

Fundamental assumptions of the structure of German nursing care insurance and their importance for farmers' nursing care insurance

Erich Koch

Abstract

Europe is currently witnessing demographic change which, on the one hand, with longer average life expectancy¹, gives rise to a growing number of seniors in need of long term-care and on the other, with the number of births declining², leads to fewer family members willing to provide such care. The change provokes a question about the most promising and practicable solution strategies to ensure public quality care.

The European secondary law coordinating social insurance schemes does not provide for nursing care insurance benefits. The benefits are identified with “sickness allowances” as construed by the said secondary law. Therefore, long-term care risk is in many countries covered partly from health insurance³. A separate nursing care insurance still remains rare in Europe. Hence, the possibly most comprehensive social insurance that includes long-term care risk is postulated by multiple environments⁴.

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1. Statista, *Europäische Union & Euro-Zone: Lebenserwartung bei der Geburt von 2011 bis 2021*, <https://de.statista.com/statistik/daten/studie/151338/umfrage/lebenserwartung-in-der-europaeischen-union-eu/>, access 5.04.2023.
 2. Statista, *Europäische Union & Euro-Zone: Geburtenrate von 2011 bis 2021*, <https://de.statista.com/statistik/daten/studie/352936/umfrage/geburtenrate-in-eu-und-euro-zone/>, access 5.04.2023.
 3. European Union, *Long-term care report, Trends, challenges and opportunities in an ageing society. Country profiles*, Vol. II, <https://op.europa.eu/de/publication-detail/-/publication/b39728e3-cd83-11eb-ac72-01aa75ed71a1>, access 5.04.2023.
 4. For the European care strategy, please cf. European Commission, *Europejska strategia w dziedzinie opieki – dla opiekunów i osób korzystających z opieki*, https://ec.europa.eu/commission/presscorner/detail/pl/ip_22_5169, access 5.04.2023.

Erich Koch, PhD, Director of the Administration and Communication Division of SVLFG till May 2023, Germany.

Germany introduced a public statute-based nursing care insurance scheme in 1995⁵. It is constantly being developed, which is considered an example to be followed in the international arena⁶. As part of social insurance for farmers⁷, farmers' nursing care insurance is only different with respect to a few special features, notably contribution provisions. Also this insurance falls under Book XI of the Social Code (SGB XI).

Later on, the fundamental structural assumptions defined in § 1 (1–4) and (6) of SGB XI will be investigated in-depth, chiefly from legal perspective. The analysis will follow primarily historical and systemic interpretation methods. The following issues will be discussed: separate character of nursing care insurance, role of nursing care insurance, scope of insurance (public insurance), solidarity-based funding and organisation.

Keywords: German nursing care insurance, fundamental structural assumptions, nursing care insurance for farmers, social insurance to address long-term care risk, demographic change.

Introduction

By 2055 the number of people in need of long-term care in Germany will rise by 37% on account of ageing population only. According to long-term care projections of the Federal Statistical Office (Destatis), their number will rise from approx. 5.0 million at the end of 2021 to approx. 6.8 million in 2055. As early as in 2035, the number will reach around 5.6 million individuals (+14%). No major change is expected following 2055 as the retired baby boomers of 1950s and 1960s will then be replaced by subsequent, less numerous generations. In 2070, the number of individuals in need of long-term care as understood by the nursing care insurance act (SGB XI) will probably amount to 6.9 million (+38%)⁸.

The referring provisions' catalogue of SGB XI in § 1 includes general principles for social nursing care insurance. From a critical perspective, some of them

5. Pursuant to Article 1 in conjunction with Article 68 of the act on social insurance to address the risk of long-term care need (Nursing Care Insurance Act – PflegeVG) of 26 May 1994. For long-term care benefits in place before the nursing care insurance was introduced, please cf.: E. Koch, *Leistungen bei Schwerpflegebedürftigkeit eine aktuelle Bestandsaufnahme*, "Vierteljahresschrift für Sozialrecht" 1993, p. 285.
6. For more on this topic, please cf.: H. Rothgang, *Die deutsche Pflegeversicherung: Ein Vorbild für Europa? 13. Sozialstaatsenquete: Die Leistungsfähigkeit verschiedener Pflegesicherungssysteme*, Vienna 2019, <https://www.sozialversicherung.at/cdscontent/load?contentid=10008.726875&version=1574083938>, access 5.04.2023.
7. For German farmers' social insurance, please cf.: E. Koch, *The German social security system for farmers*, "Ubezpieczenia w Rolnictwie – Materiały i Studia" 2020, nr 2(74).
8. Statistisches Bundesamt, *Pflegevorausberechnung: 1,8 Millionen mehr Pflegebedürftige bis zum Jahr 2055 zu erwarten*, https://www.destatis.de/DE/Presse/Pressemitteilungen/2023/03/PD23_124_12.html, access 5.04.2023.

