



▶ Social Protection in Action: Building Social Protection Floors for All

2022

Portugal: Translating constitutional rights into legislative protections

Summary

In contrast to other countries that enshrine only a general acknowledgement of social rights in their Constitution, the Constitution of Portugal dedicates an entire chapter to social rights and duties, including the right to social security, health protection, and adequate housing. It defines the main social risks that shall be covered by the different components of the social security system and establishes a set of fundamental principles for guaranteeing the right to social security, such as the principle of universality, unity and complementary of protection, general responsibility of the State, and participation. This right to social security is further reinforced in national legislation, which defines the contingencies covered, the person protected, and guiding principles on eligibility as well as the level and duration of benefits.

As a result, Portugal has effectively constructed a comprehensive social protection system founded on a sound legal framework. The system's progress is rooted in its continual evolution, whereby strategies and solutions

are developed to overcome new challenges, supporting the progressive implementation of nationally appropriate social protection for all.

Main Lessons Learned

- ▶ Legal frameworks are key to materialize the right to social security, and even more so when the Constitution lays down this right providing a basis for its implementation.
- ▶ Having a strong constitutional and legal framework limits the risk of drastic reductions in social spending during times of austerity and promotes the progressive realization of the human right to social security.
- ▶ The international legal architecture with respect to the right to social security, including human rights instruments and the standards developed by ILO's tripartite constituents, provide a useful reference framework for developing rights based social protection systems.

Social Protection Floors Recommendation, 2012 (No. 202)

SDG 1.3 aims to implement nationally appropriate social protection systems and measures for all, including floors, and by 2030, achieve substantial coverage of the poor and the vulnerable.

Social protection floors (SPFs) guarantee access to essential health care and basic income security for children, persons of working age and older persons. 187 countries have adopted the Social Protection Floors Recommendation, 2012 (No. 202), to achieve universal social protection.

Portugal's efforts to translate constitutional rights into legislative protections are in line with the core principles set out in Recommendation No. 202, including the universality of protection based on social solidarity, the provision of high-quality public services that enhance the delivery of social security systems, and the accessibility of efficient complaint and appeal procedures.

- The ratification and application of ILO social security standards provide a guiding framework to ensure universal access to comprehensive, adequate, and sustainable social protection.
- Comprehensive legal frameworks help ensure the coherence and coordination across the contributory and non-contributory schemes and programmes that make up the national social protection systems.
- Legal frameworks should continuously be adapted with a view to progressively ensuring Universal Social Protection.

Context

The Portuguese social security system has greatly evolved since it was first created in 1935. Late industrialization, urbanization, high emigration levels, and the country's democratization since 1974 led to substantial changes in the structure and administration of social security to ensure universal coverage. More recently, the ageing population combined with the impact of the global financial crisis has led to additional changes in the national legal framework to ensure both the sustainability of the social protection system and its compliance with fundamental rights enshrined in the national Constitution.

In line with international social security standards (see box), and with a view of achieving comprehensive and adequate protection for all throughout the course of life, the Portuguese national legal framework outlines a combination of contributory and non-contributory schemes providing in cash and in-kind benefits, resulting in a comprehensive normative framework that guarantees the practical realization of the right to social security.

Notably, the Social Security Framework Law (No. 4/2007), in coordination with the Framework Law on Health (No. 95/2019), sets the legal foundations for a comprehensive social protection system that embodies the general principles and safeguards found throughout ILO social security standards, including the landmark Social Security (Minimum Standards) Convention, 1952 (No. 102), which Portugal ratified in 1994. As such, Portugal's legal framework reflects many constitutional principles and rights, such as the principle of universality and equality, effectively guaranteeing universal coverage of all residents and children, irrespective of nationality and professional status and sets out the general structure of the Portuguese social security system. It can be noted that this framework model has been applied in most Lusophone countries in the

African region (Cabo Verde, Angola, and so on) and beyond (Timor-Leste).

