

European University Institute
San Domenico di Fiesole

Competition, Labor, Social Security – Striking the Right Balance

**The Relationship between Community Competition Law
and the Member States' Laws of Collective Bargaining
and Social Insurance**

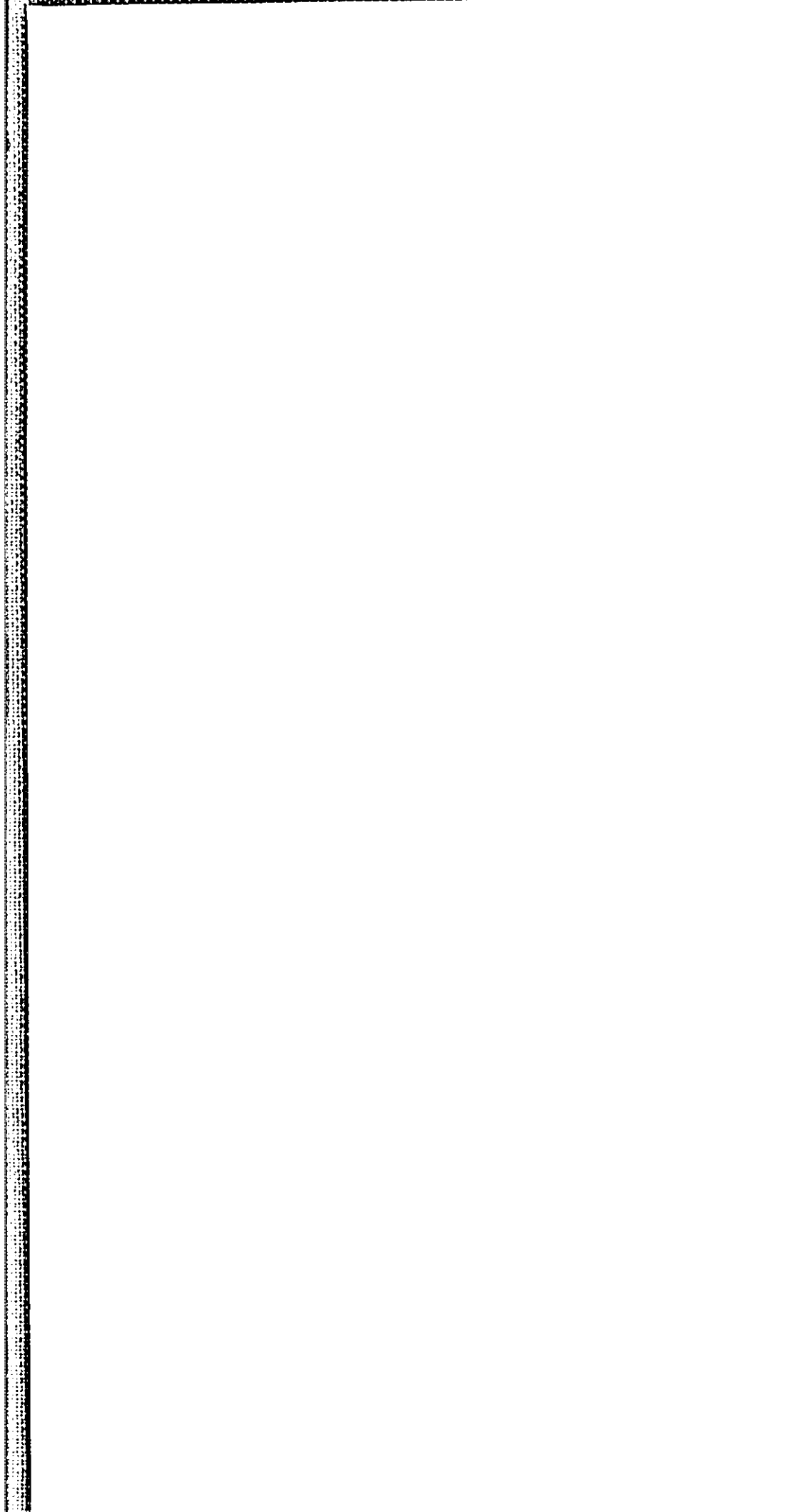
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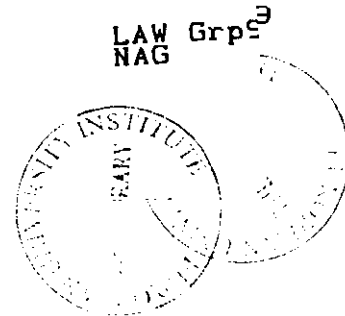
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Rosso



Für Nela und meine Eltern



Grp⁹
Grk⁹
EC⁹

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List of abbreviations

AG	Advocate General
AOK	Allgemeine Ortskrankenkasse
<i>AuR</i>	Arbeit und Recht
BAG	Bundesarbeitsgericht
BAGE	Entscheidungen des Bundesarbeitsgerichts
BGH	Bundesgerichtshof
BVerfG	Bundesverfassungsgericht
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
CCFRW	Community Charter of the Fundamental Rights of Workers
CFI	Court of First Instance
<i>CML Rev.</i>	Common Market Law Review
CUP	Cambridge University Press
<i>DB</i>	Der Betrieb
EC	European Community
EC	Consolidated (Nice) Version of the Treaty establishing the European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
<i>ECLR</i>	European Competition Law Review
ECR	European Court Reports
ECT	Treaty establishing the European Community
EEC	European Economic Community

<i>EJIL</i>	European Journal of International Law
<i>EJIR</i>	European Journal of Industrial Relations
<i>E.L. Rev.</i>	European Law Review
ESC	European Social Charter
ETUI	European Trade Union Institute
EU	European Union
EUI	European University Institute
<i>EuR</i>	Europarecht
Eur. Court HR Rep.	European Court of Human Rights Report
<i>EuZW</i>	Europäische Zeitschrift für Wirtschaftsrecht
<i>FAZ</i>	Frankfurter Allgemeine Zeitung
GG	Grundgesetz (German Basic Law)
<i>IJCLLIR</i>	The International Journal of Comparative Labour Law and Industrial Relations
<i>ILJ</i>	Industrial Law Journal
ILO	International Labour Organization
KG	Kammergericht
<i>NZS</i>	Neue Zeitschrift für Sozialrecht
OJ	Official Journal of the European Community/ European Union
OLG	Oberlandesgericht

<i>ORDO</i>	ORDO – Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft
OUP	Oxford University Press
<i>RdA</i>	Recht der Arbeit
R.J.D.	Report of judgments and decisions
SGB V	Fünftes Sozialgesetzbuch (German fifth code of social law)
TEU	Consolidated Version of the Treaty on European Union
TULCRA	Trade Union and Labour Relations (Consolidation) Act
UK	United Kingdom
<i>WRP</i>	Wettbewerb in Recht und Praxis
<i>WuW</i>	Wirtschaft und Wettbewerb
<i>ZEuP</i>	Zeitschrift für Europäisches Privatrecht
<i>ZfA</i>	Zeitschrift für Arbeitsrecht
<i>ZIP</i>	Zeitschrift für Wirtschaftsrecht

"Soziale Sicherheit und soziale Gerechtigkeit sind die großen Anliegen der Zeit. Die soziale Frage ist seit Beginn der Industrialisierung mehr und mehr zur Zentralfrage menschlichen Daseins geworden. Sie hat eine eminente geschichtliche Kraft. Auf ihre Lösung müssen Denken und Handeln vor allem gerichtet sein"

Walter Eucken, Grundsätze der
Wirtschaftspolitik, p. 1*

I. Introduction

On the 29th of May and on the 1st of June of this year first the French and then the Dutch people made a clear choice against the proposed European Union's (EU) Constitution in their referenda. These democratic decisions came as a shock to the established political class. One of the reasons frequently brought forward against the Constitution was the fear of a globalized *laissez-faire* capitalism lacking social protection and responsibility. The EU was perceived as one factor contributing to this unsocial, globalized hypercapitalism.

It is true that the European Community (EC) was founded in 1957 as a European *Economic* Community (EEC). The integration of the market was given prevalence, since it was supposed to facilitate political integration. Market integration was to be achieved by the free movement of goods, services, persons and capital in Europe and free competition in the common market. Hence the four fundamental freedoms and competition law became the keystone of European integration. Yet economic integration was not simultaneously accompanied by social integration. Marginal elements of social legal integration were only slowly included in the Treaty by the treaties of Maastricht (1992 concluded/1993 came into force), Amsterdam (1997/1999) and Nice (2001/2003). The Member States refused to transfer competences in the field of social protection and in the labor market to the Community. Today the major competences in the social field still remain in the hands of the Member States. The phenomenon that economic integration moves at a faster pace than social integration is a common experience of internationalization and globalization – and it causes fear. There is a widespread impression spread that big multinational enterprises can move relatively freely in

* W. EUCKEN, *Grundsätze der Wirtschaftspolitik*, 7th ed., Mohr Siebeck, Tübingen 2004, at p. 1. Translation by the author: "Social security and social justice are the great concerns of this time. Since the beginning of industrialization the social question has become more and more the central question of human existence. It has an eminent historical force. Thinking and acting must be directed above all to its solution."

the globalized market and have hence become independent from national labor and social laws. The feared consequences are social dumping and the undermining of national systems of social security and workers' rights. The lack of governance of globalization due to the lack of social integration has terrified the European population.

The described discrepancy between economic and social integration has led to legal problems in the European Community. EC law has primacy over national law, including labor and social law. Yet EC law is mainly economic law and it focuses on a common market with free competition. Labor law, on the other hand, necessarily involves certain restrictions of competition in order to protect employees – for example the cartelization of supply and demand of work in collective bargaining. The same is true for social law: social insurance schemes which are based on solidarity can only maintain their financial equilibrium if competition in the market is to a certain extent restricted.

The traditional division between EC competition law on the one hand and national social and labor law on the other hand was commonly accepted for a long time – 33 years. However, on the 18th of June 1991, the European Court of Justice (ECJ) received a preliminary reference from the *Tribunal des Affaires de Sécurité Sociale de l'Hérault* asking if a compulsory social insurance scheme was compatible with the Treaty's competition rules – the case *Poucet et Pistre*.¹ The Court received those questions shortly before the conclusion of the Treaty of Maastricht on the 7th of February 1992 and its declaration of the completion of the internal market. It might have been the Commission's diligent preparatory work for the formal completion of the internal market which propelled the examination of social insurance schemes under the ambit of competition law.

In the wake of *Poucet et Pistre*, several social insurance schemes were challenged before the Court for infringements of competition law. In some Member States supplementary social insurance schemes are established by collective agreements between employers and trade unions, hence collective bargaining also eventually became subject to a competition law assessment. The first judgment of the Court was given in the triplet of *Albany* cases in 1999.²

¹ Joined Cases C-159/91 and C-160/91, *Poucet et Pistre*, (1993) ECR I-637.

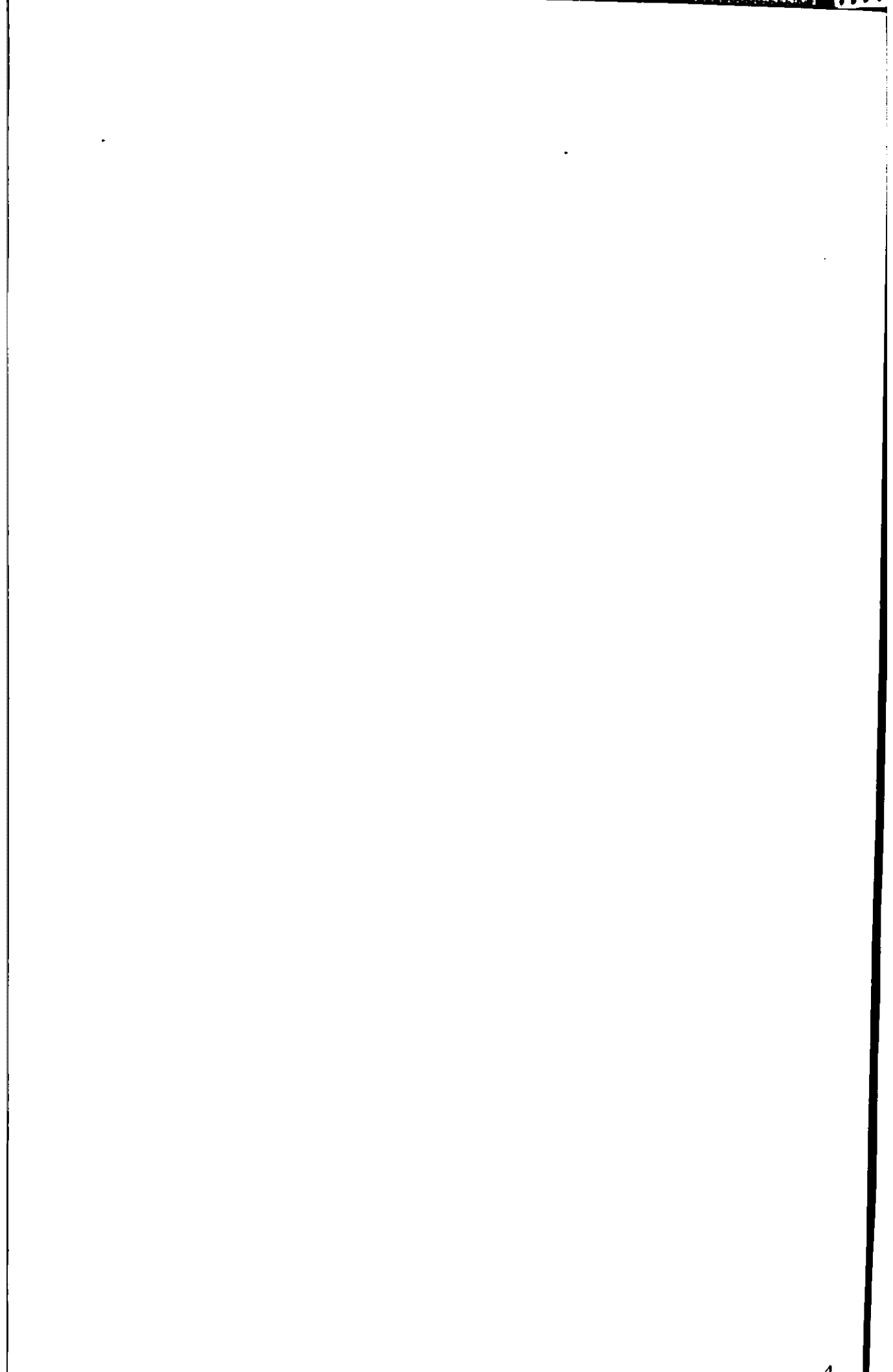
² Case C-67/96, *Albany*, (1999) ECR I-5751; Joined Cases C-115/97 to C-117/97, *Brentjens*, (1999) ECR I-6025; Case C-219/97, *Drijvende Bokken*, (1999) ECR I-6121.