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are just programmatic declarations without normative content, partly imprecise or downright vague⁹. Another view holds that the meaning of a norm goes beyond that of a purely programmatic sentence. Methodology-wise, it would be appropriate to employ the provision § 1 for interpretation in order to account for the regulation system, and to specify its purpose¹⁰. Both the opinions should be considered viable; however, regarding respective, differing paragraphs of § 1. Application in the context of interpretation, however, is necessary only if and to the extent that other, more specific provisions of SGB XI do not fully set out the rules. Contrary to how the interpretation is phrased, the norm also applies to private nursing care insurance (cf. § 1 (2) sentence 2 and § 1 (4) and (5) of SGB XI).

Social nursing care insurance is of particular importance for the German social insurance for farmers. Unlike public health insurance, health insurance for farmers is solidarity-based insurance for entrepreneurs. Such character of the insurance is transposed into the nursing care insurance, primarily as regards funding (orientation towards agricultural entrepreneur's involvement in health insurance for farmers).

Separate character of nursing care insurance

Under § 1 (1) of SGB XI, a new, separate branch of social insurance is formed. The bill's explanatory statement¹¹ reads that paragraph 1 governs the expansion of the social insurance system by introducing social nursing care insurance. The risk of long-term care need would be addressed in line with proven models of social insurance scheme which, as part of an independent social insurance branch, correspond to the following risks: sickness, accident, retirement and unemployment. Paragraph 1 is not, in fact, a stand-alone regulation, but rather is descriptive. It is by way of SGB XI provisions giving specific expression that the expansion of social insurance system referred to in the explanatory statement came about. Paragraph 1 concluded that, in spite of strong resistance, the legislature decided to form nursing care social insurance as the fifth pillar of social insurance. The four existing pillars are (1) statutory health insurance, (2) accident and (3) retirement insurance, including retirement insurance for farmers and (4) employment promotion. All of the five

9. B. Schulin, *Die soziale Pflegeversicherung des SGB XI – Grundstrukturen und Probleme*, "Neue Zeitschrift für Sozialrecht" 1994, H. 10, p. 433, p. 437.

10. JurisPK-SGB XI/Hauck, 3. Aufl. 2021 Stand, as at 1.10.2021, Rn. 5, with respect to the judgement of BSG (Federal Social Court) of 5.5.2010 – B 12 R 6/09 R = case law by Beck 2010, 70659.

11. BT-Drs. 12/5262, 88.

pillars were mentioned in § 1 (1) of SGB IV. Employment promotion, however, does not belong to narrowly understood social insurance.

Social nursing care insurance differs considerably from its private counterpart in a number of ways. Entities offering insurance are self-managed entities of the public law, not of private law. Entitlements to benefits, in turn, arise from the statute and the constitution documents, not from insurance contract. Deferral periods and individual risk exclusion are only typical for private insurance which, on the other hand, follow the reimbursement of costs and not benefits in kind rule. The amount of social insurance contributions is primarily based on the member's economic standing. It is not calculated with respect to individual damage risk. It is only in social nursing care insurance that non-contribution insurance is stipulated for family members (§ 25 and § 56 of SGB XI) and registered partners (§ 1 (6) sentence 3 of SGB XI).

Social nursing care insurance is basically mandatory insurance governed by the public law. Taking out the insurance is mandatory by law, cf. § 20 and § 21 of SGB XI. In several respects, this insurance also implements social equality: (1) it ensures equal treatment of "the rich and the poor" as all the insured receive the same benefits and on the same terms; however, contributions are collected on the basis of economic standing determined by income on which contributions are levied (§ 57 of SGB XI), (2) it ensures equal treatment of "the healthy and the sick". It is because, with equal benefit entitlements, contributions are collected depending on economic standing and not varied risk level of long-term nursing care need for the respective insured; (3) it ensures balancing the burden of family members' insurance as the next of kin are subject to non-contribution insurance under § 25 of SGB XI while maintaining separate benefit entitlement (§ 1 (6) sentence 3, § 56 (1) of SGB XI).