The Portuguese social security system lies on three pillars: the "Citizenship" social protection pillar (non-contributory pillar), the "Previdential" pillar (contributory), and the "Supplementary" pillar (additional voluntary protection). This structure reflects Portugal's comprehensive, coordinated, and dynamic approach to social protection rooted in its constitutional commitment to the welfare

► **Box. ILO Social Security Standards**

ILO social security standards represent a unique set of legal instruments that give a concrete meaning to the human right to social security enshrined in the Universal Declaration on Human Rights (1948) and the International Covenant of Economic, Social and Cultural Rights (1966). As such they guide the development and implementation of comprehensive social security systems and contribute to attaining the 2030 Agenda for Sustainable Development, in particular the goals of eradicating poverty, ensuring good health and well-being, gender equality, decent work, and reducing inequalities.

The ILO's normative framework, and notably the landmark Social Security (Minimum Standards) Convention, 1952 (No. 102) and the Social Protection Floors Recommendation, 2012 (No. 202), are globally recognized as a key reference for the design of rights-based, sound and sustainable social protection systems, including floors. Both standards are also grounded in a set of core financing, governance and administration principles.

Recommendation No. 202 calls on member States to establish, as a priority, social protection floors for all in need, and to progressively ensure higher levels of social security to as many people as possible, as soon as possible (ILO 2019). In particular, the Recommendation provides that social protection floors should be comprised of basic social security guarantees, which should ensure at a minimum that, over the life cycle, all in need have access to essential health care and to basic income security (paragraph 4). It also builds on the principles set out in Convention No.102, including universality of protection, progressive realization, social inclusion, solidarity in financing, regular monitoring and evaluation and coherence across economic, social and employment policies.

State, successfully safeguarding the human right to social security over time and throughout political and financial cycles.

Under the overall supervision of the Ministry of Labour, Solidarity and Social Security, the Social Security Institute is responsible for the administration and management of the social protection system, which includes cooperation with and tutelage of other stakeholders, such as Instituições Particulares de Solidariedade Social (IPSS) – private non-profit institutions that provide relevant social services to the most vulnerable.

The right to social security in the Constitution of Portugal

Legal frameworks constitute the formal expression of fundamental rights proclaimed by human rights instruments due to their binding and stable nature. They set down the specific details and parameters for the practical realization of rights. This is especially true when rights are enshrined in national Constitutions. In Portugal, access to essential health care and basic income security over the life cycle is rooted in an extensive national constitution, first adopted in 1976.

In contrast to other countries that enshrine a general acknowledgement of social rights, Portugal dedicates an entire chapter to social rights and duties, including the right to social security, health protection, and adequate housing. The Portuguese provisions include specific definitions on the content of social security rights, the organization of welfare institutions, and imperative social policy considerations to establish a comprehensive and coordinated social protection system (Magalhães, 2010; Brito Vieira and Carreira da Silva 2013).

The Constitution enshrines the right to protection against main social risks through multiple detailed provisions:

- **Workers' rights (article 59)** – The right to material assistance when they involuntarily find themselves unemployed, as well as assistance and fair reparation in case of work-related accidents or occupational diseases.
- **Social security and solidarity (article 63)** – The right to protection in case of illness, old age, disability, survivorship, unemployment and any other situation that entails a lack of or reduction in means of subsistence or ability to work.

- **Health (article 64)** – The right to health protection.
- **Family (article 67)** – The family's right to protection through the provision of family benefits, among others.
- **Fatherhood and motherhood (article 68)** – The protection of fatherhood and motherhood through the provision of adequate periods of leave from work without loss of remuneration or privileges, particularly for mothers during and following pregnancy.

The Constitution also reflects multiple fundamental principles established by Convention No. 102 and Recommendation No. 202. These are further upheld by the Social Security Framework Law and the Framework Law on Health. Among others, articles 63 and 64 of the Constitution prescribe the universality of protection and the public nature of the system, establishing the State's duty in organising and coordinating the social security and national health systems. The Constitution also guarantees the right to health protection through a national, universal and general health service that takes into account the economic and social conditions of the persons protected. It equally imposes additional protection and policy considerations for vulnerable groups such as children, youth, older persons, and persons with disabilities (articles 69 to 72).

