



***Accidents at work and
occupational diseases:
flat rate or full reparation?***

***European survey on the conditions of
compensation for the victims***

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Introduction

In France, the foundations of occupational injury insurance were established by an Act of 1898, which validated a sort of compromise between employees and employers: employees who are victims of an accident at work automatically receive reparation, i.e. any accident occurring in the workplace and during working hours will be presumed to be of occupational origin, without the victim having to prove a fault by the employer; on the other hand, the damage sustained by the victim is compensated for on a flat rate basis, and employers benefit from civil immunity, except in cases of inexcusable or intentional fault. An Act of 1919 then extended this principle to the occupational diseases listed in a table.

This legislation, which made it possible to award the victims of occupational injuries more generous compensation than that provided by the sickness/invalidity insurance system, was for a long time considered a significant social step forward.

However, over the last two decades, the creation by the legislator of exceptional compensation regimes for physical injuries giving entitlement to full compensation, as well as strong demand from victim's associations led the public authorities to debate on a possible reform of the occupational injuries compensation system.

In the framework of this initiative, the *Caisse nationale de l'assurance maladie des travailleurs salariés*¹ asked Eurogip to investigate the practices and plans with regard to compensation in the other countries of the European Union. The survey, launched in 2003, covers Switzerland and the 15 European Union Member States except Greece and the Netherlands, which have no specific occupational injuries insurance.

Even though everywhere in Europe, the occupational injuries insurance has been built on the fringe of the civil liability law, the terms of the historical compromise are not present everywhere : the levels of benefits are far from being homogeneous in all countries (see I) and the concept of employer's liability changed quite a lot on some of them (see II). However, there are few countries in which, such as France, there is a debate on the fate-rate or full nature of compensation (see III).

¹ French social insurance organisation in charge of health, sickness and occupational injuries insurances.

I. What compensation for what damage?

I. Benefits in kind

In the countries taking part in the study, the victim generally makes no contribution to the payment of benefits in kind, or else a modest patient's contribution: this is the case in some **Italian** regions, in **Sweden** and **France**, and in certain cases in **Austria**.

However, the insurance organisation that pays differs according to the country: while the occupational injury insurance organisation takes full responsibility for healthcare in **Germany**, **Belgium** (for accidents at work), **Spain**, **Finland**, **France**, **Luxembourg**, **Portugal** and **Switzerland**, it merely supplements the health insurance system in **Belgium** (for occupational diseases), **Denmark**, **Ireland**, **Italy** and **Sweden**, reimbursing those medical expenses that are not covered, i.e. generally prostheses, cures, vaccinations, treatments dispensed abroad and patient's contribution (except in **Italy** and **Sweden**). In **Austria**, occupational injury insurance takes over from health insurance as of the fifth week.

The coverage of medical expenses available to occupational injury victims through the ad hoc insurance organisation is therefore often more generous than that provided for the victims of not occupational accidents and diseases.

It should be added that only one country, **Denmark**, pays compensation in advance for future costs of treatment and medicines, and this since 1st January 2004. A capital payment is made to victims for the medical care (not fully covered by the health insurance system) which they will require as a result of their occupational injuries. If the need for medical care is presumed to be permanent, the cost of such care will be assessed based on the cost of the medical care actually dispensed at the time of the estimate, multiplied by a factor of 4 to 10 varying according to the victim's age.

Table 1: Reimbursement of the cost of benefits in kind

Country	Health insurance	Occupational injury insurance	Victim
Germany		X	
Austria	first 4 weeks	X ²	patient's contribution (in exceptional cases)
Belgium	ODs	X	for medical costs not covered by health insurance
	AW		
Denmark	X	for medical costs not covered by health insurance	
Spain		X	
Finland		X	
France		X	€1 per treatment since January 1st 2005
Ireland	X	for medical costs not covered by health insurance	
Italy	X	for medical costs not covered by health insurance	patient's contribution (in certain regions)
Luxembourg		X	
Portugal		X	
UK	X		
Switzerland		X	
Sweden	X	for medical costs not covered by health insurance	patient's contribution

² In practice, from the 5th week, the health insurance organisation continues to pay for the victim's care, but the occupational injury insurance will pay back later on the health insurance.

2. Cash benefits

Before discussing in succession the temporary disability benefits and those designed to compensate for the permanent disability sustained by occupational injury victims, it is necessary to indicate for each country the minimum and maximum wage insured under occupational injury insurance, and to recall that the wage used as a basis for the calculations, called the reference wage, generally corresponds to the gross wage (including bonuses) received by the victim during the year preceding the accident or diagnosis of the disease.

Table 2: Floor and ceiling wage insured in the case of temporary disability (monthly basis) and permanent disability (annual basis) in 2004

Country	Average gross annual wage in 2000 ³	Type of disability	Floor	Ceiling
Germany	not available	temporary	-	between €4,160 and €5,600 a month depending on the BG ⁴
		permanent	€17,388 per year (West) €14,616 per year (East)	between €62,400 and €84,000 per year depending on the BG
Austria	not available	temporary	-	€3,450 per month
		permanent	-	€48,300 per year
Belgium	€31,644	temporary	-	€2,729 per month
		permanent	-	€32,748 per year (2005)
Denmark	€39,515	temporary	-	maximum benefits: €418 per week
		permanent	€18,938 per year	€50,905 per year
Spain	€17,432	temporary	€537.30 per month	€2,731.50 per month
		permanent	€6,447 per year	€32,778 per year
Finland	€27,398	temporary	€767 per month	-
		permanent	€9,210 per year	-
France	€26,521	temporary	-	€2,476 per month
		permanent	€15,660.57 per year	€31,321 per year €62,328 per year ⁵
Ireland	benefits are not based on wage			
Italy	€19,991	temporary	€1,009 per month	€1,873 per month
		permanent	€12,106.50 per year	€22,483.50 per year
Luxembourg (2005)	€35,910	temporary	€1,466.77 per month	€7,333.85 per month
		permanent	€17,601.24 per year	€88,006.20 per year
Portugal	€12,620	temporary	-	-
		permanent	-	-
UK	benefits are not based on wage			
Switzerland	€43,683	temporary	-	€5,911 per month
		permanent	-	€70,939 per year
Sweden (2003)	€ 31,621	temporary	€ 88 per month	€ 2,729 per month
		permanent	€ 1,055 per year	€ 32,750 per year

³ Revenus annuels bruts (année 2000), Anne Paternoster, EUROSTAT, 2003.

⁴ Berufsgenossenschaften: German occupational risk insurance organisations, organised by sector of activity.

⁵ For a wage ranging from €31,321.14 to €125,284.56 per year, only one-third of the wage is taken into account for the calculation base.

Few countries (**Finland** and **Portugal**) have not set a maximum annual wage to be taken into account for calculating cash benefits. However, there is a big difference between **Italy**, **Belgium**, **Spain** and **Sweden** on the one hand, where this ceiling is between €22,500 and €32,800, and **Germany**, **Luxembourg** and **Switzerland** on the other hand where it ranges between €71,000 and €84,200.

2.1 Temporary disability compensation

Unlike benefits in kind, cash benefits for the victims of occupational injuries vary greatly from one country to another. This is definitely the case for the daily benefits awarded in the case of temporary disability, whether one consider the paying entity, the amount of benefits or the duration of benefits.

In half the countries studied, the employer is forced by law or collective labour agreements to maintain all (**Germany**, **Austria**, **Belgium**, **Denmark**, **Luxembourg**⁶) or part (**Italy** and **Sweden**) of the victim's wages in cases of temporary disability, for a period ranging between three days in **Italy** and three months in **Luxembourg**.

Very few countries impose a waiting period: it is one day in **Sweden** and three days in **Ireland**, the **United Kingdom** and **Switzerland**. In **Italy**, the period of three days is merely theoretical, because the employer is forced by law to maintain part of the wages, and some collective labour agreements even provide for payment by the employer of full wages during these three days.

After this wage maintenance period or the waiting period, or else as of the first day of temporary disability in **Spain**, **Finland**, **France** and **Portugal**, daily benefits are granted to the victim.

Except in **Ireland** and the **United Kingdom** where there is a single lump sum compensation payment, the amount of daily benefits depends on the victim's reference wage. It is almost always expressed as a percentage of the gross wage, and accordingly ranges from 50% in **Austria** (during the first 42 days of disability) to the entire net wage in **Luxembourg** (within the limits of the stipulated ceiling) and in **Finland** (as of week 5). In **Denmark** and **Finland**, during the first four weeks, the level of benefits also depends on the wage, but it is calculated according to the income category.

Three countries improve the level of benefits after a certain period: for example, the daily benefits increase after 42 days of disability in **Austria** from 50% to 60%, from 60% to 80% after 28 days' disability in **France**, from 60% to 75% after 90 days in **Italy**, and from 70% to 75% after 12 months in **Portugal**.

The entity paying the daily benefits is usually the injury insurance organisation (**Germany**, **Belgium**, **Spain**, **Finland**, **France**, **Ireland**, **Italy**, **Luxembourg**, **Portugal**, **Switzerland**), but it can also be the health insurance organisation (**Denmark**, **United Kingdom**, **Sweden**). In **Austria**, the sickness insurance organisation covers the first 26 weeks of temporary disability and the occupational injury insurance system then takes over (in practice only in case of hospitalisation of the victim).