The Federal Constitutional Court called for further relief for families with children¹². Therefore, by the act on raising children being included in the provisions on contributions in social nursing care insurance (act on raising children being included in provisions – KiBG) of 15 December 2004¹³, the legislature introduced surcharge on contributions for childless persons as of 1 January 2005 (§ 55 (3) of SGB XI). Under § 55 (3) of SGB XI, individuals covered by social nursing care insurance must, the month of their 23rd birthday lapsing, start to pay surcharge on account of having no children. As per the requirements of the Federal Constitutional Court, the new regulation only aims to provide for even more solidarity with families raising children. It is because, next to monetary contributions, they make

12. Judgement of the Federal Constitutional Court of 3 April 2001, BVerfG 3.4.2001 – 1 BvR 1629/94, BVerfGE 103, 242 = NJW 2001, 1712. Vgl. F. Ruland, *Das BVerfG und der Familienlastenausgleich in der Pflegeversicherung*, NJW 2001, 1673.

13. BGBl. 2004 I 3448 (Federal Law Journal).

a decisive additional contribution to maintaining the pay-as-you-go social insurance scheme the childless also enjoy. The truth is, the childless' contributions also finance the coverage of the risk of care for the spouse and children insured on non-contributory basis. In general, the advantage that the childless receive from the next generation being raised by the remaining members of the system is not diminished by the allocation of a portion of their contributions to insuring family members. Hence, it is justified to require that the insured and obliged to pay contributions, and not raising children, pay a compensation fee¹⁴. As of 1 January 2022, the surcharge on contribution has been 0.35%¹⁵ (by 31 December 2021 it was 0.25%) and it is payable in addition to the general contribution currently at 2.35% (and 3.05% if the insured does not have children). On the one hand, a higher surcharge for the childless serves the overall funding of reform-related activities which the legislature introduces by an act on further health care development (GVWG). On the other hand, there is a realignment with the original ratio between the overall contribution rate and the 2005 surcharge. At that time, the overall contribution rate was still 1.0%.

In its rulings of 7 April 2022¹⁶, the Federal Constitutional Court yet again ruled on nursing care insurance contributions of the insured having children. As per the ruling, introducing a surcharge for the childless is non-constitutional. Thus, it cannot be considered reasonable that the regulation generally provides for the insured with children not having to pay a surcharge for those without children, and that the number of their children is ignored. The Federal Constitutional Court shows that a higher financial relief must be stipulated for those insured with at least two children. By the end of July 2023, the legislature must create a new legal regulation to eliminate unequal treatment which causes parents with multiple children to use the same financial relief as those with only one child. The Court finds that the more children, the higher extra raising costs, which must subsequently be reflected in higher relief for nursing care insurance contributions¹⁷.

One of the aspects of separate character of the nursing care insurance is that the elements of social insurance law penetrating into private insurance is more conspicuous here than in other insurance system branches. Thus, § 100 of SGB XI not only allows for an obligation to contract private mandatory nursing care insurance, but it also specifies the contract contents.

14. BT-Drs. (Bundestag format) 15/3671, 5.

15. Increase under Article 2 (14) of Gesetz zur Weiterentwicklung der Gesundheitsversorgung – GVWG (act on further development of healthcare – GVWG) of 11 July 2021, BGBl. 2021 I 2754.

16. Judgement of the Federal Constitutional Court of 7 April 2022, BVerfG 7.4.2022 – 1 BvL 3/18 et al., NJW 2022, 2169.

17. For more on this topic, please cf.: U. Wenner, *Familienlastenausgleich – Differenzierung in der Höhe des Pflegeversicherungsbeitrags nach der Kinderzahl notwendig*, "Soziale Sicherheit" 2022, No. 10, p. 8.

A separate character of nursing care insurance is chiefly manifested in entities which offer nursing care insurance being legally distinct from the existing entities offering social insurance or other institutions. They are newly formed, self-managed public law entities in spite of the functions of the funds for nursing care insurance (as entities offering social nursing care insurance) being performed by health insurance funds (§ 4 (2) of SGB V) under joint management (cf. § 46 and § 2 of SGB XI). In terms of self-management, the nursing care insurance funds operate as an extension of the powers of the health insurance fund bodies (§ 46 (2) sentence 2 of SGB XI). Health insurance funds also function as employers in relation to employees working for the nursing care insurance fund (§ 46 (2) sentence 3 of SGB XI).