The accountability mechanisms, set out also in the Constitution, accompany the State's responsibility in the provision of essential healthcare and basic income security. As such, on more than one occasion, austerity measures have been successfully challenged and declared partially or wholly inoperable by the Constitutional Court of Portugal. The Constitution also establishes a set of fundamental rights that underscore efficient and accessible complaint and appeal procedures, such as the right to complain (article 52), the right to an independent judiciary (article 203), and the liability of civil servants in the execution of their functions (article 271).

Legal architecture of the Portuguese social protection system

The right to social security as laid out in the Constitution is further reinforced in national legislation, notably the Framework Law on Health and the Social Security Framework Law. Notably, with regards to contributory and non-contributory benefits in cash, the Social Security Framework Law defines the contingencies covered, the

persons protected as well as guiding principles pertaining to the level of benefits, eligibility conditions, and benefit duration.

Access to health care

The right to universal and comprehensive health care is recognized in the Constitution (article 64). Accordingly, the National Health Service (NHS) design, and reforms, have reflected these constitutional priorities over the years. In line with the principles of responsibility of the State and equality of treatment enshrined in Convention No. 102, the Framework Law on Health entrusts the Ministry of Health with the supervision of the NHS, which provides health care services for the promotion, prevention, treatment and rehabilitation of health, as well as long-term and palliative care to all residents, including illegal immigrants. Concretely, general and specialist care, maternity care, domiciliary visiting, hospitalization, essential surgery, certain prescribed medications, and transportation are all benefits in kind offered by the NHS. As such, the NHS provides all the types of medical care required by Convention No. 102 in case of a morbid condition, pregnancy and confinement and their consequences (Article 10(1)). In addition to the health care provided under the NHS, certain categories of persons may be entitled, based on means-testing,¹ to supplementary cash transfers for health care services such as dental, optical, and pharmaceutical care.² The robust national legal framework pertaining to health protection guarantees access to a nationally defined set of goods and services in line with ILO standards.

The global financial crisis in 2008/09 and subsequent adoption of the Economic Adjustment Programme led to significant health sector reforms throughout the past decade. Although primarily tax-financed, out-of-pocket spending for medical care expanded to include additional user fees for national health services. Nonetheless, in 2011, the regulation on the co-payment of NHS benefits (No. 113/2011, as amended) introduced several legislative protections. These include a maximum percentage of costs to be shared by users, annual review mechanisms for medicine prices, and exemptions of fees for certain persons

such as pregnant women, children, persons with disabilities, persons in situations of economic precariousness, and asylum seekers and refugees, which aimed at safeguarding the constitutionally enshrined right to healthcare regardless of social, economic or legal background. Although these reforms sought to ensure the affordability of medical services and individual's financial protection, according to the Organisation for Economic Co-operation and Development (OECD), out-of-pocket expenditures as a share of total health expenditure in Portugal remain almost twice as high as the European Union average, adversely affecting and undermining access to health care for households in the poorest income quintile (OECD 2019). In this light, through Law No. 2/2020, the Government introduced a phased-in process for the removal of co-payments, which started with the elimination of fees for primary healthcare consultations, complementary treatments in primary healthcare facilities, and for complementary diagnostic and therapeutic examinations prescribed within the NHS but carried out outside its network. However, the extent to which these measures will effectively reduce out-of-pocket spending remains to be seen, as cost-sharing is only one of the drivers of households' expenditure on health.³

Social protection for children and families

The Constitution sets out a multi-sectorial approach to protecting the family, based on inter alia, the right to education, adequate housing, and quality of life (article 67). These guarantees are reflected in the diversity of programmes enshrined in social security legislation that establish a comprehensive set of benefits to ensure basic income security for children and families, providing access to nutrition, education, care, and other necessary goods and services, as advocated for in Recommendation No. 202.

Support to persons with family responsibilities is mostly provided through the non-contributory pillar (Citizenship social protection pillar), specifically through the Family protection and Social action schemes.