As regards the legal period of payment of daily benefits (in which should be included the period of wage maintenance when this is provided for), it is limited in seven countries (see table 3): **Austria**, **Germany**, **Denmark**, **Spain**, **Finland**, **Ireland** and **Luxembourg**. Beyond this maximum period, the victim will receive a permanent disability pension.

In **Belgium**, **France**, **Italy**, **Portugal**, **Switzerland** and **Sweden**, daily benefits are paid until the victim recovers or until the medical stabilisation of his (her) condition.

Finally, temporary disability benefits are subject to Social Security contributions in **Germany**, **Belgium**, **Spain**, **France** and **Luxembourg**, and to income tax in **Belgium**, **Finland**, **Spain** (if their annual amount exceeds €7,229), **Luxembourg**, **Sweden** and **Switzerland** (see Appendix 1).

⁶ In Luxembourg, only the wage earners who have employee status are entitled to wage maintenance by the employer. Unless there is a collective labour agreement which specifies it, it is not the case for the workers.

Table 3: Temporary disability compensation in 2004

Country	Waiting period	Paying organisation	Amount of daily benefits (% reference wage)	Max. duration of payment (from the day of the injury or diagnosis of the disease)
Germany	-	employer	wage maintenance	6 weeks minimum
		Occ. Inj. ins.	80%	78 weeks
Austria	-	employer	wage maintenance	8 weeks minimum
		Sickness ins.	50% during 42 days 60% later on	26 weeks
Belgium	-	Occ. Inj. ins.	60%	possible extension only if hospitalisation
		employer	wage maintenance	1 month
Denmark	-	Occ. Inj. ins.	90%	until healing/med. stabilisation
		employer	wage maintenance	2 weeks
Spain	-	Sickness ins.	flat rate based on wage (max: € 418 per week) often supplemented by the firm	52 weeks (possible extension by 26 weeks)
		Occ. Inj. ins.	75%	12 months (possible extension by 6 months)
Finland	- ⁷	Occ. Inj. ins.	flat rate based on wage ⁸ 100% of net wages	first 4 weeks after that, for 1 year
France	-	Occ. Inj. ins.	60% 80%	28 days until med. stabilisation/healing
Ireland	3 days	Occ. Inj. ins.	flat rate of € 134.80 per week	26 weeks
Italy	3 days	employer	60% wage maintenance	3 days
		Occ. Inj. ins.	60% 75%	90 days until med. stabilisation/healing
Luxembourg (may 2005)	-	employer	wage maintenance	current month + at least following 3 months
		Occ. Inj. ins.	wage maintenance	52 weeks
Portugal	-	Occ. Inj. ins.	70%	12 months
			75%	until med. stabilisation/healing
UK (2002)	3 days	Sickness ins.	flat rate of € 72 per week	first 28 weeks
			flat rate of € 85 per week	52 weeks
Switzerland	3 days	Occ. Inj. ins.	80%	until healing/med. stabilisation
Sweden	1 day ⁹	employer	80% wage maintenance	from day 2 to day 14
		Sickness ins.	80%	until healing/med. stabilisation

⁷ But the disability must last at least 3 days.

⁸ The amount per day depends on annual income:

- if income less than €1,026 (and provided that the sick leave lasts more than 55 days) = €11.45
- if income ranges between €1,027 and €26,720 = 70% of 1/300th of income above
- if income ranges between €26,721 and €41,110 = €62.35 + 40% of 1/300th of income above €26,720
- if income exceeds €41,110 = € 81.53 + 25% of 1/300th of income above €41,110

⁹ Compensation is paid for this waiting day afterward, once the occupational nature of the accident or disease has been recognized.

2.2 Permanent disability compensation

While all the countries included in the study pay compensation for the permanent disability of an occupational injury victim, examination of the conditions such as the type of damage for which compensation is paid, methods for assessing such damage, and the amount and form of compensation offered, reveals a great diversity of compensation systems.

2.2.1 Damage for which compensation is paid (see summary table in Appendix 2)

Based on the criterion of the type of damage for which compensation is paid in case of permanent disability, the various countries can be classified in two major groups, to which should be added the **Ireland - United Kingdom** tandem.

► *Overall compensation for loss of occupational damage*

The first group of countries consists of **Germany, Austria, Belgium, Spain, France, Luxembourg** and **Portugal**. In these seven countries, the basis for compensation is reparation of occupational damage, i.e. the possible repercussions of the occupational injury on the victim's earning capacity/ability to work.

In principle, occupational damage is assessed according to the personal characteristics of the victim (nature of the infirmity, age, gender, training and job capabilities, potential for rehabilitation) and their value in the job market as a whole.

In practice, however, it is chiefly according to an indicative scale, basically medical – that is theoretically supposed to allow for the seriousness of the injury and job capabilities and qualifications - that the damage is assessed: the medical appraiser determines a disability rate according to the injury listed in the national scale, a rate that is used by the administrative staff to calculate benefits. Socio-economic factors are in fact only rarely involved and at most represent a correction, especially when the victim's occupational situation is greatly affected by an injury considered benign under the scale (e.g. a pianist who loses the use of a finger).

Spain and **Portugal** combine another criterion with the medical scale to assess the loss of ability to work: whether or not the victim can continue to exercise his (her) usual occupation. Thus, these two countries distinguish between partial permanent disability (for exercising one's usual occupation), total permanent disability for exercising one's usual occupation, and absolute permanent disability. In **Spain**, the first case entails a decline of at least 33% in the worker's normal efficiency in his (her) occupation, although without preventing him (her) from performing routine tasks; for example, are considered as coming within this category of disabilities the functional loss of a foot, of complete vision in one eye, or else certain types of hernia that cannot be operated on. The second case prevents the performance of tasks inherent in the insured's usual occupation, although without preventing him (her) from performing another occupation; it is felt that the complete loss of one of the lower extremities (above the knee) and total deafness can be considered as total disabilities for exercising one's usual occupation.

Spain should also be considered as somewhat of a case apart, because, in addition to reparation of occupational damage, it provides for compensation for the permanent injuries suffered by the victim. However, the small amount of this compensation justifies this country's positioning in the group of those who pay compensation (almost) exclusively for the loss of earning capacity.

Compensation is paid for non-invalidating permanent injuries only when they are completely independent of those that have been taken into account to determine the reduction in earning capacity. These are injuries, mutilations or deformities of a permanent nature which, without resulting in a work disability, represent a reduction or deterioration in the worker's physical integrity. The amount of compensation is determined according to a scale associating each type of injury with a quantified compensation.

► *Separate compensation for loss of earning capacity and physiological damage*

The second group of countries consists of **Denmark, Finland, Italy, Sweden** and **Switzerland**. In these countries, the victim is not only paid compensation for his (her) loss of earning capacity, but also for the lasting damage to physical and/or mental integrity sustained by him (her).

Unlike the first group of countries, **Denmark, Finland, Sweden** and **Switzerland** assess the loss of earning capacity in concrete terms, in other words the victim's occupation is studied on a case by case basis: the income the victim can still earn is compared with the income he (she) would have earned if the accident or disease had not occurred. This means that if the victim is forced to change job but suffers no reduction in wages, the compensation for loss of earning capacity will not be justified. The loss of a promotion already scheduled will be taken into account, but not the loss of a possibility of promotion.

The victim's remaining working capacity is assessed individually according to his (her) training and his (her) job capabilities, injuries, age and capability for rehabilitation. By examining these various criteria it is possible to deduce the victim's actual loss of earning capacity, which clearly in these countries corresponds to an economic concept (and not a medical concept), because it reflects the limitation attributable to the sequels of the occupational injury with regard to the insured's potential earnings. In **Switzerland**, around 6,500 sheets containing descriptions of job positions and the corresponding statistical wages are used to assess the loss of earning capacity. In **Denmark**, the tools are the same as those used in the context of legal proceedings. In **Finland**, the loss of earning capacity being determined one year after the occurrence of the injury or the appearance of the occupational disease, it is generally based on the actual loss of income sustained during this lapse of time.

This group of countries also pays compensation - separately - for the physiological damage sustained by the victim. In some countries, it is truly the diminution of physical and mental functions (including sexual/reproduction damage and aesthetic damage) for which compensation is paid, while in the others it is rather the consequences of the damage for the victim's quality of life.

In **Switzerland**, compensation for bodily harm as such has only existed since 1984; this type of damage was formerly more or less allowed for in assessing the disability.

In **Finland**, "handicap benefits" are paid for any injury or disease for which, in the medical sense, there remain permanent sequels constituting a discomfort. The amount of these benefits depends on the seriousness of the victim's handicap (the scale contains 20 categories of handicap), and his (her) age and gender.

Denmark pays compensation for physiological damage when it affects the victim's everyday life.

In **Sweden**, occupational injury insurance in fact pays compensation only for the loss of income. It is a contractual¹⁰ complementary insurance (no-fault liability system), funded by the employers and covering nearly all employees, which covers compensation for other damage such as the loss of income not covered due to the ceiling, but above all the immaterial damage (pain and suffering, and moral damage) and bodily damage and loss of amenities of life, all this to the extent of the compensation available in civil law.

Italy occupies a special position in this group of countries, because although formally compensation for the loss of earning capacity and physiological damage are paid for separately there, the assessment of these two types of damage is interdependent and the corresponding compensation takes the form of an overall pension.

The reparation of physiological damage (or "biological damage") constitutes the very legal foundation of the compensation awarded by occupational injury insurance. An assessment is first made of the bodily and mental harm to the victim (including aesthetic damage or damage relating to reproduction).

