between the medical professional and the employer or employee, and the rules applied when assessing medical facts.

Germany

The entitlement to *Entgeltfortzahlung* depends on 'incapacity for work' (*arbeitsunfähigkeit*) that is caused by 'sickness'. When an employee reports sickness he is obliged to inform his employer of the expected length of his sickness (§ 5 EntgFG). If the sickness will be longer than three days, the employee has to provide a medical notice, written by a doctor that states the expected duration of the sickness.⁴⁰

Any doctor can write medical notices. The only requirement is that the doctor is certified. When writing a medical notice, the doctor has to apply the guidelines

⁴⁰ W. Hunold, *Krankheit des Arbeitnehmers*, Rudolf Haufe Freiburg 1994, p. 112; H. Vogelsang, *Entgeltfortzahlung*, München: C.H. Beck, 2003, p. 26.

laid down by the *Gemeinsame Bundesausschuss*, a professional association of doctors and medical practitioners. The authority to formulate these guidelines is laid down in § 92 of book 5 the social security act. The guidelines define incapacity for work as the situation where the sickness makes it impossible for the employee to do the job, or will worsen when doing the job.⁴¹ The rules state that the doctor has to ask about the details of the job, the demands of the job and has to assess whether or not there is a causal relationship between the sickness and performing the job activities.⁴² Furthermore, these rules state that the medical notice has to be based on a ‘medical assessment’ (§ 4 paragraph, 1 *Richtlinien*). If a doctor does not obey the rules laid down in the guidelines, he runs the risk of being fined.⁴³

If the employee fails to provide a medical notice the employer may refuse further payment (§ 7 EntgFG). If the employer doubts the quality of the medical notice, the employer has the option of informing the medical service of the statutory health insurances (*Krankenkassen*). This medical service then has to check whether or not the medical assessment by the doctor meets the criteria demanded (§ 275 Abs. 1 Nr. b SGB V).

The Netherlands

In the Netherlands incapability of work due to sickness occurs when the employee is physically not able to work, or work will harm his health. Once the employee reports ill, it is the employer who has to agree that the employee is truly ‘too ill to work’. For this assessment the employer might ask the company doctor for advice. The Working Conditions Act obliges employers to contract a company doctor or company advisor, to supervise the company policy on absenteeism. This company doctor has access to all (medical) information necessary, including medical files. He can even call in the employee for a medical assessment. With regard to the company doctor the only requirement is that these professionals have a certificate (art. 14 Working Conditions Act). However, which rules they apply and how they assess whether or not the employee is truly ill and incapable for work, is not made explicit. The rules that are applied are often professional protocols, meant as general standards of the most common causes of incapability to work. These protocols are not binding nor provide entitlements to the employee.

If an employee does not cooperate with the medical assessment, or if the company doctor judges that the employee is not incapable of doing his job, the em-

⁴¹ H Vogelsang, *Entgeltfortzahlung*, München: C.H. Beck 2003, p. 28.

⁴² See: §, 2 par. 5 Richtlinien über die Beurteilung der Arbeitsunfähigkeit und die Maßnahmen zur stufenweisen Wiedereingliederung, of the Gemeinsame Bundesausschuss 01.12.2003 BAnz. Nr. 61 (S. 6501) vom, 27.03.2004.

⁴³ W. Hunold, *Krankheit des Arbeitnehmers*, Freiburg: Rudolf Haufe 1994, p. 102.

ployer can impose a 'pay freeze', meaning that the employee does not receive wages until he cooperates or returns to his job. If the employer imposes a 'pay freeze', the employee has to start action for recovering the wages, stating that he is truly ill and incapable of work. In this procedure the employee must first apply for a so-called 'expert review' by a medical advisor appointed by the employee insurance agency, the public body that is responsible for the payment of invalidity benefits (art. 7:629a BW). This expert review has high practical value. If the medical advisor judges that the employee is incapable of work due to sickness, the employee has a stronger position in the legal procedure to claim his wages. On the other hand, if the medical advisor concludes that the employee is not incapable of work due to sickness, the position of the employee in the procedure for recovering wages is very weak.

Dutch law does not contain specific requirements with regard to the authority to assess whether or not the employee is incapable of work. There are, for example, no specific requirements with regard to the expert appointed by the employee insurance agency who gives the 'expert review'. It is further unclear where the employee can address complaints regarding this expert review, since this review is not regarded a 'decision' in the meaning of the General Administrative Law Act and is therefore immune for judicial review.⁴⁴

Comparison

The assessment of medical facts is mainly publicly regulated in Germany, whereas in the Netherlands it is primarily a private matter between employee and employer. The medical notice in Germany is provided by general practitioners who act more or less as public agents. In The Netherlands the question of whether or not the employee is truly incapable for work is first of all a private dispute between employee and employer. The employee has to cooperate if the employer wishes to investigate the grounds of absenteeism and the employee runs the risk of losing wages due to the pay freeze. The 'expert review' can be seen as an attempt to compensate this unequal relationship. It is debatable whether or not this requirement is truly a support for the employee. After all, with a negative expert review it becomes quite impossible to plead the case that the employee is really ill.