The Family protection scheme covers costs related to general family expenses and specific costs arising from disabilities and long-term dependency situations. These

¹ The means tests are established in coordination with the Ministry of Labour, Solidarity and Social Security.

² These benefits are provided through the NHS's National Programme for Oral Health Promotion and the regulation on Additional Health Benefits (No. 252/2007, as amended).

³ The definition of out-of-pocket spending used by the OECD comprises user fees, the cost of self-medication, and other expenditures paid directly by private households.

cash benefits are principally regulated by the Regulation on Family Benefits (No. 176/2003, amended), the Regulatory Decree on Special Education Subsidies (No. 3/2016), and the Regulation on Social Benefit for Inclusion (No. 126-A/2017, amended). With regards to general family expenses, the scheme comprises several means-tested social transfers including a pre-natal allowance, a family allowance and an education allowance, which amounts vary according to the age and number of children, the household's composition and its income. Families with children with disabilities receive an additional family benefit, a social inclusion benefit and subsidies for special education programmes. Single-parent families and large families also benefit from an increased allowance. In cases where a family member requires constant care, a dependency benefit may also be granted. Additional social services, such as day care and family leisure centres, are provided under the Social action scheme, complementing the periodical cash benefits and promoting the overall well-being and protection of children and families. This is in line with Convention No. 102, which permits the provision of benefits either in cash and/or in kind, including food, clothing, housing, holidays, or domestic help.

Despite the numerous benefits and services available, the combination of austerity measures and low employment rates following the global financial crisis in 2008/09 led to an increase in national child poverty levels (ILO 2017). Notwithstanding, since then, key policy measures have gradually increased access to family benefits while improving their adequacy. The National Statistics Institute of Portugal has indicated a slight decrease in the at-risk-of-poverty rate of children over the last few years, reflecting the economic recovery, the fall in unemployment rates and the welfare recalibration.⁴

Social protection for women and men of working age

The principles of unity and complementarity of protection, articulated in the Social Security Framework Law (articles 15 and 16), have guided the design and coordination of the Portuguese system with a view of providing basic income security for persons in active age who are unable to earn sufficient income. Although social protection for women and men of working age is primarily

provided by the contributory pillar, all three pillars (non-contributory, contributory, and supplementary) of the Portuguese social security system work in tandem to ensure protection in the case of sickness, maternity, paternity, unemployment, employment injury⁵, disability, and survivorship.

By anchoring social security rights and obligations in its national legislation, including for the non-contributory pillar, Portugal has followed the human rights-based approach. In particular, the Solidarity scheme aims to ensure the practical realization of fundamental social security rights to prevent and eradicate situations of poverty and social exclusion. This pillar comprises several means-tested benefits that provide basic income protection to persons of working age not covered, or insufficiently covered, by contributory schemes against the aforementioned contingencies.

Affiliation to the general social security scheme ("Previdential" pillar) is mandatory and generally covers all workers, including independent workers and economically dependent self-employed persons. The Social Security Framework Law dictates the principles that outline eligibility conditions, contribution rules (including ceilings and floors), and level of benefits. The Code of Contributory Schemes in Social Insurance (Law No. 110/2009, amended) supplements the Social Security Framework Law. It establishes concrete administrative parameters such as eligibility requirements, definition of insurable earnings and contribution rates for protected persons, according to their employment category. The specificities regarding the benefit amounts, qualifying conditions and the cumulation of benefits are regulated by contingency in implementing regulations.

Regarding maternity protection, it can be noted that Portugal is a party to Convention No. 102 (Part VIII) and the Maternity Protection Convention, 2000 (No. 183), ratified in 2012. In this line, the contributory scheme provides cash maternity benefits for 120 consecutive days at a rate equal to 100 per cent of previous earnings to all women that meet the prescribed qualifying period -six months of contributions-. Furthermore, in line with Article 6(6) of Convention No. 183, the Portuguese social security system provides periodic non-contributory cash maternity benefits for 120 days to women who do not meet the qualifying

⁴ For more information, consult: https://www.ine.pt/xportal/xmain?xpid=INE&xpgid=ine_destaquas&DESTAQUESdest_boui=354099803&DESTAQUESmodo=2.