¹⁰ AFA Trygghetsförsäkring

If the medical rate of disability thus obtained exceeds a threshold determined by law, the pecuniary consequences of the "biological damage" are taken for granted. Thus, unlike the other countries of the group to which Italy belongs, the loss of earning capacity is assessed not on the basis of concrete figures, but according to the medical disability rate assigned to victims and their ability or not to continue in their customary professional activity.

In all these countries, assessment of physiological damage is always performed based on a medical scale which takes into account the seriousness of the injury, and in some countries the gender and age of the victim (**Finland, Italy** for slight disabilities, age only in **Sweden**), but never the occupation or income. This is because in these countries compensation for permanent disability is designed to repair non-pecuniary damage, which is the same for all.

► *The case of Ireland and the United Kingdom*

In both these countries, the pension paid for permanent disability is designed to compensate only for the loss of physical and mental faculties. In the **United Kingdom** there existed an allocation for lost earnings, but it was abolished in 1990. This pension is compatible with earnings (if the victim is capable of employment) or with disability/invalidity pensions.

The pension depends on the disability rate determined according to a medical scale by the doctor of the Ministry in charge of occupational injury insurance, and is completely independent of the victim's income level. Another feature of this compensation is its very modest level by comparison with the other European countries.

2.2.2 Amount and form of compensation

► *Compensation for loss of earning capacity*

To give entitlement to reparation for the loss of earning capacity, 8 of the 14 countries studied require a minimum disability rate (a rate which may, depending on the country, reflect sometimes a basically medical disability, sometimes an earnings disability, and sometimes an actual loss of income - see 2.2.1, damage for which compensation is paid). This rate is 6.66% lost earnings in **Sweden**, 10% loss of earning capacity and 5% actual loss of income in **Finland**, 10% in **Switzerland**, 16% in **Italy** and 15% in **Denmark**, and is as high as 20% in **Germany** and **Austria** and 33% in **Spain**.

Belgium, France, Luxembourg and **Portugal** pay compensation for loss of earning capacity as of the first percent of permanent disability.

As regards the compensation properly speaking, all the countries calculate it on the basis of the disability rate, the wage (with a maximum ceiling in most countries) that the victim received before the injury or disease and a maximum coefficient of compensation. As has been said, **Spain, Portugal** and **Italy** add an extra factor, namely whether or not the victim can continue to exercise his (her) customary occupation. In the latter country, allowance for this factor is more theoretical than real, because it is assumed to be directly related to the disability rate.

Finally, some countries weight the disability rate initially granted so as to favour major disabilities and/or minimise minor disabilities. In **Austria**, for example, the pension is increased by 20% if the disability is greater than or equal to 50%, and by 50% if the disability is greater than or equal to 70%. **Belgium** reduces the pension by half if the disability rate is less than 5% and by a quarter if it is between 5% and 10%. In **France**, the initial disability rate is reduced by half for the part less than 50% and increased by half for the part greater than 50%. Finally, the **Italian** system assigns graduated coefficients according to the disability category (from 0.4 for the 16-20% disability category to a coefficient of 1 for the 86-100% category). These coefficients are presumed to reflect allowance for the possibility of continuing in one's customary occupation.

Portugal, for its part, automatically grants a lump sum equivalent to 12 times the minimum monthly wage to victims whose disability rate exceeds 70%.

Generally, in Europe, compensation for loss of earning capacity is granted in the form of a pension. However, some countries automatically pay a lump sum in cases where the permanent disability rate is low or moderate: this is the case in **France** and **Luxembourg** if the rate is lower than 10%, in **Portugal** if it is less than 30%, in **Denmark** if it is less than 50%, and in **Spain** in the case of a partial permanent disability for the exercise of one's customary occupation. In **Belgium**, the method of payment in the form of a lump sum for disabilities of less than 10% was abolished for occupational diseases in 1963 and for accidents at work in 1988.

Besides, under certain conditions most of the countries allow redemption of the lump sum representing the pension if the insured so requests. The permanent disability rate must be less than or equal to 25% in **Austria**, and less than 40% in **Luxembourg**. To be redeemed, the amount of the monthly pension must be less than 20% of the full pension in **Finland**. In **Spain**, the pension paid for total disability for one's customary work can be replaced by a lump sum payment equivalent to 84 monthly pension payments if the insured is aged less than 54. This amount is reduced by 12 monthly payments per additional year, reaching 12 monthly pension payments for an insured aged 59.

The optional redemption may be only partial: if the disability rate exceeds 49%, half of the pension can be redeemed in **Denmark**; one-third of the pension can be redeemed in **Belgium** if the rate exceeds 19%, but only for accidents at work; in **Germany**, complete redemption is possible for rates less than 40%, but in other cases the redemption can not exceed half of the pension over 10 years. In **France**, redemption of a quarter of the pension is now possible immediately (as against a 5 year period beforehand).

Only **Italy** and **Sweden** in no case permit redemption of the pension.

In some countries, the pensions paid for loss of earning capacity are subject to income tax, except if they are redeemed and paid out in the form of a lump sum. They are completely exempt, on the other hand, in **Germany**, **Austria**, **France**, **Italy**, **Luxembourg** and **Portugal**, and in **Spain** in the case of a pension for total permanent disability for any type of work.

Said pensions are subject to Social Security contributions only in **Belgium** (see *Appendix 1*).

Table 4: Examples of compensation for loss of earning capacity (as a % of the reference wage) in 2004

Country	Maximum annual pension (for total disability)	Permanent disability rate				
		100%	75%	50%	25%	10%
Germany	between €41,600 and €56,000 depending on the BG	66.66%	50%	33%	17%	-
Austria	€48,300	100%	75%	50%	16.5%	-
Belgium	€32,748	100%	75%	50%	25%	10%
Denmark	€40,724	80%	60%	40%	20%	-
Spain	€29,205	inability to exercise one's customary occupation:				
		55%	partial: lump sum equivalent to 24 monthly wage payments		-	-
Finland	no wage ceiling	inability to perform any type of work:				
		100%	partial: 55%		-	-
France	€62,642	100%	62.5%	25%	12.5%	5%
Ireland	no compensation for lost earnings					
Italy	€22,483	100%	67.5%	35%	12.5%	-
Luxembourg (2005)	€75,333	85.6%	64%	43%	21.5%	8.5%
Portugal	no wage ceiling	inability to exercise one's customary occupation:				
		between 50% and 70% of the wage depending on residual ability			lump sum compensation	
UK		inability to perform any type of work:				
		80% + lump sum of € 4,279	60% + lump sum of € 4,279	40%	lump sum compensation	
Switzerland	€56,751	80%	60%	40%	20%	8%
Sweden ¹¹	€32,750	100%	70%	50%	25%	10%

¹¹ Contractual complementary insurance supplements the compensation for lost earnings by taking into account the amount exceeding the ceiling of the standard scheme.

► *Compensation for physiological damage*

While eight of the fourteen countries studied pay separate compensation for the physiological damage sustained by the victim, the amount of the benefits and the conditions under which they are granted vary greatly from one country to another.

As has already been specified, this is the only compensation paid for permanent disability by the occupational injury insurance system in **Ireland** and the **United Kingdom**, and it is small. In **Denmark, Finland, Italy, Switzerland** and **Sweden**, on the other hand, it can be a major benefit. In **Spain**, finally, it can be considered as secondary due to its low level.

It is specific medical scales for accidents at work and occupational diseases that define the level of compensation (except in **Sweden**).

Spain, Denmark, Switzerland and **Sweden** pay compensation for physiological damage (in addition to the loss of earning capacity) in the form of a lump sum payment. **Finland** leaves the insured the choice between a lump sum payment and continuous payment if his (her) damage is serious (handicap categories 11 to 20). On the other hand, **Italy** - where the insurance system pays compensation chiefly for biological damage - pays a pension above a 16% disability rate, or a lump sum in the case of a lower disability rate.

Ireland and the **United Kingdom** likewise grant their sole compensation for permanent disability in the form of a pension, except for cases of minor disabilities (up to 19%) in Ireland.

All these benefits are exempted from tax, except in **Ireland**.

Table 5: Overview of compensation for physiological damage

Country	Amount (2004)	
	Minimum	Maximum
Denmark	lump sum of €4,237 (for 5% disability)	lump sum of €84,753
Spain (April 2005)	lump sum of €450	lump sum of €6,630
Finland (for male aged 30)	lump sum of €1,991 (for category 1 handicap)	lump sum of €103,888 (for category 20 handicap)
Ireland	lump sum granted for a disability ranging between 1% and 19% (€11,610 for 19%)	weekly pension of €165.90 (for a disability > 90%)
Italy	lump sum of €2,479 (for a male with 6% disability)	annual pension of €14,719 (for a 100% disability)
UK	weekly pension of €36 (for a 14% disability)	weekly pension of €182 (for a 100% disability)
Switzerland	lump sum of €3,547 (for a 5% disability)	lump sum of €70,939 (for a 100% disability)
Sweden compensation for loss of amenities of life by AFA	lump sum of €2,763 (for a 5% disability and age 65)	lump sum of €123,304 (for a disability of 99% and age 25)

2.3 Other types of cash benefits

Only the other main benefits common to all the countries are studied here, namely pensions for the surviving spouse and orphans, the allocation for third-party help and compensation for material damage. However, it should be specified that many countries grant other types of benefits

2.3.1 Pensions for legal beneficiaries

► *Compensation for the surviving spouse*

The injury insurance system pays a pension to the surviving spouse of someone who dies from the sequels of an occupational injury in all the countries except **Sweden** and the **United Kingdom** where it is the "survivorship" insurance that pays this benefit.