Contrary to its jurisdiction in the area of free movement and social security,³ the Court did not allow competition law to interfere with the national systems of compulsory social insurance and collective bargaining. While the Court came up with a special definition of the term “undertaking” for social insurance funds which exhibit a certain degree of solidarity, it created a non-statutory labor exemption for collective agreements. These doctrinal ideas allowed the Court to immunize social security and collective agreements from EC competition law to a certain extent. However this approach has major flaws. The special definition of the term “undertaking” in the field of social insurance is inconsistent with the general doctrine of competition law and might have negative repercussions in other fields of competition law, on third parties outside the insurance relationship and on third markets. The non-statutory labor exemption unilaterally favors collective agreements and does not take into consideration their negative impact on markets other than labor markets.

The following thesis tries to reconcile the three different fields of law in a way that meets the objectives of all fields – the coverage of large parts of the population with social insurance, protecting workers from the power of employers through collective bargaining and the protection of economic freedom and a free market by competition law, which is the basis of material prosperity in Europe. In order to find a balanced approach, the different fields of law and their objectives as well as their legal rank will be described first. The case-law of the European courts will then be analyzed and its weaknesses will be pointed out. Finally, a possible solution of the conflict which meets the interests and objectives of the different fields will be presented. From this solution a general approach of how to deal with the clash of competition law with other fields of law will be derived.

In finding the solution, special attention will also be paid to the Constitutional Treaty. Even though the future of the Constitution is uncertain after the negative referenda in France and the Netherlands, this thesis takes an optimistic view with regard to its future role and tries to prove that the Constitution will contribute to social integration and improve the position of social and labor law against unbound capitalism. Hence this thesis can be read as a plea for the Constitution and as an attempt to address people’s fears of an unbound *laissez-faire* capitalism at European level.

³ See for example Case C-129/95, *Decker v Caisse de Maladie des Employés Privés*, (1998) ECR I-1871; Case C-158/96, *Kohll v Union des Caisses de Maladie*, (1998) ECR I-1935.



II. The colliding fields of law

In order to deal with the relation between EC competition law and national collective bargaining law and social insurance law, it is necessary to first identify the different fields of law i.e. their objectives and the legal rank they occupy. While this thesis deals with EC competition law established by Art. 81 EC seq., the collective bargaining and social insurance laws are national. This makes it difficult to identify the objectives of the latter, taking into consideration the diversity of the different national systems. Some tools that will be used to accomplish this task are: definitions from European and international law; a comparison of different national laws, and a historical overview of the development of the different fields in Europe.

1. Competition Law

a) Objectives

Agreeing upon the objectives of competition law is fraught with controversy. In this context, it suffices to provide a small summary of the different objectives that are discussed. It is submitted that these different objectives do not preclude each other, but rather that they complement each other and form a bundle of objectives.⁴

According to the *ordoliberal* doctrine, based on the thoughts developed by the *Freiburg School* of *Walter Eucken* and *Franz Böhm* and *Hans Großmann-Doerth*, the main objective of competition law is to protect and enable of individual economic freedom in a market economy.⁵ Economic freedom is freedom to engage in competition and it is the prerequisite of the very existence of competition.⁶ The *ordoliberals* assume that every market has to be considered in the social and legal framework which governs it, the so-called *Wirtschaftsverfassung* (economic constitution).⁷ This is not a constitution in a strict legal

⁴ J. DREXL, "Wettbewerbsverfassung – Europäisches Wettbewerbsrecht als materielles Verfassungsrecht", in A. VON BOGDANDY (ed.), *Europäisches Verfassungsrecht – Theoretische und dogmatische Grundzüge*, Springer-Verlag, Berlin, Heidelberg, New York 2003, p. 747, at p. 769 speaks of a pluralism of purposes.

⁵ For an overview of the *ordoliberal* ideas, see DREXL, *supra* note 4, at pp. 753-758.

⁶ E.-J. MESTMÄCKER, H. SCHWEITZER, *Europäisches Wettbewerbsrecht*, 2nd ed., C.H. Beck, München 2004, at § 2, recital 73 seq.

⁷ F. BÖHM, *Die Ordnung der Wirtschaft als geschichtliche Aufgabe und rechtsschöpferische Leistung*, Heft 1 in F. BÖHM, W. EUCKEN, H. GROßMANN-DOERTH (eds.), *Ordnung der Wirtschaft – Schriftenreihe*, Verlag

sense, but rather a set of norms and customs which embodies the decision for a certain economic order.⁸ The *ordoliberals* make a distinction between two poles of economic order: a command economy and a free transaction economy,⁹ and take a clear position in favor of the latter. This market system is not only more effective,¹⁰ but it also guarantees individual freedom if it is based on full competition.¹¹ The role of the state in this economy is to safeguard the principles it is based upon, i.e. above all freedom to compete.¹² However, the state is not supposed to intervene in the economy for political reasons or to itself act economically.¹³ It only has to protect and implement the *Wirtschaftsverfassung* (economic constitution) of a competitive market order.¹⁴ The state is not supposed to direct the economic process, but only to establish and safeguard the forms in which this process can function effectively.¹⁵ Thus the state enforces the *Wirtschaftsverfassung* and is at the same time constrained by the principles of a free, competitive *Wirtschaftsverfassung*.¹⁶ Since economic freedom, the fundamental principle of the market economy, is constantly threatened by private actors who try to monopolize the market,¹⁷ there is a need for a strong, politically neutral and independent competition authority, which protects this freedom against privately imposed restrictions.¹⁸ The policy of keeping the market in accordance with its legal and social framework of the *Wirtschaftsverfassung* is called *Ordnungspolitik* ("policy of order" - a term that is not translatable).¹⁹ Yet *ordoliberalism* is not restricted to the idea of individual, economic freedom in the market. Rather, the *ordoliberals* assumed that there is an

von W. Kohlhammer, Stuttgart und Berlin 1937, at pp. 54-58 and see D. J. GERBER, *Law and Competition in Twentieth Century Europe - Protecting Prometheus*, OUP, Oxford 1998, at p. 245 seq.

⁸ BÖHM, *Die Ordnung der Wirtschaft*, *supra* note 7, at pp. 58-61; W. EUCKEN, *Grundlagen der Nationalökonomie*, 7th ed., Springer Verlag, Berlin, Göttingen, Heidelberg 1959, at p. 52; DREXL, *supra* note 4, at pp. 748 seq. describes it as a normative-economic concept of constitution.

⁹ EUCKEN, *Grundlagen*, *supra* note 8, at pp. 78 seq.

¹⁰ EUCKEN, *Grundlagen*, *supra* note 8, at p. 80.

¹¹ EUCKEN, *Grundlagen*, *supra* note 8, at pp. 198-202 and id. *Grundsätze der Wirtschaftspolitik*, 7th ed., Mohr Siebeck, Tübingen 2004, at pp. 246-250 proposes the model of full competition, in which the single market actor cannot influence the data of the market. See also GERBER, *supra* note 7, at p. 240; MESTMÄCKER, SCHWEITZER, *supra* note 6, at § 2, recital 80 seq.

¹² W. EUCKEN, "Die Wettbewerbsordnung und ihre Verwirklichung", (1949) 2 *ORDO* 1, at 22 seq.

¹³ EUCKEN, "Die Wettbewerbsordnung", *supra* note 12, at 92 seq.

¹⁴ According to EUCKEN, "Die Wettbewerbsordnung", *supra* note 12, at 32-84 and id. *Grundsätze der Wirtschaftspolitik*, *supra* note 11, at pp. 254-304 this market order is to be achieved by constituting principles (primacy of monetary policy, principle of open markets, consistency of economic policy, private property, freedom of contract, liability), which create a competitive order, and regulating principles (income policy, economic calculation (*Wirtschaftsrechnung*), measures against countercyclical behavior (*anomal* supply function in the labor market), monetary policy based on stability and, above all, cartel and monopoly control), which safeguard the functioning of this competitive order.

¹⁵ EUCKEN, "Die Wettbewerbsordnung", *supra* note 12, at 92 seq.; id., *Grundsätze der Wirtschaftspolitik*, *supra* note 11, at pp. 336-338. See also GERBER, *supra* note 7, at p. 248.

¹⁶ See GERBER, *supra* note 7, at pp. 246-248.

¹⁷ EUCKEN, *Grundlagen*, *supra* note 8, at pp. 199-201; id., "Die Wettbewerbsordnung", *supra* note 12, at 4 seq. See also GERBER, *supra* note 7, at p. 250 seq.

¹⁸ GERBER, *supra* note 7, at p. 254 seq.

¹⁹ See GERBER, *supra* note 7, at p. 246.

interdependence between the different orders (political, social and economic).²⁰ This means that the economic order is related to the political order and that they function according to the same principles.²¹ Thus the economic order in a democratic state under the rule of law also has to obey the primacy of human dignity.²² This leads to a social perspective of competition law,²³ as *Franz Böhm* put it: “Because not only the level of efficiency depends on competition, which is - well comprehensible - closest to the heart of growth policy makers, but also the freedom, equity and justice content of the system of a market economy (translation by the author).”²⁴ The interdependence of orders also means that the society under private law (*Privatrechtsgesellschaft*) and the competition order are interdependent. The state creates a private law with property rights and freedom of trade which are prerequisites for competition, while competition controls freedom of trade.²⁵ But competition itself has to be protected and guaranteed by a strong state, because private market actors tend to abuse the freedom given to them in order to monopolize the market and to restrict their own freedom and the freedom of third parties, including the demand-side of the market.²⁶ This also implies that competition law serves as a device to prevent and control private power.²⁷ As *Franz Böhm* put it: “Competition is the most remarkable and ingenious instrument for reducing power known in history”.²⁸ From an *ordoliberal* point of view, private and public economic power are major obstacles to social justice and social integration. Competition law is considered as a tool to avoid the accumulation and abuse of private economic power in order to create a social market order.²⁹ If a firm has already attained a dominant position in the market and hence the prevention of private power has become impossible, competition law is

²⁰ BÖHM, *Die Ordnung der Wirtschaft*, *supra* note 7, at p. 60; EUCKEN, *Grundsätze*, *supra* note 11, at pp. 332-334. See also H.-G. KRÜSELBERG, “Zur Interdependenz von Wirtschaftsordnung und Gesellschaftsordnung: Euckens Plädoyer für ein umfassendes Denken in Ordnungen”, (1989) 40 *ORDO* 223.

²¹ EUCKEN, *Grundsätze*, *supra* note 11, pp. 332-334. See also DREXL, *supra* note 4, at p. 751 and at pp. 755 seq.

²² See EUCKEN, “Die Wettbewerbsordnung”, *supra* note 12, at 7. See also GERBER, *supra* note 7, at p. 239 seq.

²³ See DREXL, *supra* note 4, at p. 757.

²⁴ F. BÖHM, “Freiheit und Ordnung in der Marktwirtschaft”, (1971) 22 *ORDO* 11, at 20: “Denn vom Wettbewerb hängt nicht nur der Leistungspegel ab, der den Wachstumspolitikern verständlicherweise zunächst am Herzen liegt, sondern auch der *Freiheits-, Gleichgewichts- und Gerechtigkeitsgehalt des marktwirtschaftlichen Systems*.”

²⁵ F. BÖHM, “Privatrechtsgesellschaft und Marktwirtschaft”, (1966) 17 *ORDO* 75; id., “Freiheit und Ordnung”, *supra* note 24, at 21. See also DREXL, *supra* note 4, at p. 757.

²⁶ See EUCKEN, “Die Wettbewerbsordnung”, *supra* note 12, at 4 seq.

²⁷ See BÖHM, *Die Ordnung der Wirtschaft*, *supra* note 7, at pp. 155-160; GERBER, *supra* note 7, at pp. 235, 240.

²⁸ F. BÖHM, “Democracy and Economic Power”, in: Institut für ausländisches und internationales Wirtschaftsrecht an der Johann-Wolfgang-Goethe-Universität Frankfurt a.M. and Institute for International and Foreign Trade Law of the Georgetown University Law Center Washington D.C. (eds.), *Cartel and Monopoly in Modern Law – Reports on supranational and national European and American Law I*, C. F. Müller, Karlsruhe 1961, at p. 42.