⁵ Unlike occupational diseases, protection against accidents at work is part of a private programme. It is mandatory and transferred to insurance companies.

period and whose means do not exceed prescribed limits. Both, the contributory and non-contributory schemes promote a more equitable sharing of care responsibilities by increasing the duration of benefits to 150 or 180 days in case protected persons opt for parental leave or shared leave, respectively. Access to free maternity medical care is guaranteed to all residents through the NHS, which provides prenatal, childbirth and postnatal care, including hospitalization when necessary.

High levels of unemployment have been particularly challenging. Echoing constitutional obligations (article 58), the Social Security Framework Law stipulates that social security financing must fund cash benefits, as well as initiatives related to employment and vocational training policies (article 89). In line with this provision, Portugal has deployed key policy measures supported by regulations to create vocational internships, trainings, and incentives for employers to hire young and long-term unemployed persons.⁶ Although unemployment has generally decreased since its peak in 2013, efforts must continue to effectively protect certain categories of workers, such as the underemployed and persons with short-term contracts (ILO, 2018). Extending income support mechanisms to workers in all forms of employment and expanding the policies noted above is of particular importance to secure a swift recovery after the Covid-19 pandemic, which resulted in a 22.1 per cent increase in registered unemployment between April 2019 and April 2020. (ILO, 2020).

Furthermore, the Portuguese social security system also includes specific policy actions to promote the autonomy and participation of persons with disabilities in the labour market. These measures embody the objectives and protections set out in both the national Constitution (article 71) and the non-contributory pillar through a combination of cash and in-kind benefits. Most recently, cash benefits were revamped and united under the regulations regarding social benefits for inclusion. These non-contributory benefits cover disability-related expenses (the base amount), ensure a minimum level of financial resources (supplements), and provide for additional specific expenditures (top-ups). They can be combined with other benefits, such as those granted in case of unemployment or employment injury, thus ensuring a truly multi-dimensional protection. Additionally, the Independent Living Support Program regulations

(No. 129/2017) further complements this protection by providing persons with disabilities with personalized assistance services to help support daily life activities, including job searches. By linking income support to activation measures, Portugal facilitates work and life transitions for working-age women and men.

Social protection for older women and men

The provision of basic income security and services to ensure the active participation of older persons is constitutionally protected (article 72) and secured in practice through a combination of contributory and non-contributory benefits. The right of protected persons to receive an old-age pension is established in the Social Security Framework Law and accompanied regulations.

Under the general social insurance scheme (Previdential pillar), old-age pensions are regulated by the Old Age and Disability Protection regulation (No. 187/2007, amended). Once individuals reach the statutory retirement age and complete the contributory period, they are entitled to a monthly pension calculated based on their previous contribution records, which cannot be less than €275.30 a month. The statutory retirement age is the same across the three pillars and is periodically revised following an automatic mechanism that takes into consideration the evolution of life expectancy as of age 65. Accordingly, the latest regulation (Portaria No. 30/2020) determined that individuals are entitled to old-age benefits as of the age of 66 years and 6 months. In this regard, it is worth mentioning that Convention No. 102 allows for an increase of pensionable age beyond 65 years only with due regard to the working ability of older persons in the country concerned (Article 26(2)). Linking the retirement age with changes in life expectancy is a measure aimed at enhancing the financial sustainability of pension systems; however, the Committee of Experts on the Application of Conventions and Recommendations has emphasised that such adjustments would be justified only if elderly workers conserve not only their physical ability but also a fair chance to stay in the labour market and maintain their employability (ILO 2017a).

Furthermore, complementary protection at retirement is provided through the third pillar (the Supplementary pillar), consisting of public, voluntary individual accounts, and

⁶ For an example of this, see the regulations on the new rules for incentives to hire young persons, the long-term unemployed and the very long-term unemployed (No. 72/2017) and the Order on the creation of vocational internships for the young and unemployed (No. 131/2017).

individual or collective initiative schemes ruled by regulation on Supplementary Pensions (No. 26/2008).