The legal beneficiaries are of course the widower and the widow, but also the divorced spouse benefiting from alimony in **Austria, Belgium, France, Switzerland** and **Portugal**. Also concerned, under certain conditions such as the length of time they have lived together, the common law spouse in **Denmark, Finland, France**¹², **Portugal** and **Sweden**, as well as the partner¹³ in **Luxembourg**.

Note that in **Denmark**, the spouse can only claim such a benefit if he (she) was dependent on the insured before their death and if his (her) financial position has deteriorated as a result of the death. But he (she) will in all cases receive a death benefit, the amount of which (€15,983 in 2004) is much greater than that granted in the other European countries.

With the exception of **Sweden**, where the survivorship benefit is calculated based on the injury pension of the deceased spouse, and **Ireland** and the **United Kingdom** where the sum involved varies according to the age of the surviving spouse, the benefit consists of a pension expressed as a percentage of the deceased spouse's reference wage.

In more than half the countries (**Belgium, Denmark, Spain, Finland, Italy, Luxembourg, Switzerland** and **Sweden**), this percentage is uniform irrespective of the age of the surviving spouse. In the remaining countries, it increases once a certain age has been reached: 45 in **Germany**, 60 for women and 65 for men in **Austria**, 66 and 80 in **Ireland**, 55 in **France**, and 65 in **Portugal**.

The amount of the survivor's pension also depends on other criteria such as the existence of children who are legal beneficiaries in **Germany** and **Finland**, or a possible work disability of the surviving spouse in **Germany, France** and **Luxembourg**, or spouse's own earnings in **Finland**. If we consider a surviving spouse aged 40 without children and with no disability, the rate of the pension thus granted is 35% on average, with a minimum of 20% in **Austria** and a maximum of 50% in **Italy**.

This pension is a life annuity except in **Germany** where payment is limited to two years for the surviving spouse aged less than 45, and in **Denmark** where the length of payments ranges up to a maximum of 10 years depending on the age of the beneficiary.

¹² As well as the contracting party of a *Pacte Civil de Solidarité (PACS)*

¹³ Contracting party of a *déclaration de partenariat* (law of July 9th, 2004)

Table 6: Benefit for the surviving spouse

Country	Legal beneficiary	Benefit (as % of the deceased spouse's wage up to a maximum ceiling)
Germany	- widower / widow - common law spouse from 2005 on	☞ widow aged less than 45 with no dependent child: 30% for 24 months ☞ aged over 45 or work disability or dependent child: 40%
Austria	- widower / widow - divorced spouse receiving alimony	☞ 20% ☞ aged over 60 (women) / 65 (men): 40%
Belgium	- widower / widow - divorced or separated spouse receiving alimony (no influence of remarriage)	☞ 30%
Denmark	- widower / widow - common law spouse (for at least 2 years prior to the death) dependent on the deceased or if situation deteriorated following the death	☞ 30% for 10 years at most depending on the age of the survivor
Spain	- widower / widow	☞ 45%
Finland	- widower / widow - common law spouse (under conditions)	☞ 40% if no other beneficiary (otherwise, degressive)
France	- widower / widow - common law spouse and partner in "PACS" ¹⁴ (for at least two years prior to the death except if child) - separated or divorced spouse receiving alimony	☞ 40% ☞ 60% for those aged over 55 or in case of work disability of at least 50%
Ireland	- widower / widow	☞ €163.60/week if aged under 66 ☞ €171.70/week from age 66 up ☞ €173.70/week if aged over 80
Italy	- widower / widow	☞ 50%
Luxembourg	- widower / widow - "partner" (since Nov. 2004)	☞ 42.8% ☞ 53.5% in case of disability
Portugal	- widower / widow - common law spouse - divorced spouse receiving alimony	☞ 30% if aged under 65 ☞ 40% from age 65 up
UK	special benefit abolished in 1988 "survivorship" insurance	
Switzerland	- widower / widow - divorced spouse	☞ 40% ☞ 20% for the divorced spouse within the limits of alimony
Sweden	- widower / widow - common law spouse (for at least 5 years prior to the death)	survivorship annuity: ☞ 45% of the injury pension ☞ 20% if children who are legal beneficiaries

¹⁴ PACS see preceding page

► *Compensation for orphans*

The regime for pensions paid to orphans by the injury insurance system (or survivorship insurance in **Spain** and in **UK**) is more homogeneous than the pension regime for the surviving spouse.

Like for the latter, the benefit is expressed as a percentage of the reference wage of the deceased parent, except in **Ireland** (where it is the pension for the surviving spouse that is increased), in the **United Kingdom** and in **Sweden**. For an orphan who is a single child, this rate ranges from 10% in **Denmark** to 25% in **France**, and it is almost always increased if the beneficiary is fatherless and motherless.

As regards the duration of payment, it corresponds to the orphan's majority (except in **France**: age 16), but it is extended by several years if the orphan continues his (her) studies or is handicapped.

Table 7: *Orphan's benefit*

Country	Fatherless or motherless	Fatherless and motherless	Payment up to age of
Germany	20%	30%	☞ 18 ☞ 27 if studies or vocational training or handicap
Austria	20%	30%	☞ 18 ☞ 27 if studies or vocational training ☞ for life if handicap
Belgium	15%	20%	☞ 18 or expiry of entitlement to child benefits ☞ for life if handicap
Denmark	10%	20%	☞ 18 ☞ 21 if studies or vocational training
Spain	20%		☞ 18 ☞ 21 if not working ☞ 23 of fatherless and motherless
Finland	25%		☞ 18 ☞ 25 if studies or handicap
France	25%	30%	☞ 16 ☞ 18 if apprenticeship ☞ 20 if studies or handicap
Ireland	increase in widowhood pension ¹⁵ (€21.60 per week)	€109.90 per week	☞ 18 ☞ 21 if studies
Italy	20%	40%	☞ 18 ☞ 26 if studies ☞ for life if handicap
Luxembourg	21.4%		☞ 18 ☞ 27 if studies or vocational training ☞ for life if handicap
Portugal	20%	40%	☞ 18 ☞ 25 if studies
UK	special benefit abolished in 1988 "Survivorship" insurance		
Switzerland	15%	25%	☞ 18 ☞ 25 if post-secondary studies
Sweden	40% injury pension		☞ 18 ☞ 20 if studies

¹⁵ In Ireland, the orphan's benefit is only granted to children who have lost both parents. If only one parent is dead, the child is considered as dependent on the surviving parent. Thus, the benefit for dependent child is added to the widowhood pension.

2.3.2 Allocation for third party help

When the victim of an occupational injury is in such a condition that he (she) requires the assistance of someone to perform the basic acts of everyday life, a benefit is paid either by dependent coverage insurance (**Austria, Denmark, Luxembourg** since 1999, **Ireland** and **United Kingdom**) or by the injury insurance system in the other countries.

The amount of this physical infirmity/dependence allocation depends on the extent of the need for assistance in **Finland** (maximum of €23.41 per day), **Germany** (between €295 and €1,180 per month), **Austria** (from €145.40 to €1,531.50 per month) and **Switzerland**, where three degrees of dependence are defined, giving entitlement to €380, €760 or €1,140 per month respectively. This is also the case in **Belgium** (monthly maximum of €1,243.36) since 1989, because prior to that the allocation depended on the victim's wage.

In **Spain** and **France**, the benefit takes the form of an increase in the pension paid for permanent disability (50% and 40% respectively). In **Denmark**, it is the lump sum granted for physiological damage which is increased (for example, it goes up from €84,753 to €101,703 for a total disability).

The amount of the allocation is uniform, on the other hand, in **Ireland** (€149.70/week), the **United Kingdom**, **Luxembourg** (€23.85/hour) and **Italy** (€406.99/month), and this allocation is granted on condition that the victim suffers from 100% disability. **Italy** also requires that the victim be afflicted by one of the eight handicaps defined in a list (loss of 9 of the 10 fingers of the hands including both thumbs, amputation of the two lower extremities, etc.).

In **Portugal**, the injury insurance system pays an allocation the amount of which is equal to the remuneration paid to the person responsible for providing assistance, within the limits of the minimum wage applying to household workers.

Some countries offer an alternative to this cash benefit: e.g. assistance in **Germany** and provision of care by a healthcare centre in **Spain**.

2.3.3 Damage to property

The **Luxembourg** injury insurance system has since 1926 covered the repayment of purely material damage accessory to the bodily injuries of the insured. For example, this country is apparently the only one to pay compensation for the loss of clothing or other personal effects, and for material damage to vehicle, up to a ceiling equal to 2.5 times the minimum legal wage (i.e. €3,666.93 since January 2005).

In all the other countries, the occupational injury insurance system pays compensation only for the loss of objects which morphologically or functionally replace part of the body, i.e. generally spectacles and prostheses. In theory, it is always possible to claim reparation for other material damage, but according to the rules of civil law, hence by proving a fault or negligence of the employer.

3. **Exceptional compensation rules**

The compensation rules described here above apply in all those cases in which an insured is the victim of an occupational injury recognised as such. However, a few rare countries have provided for exceptions to the system described.

Rather than derogation, for **Spain, Austria, Denmark** and to some extent in **France**, one should speak of an improvement in the benefits for exceptional circumstances.