This social insurance branch caters for social insurance in case long-term care is needed. As the 11th Book of the Social Code took effect, the conclusive definition in this respect is provided in § 14 and § 15 of SGB XI. Under § 14 (1) of SGB XI, persons in need of care are those who have a health-related limitation of independence or dexterity and who therefore require the assistance of others. They must be individuals who are unable to independently compensate for or overcome physical, cognitive or mental limitations or health burdens or requirements. The need for care must be persistent, its expected duration must be at least six months, and it must be at least as advanced as specified in § 15 of SGB XI.

Social insurance is (only) partial insurance which covers benefits primarily arising from § 28 et seq. of SGB XI, with a clear tendency to expand the scope of benefits becoming observable for a few dozen years following the introduction of the insurance. However, even after extensive reforms under the first Long-Term Care Enhancement Act (PSG I)¹⁸ and the second Long-Term Care Enhancement Act (PSG II)¹⁹, nursing care insurance still does not provide full care, ultimately only partial care entitlements. It is due, for instance, to financial contribution being necessary on part of the insured in case inpatient care is needed, with the amount of respective benefits becoming systematically reduced.

The nature of partial insurance is manifested in that, under § 8 (1) of SGB XI, it is the whole society's task to provide long-term care to its population members. Under § 8 (2) of SGB XI, federal states, communes/municipalities, care institutions and nursing insurance funds closely cooperate with healthcare to provide for efficient, regionally-organised, local and coordinated, outpatient and inpatient long-term care for the population. They foster the expansion and further development of necessary

18. Gesetz vom 17.12.2014, BGBl. 2014 I 2222; bill put forward by the federal government – cf. BT-Drs. 18/1798; report and decision by the Health Committee, BT-Drs. 18/2909.

19. Gesetz vom 21.12.2015, BGBl. 2015 I 2424; bill put forward by the federal government – cf. BT-Drs. 18/5926, 109: “partial insurance”; report and decision by the Health Committee, BT-Drs. 18/6688.

care structures. In particular, it is about complementing the home and inpatient care with new forms of day and short-term care, and about providing a number of medical rehabilitation services in addition to the care. Moreover, they foster and promote an attitude of providing humanitarian care and support from full-time and voluntary carers, as well as relatives, neighbours and self-help groups, thus contributing to the development of a new culture of providing assistance and showing solidarity.

Role of nursing care insurance

Under § 1(4) of SGB XI, the role of nursing care insurance is to provide assistance to persons in need of care who, due to their state of health, are forced to rely on solidarity support. In referring to this general provision governing the role of nursing care insurance, the bill explanatory statement reads²⁰ that the scope of the tasks of nursing care insurance is defined in § 1(4) of SGB XI. It aims to provide assistance to persons in need of care who, given the scope of their needs, are so burdened that state intervention becomes necessary. It was possible to abandon such a general programmatic provision as in paragraph 4. It receives criticism also because the overriding purpose of nursing care insurance is not individual protection, rather protection of the whole society from having to fund nursing care benefits from tax income in the absence of individual insurance²¹.

Right to social nursing care benefits is governed in § 28 et seq. of SGB XI. Individual benefits are enumerated there, and they include: nursing care benefit in kind (§ 36), nursing care allowance for out-of-pocket care aids (§ 37), combination of cash benefit and benefit in kind (§ 38), home care when a carer cannot provide it (§ 39), care aids and funds for home adaptation (§ 40), day and night care (§ 41), short-term care (§ 42), full inpatient care (§ 43), lump-sum disability care allowance (§ 43a), extra care and activation at inpatient care facilities (§ 43b), social insurance benefits for carers (§ 44), additional benefits for carers' leave and short-term incapacity for work (§ 44a), care courses for relatives and volunteers (§ 45), recalculation of the outpatient benefit in kind (§ 45a), relief (§ 45b), personal budget benefits under § 29 of the Social Code Book, additional benefits for persons in need of care in outpatient assisted living communities (§ 38a), additional support in the use of digital care applications (§ 39a) and their provision (§ 40a), entitlement to benefit

20. BT-Drs. 12/5262, 89.

21. B. Schulin, *Die soziale Pflegeversicherung des SGB XI – Grundstrukturen und Probleme*, "Neue Zeitschrift für Sozialrecht" 1994, H. 10, p. 433, p. 435 et seq.

when using digital care applications (§ 40b). The insured are also entitled to advisory services for long-term care to be provided by their nursing care insurance fund or the insurer (§ 7a).