²⁹ EUCKEN, *Grundsätze*, *supra* note 11, at pp. 185-193, 312-318; See also GERBER, *supra* note 7, at p. 241.

at least supposed to control the behavior of this dominant undertaking and prevent it from abusing its power, which would be detrimental to the freedom of other market actors, including consumers.³⁰ Thus the main objective of competition law is, according to the *ordoliberal* doctrine, the protection of economic freedom, which facilitates a democratic,³¹ functional, social and humane market order.³² These *ordoliberal* thoughts strongly influenced the idea of a *social market economy* in Germany by *Armin Müller-Armack*.³³

Closely related to the *ordoliberal* point of view is the identification of competition as a learning process (or a process of discovery) which has to be protected.³⁴ This idea can be traced to the work of *F. A. von Hayek*.³⁵ It implies that the function of competition can be recognized (the learning process), whereas the realization and results of this function remain contingent.³⁶ This also implies that the objective of competition law can only be the protection of the preconditions of competition (i.e. freedom to compete) and not the attainment of certain results of the competitive process (for example, public welfare), because they have to be left to the market and cannot be predicted by the undertakings themselves nor by authorities or courts.³⁷ *Von Hayek* does not view the market as a static order, but rather as a dynamic, evolutionary process of learning, which creates so-called "spontaneous orders".³⁸ Yet the precondition for the creation of spontaneous orders is free economic action according to the legal rules of competition law.³⁹ The law has to create a framework which guarantees individual freedom by abstract rules.⁴⁰

The *ordoliberal* school has had a decisive influence on the development of EC competition law. The drafting of the competition rules was mainly based on the *ordoliberal* theory and the *ordoliberal* thinkers also had an enormous influence on the implementation of European

³⁰ See GERBER, *supra* note 7, at p. 252 seq.

³¹ See BÖHM, "Privatrechtsgesellschaft", *supra* note 25, at 92.

³² EUCKEN, "Die Wettbewerbsordnung", *supra* note 12, at 7 and id. *Grundsätze*, *supra* note 11, at pp. 312-324.

³³ A. MÜLLER-ARMACK, "Die Wirtschaftsordnungen sozial gesehen", (1948) 1 *ORDO* 125. See also GERBER, *supra* note 7, at p. 237.

³⁴ F. A. VON HAYEK, "Wettbewerb als Entdeckungsverfahren", in M. E. STREIT (ed.), *Rechtsordnung und Handlungsordnung: Aufsätze zur Ordnungsökonomik*, Mohr Siebeck, Tübingen 2003, p. 132.

³⁵ In 1962 *von Hayek* succeeded *Eucken* as the chair of economics in Freiburg. Nevertheless, he cannot be ascribed to the *ordoliberal* school, but rather has to be considered *liberal*, especially because his later works denied the role of the state in protecting competition. See DREXL, *supra* note 4, at p. 761; GERBER, *supra* note 7, at p. 237.

³⁶ MESTMÄCKER, SCHWEITZER, *supra* note 6, at § 2, recital 75.

³⁷ MESTMÄCKER, SCHWEITZER, *supra* note 6, at § 2, recital 86, 90, 95.

³⁸ F. A. VON HAYEK, *Individualismus und wirtschaftliche Ordnung*, Wolfgang Neugebauer, Salzburg 1976, at pp. 49-77; F. A. VON HAYEK, "Wahrer und falscher Individualismus", (1948) 1 *ORDO* 19. See also E.-J.

MESTMÄCKER, *Organisationen in spontanen Ordnungen*, Rudolf Haufe Verlag, Freiburg 1992.

³⁹ MESTMÄCKER, SCHWEITZER, *supra* note 6, at § 2, recital 93.

⁴⁰ MESTMÄCKER, SCHWEITZER, *supra* note 6, at § 2, recital 93 seq.

competition law. The first President of the Commission, *Walter Hallstein*, as well as one of the principal drafters of the “Spaak Report” (the document on which the Rome Treaty was based), and later first Commissioner for Competition Policy, *Hans von der Groeben* were strongly influenced by *ordoliberal* thoughts.⁴¹ Even today, the interpretation of Art. 81(1) EC by the ECJ clearly reveals an *ordoliberal* tradition.⁴² Having due regard to the protection of economic freedom as the main objective of competition law, the Court in defining a restriction of competition in the sense of Art. 81(1) EC, ruled that “each economic operator must determine independently the policy which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells.”⁴³ The principle of economic freedom and self-determination has been constant in the case-law ever since.⁴⁴ However, as well as protecting the economic freedom of parties to a restrictive agreement, the ECJ has also interpreted competition law to protect the freedom of third parties⁴⁵ and of the opposite side of the market.⁴⁶ The idea of competition as a process of discovery is reflected in the fact that the ECJ regards the uncertainty of the market development as a prerequisite for competition.⁴⁷ Furthermore Art. 82 EC, which deals with the abuse of a dominant position, is clearly based on the *ordoliberal* idea of controlling private power.

Another objective which plays a major role in EC competition law is market integration and the protection of the single market.⁴⁸ EC competition law is very keen on agreements, which lead to national market separation and prevent parallel trade between Member States.⁴⁹ Since

⁴¹ See DREXL, *supra* note 4, at p. 767; GERBER, *supra* note 7, at pp. 263-265.

⁴² See G. MONTI, “Article 81 EC and Public Policy”, (2002) 39 *CML Rev* 1057, at 1061 seq.

⁴³ Joined Cases 40-48, 50, 54-56, 111, 113 and 114/73, *Suiker Unie and others v Commission*, (1975) ECR 1663, para. 173.

⁴⁴ See, for example, Case 172/80, *Züchner v Bayerische Vereinsbank*, (1981) ECR 2021, para. 13 seq.; Case C-393/92, *Almelo*, (1994) ECR I-1477, para. 34 seq.; Case 309/99, *Wouters and Others*, (2002) ECR I-1577, para. 97.

⁴⁵ With regard to market access of third parties, see Case C-234/89, *Delimits*, (1991) ECR I-935, para. 13-23.

⁴⁶ This is achieved by the requirement of a “significant effect on the market”, whereby the German expression “spürbare Marktbeeinträchtigung” describes more appropriately the relation to third market actors. See, for example, Case C-7/95 P, *Deere v Commission*, (1998) ECR I-3111, para. 77; joined Cases C-215, 216/96, *Bagnasco and Others v BPN and Carige*, (1999) ECR I-135, para. 34 and MESTMÄCKER, SCHWEITZER, *supra* note 6, at § 10, recital 23; contra R. WESSELING, *The Modernisation of EC Antitrust Law*, Hart Publishing, Oxford and Portland 2000, at p. 90 seq., who regards this test as the introduction of an efficiency test into Art. 81(1) EC.

⁴⁷ See, for example, Case 8/72, *Cementhandelaren v Commission*, (1972) ECR 977, para. 18-21.

⁴⁸ Commission of the European Communities, *XXVth Report on Competition Policy 1995*, COM(96)126 final, Office for Official Publications of the European Communities, Brussels, Luxembourg 1996, at p. 15, para. 2; id., *XXIXth Report on Competition Policy 1999*, SEC(2000) 720 final, Office for Official Publications of the European Communities, Brussels, Luxembourg 2000, at p. 19, para. 3.

⁴⁹ Commission of the European Communities, *XXIXth Report on Competition Policy 1999*, *supra* note 48, at p. 19, para. 3. From the case-law, see, for example, Case 56/65, *Société Technique Minière v Maschinenbau Ulm*,

EC competition law is intended to serve the purpose of flanking and supplementing the fundamental freedoms, especially the free movement of goods Art. 28 EC and the free movement of services Art. 49 EC, whose objectives are market integration and the protection of the single market (i.e. originally the creation of an internal market), it follows that market integration is also one of the main objectives of EC competition law.⁵⁰ While the fundamental freedoms guarantee the opening up of national boundaries between Member States, competition law has the objective of preventing the recreation of these boundaries by private actors.⁵¹ This also implies that one of the main objectives of EC competition law is to eliminate national discrimination in the European market.⁵²

Another approach, nowadays favored by many economists in the field of industrial organization and which derives from the teachings of the so-called *Chicago School*, focuses on welfare maximization by the means of efficiencies. The efficiency doctrine is not mainly concerned with competition as a process, but rather with the results that may be obtained from it. As *Richard A. Posner*, one of the leading scholars of the *Chicago School*, states: "Efficiency is the ultimate goal of antitrust, but competition a mediate goal that will often be close enough to the ultimate goal to allow the courts to look no further."⁵³ Economic welfare is thereby defined as total surplus, i.e. consumer surplus and producer surplus in a given industry. While consumer surplus is the aggregate surplus of individual consumers and individual consumer surplus is the difference between the consumer's valuation for the good considered (the willingness to pay for it) and the price he has to pay for it, producer surplus is the sum of the profits the producers in a given industry make by selling the respective goods.⁵⁴ Within the efficiency doctrine it is disputed if the main objective of competition law is total surplus (i.e. the sum of consumer and producer surplus) or rather consumer surplus, because it might be the case that total surplus is increased to the prejudice of consumers.⁵⁵ The device to maximize welfare is deemed to be efficiency. Here a distinction is made between allocative, productive and dynamic efficiency, while allocative efficiency is clearly given a prerogative. Allocative efficiency is defined as charging a certain price for a given

(1966) ECR 235, 249; joined Cases 56 and 58/64, *Consten and Grundig v Commission*, (1966) ECR 291, 340; Case 19/77, *Miller v Commission*, (1978) ECR 131, para. 7.

⁵⁰ See MESTMÄCKER, SCHWEITZER, *supra* note 6, at § 10, recital 8; WESSELING, *supra* note 46, at p. 97.

⁵¹ DREXL, *supra* note 4, at p. 760; Commission of the European Communities, *XXIXth Report on Competition Policy 1999*, *supra* note 48, at p. 19, para. 3; S. GRAF VON WALLWITZ, *Tarifverträge und die Wettbewerbsordnung des EG-Vertrages*, Peter Lang, Frankfurt a.M. and others 1997, at p. 76 seq.; WESSELING, *supra* note 46, at pp. 85, 97.

⁵² M. MOTTA, *Competition Policy – Theory and Practice*, CUP, Cambridge 2004, at p. 14.

⁵³ R. A. POSNER, *Antitrust Law*, 2nd ed., The University of Chicago Press, Chicago 2001, at p. 29.

⁵⁴ MOTTA, *supra* note 52, at p. 18.

⁵⁵ MOTTA, *supra* note 52, at pp. 19 seq.

product, which yields the highest welfare gains in overall terms (this is usually the price that equals marginal costs of production).⁵⁶ Productive efficiency is the production of goods and services at optimal costs, using the most efficient technology for production and the highest managerial and labor effort. It thus directly affects allocative efficiency, since higher marginal production costs push the prices of products without raising the profit of producers, hence causing welfare loss.⁵⁷ While allocative and productive efficiency have a static dimension, dynamic efficiency relates to innovation, i.e. the introduction of new and better technologies and products.⁵⁸ Dynamic efficiency affects directly productive and allocative efficiency. While the introduction of better technologies facilitates production at lower marginal costs, thus enhancing welfare, the introduction of new products not only opens up new markets to derive welfare from, but also contributes in the case of product improvement to the utility the consumer derives from a certain product, thus raising consumer and total welfare. Dynamic efficiency therefore creates future welfare.⁵⁹ A monopolistic market is detrimental to allocative efficiency (welfare is lowest when the market price equals the monopoly price and highest when it equals marginal costs of production in a highly competitive market)⁶⁰ and also has negative repercussions on productive⁶¹ and dynamic efficiency,⁶² hence monopolistic structures have to be prevented by competition law.

Art. 81(3) EC shows that allocative, productive and dynamic efficiency is one of the objectives of EC competition law, because such restrictive agreements can be exempted from the prohibition of Art. 81(1) EC “which contribute (...) to improving the production or distribution of goods or to promoting technical or economic progress”. Yet EC competition law also makes a clear decision against the promotion of total surplus and in favor of consumer surplus, by making the exemption conditional on “allowing consumers a fair share of the resulting benefit”. From this provision, *Josef Drexl* draws the conclusion that it leads to a distribution of wealth to the advantage of consumers, thus including social elements and elements of solidarity in the concept of competition law.⁶³ The Commission also emphasizes the role of efficiency in EC competition law by stating that one of the purposes of its

⁵⁶ For an explanation see MOTTA, *supra* note 52, at pp. 40–45.

⁵⁷ MOTTA, *supra* note 52, at pp. 45 seq.

⁵⁸ MOTTA, *supra* note 52, at p. 55.

⁵⁹ MOTTA, *supra* note 52, at p. 19.

⁶⁰ MOTTA, *supra* note 52, at p. 18.

⁶¹ MOTTA, *supra* note 52, at pp. 46–51.

⁶² MOTTA, *supra* note 52, at pp. 56 seq.