It is worth specifying that what we are dealing with here is not compensation which could be obtained through legal channels by a court action brought by the victim against his (her) employer, but indeed special compensation rules provided for in exceptional circumstances by the occupational injury insurance system.

As regards the existence of derogatory regimes properly speaking, only **France** seems to have one, for illnesses caused by asbestos dust.

3.1 Cases of improved benefits

In **Spain**, the legislation foresees that the cash benefits due to the victim of an occupational injury suffering from a permanent disability are increased in case of infringement of health and safety measures, i.e. when "the injury is caused by equipment or machinery or in installations, plants or workplaces which do not have the regulatory protection devices or which have such devices but in poor condition or inoperative, or when the general or particular health and safety measures have not been complied with at work, or basic sanitary measures or again measures concerning personal fitness for each job taking into account its characteristics, as well as age, gender and other conditions concerning the worker".

The pension is increased by 30% to 50% depending on the seriousness of the infringement, and is payable by the employer with no possibility of insurance.

In **France**, the victim (or his (her) legal beneficiaries in case of decease) is entitled to additional compensation in the case of an "inexcusable fault" by the employer. Failing friendly settlement between the insurance fund and the victim on the one hand and the employer on the other hand, the amount of this supplement is determined by the Social Security courts.

The law provides first for an increase in the pension, the amount of which depends on the seriousness of the fault. This increase is limited to at most the fraction of the real wage corresponding to the reduction in capability, or to the amount of this wage in cases of total disability or death of the victim. Moreover, since 1976, lump sum compensation is granted, in addition to the increased pension, to victims suffering from total permanent disability; the amount of this lump sum payment is equal to the minimum annual legal wage at the date of medical stabilisation.

These improved benefits provided for by the occupational injury insurance system do not prevent the victim from claiming from their employer before the Social Security courts reparation for damage not covered by the insurance system.

The increase in the pension, and where applicable the lump sum compensation and compensation for non-pecuniary damage, are paid by the Social Security fund, which recovers the amount from the employer in the form of an additional contribution and, for the reparation of other damage, out of the employer's personal assets. Note that, since 1987, the employer can take out insurance against the consequences of an inexcusable fault.

In **Austria**, compensation for bodily harm (*Integritätsabgeltung*) has since 1990 supplemented the pension paid to compensate for the loss of earning capacity if two conditions are met: the occupational injury must be due to gross negligence in failing to comply with the safety regulations in the enterprise, and the victim must provide evidence of a considerable reduction in his (her) physical or mental capabilities.

It is the occupational injury insurance organisation that decides whether these conditions are met and that determines the amount of the lump sum compensation. The amount of this lump sum ranges from €19,320 to €96,600 depending on the permanent disability rate and the degree of damage to the bodily functions, mental faculties and physical appearance of the victim.

In **Denmark**, the recent reform that came into force in 2004 provides for a special benefit for survivors as compensation for their moral prejudice: if the victim has deceased following an accident at work or an occupational disease due to an intentional act or to gross negligence, his (her) close relatives, even if they are not financial dependents, will receive compensation in the form of a lump sum payment equivalent to that provided under civil liability law. The amount of this compensation will depend on the nature of the intentional act or negligence, and on the moral prejudice sustained by the close relatives.

In the **United Kingdom**, an Act of 1979 provides that, in the event that the employer no longer existed, the insurance organisation would pay additional compensation for the victims of certain occupational diseases: diffuse mesothelioma, pneumoconiosis (including asbestosis, silicosis and kaolin pneumoconiosis), diffuse pleural plaques, primary carcinoma of the lung combined with an asbestosis or diffuse pleural plaques, and cotton-dust asthmas.

3.2 Derogatory regime

French legislation in 2000 established a specific system of compensation for the victims of asbestos, which enables them to obtain full reparation of their damages.

The asbestos victim compensation fund FIVA (*Fonds d'Indemnisation des Victimes de l'amiante*), created on this occasion, provides people who are victims of diseases related to asbestos exposure - even non-occupational - and their legal beneficiaries with additional compensation paid by the Social Security regimes.

In accordance with the principles of full reparation, compensation is paid for:

- pecuniary damage: functional disability, lost earnings, expenses resulting from the disease (treatment, third-party assistance, adaptation of their vehicle and accommodation, etc.). Note that FIVA has adopted its own indicative scale to assess functional disability;
- non-pecuniary damage: moral and physical prejudice, loss of amenities of life and aesthetic prejudice.

The victim (or their legal beneficiaries) who make a claim for compensation to FIVA and who accept its offer waive all legal action for reparation of said damage. FIVA is then subrogated to the rights of the victim and is required to take action for reparation against the person or entity responsible for the damage, especially in the context of an inexcusable fault (see Section II).

II. Causal link and limitation of employer's liability

I. Risks insured and onus of proof

In all the European countries, accidents at work were the first risk covered by occupational injury insurance. Then this insurance was extended to occupational diseases and more recently to commuting accidents.

1.1 Accidents at work

Although the terminology varies from one country to another, the concept covered by the definition of accident at work is the same throughout Europe: it is a sudden event in the workplace or during work which causes an injury.

There is generally a presumption of occupational imputability for accidents occurring during work time and in the workplace; in this case, the victim can automatically be entitled to injury insurance benefits.

This presumption is, however, of unequal force depending on the country, because proof to the contrary is accepted in some of them. The victim's faulty behaviour can, for example, have consequences for recognition of the job-related nature of the injury or else for its compensation.

In no country does a minor fault or mere negligence or carelessness prevent recognition of the accident. To be taken into account, the fault must be serious.

- In all the countries except **Denmark**, the existence of an intentional fault by the victim rules out all possibility of recognition; it should be specified that such cases are very rare.
- **Spain** is the only country to rule out any recognition in the event of behaviour by the victim of some seriousness: the cases referred to are cases of "rash carelessness", i.e. generally cases in which the victim has disobeyed the health and safety instructions issued by his (her) employer. It would seem that recent legal decisions tend to adopt increasingly frequently this limit to the presumption of imputability.
- Countries such as **Germany, Austria and Luxembourg** evaluate the fault not according to its degree of seriousness, but depending on whether the reasons for the faulty act are of an occupational or extra-occupational nature. In the latter case, recognition may be ruled out.

Gross negligence by the victim is liable to entail a reduction in compensation in **Denmark** and **Finland**; **France**, for its part, requires the existence of an inexcusable fault to reduce the pension paid to a victim suffering from permanent disability or his (her) legal beneficiaries.

1.2 Occupational diseases

The procedures for recognition of occupational diseases are less uniform than those applying for accidents at work.

Although one observes that all the countries of Europe have a national list of occupational diseases, the value of this list differs greatly depending on the country.

It concerns only infectious diseases which could be recognised as work-related in **Sweden**. In general, the victim must provide evidence of the highly probable link between his (her) disease and his (her) occupation, by demonstrating that there are more serious reasons in favour of a work-related origin than against it.

In the other countries, the list entails a more or less strong presumption of occupational imputability.

- In **Denmark, Finland, Germany, Austria, Switzerland, Spain** and **Portugal**, it reinforces and facilitates the recognition procedure. It serves as a guide for the insurance organisation that has to investigate the claims of both the "prosecution" and the "defence" by searching whether the disease from which the insured is suffering has indeed been caused by exposure to a causal agent marked on the list; the organisation will also search to find whether there are extra-occupational factors which could cause the disease.
- In **Belgium, Italy, Luxembourg, Ireland** and the **United Kingdom**, it is sufficient for the victim to prove that he (she) is suffering from a disease marked on the list and that he (she) has been exposed to the corresponding risk or has carried out a job included on the list, and this disease will be presumed to be of occupational origin, hence the causal link will not have to be demonstrated. But the insurance organisation or the employer may provide evidence to the contrary.
- In **France**, the tables entail an irrebuttable presumption of imputability, on condition that all the recorded requirements are fulfilled: existence of the disease, duration of exposure to the causal agent, occupation in question.

With the exception of **Spain, Ireland** and the **United Kingdom**, all the countries also have a complementary system (or off-list system) of recognition for the diseases not recorded on the list of occupational diseases. The proof of exposure to the risk and of the causal link must then be fully provided by the victim.

Only **Denmark, Ireland, Portugal** and the **United Kingdom** allow for extra-occupational factors, i.e. the victim's medical history where applicable, to pay compensation only for the "proportion" of the disease that was caused by the work. In the other countries, the victim's prior condition is immaterial.

1.3 Commuting accidents

In most countries, accidents occurring between the insured's workplace and his (her) home or customary place of meal eating are covered by injury insurance. In **Portugal**, only the judge can determine whether the commuting accident should be considered as an accident at work.

In **Denmark** and in the **United Kingdom**, on the other hand, commuting accidents are only exceptionally considered as an occupational risk, for example when the means of transport has been made available to the employee by his (her) employer.

In all the countries, it is up to the victim to demonstrate that the accident occurred on the occasion of commuting, and on the direct route from work to home.

2. *The employer's liability*

In most European countries, the occupational injury insurance system was built at the turn of the 20th century based on a mechanism deviating from civil fault liability law, and often constitutes the oldest form of social insurance.

Accordingly, in return for automatic compensation as of the recognition of the accident, the national laws have provided for limitation of the compensation to the victim's loss of earning capacity, but also, and above all, for limits to the employer's liability by comparison with the liability that would have resulted from civil law.