In this respect, nursing care insurance for farmers virtually does not stand out as having any special features. Under Article 44 (6) of SGB XI, agricultural entrepreneurs not being able to pursue their operations on account of having to arrange for proper care for their relative in need of care in case of sudden illness, or having to provide the care on their own, are granted (instead of care allowance) assistance in running the matters of an agricultural holding for up to ten business days. Agricultural entrepreneurs holding private nursing care insurance who are unable to pursue their operations on account of having to arrange for proper care for their relative in need of care in case of sudden illness, or having to provide the care on their own, will have costs reimbursed of arranging for assistance in running the matters of an agricultural holding for up to ten business days from the nursing care insurance fund respective for the person in need of care or from the private insurer of the person in need of care in the amount of the applicable reimbursement rate. This amount is not based on real costs, rather as a lump-sum of EUR 200 per day of assistance in running the matters of the holding.

In addition, neither the act nor the explanatory statement holds that as early as at the introduction of nursing care insurance and in the decades to come, one of the tasks of nursing care insurance has been and is increasingly becoming to support family members acting as carers²². Under nursing care insurance, next to benefits for persons in need of care, benefits for relatives providing care have been allowed for (in particular, payment of contributions to the retirement insurance authority). Nevertheless, the benefit is clearly understood as one falling under social or private nursing care insurance (cf. § 28 (1) (10) in conjunction with § 44 of SGB XI). The mandatory character of insurance for non-professional carers and the requirement to pay retirement insurance contributions ultimately serve to carry out the task nursing care insurance has, which is (under § 1 (4) of SGB XI) to provide assistance to persons in need of care. From this perspective, an issue of social insurance for carers comes up. Therefore, the obligation of retirement insurance and its pre-requisites is accessory to pre-requisites for nursing care insurance benefits²³.

The provision in § 1 (4) of SGB XI is to be seen in the context of § 2 (1) of SGB XI which holds that the purpose of nursing care insurance benefits is to help those in

22. For more on this topic, please cf.: E. Koch, *Propositions of benefits for persons providing care for family members employed in agriculture in Germany – significance, legal basis, and further development*, “Ubezpieczenia w Rolnictwie – Materiały i Studia” 2022, nr 1(77).

23. Judgement of the Federal Social Court of 5 May 2010, BSG 5.5.2010 – B 12 R 6/09 R.

need of care to lead as independent a life as possible, and to self-determine, despite the need for assistance, with respect for human dignity. The assistance must therefore be oriented towards regaining or maintaining the physical, mental and spiritual strength of persons in need of care, including in the form of activity-based care.

Advanced character of the need for care referred to in § 1 (4) of SGB XI is defined in more detail in § 14 and § 15 of SGB XI. Pursuant to § 14 (1) of SGB XI, persons in need of care are those who have a health-related limitation of independence or dexterity and who therefore require the assistance of others. They must be individuals who are unable to independently compensate for or overcome physical, cognitive or mental limitations or health burdens or requirements. The need for care must be persistent, its expected duration must be at least six months, and it must be at least as advanced as specified in § 15.

Scope of insurance (public insurance)

The provision in § 1 (2) of SGB XI includes fundamental guidelines which concern the community of the insured. It expresses more clearly the idea that the legislature wishes to provide cover to two groups, namely persons who are insured by law (paragraph 1, sentence 1) and those who are insured against illness with a private health insurance company (paragraph 1, sentence 2). For the latter, the insurance does not apply by operation of law, but they have to enter into an insurance contract under private law. In order to ensure that such contracts are in fact made, the legislature has provided for and varied (in § 110 of SGB XI) an obligation to conclude contracts punishable by a fine under § 121 (1) (1) of SGB XI. By linking nursing care insurance to statutory health insurance and private nursing care insurance, the public character of insurance covering the risk of need for long-term care is essentially achieved as only relatively few people are not insured by health insurance²⁴.

The provision in § 1 (2) sentence 1 of SGB XI stipulates that everyone with statutory health insurance is covered by the social nursing care insurance. This applies to persons subject to mandatory insurance (§ 20 (1) of SGB XI) and to those with voluntary statutory health insurance (§ 20 (3) of SGB XI). Thus, the act introduces a principle for insured persons which holds that “nursing care insurance arises from health insurance”.