The non-contributory old-age social pension, regulated by Social Pensions regulations (No. 464/80, amended), provides a monthly benefit to individuals who have reached the statutory retirement age but are not entitled to benefits provided under any existing compulsory social security scheme and who have gross monthly income equal to or less than €175.52. The old-age social pension ranges from approximately €230 to €250 depending on the beneficiary's age.⁷

Older persons with a gross monthly income higher than the threshold established for accessing the old-age social pension but lower than the annual minimum threshold (approximately €5 258.63) qualify as at-risk-of-poverty and might be eligible for a solidarity supplement grant. The Solidarity Supplement for the Elderly (regulation no. 232/2005, amended) provides monthly cash benefits to low-income pensioners. In coordination with the Ministry of Health, individuals entitled to this supplement are equally eligible to receive aid under the regulation on Additional Health Benefits (No. 252/2007, amended), which provides reimbursement of certain expenses related to the purchase of medicine, glasses, and dental prosthetics. The increasing share of older persons in the total population has also led health and social policies to address this demographic challenge by expanding community-based and institutional services such as home help services, residential structures, social and night-care centres (European Commission 2018b).

Firmly rooted in a robust and comprehensive legal framework, the statutory provisions that guarantee a minimum standard of living for older persons have led to positive improvements over time. Concretely, statistics indicate that in 2016 the risk-of-poverty or social exclusion rate for persons over the age of 65 had decreased by approximately 6 per cent since the initial social security reforms of 2007 (European Commission 2018a).

Towards a comprehensive social protection legal framework based on international social security standards

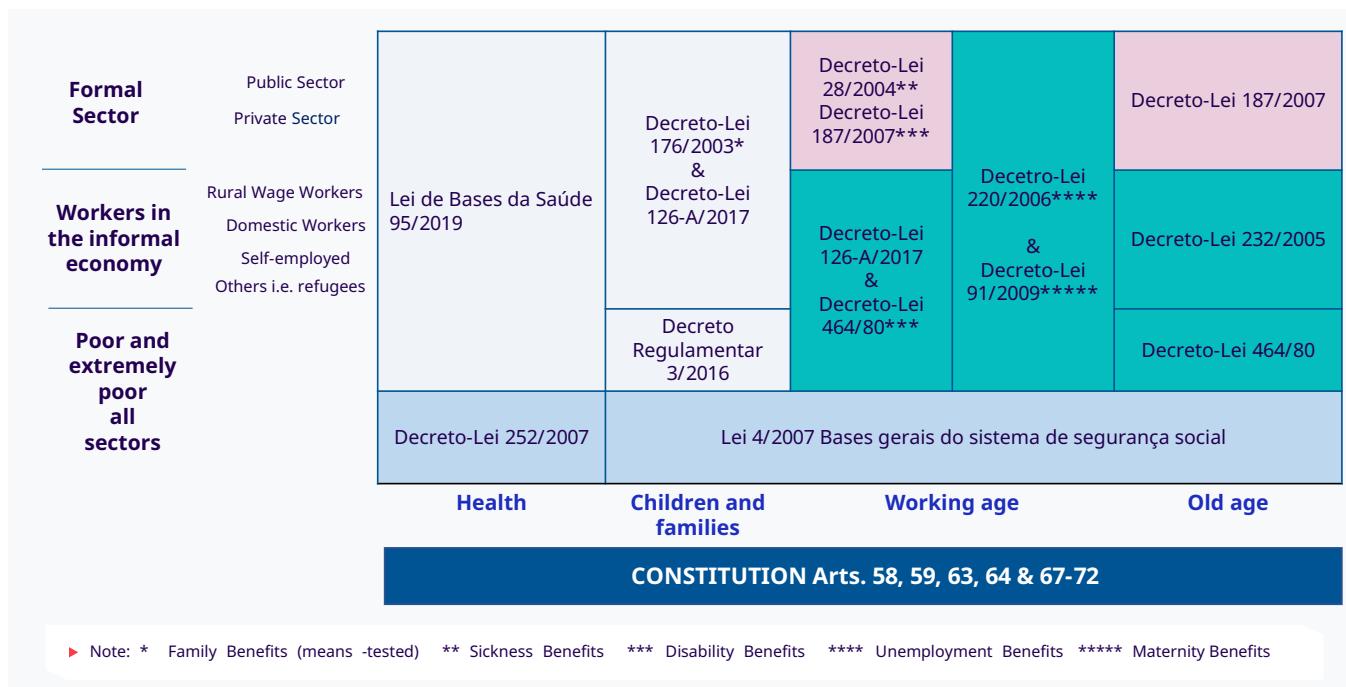
Portugal has effectively constructed a comprehensive social protection system founded on a sound legal framework (see figure). Bound by constitutionally enshrined parameters and principles, the Social Security Framework Law and the Framework Law on Health set out the fundamental structure for the practical realisation of the right to social security. Accompanying regulations provide the necessary details of the array of cash and in-kind benefits provided under the three pillars of the social protection system and that altogether serve to ensure access to health care and income security for children and families, persons of active working age, and older persons.