Employers' immunity against civil liability claims is therefore the general rule in European countries, or at least it was so for a long time, because some countries have chosen to abolish this immunity.

2.1 A principle of employers' immunity in seven countries

In seven European countries - **Germany, Austria, Belgium, France, Italy, Luxembourg** and **Sweden** -, the application of the legislation relating to occupational injuries, and hence the award of Social Security benefits, rules out the victim's taking any legal action against his (her) employer with a view to repairing the damage sustained on the occasion of the accident at work or occupational disease. This exemption from liability also applies to the insurance organisation.

There are, however, some rare exceptions to this principle of employers' immunity. Under these exceptions, the victim can bring a civil liability suit against his (her) employer, which implies that the latter have committed a fault which is the cause of the accident or disease.

The victim can bring a civil liability suit against his (her) employer in the event of:

- Damage to property on the occasion of the accident at work.
- A commuting accident in **Germany, Belgium** and **France** (i.e. in the event of a commuting accident caused by the employer or his employees, or more generally by a person belonging to the same company as the victim).

In **Belgium**, until recently there existed an inequality of treatment between transport (or so-called "driving") accidents which occurred in the workplace and those that were commuting accidents properly speaking, because only the latter entitled the victim to take civil liability action against his (her) employer. An Act of 1999 finally abolished this distinction. In **Germany** and **France**, claims can be made only for commuting accidents outside of the company.

- Serious fault/offence of the employer in **Germany, France, Italy, Belgium, Luxembourg** and **Sweden**.

The intentional fault of the employer reintroduces the common law system of civil liability in these six countries. Accordingly, **Belgian** law provides that for occupational diseases, shall be considered as an intentional fault a situation in which the employer has been informed of a hazard in writing by the Labour Inspectorate and has not taken the measures which would have enabled the disease to be avoided. An Act of 1999 then introduced this possibility of making claims against the employer who, having "seriously neglected the obligations imposed on him by the legal and regulatory provisions relating to occupational safety and health, has exposed workers to the risk of occupational injuries, when the civil servants appointed to monitor the application of said provisions have indicated to him in writing the danger to which he is exposing those workers". In practice, these requirements for claims for serious offences reported by the Labour Inspectorate are so restrictive that they have never been applied to date.

In **Italy** and **Sweden**, the civil liability of the employer can be recognised in the event of an offence committed in breach of occupational injury prevention standards and determined by a criminal or, where applicable, civil law judge.

In **France**, civil liability claims by the employee against his (her) employer are possible in case of an inexcusable fault of the latter. The victim can, on this occasion, claim compensation for damage not indemnified within the framework of injury insurance, namely the physical and moral suffering endured, aesthetic prejudice and loss of amenities of life, the loss/reduction of potential for job promotion (restrictive list), which will be evaluated in accordance with common law. If, in the context of an inexcusable fault, the Social Security fund is required to pay the victim not only the additional compensation provided for under injury insurance but also the compensation for personal damage mentioned above, it can reclaim this amount from the employer responsible. Formerly exceptional, the recognition of an inexcusable fault has in recent years become commonplace (see Chapter III-2).

In **Germany, Austria** and **Luxembourg**, apart from an intentional fault of the employer, the employee can in no case sue his (her) employer for civil liability. On the other hand, the insurance organisation can take action against them, in the case of a serious offence and in **Luxembourg** in cases of negligence, recognised by a decision of criminal conviction of the

employer to 8 days imprisonment (interpreted by Luxembourg law as immediate imprisonment).

2.2 No employers' immunity in seven countries

In **Ireland** and the **United Kingdom, Denmark, Finland, Switzerland, Spain** and **Portugal**, the employer benefits from no immunity in the case of an accident at work or occupational disease, whether civil recourse be a means of obtaining full compensation or whether it be merely a means of obtaining reparation in addition to that provided by injury insurance.

In **Ireland** and the **United Kingdom**, there are two possible means of compensation for the victim of an occupational injury: on the one hand social insurance which offers relatively limited benefits, and on the other hand civil liability action against the employer who, as already mentioned, benefits from no immunity. The victim who proves negligence by his (her) employer receives compensation for lost earnings, coverage of health costs and settlement of non-pecuniary damage.

This type of claim being frequent, many employers subscribe to an insurance policy with private companies; such insurance is even compulsory in the **United Kingdom**. In the UK, the number of claims doubled between 1981 and 1991, even though most of the cases are settled out of court before even going before the judge.

In **Ireland**, an Act of 2003 created the Personal Injuries Assessment Board (PIAB), a public organisation in charge of liability claims by all accident victims (with the exception of medical accidents). The creation of the PIAB should make it possible to relieve the courts of those claims presenting no difficulties relating to recognition of liability, and ensure a victim compensation procedure that is faster (9 months from receipt of the claim) and less expensive (no costs of proceedings and representation). The claimant must send his (her) claim for compensation supported by evidence to the PIAB, which shall inform the defendant of this. The damage (non-pecuniary damage, lost earnings, cost of medical care, material damage and any other expenses) is evaluated with the same tools as those used by civil law courts. If the PIAB's evaluation is accepted by both parties, it has the same enforceable power as a court decision. Otherwise, the PIAB shall issue to the plaintiff an authorisation to pursue the claim before the court.

Since the PIAB has come into operation, almost one-third of claims for compensation have concerned accident at work (995 claims between 1st June 2004 and 25 January 2005).

In **Denmark**, the victim can make a claim for compensation to a court based on the employer's failure to comply with the regulatory provisions in force in the area of safety. In practice, within the framework of such a procedure, the onus of proof is, as it were, reversed, and it is up to the employer to demonstrate that he has complied with safety rules.

This legal claim solution may be chosen by the victim either independently (the interest being often to obtain reparation for an injury whose job-related nature will probably not be recognised under Danish social legislation), or in addition to a claim for compensation made to the injury insurance system (solution that is advantageous for victims who had a high wage before the injury and who do not want to be subjected to the ceiling imposed by the injury insurance system). In this case, from the benefits that are paid to the victim by the employer is deducted the amount of the compensation to which they are entitled under the injury insurance system.

In practice, such claims are rare, because the benefits paid under the injury insurance system and those offered under common law conditions largely overlap one another. Employers can take out insurance for their civil liability, but they are not obliged to do so.

In **Finland**, social insurance is the main system of compensation for occupational injuries. The insured may, however, receive from his (her) employer, on a civil liability basis, benefits exceeding those provided by the injury insurance system, such as non-pecuniary damage (suffering/pain).

As in Denmark, the number of claims is small because the level of injury insurance benefits is considered as high, close to the level under common law.

It is only since 2003 that in **Switzerland**, the exemption from liability has been abolished and accordingly an employer can be held civilly liable for an occupational injury. According to the old

legislation, the employer was liable only if he had caused the injury intentionally or through gross negligence.

However, the social insurer can still take action against the employer only if the latter caused the injury intentionally or through gross negligence.

In **Spain**, the principle of immunity was recognised in the Act of 1900 founding the accident insurance system. After some uncertainty relating to ambiguous legal provisions of 1933 and 1956, the Social Security Act of 1966 made a clear break with this principle of immunity by providing that "workers and their legal beneficiaries may demand appropriate compensation from those responsible, including the employer, through criminal or civil proceedings". The goal of such claims is the reparation of damages not covered by the social insurance system, namely compensation for material damage (property damage), for suffering (past), for the loss of income assessed in its entirety, and for payment of future expenses for healthcare and medicines.

However, neither the legislation nor case law have coordinated the various methods of reparation consisting of injury insurance benefits, an increase in such benefits for infringements of occupational health and safety measures, and the more recent civil liability compensation. This imprecision is reflected even today by a situation in which the social law courts and the civil law courts, which both recognise claims for compensation based on fault liability, hand down contradictory judgements concerning the compatibility of civil and social compensation. In particular, the social law courts deduct from the compensation that the employer is condemned to pay to the victim the Social Security benefits already received by the latter, whereas the civil courts compound them. Thus, depending on whether victims apply to the former or latter courts, they see their damage fully repaired or else receive excess compensation.

It should be specified that although employers' immunity disappeared several dozen years ago in Spain, the number of claims remains limited.

In **Portugal**, claims are also possible, but they are virtually non-existent due to the insureds' lack of information and the complexity of the procedure.

III. Compensation in question: plans for reform and thinking

Occupational injury insurance, and especially compensation for accidents at work and occupational diseases, is a very lively area in Europe, because numerous countries have recently reformed or are considering reforming their victim compensation system. However, countries bringing into question their system as a whole are rare.

I. Recent reforms

In **Italy**, an Act of 2000 (that came into force in July 2002) radically changed the system of compensation for the victims of occupational injuries. This reform grew out of the desire of the authorities to make the concept of right to health prevail over the original concept of insurance against loss of earning capacity. Accordingly, the concept of loss of earning capacity has been replaced by that of biological damage, in other words the insurance organisation now pays compensation chiefly for physical and psychological harm to the victim.

In practice, this reform improves the compensation for permanent disability because it now enables compensation for minor disabilities (above 6% versus above 11% formerly) and compensation for new damages such as aesthetic or sexual/reproduction damage. The level of the pensions paid as compensation for economic damage has also been increased, especially for major disabilities.

In **Denmark**, following several years of debate, a reform of the occupational injury insurance system came into force on 1st January 2004. While the main purpose of this law was initially to extend the concept of occupational injury, compensation for victims is also concerned since the law provides on the one hand for paying compensation to the insured for the cost of future medical treatment, and on the other hand provides for granting special compensation to the survivors in case of death due to an intentional fault or gross negligence of the employer. The amount of this compensation is equivalent to that available within the framework of civil legal liability law.