⁶³ DREXL, *supra* note 4, at p. 781. See also MONTI, *supra* note 42, at 1061.

competition policy is "to encourage industrial efficiency, the optimal allocation of resources, technical progress and the flexibility to adjust to a changing environment."⁶⁴

Finally there are also other policy considerations that find their way into competition law. Usually a broad interpretation of Art. 81(3) EC is used to take account of other policy objectives.⁶⁵ Thus the Commission and the Court have considered social and environmental issues (especially with regard to employment) in the exemption of restrictive agreements and practices under Art. 81(3) EC. In *Ford/Volkswagen* the Commission exempted a joint venture according to Art. 81(3) EC, because, among other reasons, it led to the creation of jobs in Portugal, a structurally underdeveloped Member State.⁶⁶ Similarly the ECJ ruled in the *Metro* and *Remia* cases that an agreement's beneficial effect on employment can constitute an improvement of the general conditions of production in the sense of Art. 81(3) EC.⁶⁷ From today's perspective, these decisions are in accordance with Art. 127(2) EC: "The objective of a high level employment shall be taken into consideration in the formulation and implementation of Community policies and activities." With regard to environmental considerations, the Commission exempted restrictive agreements because (among other reasons) they gave "direct practical effects to environmental objectives" of secondary Community law⁶⁸ or because the reduction of pollution caused by an agreement was deemed to contribute to economic efficiency^{69, 70}. This corresponds to Art. 6 EC which demands the integration of environmental protection requirements with a view to sustainable development when implementing the Community's policies and activities as referred to in Art. 3, including competition policy in Art. 3(1)(g) EC. The Commission also took into consideration industrial policy concerns, for example in the exemption of "crisis-cartels", which were deemed necessary to recover certain industrial sectors, especially the synthetic fibre and petrochemical sector, that suffered from severe economic crises in the aftermath of the oil crises in the 1970s.⁷¹ This corresponds to Art. 157(3) EC. The consideration of the Community

⁶⁴ Commission of the European Communities, *XXIXth Report on Competition Policy 1999*, *supra* note 48, at p. 19, para. 2. See also Commission of the European Communities, *XXVth Report on Competition Policy 1995*, *supra* note 48, at p. 15, para. 1.

⁶⁵ WESSELING, *supra* note 46, at pp. 109-111.

⁶⁶ Commission Decision of 23.12.1992, *Ford/Volkswagen*, (1993) OJ L20/14, para. 36.

⁶⁷ Case 26/76, *Metro v Commission*, (1977) ECR 1875, para. 43; Case 42/84, *Remia v Commission*, (1985) ECR 2545, para. 42.

⁶⁸ Commission Decision of 17.09.2001, *DSD*, (2001) OJ L319/1, para. 142-146.

⁶⁹ Commission Decision of 24.01.1999, *CECED*, (2000) OJ L187/47, para. 48.

⁷⁰ MONTI, *supra* note 42, at 1075 and 1078 draws from these decisions the questionable conclusion that the protection of the environment is close to becoming a core objective of EC competition law.

⁷¹ Commission Decision of 4.07.1984, *Synthetic Fibres*, (1984) OJ L207/17, para. 28-52; Commission Decision of 4.12.1986, *ENI/Montedison*, (1987) OJ L5/13, para. 26-41; Commission Decision of 22.12.1987,

policies and objectives of Articles 2 and 3 EC when applying Art. 81 seq., was also acknowledged by the ECJ: "(...) the restraints on competition which the Treaty allows under certain conditions because of the need to harmonize the various objectives of the Treaty, are limited by the requirements of Articles 2 and 3."⁷²

Outside the framework of Art. 81(3) EC, other (national) policy objectives have been taken into account in the application of Art. 81(1) and 82 EC. Thus the ECJ decided that a regulation of the Netherlands Bar Association prohibiting lawyers from entering into multi-disciplinary partnerships with accountants did not infringe Art. 81(1) EC, because the restrictions of competition were deemed necessary to ensure the proper practice of the legal profession.⁷³ It also declared the competition rules inapplicable to collective agreements in the labor market and to certain kinds of national social insurance schemes, which will be analyzed in detail below.⁷⁴

The consideration of policies, which do not relate to the protection of competition itself, is actually foreign to competition law. Even though Articles 6, 127(2) and 157(3) EC provide for the consideration of certain non-competition policy objectives and the Court argues that the objectives of Articles 2 and 3 EC should be taken into account when applying Art. 81 seq., these additional considerations should be dealt with very carefully. A balanced trade-off must be found, because the consideration of non-competition objectives might interfere with the actual goals and objectives of competition law and lead to additional distortions of competition.⁷⁵ In general, competition law should not be the policy tool to achieve objectives that are not related to competition. Other policies might be much more effective in achieving these aims, without producing detrimental effects on competition.⁷⁶ The consideration of other policy objectives, for example with regard to "crisis cartels", might even contravene the actual goal of competition law, the protection of competition, and reflect a critical attitude towards a

Enichem/ICI, (1988) OJ L 50/18, para. 31-50, where the Commission took issue with the concept of "workable competition". For a discussion of these decisions see WESSELING, *supra* note 46, at pp. 36-39.

⁷² Case 6/72, *Europemballage and Continental Can v Commission*, (1973) ECR 215, para. 24. See also Case 14/68, *Wilhelm v Bundeskartellamt*, (1969) ECR 1, para. 5.

⁷³ *Wouters and Others*, *supra* note 44, para. 97-110; MONTI, *supra* note 42, at 1086-1090. This author considers this decision as a landmark case which transfers the *Cassis de Dijon* jurisdiction to the field of competition law. He calls it a "European style rule of reason".

⁷⁴ See below III. Critique of the current case-law of the ECJ and the CFI, at pp. 41-78.

⁷⁵ See also the argument of MOTTA, *supra* note 52, at p. 28, who points out that these objectives might well be attained by other policy tools.

⁷⁶ See also MOTTA, *supra* note 52, at p. 30 and MONTI, *supra* note 42, at 1092.

competitive market in general.⁷⁷ This is not to say that other policy objectives should not have any influence on the applicability and application of competition law.⁷⁸ If the application of competition law unavoidably clashes with other fundamental policies of the EC, a balanced and fair trade-off between the colliding fields must be established. It is the main task of this thesis to find a way of reconciling competition law with other policy considerations in the social field, yet it must be clear that those considerations are not an integral part of competition law and do not constitute objectives of competition law.

In summary it can be said that the objectives of EC competition law are above all the protection of economic freedom, the integration of the market, the promotion of public welfare, in particular consumer welfare and the protection of competition as a learning process. Competition law thus serves freedom, the restriction of power, the unification of Europe in market terms, innovation and progress, the effective allocation of goods and allocative as well as distributive justice with a view to consumers.

b) Legal rank

Competition law and the fundamental freedoms constitute the keystone of economic integration in the EC. Since the EC was originally founded as an economic community (EEC), mainly focusing on the creation of the internal market, competition law had and still retains a most prominent place in EC law. It can be considered as part of the material "constitutional" law of the EC.⁷⁹ Art. 2 EC states that the establishment of a common market and an economic and monetary union with a high degree of competitiveness is one goal of the Community. Art. 3(g) EC describes as one of the activities of the Community a system ensuring that competition in the Common Market is not distorted. Furthermore Art. 3(c) establishes as a policy objective an internal market characterized by the abolition, between Member States, of obstacles to the free movement of goods, persons, services and capital, which is – as seen above – one of the core objectives of EC competition law. Art. 4 EC finally declares the principle of an open market economy with free competition, thus embodying the

⁷⁷ Thus the Commission defended the consideration of industrial policy objectives with regard to economic crises, stating that "In current circumstances in particular, the Commission's competition policy not only has to sustain effective competition; it has to support an economic policy which promotes the necessary restructuring.", Commission of the European Communities, *Xth Report on Competition Policy 1980*, Office for Official Publications of the European Communities, Brussels, Luxembourg 1981, at p. 9.

⁷⁸ Thus MONTI, *supra* note 42, at 1070 seq. suggests that other policy objectives should be taken into account when exempting an agreement under Art. 81(3) EC, as long as the core objectives of competition law (economic freedom, market integration and efficiency) are not undermined.

⁷⁹ DREXL, *supra* note 4, at pp. 747-750.

constitutional choice for a transfer economy based on competition. The EC Treaty hereby establishes a *Wirtschaftsverfassung* of a competitive market order.⁸⁰

Articles 81 and 82 EC, which lie at the heart of EC competition law, are primary EC law. They are superior to national law and directly applicable to private undertakings. The importance of the cartel prohibition is underlined by Art. 81(2) EC, which declares that every agreement infringing Art. 81 is automatically void. In order to support the *effet utile* of EC competition law, the ECJ even derived an individual right from Art. 81 EC, whose breach can lead to a claim for damages under national law.⁸¹ Hence competition law is at the heart of the Community legal order.⁸²

With regard to the proposed EU Constitution,⁸³ the decision for a free, competitive market order will be embodied in Art. I-3(2), which declares that one of the objectives of the Union is an internal market where competition is free and undistorted. In an *ordoliberal* tradition, Art. I-3(3) declares a highly competitive social market economy. Primary competition law itself will be contained in Part III, Section 5 of the Constitution.

2. Social Insurance

a) Objectives

Before addressing the objectives of *social insurance*, it is necessary to define this term. The function of *social insurance* is to provide *social security*.⁸⁴ The term *social security* is used in different international and European legal norms which can be employed to define its meaning. It is frequently used in the EC Treaty, as for example in Articles 42, 137(1)(c) and (4) and 140 EC. *Social Security* is not defined in these provisions, but ILO Convention No. 102, which served as a model for the coordination of social security in the EC according to

⁸⁰ DREXL, *supra* note 4, at p. 759; see also VON WALLWITZ, *supra* note 51, at pp. 82-89.

⁸¹ Case C-453/99, *Courage and Crehan*, (2001) ECR I-6297, para. 23-29. See DREXL, *supra* note 4, at pp. 769-777.

⁸² See also VON WALLWITZ, *supra* note 51, at pp. 75-80.

⁸³ As a consequence of the results of the referenda in France and the Netherlands, it has become very doubtful if the proposed Constitution will ever become valid law.

⁸⁴ G. WANNAGAT, *Lehrbuch des Sozialversicherungsrechts*, J.C.B. Mohr (Paul Siebeck) Tübingen 1965, at pp. 33-35.

Regulation 1408/71,⁸⁵ defines the term *social security* as the provision of benefits with respect to medical care (Part II), sickness/incapacity of work benefit (Part III), unemployment benefit (Part IV), old-age benefit (Part V), employment injury benefit (Part VI), family benefit (Part VII), maternity benefit (Part VIII), invalidity benefit (Part IX) and survivor's benefit (Part X). Regulation 1408/71, which coordinates social security schemes for the free movement of workers according to Art. 42 EC, does not provide a proper definition of *social security*, but its Art. 4(1) of the regulation at least lists the areas it applies to and exhibits a high degree of accordance with ILO Convention No. 102, on which it is based.⁸⁶ The material scope of the regulation extends to: sickness and maternity benefits, invalidity benefits, old-age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits and family benefits. Art. 34 of the Charter of Fundamental Rights of the European Union also lists as examples of cases that trigger *social security* benefits and social services: maternity, illness, industrial accidents, dependency, old age and loss of employment.

The emergence of national *social security* schemes in Europe took place at the end of the 19th century. Germany was the first state to introduce compulsory social insurance: in 1883 against sickness, in 1884 against work injuries and in 1889 against accidents at work. The last country in Europe to introduce compulsory social insurance was Belgium, which introduced compulsory pension insurance as late as 1924.⁸⁷ From a sociological point of view, all social security schemes served the establishment of political integration and nation building in times of social tension caused by an unbound capitalism.⁸⁸

There are different ways of providing (financial) security against the social risks listed above. Thus the ILO states: "There is no single right model for social security. It grows and evolves over time. There are schemes of social assistance, universal schemes, social insurance and public or private provisions. Each society must determine how best to ensure income security and access to health care. These choices will reflect their social and cultural values, their history, their institutions and their level of economic development."⁸⁹ It must be noted that the

⁸⁵ U. BECKER in J. SCHWARZE (ed.), *EU-Kommentar*, Baden-Baden 2000, Art. 42 EGV, recital 4.

⁸⁶ BECKER, *supra* note 85, recital 4.

⁸⁷ M. FERRERA, "European Integration and National Social Citizenship – Changing Boundaries, New Structuring?", (2003) 36 *Comparative Political Studies* 611, 622 seq.; J. ALBER, *Vom Armenhaus zum Wohlfahrtsstaat*, 2nd ed., Campus Verlag, Frankfurt a.M./New York 1987, at pp. 24-40, 48-56.

⁸⁸ FERRERA, *supra* note 87, at 621 and 625. For the different sociological explanations and theories see ALBER, *supra* note 87, at pp. 73-92.

⁸⁹ ILO, *Social Security: A new consensus*, International Labour Office, Geneva 2001, at p. 2.

ILO uses a broad definition of *social security*, which includes all different ways of financing and organization, whereas the EC Treaty makes a distinction between *social security* and *social protection*, whereby the former does not include social assistance.⁹⁰ In the following, the terms of the EC Treaty will be employed.