Sole traders are not typically covered by statutory health insurance and, thus, nor by social nursing care insurance. Under § 5 (5) sentence 1 of SGB V, anyone

24. B. Schulin, *op. cit.*, p. 433, p. 436 et seq.

who pursues business operations being their primary source of income is subject to mandatory insurance. Such a mechanism aims to avoid a situation whereby a person who pursues business operations and is not subject to mandatory insurance receives comprehensive protection under the statutory health insurance by taking on low-paid but insurable additional work, even though this person is not among those in need of solidarity protection, nor do they contribute to the load shouldered by the solidarity community as per the income received or their economic standing²⁵. This does not apply to agricultural entrepreneurs. Under § 2 of the second Act on Sickness Insurance for Farmers (KVLG 1989), they are covered by statutory health insurance and therefore also (under § 20 (1) sentence 1, sentence 2 (3) of SGB XI) by nursing care insurance.

Mandatory insurance of other groups is governed by § 21 and § 24 of SGB XI. The provision in § 25 of SGB XI concerns family insurance, and in § 26 of SGB XI, continued insurance. The provision in § 26a of SGB XI confers the right to become covered by the insurance. Persons without sickness insurance have been covered by statutory health insurance under § 5 (1) (13) of SGB V since 1 April 2007, and by private health insurance under § 193 (3) sentence 1, § 193 (5) (2) of the Insurance Contracts Act since 1 January 2009. These persons are therefore covered by statutory or private health insurance and thus also by nursing care insurance.

Under § 1 (2) sentence 2 of SGB XI, anyone who is insured against sickness with a private health insurance company must take out private nursing care insurance. In this respect, the principle of the “nursing care insurance arising from the health insurance” applies, too.

Solidarity-based funding

Outlays for the social nursing care insurance are financed from employers' and employees' contributions under § 1 (6) sentence 1 of SGB XI. However, this should only be viewed as a general rule. The provision in § 58 (1) sentence 1 of SGB XI shows that employees subject to mandatory insurance under § 20 (1) sentence 2 (1) and (12) of SGB XI and covered by statutory health insurance, and their employers, pay, half each, contributions the amount of which is to be determined on the basis of remuneration.

25. Judgement of the Federal Social Court of 27 June 2012, BSG 27.6.2012 – B 12 KR 18/10 R, BeckRS 2012, 72965 Rn. 17.

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The contributions cover the expenses of the social nursing care insurance, not all of which, however, are necessary to provide care. Nursing care insurance is made as a system of partial insurance, hence the benefits are granted only as far as prescribed by law. Additional benefits must be funded by other entities or by the very person in need of care. For instance, this applies under § 82 (1) sentence 4 of SGB XI for costs of accommodation and meals at inpatient care facilities.

In social nursing care insurance, the amount of contributions is not dependent on the insured risk, rather, as in statutory health insurance, on the income on which contributions are levied reflecting the member's economic standing (§ 6 sentence 3 of SGB XI). Such is the idea of the equality element in social nursing care insurance. Under § 54 (2) of SGB XI, contributions are paid on the basis of a percentage rate (contribution rate) on the members' income on which contributions are levied, up to the income threshold (§ 55 of SGB XI). The contribution rate as per § 55 (1) sentence 1 of SGB XI is 3.05% on the income on which contributions are levied, and it is determined by a statute. Under § 55 (3) sentence 1 of SGB XI, after lapse of the month in which the members turn 23, they are required to pay contributions at a rate increased by a childlessness surcharge of 0.35 percentage points²⁶. No contributions are collected for insured family members and registered partners (§ 6 sentence 3 of SGB XI). Such is the idea of yet another equality element in social nursing care insurance.

For agricultural entrepreneurs and family members working in the agricultural holding with them, the nursing care insurance contribution is charged as a surcharge on health insurance contribution of the respective contribution class in accordance with the contribution table (§ 55 (5) SGB XI). Childless persons make a higher surcharge. The amount of the surcharge is determined on the basis of the ratio of the general contribution rates for nursing care and health insurance, plus the ratio of the general contribution rates for nursing care insurance of childless persons and parents.

Despite being marked for elements of social equality, the private mandatory nursing care insurance which was not mentioned in § 6 (6) does implement the principles of private insurance law; cf. § 61 and § 110 of SGB XI. Persons insured under private mandatory nursing care insurance pay the contributions themselves and receive funding only on this account. The Constitution does not prescribe the contributions being equal in the social and private nursing care insurance schemes²⁷.