It should be added that, in 2002, the level of compensation for permanent disability almost doubled, so that it is now close to the compensation granted within the framework of civil law.

As a result of all these measures, there is currently a consensus in Denmark concerning the compensation of victims of occupational injuries.

In **Sweden**, the introduction of new legislation in 2002 has had more consequences for the procedure for recognition of occupational diseases than for reparation. This legislation has lightened the onus of proof with regard to occupational diseases: since 1993, the victims had to prove the highly probable link between their disease and their professional activity. From now on, they have to demonstrate that there exist more serious reasons in favour of a presumption of occupational origin than the contrary.

In **Switzerland**, it should be noted that the employer's civil immunity has been abolished since 1st January 2003. It is too soon yet to determine whether this measure has consequences for the number of claims brought by victims.

2. Currents projects

In **Luxembourg**, a major occupational injury insurance reform has been announced for some years now. In this context, and following referral of the matter to the Prime Minister, the Economic and Social Council (ESC) set up in 1996 a working group responsible for examining the various problems relating to occupational injury insurance. In addition to proposals relating to the scope of

application of insurance and prevention, the decision made in October 2001¹⁶ suggests a series of modifications, in particular to make the compensation system fairer.

It is proposed chiefly to adopt separate compensation for work-related damage and bodily harm in place of the pension currently paid for loss of earning capacity. The system in force is criticised as being not very transparent, because the compensation is fixed and makes virtually no allowance for the specific situation of the insured.

Under the system recommended by the ESC, compensation for loss of wages would be established concretely for permanent disability rates equal to or greater than 10%, i.e. by comparing the income actually earned after medical stabilisation with the income earned before the injury and by examining whether the reduction is completely or partially attributable to the injury. It would be expressed in the form of a percentage of the remuneration earned prior to the injury. This pension, compensating fully for the loss of income, would be subject to tax and social security contributions, and would be paid only until age 65.

It is also proposed to pay compensation for non-pecuniary damage following bodily harm (but also physical suffering, disfiguration damage, sexual prejudice and loss of amenities of life and youth) through a benefit different from this pension, namely a lump sum payment the amount of which would be independent of the income level.

For minor disabilities (less than 10%), the mechanism currently in force would be maintained, except if it proves that the loss of income exceeds the pension resulting from application of the permanent disability rate.

As regards civil liability claims against the employer, the employees' group in the ESC proposes extending its conditions to the criterion of negligence, whereas the employers' group declares itself in favour of maintaining the current legal arrangements.

A proposal was also made regarding compensation for material damage. It is considered inadequate in view of the ceiling currently set at €3,666.93, which enables only partial compensation for the cars damaged (usually in commuting accidents). For this type of damage, the ESC recommends removing the requirement of existence of an actual bodily injury, introducing an excess and, on the other hand, considerably raising the compensation ceiling up to the amount of the minimum annual wage, i.e. €16,824.

Moreover, it was suggested to pay the benefits for temporary disability until medical stabilisation of the victim's condition, and no longer until the thirteenth week of disability. In this end, the duration of the payment of these benefits has recently been brought up to 52 weeks.

In **France**, thinking has been underway for more than about ten years concerning compensation for accidents at work and occupational diseases.

The current system of compensation is being brought into question for three reasons in particular.

On the one hand, it is considered inadequate, because it is designed to compensate only for the loss of earning capacity and rules out allowance for any other type of damage.

In addition, it is considered unfair for the victims, because rendered obsolete by the changes that have occurred over the last two decades in the legislation relating to compensation for bodily injuries of origin other than occupational (terrorist offences and acts, traffic accidents, HIV infection through blood transfusion, asbestos poisoning), which has created a series of derogatory regimes offering full reparation.

Finally, and above all, the "Cour de Cassation" (Supreme Court of appeal) opened a breach in the system of compensation for occupational injury by handing down orders in 2002 which extended the definition of inexcusable fault of the employer, making safety an absolute obligation and no longer a "best endeavour" obligation regarding the employees. This interpretation has since then allowed the victims to obtain greater access to full reparation through civil recourse.

The system of occupational injury insurance is therefore the subject of great discussion among the trade union and employers' organisations, victims' associations, academic circles, the media and

¹⁶ Available on the website of the Economic and Social Council of Luxembourg (www.ces.etat.lu)

the government. The government has commissioned various studies¹⁷ with a view to modernising the system of compensation for occupational injuries and in particular to consider the introduction of full reparation. The last report published in March 2004 proposes three reform scenarios, ranging from mere improvement of the current system of compensation to the implementation of full reparation under common law.

In the **Netherlands**, there has no longer been any specific insurance against occupational injuries since 1967.

Two types of explanations were put forward for the abolition of the system existing beforehand:

- On the one hand, it was considered that the distinction between occupational risk and general risk was an injustice, because the damage for victims is the same irrespective of the origin of their disease or handicap;
- This distinction according to the nature of the risk also posed serious practical problems, because the "candidates" for compensation on the basis of occupational risk were increasingly numerous, the latter being more favourable than the compensation granted by the health/disability insurance system.

The two systems were therefore merged under one and the same law, the disability insurance law (WAO). This new system has since then offered an invalidity pension in the event of unemployability for medical reasons, whatever the cause. The amount of this pension is determined according to the category of disability, which itself depends on the loss of earning capacity sustained by the victim. The latter is determined according to the calculation rules under the former regulations concerning occupational risk: the remuneration that can still be earned by the sick or handicapped worker is compared with what he would receive if he were in good health, by means of a database containing 10,000 jobs and the corresponding wages.

Since the early 1980s, the disability insurance system has posed serious financial problems: it is considered as generous, and the number of beneficiaries and claimants is increasing greatly from year to year. At the same time, civil liability claims against employers have become far more numerous over about the last ten years, either because the compensation allocated within this framework is more generous, or because the judges seem to be open to the recognition of disabilities arising from diseases such as job burn-out, slight mental disorders or again musculoskeletal disorders, which are seldom recognised as occupational diseases in the other countries of Europe.

The Dutch authorities are therefore considering two sorts of solution to the problem.

On the one hand it has been decided to define the concept of work disability more strictly: the conditions of access to qualification for total disability will be stricter, the level of benefits paid for partial disability will be reduced, and their payment will be subject to income conditions.

The latter condition being contrary to ILO Convention No. 121 on employment injuries, the Ministry of Social Affairs has also undertaken to draw up a draft law restoring a specific insurance system for occupational injuries. This insurance would provide benefits for disability (temporary and permanent), would reimburse certain medical expenses, and would repair moral prejudice, in return for which the employer would benefit from civil immunity. Management of this insurance would be entrusted to private sector insurers. This initiative, however, is on the whole very controversial, and the position of the government and parliament has not yet been finalised.

¹⁷ DORION Report (1991): *La modernisation de la réparation des accidents du travail et des maladies professionnelles*
Masse Report (2001): *Réflexions et propositions relatives à la réparation intégrale des accidents du travail et des maladies professionnelles*
YAHIEL Report (2002): *Vers la réparation intégrale des accidents du travail et des maladies professionnelles : éléments de méthode*
LAROQUE Report (2004): *La rénovation de la réparation des accidents du travail et des maladies professionnelles*

3. Debates

In several European countries, compensation for occupational injuries is the subject of criticism by various players or experts of this insurance system, although without any reform being considered at the government level.

In **Spain**, the system for compensation of victims is a subject debated within the trade unions, victims' associations and the *mutuas*¹⁸, but it is especially magistrates and academics who criticise its injustices¹⁹.

The flat rate - and inadequate - nature of the compensation granted by the social security system, and the lack of coordination of complementary methods of compensation, are denounced by the partisans of a system of full reparation. This would, on the one hand, be fairer than the system currently in force, because it would enable compensation of both pecuniary and non-pecuniary damage for all the insured, and not only those who sue their employers for civil liability. It would also make it possible to eliminate the problem – more legal than practical given the still limited number of cases - of the over-compensation of some victims and double payment by the employer who may have to pay for given damage both Social Security contributions to the occupational injury insurance and damages to the victim.

In **Austria**, the compensation system has been the subject of intense debate for the last five years, especially in academic circles, which denounce the system of flat rate compensation currently in force, to which they oppose a concrete estimate of the damage as under the Swiss model. Indeed, according to them, flat rate compensation leads sometimes to over-compensation and sometimes to under-compensation of the victim.

As regards the social partners and victims' associations, they apparently do not fundamentally reject the current system and appear cautious regarding the idea of concrete assessment of the damage, some fearing an increase in the cost of insurance, and the others a fall in the level of benefits.

The **United Kingdom** is another country in which there is a debate, not only with regard to compensation of victims of occupational injuries, but also concerning occupational injury insurance as a whole.

In particular, reform of the current insurance system has been included in the 2000-2010 "*Revitalising Health and Safety*" strategy defined by the government; this strategy, the aim of which is to reduce greatly the number of accidents at work and occupational diseases, is based on the observation that the British insurance system does not motivate employers to improve the level of health and safety in enterprises.

As part of this strategy, the HSE²⁰ has therefore undertaken to carry out a detailed study²¹ of the "performance" of the insurance systems in force in the United Kingdom, but also in other economically comparable countries such as Canada, the United States, Australia and some European countries such as Germany, Belgium, France and Italy. Emphasis has been placed on the relationship between the cost of the insurance and the number of accidents at work and occupational diseases occurring in each country.