The question arises as to which way of providing *social security* can be defined as *social insurance*. The term includes the word *insurance* as a special system of bearing and financing risks. The random risks of life are for the individual not assessable, incalculable and hence not financeable. Yet the pooling of the risks allows an estimation of the probability and probable time of its statistical occurrence and hence provision for its financing.⁹¹ The more risks of the same kind are pooled together, the better their average rate and time of occurrence can be estimated, i.e. the better they can be financed (this is one of the arguments for making *social insurance* compulsory for large parts of the population).⁹² Hence *insurance* can be described as a pooling of risks of the same kind to make them assessable.^{93 94} *Insurance* is financed by contributions or premiums, which every insurance holder has to pay. In return he or another beneficiary receives a legal claim for benefits where the risk occurs.⁹⁵ The sum of contributions on an aggregate level should suffice to cover the expected expenses for benefits and administration (principle of actuarial equivalence).⁹⁶ In the case of *social insurance*, however, this equilibrium is not sustained in many European countries, so that tax subsidies have become necessary (in many Member States, however, there have always been financial subsidies for social insurance for political reasons, e.g. in order to establish stronger bounds between the State and its citizens – this was one of the main incentives for *Bismarck's*

⁹⁰ T. KINGREEN, *Das Sozialstaatsprinzip im europäischen Verfassungsverbund*, J.C.B. Mohr (Paul Siebeck), Tübingen 2003, at p. 297, Fn. 8. See for example the wording of Art. 137 (1)(c) EC. This peculiar distinction between *social security* and *social protection* is probably due to Art. 4(4) Regulation 1408/71, which excludes social assistance from the scope of the regulation. A similar distinction is also made in Articles 12 and 13 ESC.

⁹¹ See H. BLEY (founder), R. KREIKEBOHM, A. MARSCHNER, *Sozialrecht*, 8th ed., Luchterhand, Neuwied und Kriftel 2001, recital 276; KINGREEN, *supra* note 90, at p. 177; WANNAGAT, *supra* note 84, at p. 2.

⁹² WANNAGAT, *supra* note 84, at p. 2.

⁹³ KINGREEN, *supra* note 90, at pp. 177 seq.

⁹⁴ Since the risk of unemployment is usually not assessable – it depends on random factors like economic cycles, the behavior of the employee and the employer, a strong argument can be made that unemployment insurance is no real insurance, but rather social provision. See R. GIESEN, *Sozialversicherungsmonopol und EG-Vertrag – Eine Untersuchung am Beispiel der gesetzlichen Unfallversicherung in der Bundesrepublik Deutschland*, Nomos-Verlags-Gesellschaft, Baden-Baden 1995, at p. 125, Fn. 149; contra WANNAGAT, *supra* note 84, at p. 13.

⁹⁵ BLEY, KREIKEBOHM, MARSCHNER, *supra* note 91, recital 278; KINGREEN, *supra* note 90, at pp. 177 seq.; WANNAGAT, *supra* note 84, at p. 5.

⁹⁶ BLEY, KREIKEBOHM, MARSCHNER, *supra* note 91, recital 279; KINGREEN, *supra* note 90, at p. 178; WANNAGAT, *supra* note 84, at p. 2 seq.

reforms in Germany)^{97, 98} Nevertheless, the term *insurance* implies that *social security* schemes which are entirely financed by the state, i.e. by tax money and not by contributions, cannot be considered *social insurance*.⁹⁹

The next word in the term *social insurance* is *social*. First of all, this term describes the scope of the insurance, i.e. the social risks listed above. These risks all share the common feature that they destroy or impede the workforce of the individual as his source of income, be it for physical or, as in the case of unemployment, other external reasons.¹⁰⁰ Yet the word has an additional meaning, which constitutes the decisive difference between social insurance and other forms of insurance. The aim of social insurance is to provide large parts of the population,¹⁰¹ especially employees,¹⁰² with insurance from social risks under socially acceptable conditions for the individual.¹⁰³ This means, as the term *social* also indicates, that there must be certain aspects of solidarity involved in the scheme, so that everybody eligible can be covered and the scheme can be financed.¹⁰⁴

There are different types of solidarity and redistribution that can be distinguished. These types can be roughly divided into four groups: 1. solidarity between risks, 2. solidarity between different income groups, 3. solidarity between the community and the individual, 4. intergenerational redistribution. Solidarity between risks, i.e. the first group, can take the following forms: no or only restricted risk selection,¹⁰⁵ independence of contributions from

⁹⁷ In Germany pension schemes for workers have been subsidized by the state since the introduction of compulsory insurance in 1889; see WANNAGAT, *supra* note 84, at p. 18. It was part of *Bismarck's* policy to make social insurance dependent on state subsidies in order to establish bonds of loyalty between the State and workers and the cooperative social insurance as a controllable medium of voice articulation in rivalry with the *Reichstag* (in order to weaken the parliament), see KINGREEN, *supra* note 90, at pp. 170-176.

⁹⁸ Thus VAT and petroleum taxes in Germany (so-called "ecological taxes") subsidize the pension schemes, see H. GÖBEL, "Der Griff zur Mehrwertsteuer", *FAZ* 01.06.2005 No. 124, p. 9 and BLEY, KREIKEBOHM, MARSCHNER, *supra* note 91, recital 284.

⁹⁹ WANNAGAT, *supra* note 84, at p. 7 seq.; GIESEN, *supra* note 94, at p. 125 calls tax-financed social schemes insurance, because he considers the taxes as a remuneration for the benefits of insurance. This is very questionable, because the financing by contributions is one of the defining features of insurance as opposed to social provision. The actual question he deals with in this context is whether social insurance can be considered an economic activity. This problem will be dealt with below at pp. 55-66.

¹⁰⁰ WANNAGAT, *supra* note 84, at pp. 1, 20.

¹⁰¹ It depends on the national framework if the entire population, only employees or only employees up to a certain amount of income are covered by the different kinds of social insurance.

¹⁰² For Germany: BVerfG judgment of 10.05.1960 BVerfGE 11, 105; WANNAGAT, *supra* note 84, at p. 21.

¹⁰³ Poucet et Pistre, *supra* note 1, para. 9; WANNAGAT, *supra* note 84, at pp. 1, 23-25.

¹⁰⁴ Poucet et Pistre, *supra* note 1, para. 9-13; GIESEN, *supra* note 94, at p. 154 seq., on the other hand, considers solidarity and social balance as an end in itself and not as a means to the end of attaining the coverage of large parts of the population with insurance.

¹⁰⁵ KINGREEN, *supra* note 90, at p. 179; BLEY, KREIKEBOHM, MARSCHNER, *supra* note 91, recital 283. See for example the schemes in Case C-244/94, *Fédération Française*, (1995) ECR I-4013, para. 9; Albany, *supra* note 2, para. 74.

risks¹⁰⁶ and redistribution of costs and profits between different funds (the funds with good risks subsidize the funds with bad risks).¹⁰⁷ The second group of solidarity, solidarity between income groups, includes the following types: independence of benefits from contributions with calculation of contributions according to income,¹⁰⁸ and obligation of the employer to pay at least part of the contributions.¹⁰⁹ The third group, solidarity between the community and the individual, occurs as, for example, independence of payment of benefits from payment of contributions (in case the employer failed to pay the contributions for the employee),¹¹⁰ suspension of payment of contributions in the case of incapacity of work or other economic hardship of the insured,¹¹¹ free insurance for unemployed family members of the insured,¹¹² and subsidies by the state financed by tax money.¹¹³ The last group is intergenerational redistribution, which is relevant in pension schemes. There are two different methods of financing pension schemes: the *redistribution method*¹¹⁴ (*pay-as-you-go*)¹¹⁵ and *capitalization*¹¹⁶ (or *funding*)¹¹⁷. *Redistribution method* or *pay-as-you-go* means that the working population directly pays the pensions of the retired.¹¹⁸ This is a method of financing different from the method of *capitalization* (or *funding*). *Capitalization* (or *funding*) is a financing method in which a capital stock is created by the contributions. The existing capital is invested in capital markets in order to produce revenues. The benefits are paid from the capital stock and the additional revenues.¹¹⁹ *Pay-as-you-go* does not necessarily include more

¹⁰⁶ BLEY, KREIKEBOHM, MARSCHNER, *supra* note 91, recital 283; KINGREEN, *supra* note 90, at p. 179; WANNAGAT, *supra* note 84, at p. 27 seq. See for example *Fédération Française*, *supra* note 105, para. 19; *Albany*, *supra* note 2, para. 74; Case C-218/00, *Cisal*, (2002) ECR I-691, para. 39.

¹⁰⁷ As for example in *Poucet et Pistre*, *supra* note 1, para. 12 and the *Risikostrukturausgleich* in the German statutory health insurance, see joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK-Bundesverband*, (2004) ECR I-2493, para. 10.

¹⁰⁸ KINGREEN, *supra* note 90, at p. 179; WANNAGAT, *supra* note 84, at p. 28. For example the schemes in *Poucet et Pistre*, *supra* note 1, para. 10 seq.; *Cisal*, *supra* note 106, para. 40-42; *AOK-Bundesverband*, *supra* note 107, para. 7, 9.

¹⁰⁹ As for example in the German social insurance schemes, see BVerfG *supra* note 102; KINGREEN, *supra* note 90, at p. 180; WANNAGAT, *supra* note 84, at pp. 21, 150-153. See also *AOK-Bundesverband*, *supra* note 107, para. 7.

¹¹⁰ KINGREEN, *supra* note 90, at p. 180 seq.; WANNAGAT, *supra* note 84, at p. 13. See for example *Albany*, *supra* note 2, para. 74.

¹¹¹ As for example in *Poucet et Pistre*, *supra* note 1, para. 10; *Albany*, *supra* note 2, para. 74.

¹¹² As for example in the German statutory health insurance, see Opinion of AG Jacobs in *AOK-Bundesverband*, *supra* note 107, para. 5.

¹¹³ KINGREEN, *supra* note 90, at pp. 180 seq.; WANNAGAT, *supra* note 84, at pp. 150-153, 155 seq.

¹¹⁴ This term is used by AG Jacobs in his Opinion in *Albany*, *supra* note 2, para. 338 and his Opinion in *Cisal*, *supra* note 106, para. 20.

¹¹⁵ This term is used by economic writers, see N. BARR, *The Economics of the Welfare State*, 4th ed., OUP, Oxford and others 2004, at p. 189.

¹¹⁶ The term *capitalization* is used by the ECJ, see for example *Fédération Française*, *supra* note 105, para. 17; *Albany*, *supra* note 2, para. 81.

¹¹⁷ This term is used by economic writers, see BARR, *supra* note 115, at p. 189.

¹¹⁸ See BARR, *supra* note 115, at pp. 90 seq. See also the examples in *Poucet et Pistre*, *supra* note 1, para. 11; *Fédération Française*, *supra* note 105, para. 10.

¹¹⁹ See BARR, *supra* note 115, at pp. 189 seq.

or less solidarity than the *capitalization* principle, because there may be a clear link between contributions and benefits for subsequent generations in a *pay-as-you-go* scheme that involves little redistribution. Furthermore, there are pension schemes based on *capitalization*, where the working generation subsidizes the retired generation in times of low investment returns by higher contributions, while in times of good investment returns profits can be passed on to the next generation.¹²⁰ Both a scheme based on the *pay-as-you-go* principle and a scheme based on *capitalization* can include elements of solidarity of the other groups.¹²¹

Without elements of solidarity, high risks or risks that have already realized would not be covered by the insurance;¹²² the sick and poor would be excluded because of their inability to pay the (higher) contributions; the pensions of old people with low incomes would be insufficient to afford them a decent standard of living,¹²³ and employees would be excluded from benefits if employers failed to pay the contributions. This means that the healthy must subsidize the sick, the rich must subsidize the poor and the community must subsidize the individual.¹²⁴ Solidarity is essential to facilitate (and finance) the coverage of large parts of the population with insurance under socially acceptable conditions for the individual. The word *social* distinguishes *social insurance* from *private, optional and individual insurance*. Since *social insurance* schemes can take many different forms in the different Member States, here the distinction between *social* and *private-individual insurance* shall be made according to the purpose of *social insurance* to insure large parts of the population against social risks under socially acceptable conditions. This necessarily means that at least a minimum degree of solidarity must be involved in the schemes, so that they can be financed. Thus earning-related compulsory schemes, occupational schemes and even compulsory private schemes without risk selection are included in this definition. This is admittedly a very broad definition

¹²⁰ See Commission of the European Communities, Directorate-General for Employment and Social Affairs, *Adequate and sustainable pensions – Joint report by the Commission and the Council*, Office for Official Publications of the European Communities, Luxembourg 2003, at p. 35.

¹²¹ For example in *Albany*, *supra* note 2, a pension scheme based on capitalization exhibited the following features of solidarity: no risk selection, independence of contributions from risks, only limited relation between contributions and benefits, payment by the employer of part of the contributions, discharge of arrears of contributions in case of the employers' insolvency.

¹²² See WANNAGAT, *supra* note 84, at p. 18.

¹²³ For solidarity among the elderly in pension schemes, see Commission of the European Communities, *Adequate and sustainable pensions*, *supra* note 120, at p. 35 seq.

¹²⁴ See WANNAGAT, *supra* note 84, at pp. 28, 157 seq.

of the term, which also deviates from the definition in certain Member States,¹²⁵ yet it is appropriate to cover national differences.¹²⁶

As evident from the discussion above, *social insurance* automatically implies solidarity and thus a certain extent of redistribution of wealth in the society. In order to facilitate redistribution and solidarity and to guarantee the financial equilibrium of the schemes, it is indispensable to either make affiliation with the schemes compulsory¹²⁷ or to regulate the market for social insurance to a certain extent (a system of redistribution between the insurers, limiting the number of insurance suppliers, obligations to contract). This necessarily collides with the idea of free competition and free economic action.