26. Speaking of constitutionality of the regulation in cases involving unintentional childlessness, see the judgement of the Federal Social Court of 27 February 2008 – B 12 P 2/07 R.

27. Judgement of the Federal Social Court of 3 April 2001, BVerfG 3.4.2001 – 1 BvR 1681/94.

The act only restricts the typical option in place to charge contributions depending on insurance risk. The amount of the contribution in this case follows criteria other than the income on which contributions are levied. The exemption from contributions is only provided for the policyholder's children (§ 110 (2)(1)(f) and § 110 (3) (6) of SGB XI). Child care and child raising do not have to be included in private mandatory nursing care insurance in order to reduce contributions²⁸ (unlike contributions in social nursing care insurance²⁹). The constitutional provisions do not allow for financial equalisation between private and social nursing care insurance³⁰.

Organisation

The provision in § 1 (3) of SGB XI designates the nursing care insurance funds as providers of social nursing care insurance (first part of the sentence) and the health insurance funds as performers of tasks under § 4 of SGB V (second part of the sentence) under joint management. The bill explanatory memorandum reads³¹: the providers of social nursing care insurance are independently managed public law entities. Implementation of the tasks of nursing care insurance funds is among (given their legal basis) statutory powers of the health insurance funds.

Whenever the provision in § 1 (3) of SGB XI refers to “nursing care insurance funds”, the term refers to the structured health insurance fund system and therefore also to nursing care insurance funds. Under § 143 et seq. of SGB V, there are the following types of insurance funds: local health insurance funds, company health insurance funds, guild health insurance funds, agricultural health insurance fund³², German pension insurance for mining-railways-water transport, as well as substitute health insurance funds.

Under Article 12 (1) sentence 1 of SGB XI, the responsibility of nursing care insurance funds for the provision of long-term care to insured persons arises from their responsibility as service providers referred to in Article 1 (3) of SGB XI. Under § 69 of SGB XI, nursing care insurance funds must, as part of their duty to provide

28. Cf. Judgement of the Federal Constitutional Court of 3 April 2001, BVerfG 3.4.2001 – 1 BvR 1681/94 et al., BVerfGE 103, 271 = SozR 3–3300 § 23 (3) = NJW 2001, 1707.

29. Cf. Judgement of the Federal Constitutional Court of 3 April 2001, BVerfG 3.4.2001 – 1 BvR 1629/94, BVerfGE 103, 242 = SozR 3–3300 § 54 No. 2 = NJW 2001, 1712; on the legislature's response (surcharge on contributions for the childless).

30. According to: H. Kube, *Verfassungsrechtliche Unzulässigkeit eines Finanzausgleichs zwischen Privater Pflegeversicherung und Sozialer Pflegeversicherung*, “Zeitschrift für Gesetzgebung” 2022, Vol. 37, No. 3, p. 225. 31. BT-Drs. 12/5262, 89.

32. For German social insurance for farmers, please cf.: E. Koch, *The German social security system for farmers*, “Ubezpieczenia w Rolnictwie – Materiały i Studia” 2020, nr 2(74).

benefits, ensure that the provision of care to insured persons is customised and uniform, and it corresponds to the generally recognised state of medical and nursing knowledge (duty of care). To this end, the funds enter into care and remuneration contracts with entities running care facilities (§ 71 of SGB XI) and other service providers. In this context, under § 11 (2) sentence 1 of SGB XI, the diversity of care providers must be preserved. In addition, their autonomy, the way they define their own tasks and their independence must be respected.

Summary

The fundamental structural assumptions specified in § 1 (1)-(4) and (6) of SGB XI give a brief account of vital characteristics of the German nursing care insurance. The Federal Constitutional Court found that the legislature should be required to observe these fundamental assumptions. As regards contributions, the Court on the one hand affirmed the autonomy of nursing care insurance and, on the other, ultimately called for children being included in the structure of contributions, albeit to varying degrees. This requirement is coherent. In the opinion of the German supreme court, persons raising children must pay lower contributions; at the same time, the number of children should be conclusive. This principle also applies for social insurance for farmers which, in other respects (on account of being linked to health insurance fund for farmers), basically only differs from the public nursing care insurance in terms of provisions for contributions.

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