This study, published in 2002, concluded that a reform of the British insurance system could be made according to three options: a voluntary type of approach on the part of enterprises, without

¹⁸ Mutuas: Insurance organisms for occupational injuries

¹⁹ *Las transformaciones del accidente de trabajo entre la Ley y la Jurisprudencia (1900-2000) : Revisión crítica y propuesta de reforma*; Aurelio Desdentado Bonete and Magdalena Nogueira Guastavino, Revista del ministerio de trabajo y asuntos sociales pp.31 to 66, 2000

Las medidas complementarias de protección del accidente de trabajo a través de la responsabilidad civil del empresario y del recargo de prestaciones; Aurelio Desdentado Bonete and Ana de la Puebla; Cien años de Seguridad Social. A propósito del centenario de la Ley de Accidentes de Trabajo de 30 de enero de 1999 pp. 639 to 664. Editorial Fraternidad Muprespa y UNED 2000

²⁰ HSE: Health and Safety Executive

²¹ *Changing business behaviour - would bearing the true cost of poor health and safety performance make a difference?* HSE 2002

changing the legislation but by adopting good practice rules, or else a reform of the legislation while remaining within the framework of a double system of compensation (legal/state), or else the replacement of the current model with a mutualised insurance system similar to those in continental Europe.

While it is agreed that it is this third solution which would have the strongest impact on the employers' behaviour with regard to health and safety, it is also that which arouses the greatest resistance to the extent that the employers fear that the introduction of a system of the no-fault liability type would result in a spiralling increase in compensation claims. To which the insurers and the Ministry of Labour and Pensions reply that the number of legal claims is already high and that such a system would make it possible to control the number of claims for compensation. The report suggests, for the time being, collecting best practices in the insurance area so as to work out a model which could serve as a reference. At the same time, it is planned to launch a major debate on the subject at the national level, involving the social partners, the insurers and the state.

Conclusion

- ▶ ***Today, occupational injury insurance offers no real full reparation in any of the European countries (as considered under civil law)***

No system of reparation for occupational injuries at present is equivalent to the common-law compensation. All the systems of repair have been built everywhere within the framework of a social insurance system, almost always specific. For example, in return for an "objective" liability of the employer (for risk and not for fault) and hence facilitation of access to reparation for the victim, the latter may claim compensation less generous than that offered in the context of so-called full civil liability.

The reparation for occupational injuries is limited in several respects.

On the one hand, not all types of damage are generally covered by the insurance: this is the case in particular for pain and suffering damage, loss of future promotion and material damage (except in Luxembourg).

In addition, the damage covered is often not fully compensated. While it can be considered that benefits in kind are fully covered by the insurance system, this is far from being the case for cash benefits. Whether it be for temporary or permanent disability, the benefits are almost always calculated within the limits of a ceiling applicable to the insured remuneration.

Moreover, for the award of pensions and/or lump sum compensation for physiological damage, a minimum disability rate is often required, which leads to the exclusion of compensation for minor disabilities.

Finally, there are few countries in which the percentage of wage, to which the pension corresponds, coincides with the victim's disability rate. For a total disability, the pension level may be limited to two-thirds of the victim's reference income.

- ▶ ***In some countries, however, the compensation is "fuller" than in others***

Some countries (Germany, Austria, Belgium, Spain, France, Luxembourg and Portugal) have based their system of compensation on flat rate compensation for occupational damage. This damage is assessed in such countries according to a basically medical scale, but it is indeed economic damage that is insured, which is by no means inconsistent with a social insurance framework.

Other countries (Denmark, Finland, Italy, Switzerland and Sweden if one takes into account complementary insurance) have chosen a more individualised approach to reparation and a more concrete evaluation of the damage by separating compensation for economic damage from compensation for physiological damage. The former is calculated according to the victim's actual loss of earning capacity, and the latter in accordance with a medical scale common to all.

Moreover, it is undeniable that the level of compensation varies greatly according to the country irrespective of the type of damage considered, and that in some countries it is similar to the reparation granted under common law (Denmark, Sweden, and Switzerland).

- ▶ ***It seems that the few recent reforms or reforms in progress are all moving away from the flat rate model to come closer to the full-coverage model***

Even though compensation for occupational injuries is not really a subject of debate in Europe, and even though outside of France the discussions on this subject are never posed in terms of "flat rate" or "full coverage", the compensation systems are changing toward greater allowance for damage and toward attenuation of the employer's civil immunity.

For example, Italy in 2000 completely reformed its system of compensation for occupational injuries, replacing its system previously based solely on reparation of the loss of earning capacity by virtually separate allowance for the economic and biological damage sustained by the victim. Switzerland had already followed a similar pattern in 1984. Likewise, the planned Luxembourg reform considers such a separation of damage liable for compensation, and the debates taking place in France concern the possibility of repairing damage other than the loss of earning capacity. The "all-inclusive" nature of reparation for occupational injuries is also a subject of discussion in Spain and, to a lesser extent, in Austria.

At the same time, and even though this trend applies only to a few countries, the civil immunity of the employer is a principle that has been in decline for some years now, which in practice enables the victims to obtain improved reparation in court. In Switzerland, since 2003 an employer can be held civilly liable for an occupational injury. In Spain, employers' immunity was abolished as of 1966, and in France, even though the principle still exists, recent court decisions have opened up more opportunities for victims to make claims against their employers.

Appendix I

Benefits subjects to Social Security contributions or income tax

Country	Type of benefits	Subject to Social Security contributions	Subject to income tax
Germany	daily benefits	X	
	pension		
Austria	daily benefits		
	pension		
Belgium	daily benefits	X	X (except if disability < 20% and except for retired people and widow(er))
	pension	X	X
Denmark	daily benefits		X
	pension		X
	lump sum		
Spain	daily benefits	X	X
	pension		X (except in case of absolute permanent disability)
	lump sum (rate < 33%)		
Finland	daily benefits		X
	pension		X
France	daily benefits	X	
	pension		
Ireland	daily benefits	-	-
	pension		X
Italy	daily benefits		X
	pension or lump sum		
Luxembourg	daily benefits	X	X
	pension		
Portugal	daily benefits		
	pension		
UK	daily benefits	X	X
	pension		
Switzerland	daily benefits		X
	pension		X
	lump sum		
Sweden	daily benefits		X
	pension		X
	lump sum (TFA)		

Appendix 2

Calculation of compensation for permanent disability

W = wages (with a maximum ceiling where applicable)

PD rate = permanent disability rate

Country	Compensation for loss or earning capacity		Compensation for physiological damage	
	Required minimum rate	Pension calculation	Required minimum rate	Amount of the lump sum (2004)
Germany	20%	W X PD rate X 66.66%	-	-
Austria	20%	W X PD rate X 66.66% - if rate ≥ 50%: 20% supplement added to pension - if rate ≥ 70%: 50% supplement	-	-
Belgium	-	W X PD rate (except for PD rate < 10%)	-	-
Denmark	15%	W X PD rate X 80%	5%	min: €4,237.65 max: €84,753
Spain	33%	- absolute PD: W X 100% - total PD for exercise of one's usual occupation: W X 55% - partial PD for exercise of one's usual occupation: lump sum of 24 monthly wage payments	-	min: €216 max: €4,039
Finland	10% reduction in working capacity 5% reduction in annual wages	W X PD rate X 85%		min: €921 max: €5,526
France	-	W X reduced rate (the disability rate is reduced by half for the part less than 50% and increased for the part greater than 50%) if PD rate < 10%: lump sum	-	-
Ireland	-	-	Benefits not based on income: 1% ≤ PD rate ≤ 19%: lump sum PD rate ≥ 20%: weekly pension	max: €11,610 pension max: €165.90 weekly (if rate > 90%) min: €33.20 weekly (if rate = 20%)

Calculation of compensation for permanent disability (forward)

W = wages (with a maximum ceiling where applicable)

PD rate = permanent disability rate

Country	Compensation for loss of earning capacity		Compensation for physiological damage	
	Required minimum rate	Pension calculation	Required minimum rate	Amount of the lump sum (2004)
Italy	16%	$W \times \text{PD rate} \times \text{coefficient}$ based on PD rate 16- 20: 0.4 21- 25: 0.5 26- 35: 0.6 36- 50: 0.7 51- 70: 0.8 71- 85: 0.9 86-100: 1	6 %	if $6\% \leq \text{PD rate} \leq 15\%$: lump sum min: €2,479 max: €24,402 if PD rate > 15%: pension min: €1,032/year max: €14,719/year
Luxembourg	-	$W \times \text{PD rate} \times 85.6\%$	-	-
Portugal	-	$W \times \text{PD rate} \times 70\%$ - in case of total disability for any work: 80% wages - if total disability for customary work: between 50% and 70% of wage according to PD rate if PD rate $\geq 70\%$: allocation of €4,279.20	-	-
UK	Allocation for lost earnings abolished in 1990		14% (or 1% for pneumoconiosis, diffuse mesothelioma and cotton-dust asthma; 20 % for deafness)	100%: €182 weekly (2004)
Switzerland	10%	$W \times \text{PD rate} \times 80\%$	5%	min: €3,547 max: €70,939
Sweden	6.66% lost of earnings	100% of lost wages (system coordinated with disability insurance benefits, and paying a pension only if greater than the disability pension).	AFA	

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