Yet it must be observed that social insurance in Europe is currently undergoing dramatic changes. The inefficiency of compulsory insurance schemes (the simple reason for this is the monopoly effect) – especially in the health sector – has forced many European legislatures to introduce elements of competition in the market without, on the other hand, endangering the underlying principle of solidarity.¹²⁸ Pension schemes constitute a special problem in Europe. Many pension schemes are exclusively based on the pay-as-you-go principle. This financing scheme is based on an intergenerational contract.¹²⁹ Yet the demographic development of Europe, particularly its decreasing birthrates no longer supports this method of financing pensions and necessitates new ways of financing, for example supplementary pension

¹²⁵ In Germany, for example, only earning-related compulsory and statutory schemes (the first pillar) are considered *Sozialversicherung*. See BLEY, KRIEKEBOHM, MARSCHNER, *supra* note 91, recital 288; WANNAGAT, *supra* note 84, at pp. 25-31.

¹²⁶ This is also in line with secondary Community legislation. Thus Directive 2002/83/EC concerning life assurance is according to its Art. 2(3) applicable to the taking-up and pursuit of the self-employed activity of operations relating to the length of human life which are prescribed by or provided for in *social insurance legislation*, when they are effected or managed at their own risk by assurance undertakings in accordance with the laws of a Member State. On the other hand, Art. 3(4) excludes from the application of the directive, subject to the application of Art. 2(3), insurance forming part of a *statutory system of social security*. Hence there can be certain schemes of social insurance which are considered similar to private insurance. In the same vein, GIESEN, *Sozialversicherungsmonopol*, *supra* note 94, at p. 110 points out that private insurance against accidents at work in Belgium and Denmark is subject to both the third non-life insurance directive 92/49/EEC (recital 26 and Art. 37) and to the coordination of social security in the Community according to Art. 4(2) Regulation 1408/71 and Annex 2 Regulation 574/72.

¹²⁷ Poucet et Pistre, *supra* note 1, para. 13; WANNAGAT, *supra* note 84, at pp. 18, 29.

¹²⁸ See for example the *Gesundheitsstrukturgesetz* (law concerning the structure of health insurance) in Germany which introduced, in order to promote efficiency, certain elements of competition between the statutory sickness funds. The so-called *Risikostrukturausgleich* – a system of financial redistribution between the different funds – guarantees a level playing field between the funds and the principle of solidarity in the health insurance sector. See for an overview on the *Gesundheitsstrukturgesetz* J. KRUSE, A. HÄNLEIN, *Gesetzliche Krankenversicherung – Lehr- und Praxiskommentar (LPK - SGB V)*, Nomos Verlagsgesellschaft, Baden-Baden 2003, Einleitung, recital 4-6; Bundesministerium für Gesundheit und Soziale Sicherung (ed.), *Übersicht über das Sozialrecht*, 2nd ed., BW Bildung und Wissen Verlag und Software GmbH, Nürnberg 2005, at pp. 139-141.

¹²⁹ See, for example, GIESEN, *Sozialversicherungsmonopol*, *supra* note 94, at p. 122.

schemes, which are based on the principle of funding and capitalization. It must be emphasized, as the Council and the Commission noted in their report on sustainable pensions, that pay-as-you-go does not necessarily involve intergenerational solidarity, nor does capitalization necessarily lack this kind of solidarity. Capitalization and pay-as-you-go are simply different financing methods.¹³⁰ The Council and the Commission make a distinction between public earning-related schemes (*first pillar*), private occupational schemes (*second pillar*) and individual retirement provision (*third pillar*).¹³¹ The idea of the three pillars is essential for the comprehension of pension schemes. It is remarkable that some of the strategies named by the Council and the Commission and pursued by some Member States to face the challenge of an ageing population involve strengthening the importance of second and third pillar funded schemes and the establishment of a closer link between contributions and benefits in the first pillar without erasing solidarity in the schemes.¹³²

In summary it can be said that the objective of *social insurance* is to insure large parts of the population against social risks under socially acceptable conditions. This necessarily involves a certain degree of solidarity among the affiliated and eventually leads to social peace.¹³³ It is thus an important factor of distributive justice, as expressed in the papal encyclical *Mater et Magistra*: "Systems of social insurance and social security can make a most effective contribution to the overall distribution of national income in accordance with the principles of justice and equity. They can therefore be instrumental in reducing imbalances between the different classes of citizens."¹³⁴

b) Legal rank

The Community's activities in the field of social security are still restricted to coordination and basic harmonization. In the wake of market integration, Regulations 1612/68 and 1408/71 in connection with Regulation 574/72, which were based on Articles 49 and 51 ECT (nowadays Articles 40 and 42 EC), facilitated the free movement of workers within the internal market by coordinating the different national schemes of social security and enabling

¹³⁰ Commission of the European Communities, *Adequate and sustainable pensions*, *supra* note 120, at pp. 34 seq.

¹³¹ Commission of the European Communities, *Adequate and sustainable pensions*, *supra* note 120, at p. 6.

¹³² Commission of the European Communities, *Adequate and sustainable pensions*, *supra* note 120, Luxembourg 2003, at pp. 70-79.

¹³³ See also WANNAGAT, *supra* note 84, at p. 27.

¹³⁴ POPE JOHN XXIII, *Mater et Magistra – Encyclical of Pope John XXIII on Christianity and Social Progress*, May 15 1961, recital 136.

the transfer and recognition of social security claims as well as the equal treatment of workers with regard to social security. Coordination is still the main focus of Community social law.¹³⁵ With regard to harmonization, the Amsterdam Treaty introduced a genuine Community competence for social issues in Art. 137 EC.¹³⁶ Thus the Council may adopt, according to Art. 137(1)(c), (2)(b) EC, by means of directives, minimum requirements for gradual implementation in the field of social security and social protection of workers, while having regard to the conditions and technical rules obtaining in each of the Member States. According to Art. 137(2)(b) EC, the Council has to act unanimously in the field of social security and social protection. Art. 137(1) EC points out that the Community measures only serve to support and complement the activities of the Member States. At the same time, Art. 137(4) EC, introduced by the Nice Treaty, makes clear that those minimum standards “shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof” and “shall not prevent any Member State from maintaining and introducing more stringent protection compatible with this Treaty”. Thus the Court’s constant case-law that “Community law does not detract from the powers of Member States to organize their social security systems”¹³⁷ is still valid. As the Community is only competent to set minimum standards, the organization of social security and insurance remains in the hands of the Member States. Social insurance law is a genuine national competence.¹³⁸

The question arises if there is a fundamental right of access to social security schemes at the Community level. The Court generally recognizes fundamental rights at the Community level: “Furthermore, it is well settled that fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard, the Court

¹³⁵ KINGREEN, *supra* note 90, at p. 289.

¹³⁶ R. REBHahn in SCHWARZE, *supra* note 85, Art. 136 EGV, recital 5.

¹³⁷ For example: Case 238/82 *Duphar v Netherlands*, (1984) ECR 523, para. 16 ; *Poucet et Pistre*, *supra* note 1, para. 6; Case C-70/95, *Sodemare and Others*, (1997) ECR I-3395, para. 27 ; *Kohll*, *supra* note 3, para. 17. The Court also held up this case-law after the Amsterdam Treaty, see Case C-157/99, *Geraets-Smits and Peerbooms*, (2001) ECR I-5473, para. 44.

¹³⁸ R. GIESEN, *Die Vorgaben des EG-Vertrages für das Internationale Sozialrecht*, Heymanns, Köln and others 1999, at p. 20; KINGREEN, *supra* note 90, at pp. 297-303.

has stated that the Convention (the European Convention on Human Rights (ECHR) – added by the author) has special significance.”¹³⁹

With regard to the constitutional traditions of the member states, the situation is very heterogeneous. Some constitutions, especially newer ones, contain subjective fundamental rights of access to social security: for example Art. 63 of the Portuguese constitution, Art. 41 of the Spanish constitution, Art. 20 of the Dutch constitution and Art. 23 No. 2 of the Belgian constitution (special social rights are also guaranteed in Articles 21 and 22 of the Greek constitution). The French and the Irish constitution guarantee appropriate support to ensure a decent standard of living. Other constitutions, like the Danish, the Finnish and the German ones (principle of the welfare state in connection with the right of human dignity), only provide for a guarantee of the subsistence level. Furthermore, many constitutions restrict themselves to the declaration of a social welfare state, for example the Italian, the Swedish and the Luxembourg constitution.¹⁴⁰ In summary it can be said that a right of access to social security cannot be derived from the common constitutional traditions of the Member States.

With regard to international treaties and covenants, the Court’s main source of inspiration is the ECHR, which does not contain any reference to social security. Articles 22 and 25 of the Universal Declaration of Human Rights of 1948 declare rights of access to social security, social services and social assistance. Art. 9 of the International Covenant on Economic, Social and Cultural Rights also declares a right of access to social security, including social insurance. Furthermore the ILO Convention 102 imposes a duty upon the signatory parties to provide social security for large parts of the population, but only for employees. The European Social Charter, which has little legal effect and only obliges the signatory states to aim at establishing conditions for the effective exercise of certain rights, declares a right to social security in Art. 12 and a right to social assistance in Art. 13.¹⁴¹ The Community Charter of the Fundamental Rights of Workers, a declaratory document without legal effect,¹⁴² contains a right to adequate social protection and adequate social security benefits¹⁴³ for workers and a general right to social assistance in No. 10. Finally, the Charter of Fundamental Rights of the European Union recognizes the entitlement to social security benefits and social

¹³⁹ Opinion 2/94, *Opinion pursuant to Article 228(6) of the EC Treaty*, (1996) ECR I-1759, para. 33; joined Cases C-20/00 and C-64/00, *Booker Aquaculture*, (2003) ECR I-7411, para. 65.

¹⁴⁰ For a summary of the different constitutional provisions see E. RIEDEL in J. MEYER (ed.), *Kommentar zur Charta der Grundrechte der Europäischen Union*, Baden-Baden 2003, Art. 34 recital 5.

¹⁴¹ Compare the narrow and broad definition of social security above at pp. 16 seq. and note 90.

¹⁴² See also below at p. 36.

¹⁴³ Here, again, in the narrow sense, see above at pp. 16 seq. and note 90.

services in Art. 34(1) and the right to social assistance in Art. 34(3). The current legal status of this Charter is not clear. It was drafted at the Cologne Summit in 1999, with a view to becoming part of the future European Constitution, yet the Member States did not agree to confer it with any legal effect.¹⁴⁴ Even though some Advocate Generals¹⁴⁵ as well as the Court of First Instance,¹⁴⁶ have frequently referred to the Charter for the observance of fundamental rights at the Community level, the European Court of Justice has so far refrained from expressly deriving fundamental rights from the Charter.¹⁴⁷ Thus the Charter has only declaratory status and is not legally binding.¹⁴⁸ It can only be employed as a subsidiary help for orientation.¹⁴⁹ Yet a closer look should be taken at the provisions of the Charter, because it is part of the Constitutional Treaty and might gain high legal importance in the future.

The wording of Art. 34(1) of the Charter is problematic. As opposed to the formulation “everybody has the right of...” to be found in other fundamental rights provisions, Art. 34 merely states that “the Union *recognizes* and *respects* the entitlement to social security benefits and social services (...) in accordance with the rules laid down in Community law and national laws and practices.” One reason for this formulation is that the competence for social security is a clear competence of the Member States; hence the Community must not interfere with this competence, but rather respect the right to social security in accordance with the respective provisions of the Member States.¹⁵⁰ Thus Art. 34(1) is formulated as a negative right against Community interference and not as a positive right providing the

¹⁴⁴ See C. COSTELLO, “The Legal Status and Legal Effect of the Charter of Fundamental Rights of the European Union”, in C. COSTELLO, *Fundamental Social Rights – Current European Legal Protection & the Challenge of the EU Charter on Fundamental Rights*, Conference Proceedings September 2000 Trinity College Dublin, p. 125, at pp. 125-130.

¹⁴⁵ For example: Opinion of AG Alber in Case C-340/99, *TNT Traco*, (2001) ECR I-4109, para. 94; Opinion of AG Geelhoed in Case C-413/99, *Baumbast*, (2002) ECR I-7091, para. 59, 110; Opinion of AG Mischo in *Booker Aquaculture*, *supra* note 139, para. 125; Opinion of AG Tizzano in Case C-173/99, *BECTU*, (2001) ECR I-4881, para. 26 seq.; AG Leger in his Opinion in Case C-353/99, *Heidi Hautala*, (2001) ECR I-9565, para. 51, 73-83, even claims that “the nature of the rights set down in the Charter of Fundamental Rights precludes it from being regarded as a mere list of purely moral principles without any consequences(...)... the Charter was intended to constitute a privileged instrument for identifying fundamental rights. It is a source of guidance as to the true nature of the Community rules of positive law.”

¹⁴⁶ Case T-54/99, *max.mobil*, (2002) ECR II-313, para. 48, 57; Case T-177/01, *Jégo-Quéré et Cie SA*, (2002) ECR II-2365, para. 42, 47; joined Case T-377/00-380/00, T-260/01 and T-272/01, *Philip Morris*, (2003) ECR II-1, para. 122, where the CFI admits that the Charter does not have legally binding force, but nevertheless uses it as an aid for interpretation.

¹⁴⁷ See T. SCHMITZ, “Die Grundrechtscharta als Teil der Verfassung der Europäischen Union”, (2004) *EuR* 691, at 696 seq.

¹⁴⁸ Opinion of AG Geelhoed in *Baumbast*, *supra* note 145, para. 59; J. STEINER, L. WOODS, *Textbook on EC Law*, 8th ed., OUP, Oxford 2003, at p. 165.