A member State of the ILO since its foundation in 1919, Portugal has ratified a total of eighty-five Conventions and one Protocol, seven of which pertain to social security.⁸ In 1994, dedicated to providing comprehensive protection, Portugal is one of the eight countries that have accepted all nine parts of Convention No. 102. Furthermore, Portugal is a party to the European Code of Social Security and

⁷ In addition to the flat-rate social pension (€211.79), an extraordinary solidarity supplemented of €18.44 or €36.86 a month is paid to beneficiaries younger than age 70, and those aged 70 or older, respectively.

⁸ Workmen's Compensation (Agriculture) Convention, 1921 (No. 12); Workmen's Compensation (Accidents) Convention, 1925 (No.17); Workmen's Compensation (Occupational Diseases) Convention, 1925 (No.18); Equality of Treatment (Accident Compensation) Convention, 1925 (No.19); Social Security (Minimum Standards) Convention, 1952 (No. 102), Parts II to X; Maternity Protection Convention, 2000 (No. 183); and Domestic Workers Convention, 2011 (No. 189).

Figure: Overview of the Portuguese Social Protection Legal Framework



Protocol, which in addition to enshrining key principles found in ILO social security standards, also imposes annual reporting obligations to ensure the periodic supervision of compliance.

Throughout the years, the Portuguese social security system has consistently sought out solutions and strategies to overcome evolving challenges. Among others, it has successfully implemented a modernization strategy, “Social security with you”, which includes key transparency and simplification measures aimed at fostering user’s trust, addressing fraud and contribution evasion while increasing the system’s overall efficiency.⁹ For example, users may visit their district centres to obtain additional information on their rights and obligations and receive assistance on filing a complaint or appeal. Likewise, Portugal has set out to address high levels of child poverty and long-term unemployment¹⁰ through a combination of measures, including progressively higher levels of family benefits, expanded parental protection, and access to employment and vocational training programmes (ILO 2017b).

Conclusion

Portugal has anchored its social protection system in a sound legal framework that considers the guidance of international social security standards and reflects all the essential elements necessary for a human rights-based approach to the right to social security. The body of national legislation dictates fundamental principles that underlie the effective realisation of social security rights and structures the non-contributory, contributory, and supplementary pillars to interact in a complementary manner with a view of attaining universal coverage and providing comprehensive and adequate protection.

Overall, the Portuguese social security system has progressively implemented nationally appropriate social protection for all and is well in line with contributing to end poverty in all its forms as per the Sustainable Development Goals.

⁹ For more details, consult “Social Security with you”: The Portuguese social security modernization strategy (ISSA, 2019) and art. 8(2a) of Portaria No. 135/2012.

¹⁰ ILO, 2017b. World Social Protection Report 2017-2019.

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