Seen from a perspective of public trust it is interesting to notice that the exact rules on who is incapable for work and who not is regulated quite differently in The Netherlands and Germany. In The Netherlands, it is up to the professional standards of the company doctor and the doctor of the public agency to assess the incapability to work. The protocols they use are not relevant in court procedures. The procedures used when developing these protocols are not regulated.

⁴⁴ See: A.M.P. Rijkema, *Toegang tot het recht bij ziekte en arbeidsongeschiktheid*, Deventer: Kluwer 2013.

Compared to this, the German *Richtlinien* seem to be the result of delegated rule-making. The legal basis is made explicit, giving a competence to promulgate these rules. In practice these rules will play a more important role since the assessment of incapability for work by the general practitioner has to be based on these rules.

Regarding the responsibilities, the picture is mixed as well. In Germany it is striking that the general practitioner can assess whether or not his client is incapable for work. For this assessment the general practitioner does not have to know anything about the actual working situation and whether or not the employer would be able to offer a different kind of work. In that sense the responsibilities are clearly demarcated. In The Netherlands, the responsibilities are concentrated with the employer; he has to agree on the incapability to work and can ask a company doctor for advice. This may provide the opportunity to make tailor-made decisions, meaning that the employer would be able to offer work that suits the specific handicaps that the employee faces.

The other side of the coin is that in this system the corrective mechanisms are not easy to use. In case of a dispute the procedure is quite burdensome for the employee. The expert review by the public agency provides only limited support, since this review cannot be questioned. Compared to this, the German system has clear corrective mechanisms; correspondingly also for an employer who thinks that the medical notice is inadequate.

The mixture of procedures in The Netherlands is also relevant for the last factor of trusted institutions. The expert review is an intervention meant to strengthen the position of the employee. This already shows that the original design, in which the employee and employer have to solve their issues together, has its problems and does not promote public trust. The expert review can be seen as an attempt to solve this issue, but it is then striking that this review cannot be questioned in administrative procedures. Compared to this, the German system contains administrative procedures that normally do promote public trust.

The next table contains a summary of this analysis.

Table 2. Public trust when assessing sickness

	Germany	The Netherlands
Clear rules	Yes: guidelines promulgated by the medical association	No: medical protocols with a vague status
Clear responsibilities	Yes: general practitioner has to assess incapability for work	No: the employer is fully responsible for agreeing on incapability for work.
Corrective mechanisms	Yes: Krankenkassen can intervene	Partly: there is a procedure (expert review) but the employee cannot fully challenge the assessments of this reviewer
Trusted institutions	Yes: administrative court procedures	No: mixed procedures, with expert review that cannot be challenged

6. Concluding remarks

What are the consequences of mixed public and private social security for public trust? With the observation that social security contains more and more private elements, this question seems very relevant. Public trust is described as a dependent variable in a model with four factors. These factors are clear rules and norms on substantive rights and obligations, clearly demarcated responsibilities, the availability of corrective mechanisms, and the use of institutions that have a trusted reputation. In a regulatory welfare state, it is likely that these factors are affected and therefore that public trust is endangered.

The comparison of the actual regulation of the social security in The Netherlands and Germany show many differences in the balance between public and private social security. The general tendency is that the public regulation is retreating, leaving room for private initiatives. With regard to the substantive rights on continued payment of salary when reporting sick, the employee in The Netherlands is depending on vague standards and protocols that do not have a legal effect. On the other hand, in the Dutch situation the employee and employer are able to work out solutions together and finding work that is still feasible with the experienced physical obstacles. This is aimed at preventing long-term absenteeism.

In this regard the German design is more clear, with clear distinctions between public and private responsibilities and clear rules on who is incapable for work and who is not. The privatisation in Germany is mainly seen as an instrument to avoid too much bureaucracy. A short period of continued payment of wages, combined with the compensation scheme for smaller companies makes it less likely that the medical facts will be disputed. Therefore, there is no reason to compensate the weak position of the employee, and responsibilities are clearly distinguished.

The comparison in this contribution focuses only on two aspects, related to the income security of sick employees. With the model of public trust one might be able to fully assess the quality of a regulatory design in terms of promoting or harming public trust.

To conclude; if one compares the two systems of social security it seems more likely that public trust is better maintained in Germany. At least the score on the factors in our model seems more positive for the German system. The Dutch system contains more private elements, with new public corrective mechanisms. This system is therefore an example of the regulatory paradox: private instruments to replace failing public provision result in even more, but slightly different public interference, resulting in an even more complex regulatory welfare state.

Though the comparison shows a different pathology the tendency in both countries is similar. Recent German developments with institutionalised competition between statutory and private health insurance show also that in Germany the search for efficiency comes with regulatory complexity. It is therefore interesting to monitor the consequences with regard to public trust. Will solidarity indeed fade away? To answer that question (more) empirical data is needed. Or, as the German constitutional court judged in its decision on the reform of the health insurance stated: 'Expectations of the legislator on the functioning of specific instruments can prove to be wrong. That should be a reason to correct the law.'⁴⁵

⁴⁵ BVerfG, 1 BvR 706/08 vom, 10.6.2009, Absatz-Nr. 170.