¹⁴⁹ SCHMITZ, *supra* note 147, at 696 seq.

¹⁵⁰ For the discussion at the Cologne summit see RIEDEL in MEYER, *supra* note 140, Art. 34 recital 12 seq. R. C. A. WHITE, “Social Security”, in S. PEERS, A. WARD (eds.), *The European Union Charter of Fundamental Rights*, Hart Publishing, Oxford and Portland 2004, p. 309, at p. 318 interprets this formulation as a reference to the ESC and hence assumes that it expresses Art. 34(1)’s purely promotional character.

individual with claims against the Community or the Member States.¹⁵¹ With regard to the amendment of the Charter of Fundamental Rights by the Working Group II of the Convention on the Charter, it might be more appropriate to speak of a *principle*, as opposed to a subjective right. Art. 52(5) of the amended Charter states that: “The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality”. The Explanation to Art. 34(1) in Declaration 12 Concerning Provisions of the Constitution,¹⁵² which has to be given due regard by the courts of the Union and the Member States according to the new Art. 52(7) of the Charter, describes Art. 34(1) of the Charter as a *principle*. The exact legal meaning of *principle* in the Charter of Fundamental Rights is unclear.¹⁵³ Art. 51(1) and the Explanation to Art. 52(5) state that the institutions, bodies, offices and agencies of the Union must *respect* (subjective) *rights* and *observe principles* when they are implementing Union Law. The Explanation to Art. 52(5) sheds a little bit more light on the opaque meaning of *principle*. It says that *principles* must be *observed*, but do not give rise to direct claims for positive action by the Union’s institutions or Member State authorities.¹⁵⁴ This Explanation approximates the meaning of principle with what has been called a negative fundamental right above. On the other hand, Art. 52(5) clearly states that principles can only be taken into account by the courts when interpreting or reviewing acts that *implement* the principles in question. Yet this is obviously not enough and would deprive Art. 51(1) of its meaning.¹⁵⁵ Principles also have to be observed if the application of Community law would infringe them. Thus the EU Network of Independent Experts on Fundamental Rights correctly points out:

¹⁵¹ RIEDEL in MEYER, *supra* note 140, Art. 34 recital 15-17. See also Explanation to Art. 34 of Declaration 12 concerning the explanations relating to the Charter of Fundamental Rights OJ 2004 C310/420, at p. 444: “The reference to social services relates to cases in which such services have been introduced to provide certain advantages but does not imply that such services must be created where they do not exist.”

¹⁵² Declarations Concerning Provisions of the Constitution OJ 2004 C310/420, at p. 444.

¹⁵³ P. ALSTON, “The Contribution of the EU Fundamental Rights Agency to the Realization of Economic and Social Rights”, in P. ALSTON, O. DE SCHUTTER (eds.), *Monitoring Fundamental Rights in the EU – The Contribution of the Fundamental Rights Agency*, Hart Publishing, Oxford and Portland 2005, p. 159, at pp. 162-165 rejects the distinction between “principles” and “subjective rights” entirely and proposes to assume that every right in the Charter is simply a fundamental right. Examples of the lack of clarity of the distinction between “principles” and “rights” are provided by G. DE BÚRCA, “Beyond the Charter: How Enlargement Has Enlarged the Human Rights Policy of the European Union”, (2004) 27 *Fordham International Law Journal* 679, at 693 seq. In favor of a clear restriction of social and economic rights to principles, see the argument of LORD GOLDSMITH Q.C., “A Charter of Rights, Freedoms and Principles”, (2001) 38 *CML Rev.* 1201, at 1212 seq. See also P. LORBER, “Labour Law”, in S. PEERS, A. WARD (eds.), *The European Union Charter of Fundamental Rights*, Hart Publishing, Oxford and Portland 2004, p. 211, at pp. 227 seq.

¹⁵⁴ For the legal status of social fundamental rights lacking a “positive status”, see also LORBER, *supra* note 153, at pp. 227 seq.

¹⁵⁵ For a criticism of the constraints Art. 52(5) imposes on the justiciability of social rights, see DE BÚRCA, *supra* note 153, at 690 seq.

“Despite the ambiguity of the formula adopted by the drafters of Art. 52 § 5 of the Charter (...), the “principles” set forth by the Charter (...) cannot be relied upon solely for the purpose of interpreting and reviewing the legality of acts that are intended to implement those principles; on the contrary, the recognition of those principles by the founding authority is helpful where, instead of implementing them, the European legislator or executive commit a sufficiently obvious infringement of those principles to justify an annulment by the court.”¹⁵⁶ It must be added that the courts, as well as the legislator and the executive, should take the principle of Art. 34 of the Charter into consideration, at least *de lege ferenda*, when interpreting Community law, for example in the application of competition law to social insurance schemes. Hence it can be said that Art. 34(1) of the Charter (not yet legally binding) will contain a fundamental principle (negative fundamental right) of access to social insurance.

Because of the lack of a right to social security in the ECHR and the different constitutional traditions in the Member States, it is difficult to establish a fundamental right to social security (be it in the form of a “principle” rather than a “subjective right”) at the Community level. Yet taking seriously the Court’s position that it draws inspiration, among others, “...from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories”¹⁵⁷, there are strong arguments in favor of a right to social security, especially with regard to the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, ILO Convention 102 and an at least implicit effect of the EU Charter of Fundamental Rights. The fundamental importance of these international norms leads to the conclusion that there must be a fundamental right/principle of access to social security at the Community level. However, it has to be observed, as evident above,¹⁵⁸ that a recognition of this fundamental right must not interfere with the Member States’ competence in the field of social security. The limits set by the social security legislation of the Member States have to be respected. Thus the fundamental right of access to social security can only be a negative fundamental right. It does not provide for positive claims of social security benefits, but only prevents interference of the Community with existing access to social security. In summary, it

¹⁵⁶ EU Network of Independent Experts on Fundamental Rights, *Report on the Situation of Fundamental Rights in the European Union in 2003*, CFR-CDF.repEU.2003.en (Jan 2004), at p. 123. Contra DE BÚRCA, *supra* note 153, at 690 seq., who doubts the justiciability of social and economic rights beyond implementing acts. In favor of restricting the justiciability of social and economic rights to implementing acts: LORD GOLDSMITH Q.C., *supra* note 153, at 1212 seq.

¹⁵⁷ Opinion 2/94, *supra* note 139, para. 33; *Booker Aquaculture*, *supra* note 139, para. 65.

¹⁵⁸ See above at pp. 25 seq.

can be assumed that there is a negative fundamental right (or, in the language of the revised Charter of Fundamental Rights, a fundamental *principle*) of access to social security in the framework set by the social security schemes of the Member States.

Apart from the existence of a fundamental right of access to social security at the Community level, several provisions of the EC Treaty clearly recognize social security. Thus Art. 2 EC declares the promotion of a high level of social protection as one of the tasks of the Community. Similarly Art. 3(j) EC declares a Community policy in the social sphere as one of its activities. Art. 136 EC repeats that the Community and the Member States shall have as their objectives the promotion of proper social protection. Furthermore Art. 137(1)(c) and (k) EC states that the Community shall support and complement the activities of the Member States in the field of social security and social protection of workers and in the field of the modernization of social protection systems. According to Art. 140 EC, the Commission shall encourage cooperation between the Member States and facilitate the coordination of their action in matters relating to social security. Lastly, Art. 143 EC provides for an annual report of the Commission on, among other matters, social protection and Art. 144 EC provides for the establishment of a Social Protection Committee with advisory status to promote cooperation on social protection policies between Member States and with the Commission.

De lege ferenda the negative fundamental right to/principle of social security will become part of the primary law of the Community as Art. II-94 of the new Constitution. The promotion of social protection will become a main objective of the Union as declared in Art. I-3(3) of the Constitutional Treaty. The cross-sectional clause of Art. III-117 will oblige the Union to take into account the guarantee of adequate social protection in defining and implementing the policies referred to in Part III of the Constitution, among them competition law (Section Five).

In summary it can be said that the EC Treaty attaches great importance to social security and social insurance and that it has a constitutional rank in the Treaty. Furthermore, a coherent interpretation of the different international and European treaties and declarations for the protection of human rights leads to the result that there is a (negative) fundamental right/fundamental principle of access to social security at the Community level.

3. Collective Bargaining

a) Objectives

Collective bargaining means that employees do not negotiate individually, but collectively with the employer(s). They associate, usually in a trade union, to bargain either with a single employer or an employers' association.¹⁵⁹ ILO Convention 98 defines collective bargaining as "voluntary negotiations between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by collective agreements". One can distinguish between collective bargaining in a broad and in a narrow sense. The broad definition covers all sorts of bipartite or tripartite discussions concerning labor problems. The narrow meaning focuses on discussions leading to binding agreements - either *de facto*, morally or legally binding - and usually confined to both sides of the industry (bipartite).¹⁶⁰ In the following section collective bargaining is to be understood in the narrower sense, because the issue in question is not collective bargaining itself, but its results, i.e. the collective agreements.

The bargaining procedure can take place at national, sectoral or company level. Usually, collective bargaining occurs on different levels in the Member States.¹⁶¹ Collective bargaining is supposed to eventually lead to the conclusion of collective agreements. The contents of these agreements are diverse, depending on the national law. The *COLCOM-project*,¹⁶² a study conducted in 1999/2000 to assess the relationship between competition law and collective agreements at the European and national level after the *Albany-cases*,¹⁶³ has compared the legally possible contents of collective agreements in ten Member States. National reports by different scholars served as a basis for the comparative overview. The study found that there is a wide scope of different possible contents of collective agreements

¹⁵⁹ F. GAMILLSCHEG, *Kollektives Arbeitsrecht: ein Lehrbuch, Band I*, C.H. Beck, München 1997, at p. 1.

¹⁶⁰ For the distinction between the broad and narrow term "collective bargaining" see G. J. BAMBER, P. SHELDON, "Collective Bargaining" in R. BLANPAIN, C. ENGELS (eds.), *Comparative Labour Law and Industrial Relations in Industrialized Markets Economies*, 5th ed., Kluwer Law International, The Hague and others 2001, Chapter 22, p. 549, at p. 550.

¹⁶¹ For an overview of the different procedures and levels in the Member States, see European Foundation for the Improvement of Living and Working Conditions, *Industrial relations developments in Europe 2003*, Office for Official Publications of the European Communities, Luxembourg 2004, at pp. 34-39. This publication can be found on the internet at <http://www.eurofound.eu.int/publications/files/EF0477EN.pdf>. See also Commission of the European Communities, Directorate-General for Employment and Social Affairs, *Industrial Relations in Europe 2004*, Office for Official Publications of the European Communities, Luxembourg 2004, at pp. 29-50.

¹⁶² N. BRUUN, J. HELLSTEN (eds.), *Collective agreements and competition law in the EU: the report of the COLCOM-Project*, Iustus Förlag, Uppsala 2001.

¹⁶³ *Albany, Brentjens, and Drijvende Bokken*, *supra* note 2.

in the various Member States, ranging from a relatively narrow enumeration of employment conditions in section 178(2) TULCRA in the UK¹⁶⁴ to a rather broad competence of the parties to collective agreements. In Germany the constitutional fundamental right of collective bargaining in Art. 9 III GG covers “conditions of work and economy”, whereby collective agreements themselves are actually restricted to conditions of work and it is controversial whether the term “conditions of economy” has a separate meaning. If so, this term is restricted to the possibility of widening the scope of the rights of work councils by collective agreements and to anti-rationalization clauses in collective agreements.¹⁶⁵ In France, in addition to regular working conditions, supplementary social security is covered by collective agreements;¹⁶⁶ in Belgium the term employment conditions is widely interpreted and includes regulation of recruitment and selection of employees;¹⁶⁷ and in Spain even economic matters can be covered, but there are many restrictions to collective agreements and they can be challenged because of damage to a third party.¹⁶⁸ Probably the widest scope of collective agreements exists in Greece, where even the reorganization of production, changing the object of an enterprise and the general perspectives of production can be included in collective agreements.¹⁶⁹ Yet all the different national systems have one common denominator: all collective agreements deal with the individual and/or collective relationship between employers and employees – all of them have as their objective the regulation of employment conditions.¹⁷⁰

There are different purposes of collective bargaining. In order to better understand these purposes, it is helpful to examine the history of collective bargaining. The beginning of collective bargaining in the modern sense took place in the 19th century. The invention of the steam engine and the building of railroads in England resulted in a division of labor at the machine. This division of labor led to an alienation of worker and product; the worker, being only part of a production process, could not identify with the final product. The alienation was furthered by delocalization. While in medieval times the apprentices and craftsmen lived in the building where the master lived and where the workshop was situated, the factory and the

¹⁶⁴ See B. BERCUSSON in BRUUN, HELLSTEN, *supra* note 162, at p. 213.

¹⁶⁵ See T. BLANKE in BRUUN, HELLSTEN (eds.), *supra* note 162, at pp.151 seq.; G. SCHAUB, U. KOCH, R. LINCK, *Arbeitsrechts-Handbuch – Systematische Darstellung und Nachschlagewerk für die Praxis*, 11th ed., C.H. Beck, München 2005, at § 200, recital 3-9.

¹⁶⁶ C. VIGNEAU in BRUUN, HELLSTEN (ed.), *supra* note 162, at p. 141.

¹⁶⁷ P. HUMBLET and M. RIGAUX in BRUUN, HELLSTEN (eds.), *supra* note 162, at pp. 99 seq.

¹⁶⁸ A. OJEDA AVILÉS in BRUUN, HELLSTEN (eds.), *supra* note 162, pp. 178 seq.

¹⁶⁹ VON WALLWITZ, *supra* note 51, at p. 130.

¹⁷⁰ See the overview table in BRUUN, HELLSTEN (eds.), *supra* note 162, p. 221 seq. and the general definition of collective bargaining as well as a comparative (historical) overview in BAMBER, SHELDON, *supra* note 160, at p. 549 and at pp. 570-573.

home became two different sites in the age of industrialization. Industrialization was supported by urbanization, the poor peasants streaming into the towns looking for industrial labor. The philosophical response to this development was provided by the emergence of liberalism. All these factors led to a capitalist, *laissez-faire* industrial society. The legal, formal equality of employer and employee was *de facto* contradicted by a huge imbalance of economic power. This imbalance of power eventually led to the exploitation and pauperization of workers. Competition between workers caused wage dumping, so that wages did not suffice to lead a dignified life. In order to survive, the entire family, including the children, were forced to work. One response to this unbearable situation was the foundation of trade unions and the emergence of collective bargaining to counterbalance the power of the employers.¹⁷¹ The first European state which allowed the foundation of trade unions was the UK in 1824,¹⁷² on the continent the first association was not allowed until the revolution in 1848 in France and Germany.¹⁷³

Thus the main reason to bargain collectively was the imbalance of power between the employer and the employee, and this holds true today. The employer owns the means of production and thus has the power to distribute the profits and to give orders, whereas the employee depends on his employment to lead a dignified life, to nourish himself and his family.¹⁷⁴ This is not to deny that there are highly-qualified workers who are economically independent and can use their skills as investment capital. Yet the overwhelming majority of workers depend economically on the employers.¹⁷⁵ Once the employee is integrated in the company, this economic dependence is enhanced by institutional dependence.¹⁷⁶ Almost every democratic legal order acknowledges this economic imbalance of power and provides legal means, for example collective bargaining, to mitigate the results of this inequality.¹⁷⁷ The coalition of workers forms a counterbalance to the power of the employers.¹⁷⁸

¹⁷¹ Regarding social development in the 19th century see GAMILLSCHEG, *supra* note 159, at pp. 83-94 and BAMBER, SHELDON, *supra* note 160, at pp. 550 seq. For a description of the situation of the working class in England see F. ENGELS, *Die Lage der arbeitenden Klassen in England: nach eigener Anschauung und authentischen Quellen*, O. Wigand, Leipzig 1845.

¹⁷² GAMILLSCHEG, *supra* note 159, at p. 89, K. W. WEDDERBURN, *The Worker and The Law*, 3rd edition, Sweet & Maxwell, London 1986, at pp. 515 seq.

¹⁷³ GAMILLSCHEG, *supra* note 159, at p. 91.

¹⁷⁴ GAMILLSCHEG, *supra* note 159, at p. 3 seq.; H. WIEDEMANN in H. WIEDEMANN (ed.), *Tarifvertragsgesetz: mit Durchführungs- und Nebenvorschriften; Kommentar*, 6th ed., C.H. Beck, München 1999, Einl. recital 3.

¹⁷⁵ GAMILLSCHEG, *supra* note 159, at p. 4.

¹⁷⁶ GAMILLSCHEG, *supra* note 159, at p. 6; D. REUTER, "Betriebsverfassung und Privatautonomie", (1975) *ZfA* 85, at 86 seq.

¹⁷⁷ For examples, see GAMILLSCHEG, *supra* note 159, at p. 4 seq..

¹⁷⁸ WIEDEMANN, *supra* note 174, Einl. recital 3.

From an economic perspective, collective bargaining means founding a workforce cartel and erasing competition between the workers to a certain extent. This cartel raises wages (labor prices) and shortens working time (supply) by setting minimum standards.¹⁷⁹ The necessity of the workforce cartel can be explained by the imperfection of the labor market. While in usual markets for goods and services the decrease of price under marginal costs of production leads to a shortage of supply (in order to raise prices again) or the exit of market actors, the opposite is the case in the labor market. The individual depends on his employment and the wages to lead a dignified life, hence a decrease in wages leads to an increase in supply, i.e. working time (the so-called anomalous curve of supply on the labor market).¹⁸⁰ This is even the case if wages fall under marginal costs, i.e. the amount of money a worker needs to have a decent standard of living. In a normal market for goods and services, the entrepreneur would leave the market if prices were lower than his marginal costs of production. This exit option is very limited for the worker,¹⁸¹ who depends on offering his work in the relevant labor market he is qualified for.¹⁸²

The possibility that wages are pushed under marginal costs of living is particularly strong in labor markets, where a large number of employees face a relatively small number of employers, leading to a high elasticity of demand for labor. Competition would cause a decrease of wages and quality of working conditions combined with an additional supply of work, which would cause an even greater lowering of employment standards, hence a race to the bottom.¹⁸³ This is especially true in times of high unemployment¹⁸⁴ and for lowly qualified workers. Of course there are also other means to prevent a race to the bottom, for example social assistance. Yet social assistance only covers, depending on the national system, the essential costs of living, which often do not correspond to the individual marginal costs of

¹⁷⁹ WIEDEMANN, *supra* note 174, Einl. recital 34 seq.

¹⁸⁰ W. DÄUBLER, *Tarifvertragsrecht – Ein Handbuch*, 3rd ed., Nomos Verlagsgesellschaft, Baden-Baden 1993, recital 27; This special feature of the labor market was also recognized by *ordoliberal* scholars, see EUCKEN, *Grundsätze der Wirtschaftspolitik*, *supra* note 11, at pp. 303 seq.

¹⁸¹ An employee usually lacks the capital to enter the markets for goods and services as an alternative.

¹⁸² G. KORDEL, *Arbeitsmarkt und Europäisches Kartellrecht*, Carl Heymanns Verlag, Köln and others 2004, at p. 55 actually states that the exit of inefficient workers into unemployment is efficient and hence positive, because their marginal costs are too high. This example illustrates how inhuman and immoral a neo-classical perception of the market can be, which does not care about the well-being of people, but only worships an abstract idol called “efficiency”.

¹⁸³ GAMILLSCHEG, *supra* note 159, at p. 496; W. MÖSCHEL, “Tarifautonomie – ein überholtes Ordnungsmodell?”, (1995) *WuW* 704, at 709 claims that this model is unrealistic, because it considers workers as a homogeneous group, not taking into account the differences between different professions; in the same vein also see KORDEL, *supra* note 182, at pp. 53-55.

¹⁸⁴ See GAMILLSCHEG, *supra* note 159, at p. 496.

living. It is socially stigmatized and means social descent for the employee. Dependence on social assistance often causes low self-esteem and mental health problems, because the employee cannot find fulfillment in a job. Hence social assistance should be regarded as a supplement to collective bargaining, not as a substitute.

As opposed to undertakings, which own real capital, employees only own human capital, which is inseparably connected to their person and much more immobile and difficult to transfer.¹⁸⁵ This means that the relevant geographic labor market is relatively limited and an efficient allocation of the human capital of workforce is much more difficult to attain than an efficient allocation of real capital. This also limits the exit options of the employee and puts him at a competitive disadvantage compared to the employer. The structural imbalance on the labor market, the dependence and immobility of the workers, makes this market imperfect. Competition would not yield the most effective results; wages and labor conditions would not represent the competitive price for work under equal conditions between supply and demand.¹⁸⁶ The prevention of competition, caused by collective agreements at the sectoral and national level, also prevents the employers from competing on the cost factor labor, thus enabling them to offer better working conditions without the risk of becoming uncompetitive.¹⁸⁷ Historical evidence from the period before the legalization of collective bargaining shows how the lack of collective bargaining in the labor market causes exploitation and pauperization of workers.¹⁸⁸ The function of collective agreements to prevent this exploitation and pauperization can be called the *protection function* for the employees.¹⁸⁹

Yet collective bargaining not only serves the interest of the workers. It saves the employer transaction costs that would occur if he was to negotiate every employment condition individually.¹⁹⁰ Throughout the duration of the collective agreement, the employer benefits from the peace effect on labor relations (*peace function*).¹⁹¹ Furthermore collective bargaining

¹⁸⁵ WIEDEMANN, *supra* note 174, Einl. recital 77.

¹⁸⁶ This is not to say that the wages attained by collective agreements represent competitive wages. Often they may range over the competitive level.

¹⁸⁷ GAMILLSCHEG, *supra* note 159, at p. 499 seq.; WIEDEMANN, *supra* note 174, Einl. recital 35.

¹⁸⁸ Contra KORDEL, *supra* note 182, at p. 54 and MÖSCHEL, *supra* note 183, at 709, who deny any empirical evidence for the "race to the bottom" hypothesis. It must be conceded that the situation before the legalization of collective bargaining cannot be compared to a competitive market order, because the *laissez-faire* capitalism of the 19th century lacked competition law and thus allowed employers to form demand cartels for labor.

¹⁸⁹ R. J. VAN DEN BERGH, P. D. CAMESASCA, "Irreconcilable Principles? The Court of Justice Exempts Collective Labour Agreements from the Wrath of Antitrust", (2000) 25 *E.L. Rev.* 492, at 502; WIEDEMANN, *supra* note 174, Einl. recital 3.

¹⁹⁰ WIEDEMANN, *supra* note 174, Einl. recital 15.

¹⁹¹ GAMILLSCHEG, *supra* note 159, at p. 500.

fulfills an *order function* in the labor market by regulating labor relations. It has a rationalizing and a rulemaking effect in the field of industrial relations.¹⁹² Additionally, it creates a fair distribution of wages and a basic equality of wages and it influences, where the collective agreement is concluded at sectoral or national level, the overall structure of wages (*distribution function*).¹⁹³ Yet it is still controversial whether collective bargaining actually leads to a redistribution of the gross national product in favor of the employees.¹⁹⁴ Collective agreements cause social justice and social peace¹⁹⁵ as well as a certain level of equality for the employees and they contribute to general economic welfare by avoiding costly industrial conflicts.

In summary, collective agreements developed from the misery of the working class in the 19th century. Workers had to establish cartels of labor to strengthen their bargaining position against employers. A core objective of collective bargaining is hence the collective negotiation of employment conditions, as could also be seen from the comparative overview. Next to its main functions of *protection of employees* and *social peace*, collective agreements – at least at a sectoral and national level – also fulfill functions of *redistribution* and *order of industrial relations*. They are thus an important factor in the establishment of distributive justice.

b) Legal rank

Collective bargaining is still restricted to a national level in Europe and hence mainly regulated by national law. Even though certain collective agreements at Community level exist within the framework of the social dialogue according to Art. 138 seq. EC¹⁹⁶ and the European Work Council according to Council Directive 94/45/EC¹⁹⁷ and workers' participation might lead to collective agreements in the European Company according to

¹⁹² BAMBER, SHELDON, *supra* note 160, at p. 564; GAMILLSCHEG, *supra* note 159, at p. 498 seq.; WIEDEMANN, *supra* note 174, Einl. recital 13-19.

¹⁹³ BAMBER, SHELDON, *supra* note 160, at p. 563; WIEDEMANN, *supra* note 174, Einl. recital 7, 8.

¹⁹⁴ WIEDEMANN, *supra* note 174, Einl. recital 9-11.

¹⁹⁵ BAMBER, SHELDON, *supra* note 160, at p. 563; GAMILLSCHEG, *supra* note 159, at pp. 500 seq.; O. VON NELL-BREUNING, "Wilhelm Herschel zum 90. Geburtstag", (1985) *AuR* 297; VAN DEN BERGH, CAMESASCA, *supra* note 189, at 502; WIEDEMANN, *supra* note 174, Einl. recital 27-29.

¹⁹⁶ See M. E. BLAS LOPEZ, *La mutation des partenaires sociaux en Europe en réponse à la globalisation de l'économie*, EUI Working Paper, RSC 2005/_ (forthcoming), at pp. 15 seq.; regarding the limited scope of European collective agreements see Commission of the European Communities, *Industrial Relations in Europe 2004*, *supra* note 161, at pp. 71-108.

¹⁹⁷ See BLAS LOPEZ, *supra* note 196, at pp. 18-21; L. TURNER, "The Europeanization of Labour: Structure before action", (1996) *EJIR* 325, at 332-337.

Council Directive 2001/86/EC,¹⁹⁸ the range and coverage of these forms of collective bargaining is still very restricted and negligible compared to the importance of national collective bargaining.¹⁹⁹ A Community framework for transnational collective bargaining about core subjects like wages has not yet developed.²⁰⁰

The next question is what rank collective bargaining occupies in the hierarchy of legal norms in the EC. First the question arises whether there is a fundamental right to collective bargaining at the Community level. Again, it must be noticed that in establishing fundamental Community rights "...the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard, the Court has stated that the Convention (the ECHR – added by the author) has special significance."²⁰¹

Firstly, it can be observed that there is a constitutional guarantee of collective bargaining or anchoring via an expressed right to strike only in some Member States (Austria, Belgium, France, Germany, Italy, Spain and Sweden). In the ECHR, to which the Court attaches great importance when defining fundamental Community rights,²⁰² Art. 11 guarantees the right of association and to form and join trade unions. The European Court of Human Rights also derived the right to certain collective actions of trade unions from Art. 11 (1) ECHR,²⁰³ but did not recognize the right to strike.²⁰⁴ It must be noted that neither the right of association nor the right to collective action derived from the ECHR necessarily include a right to collective bargaining. The same is true of the right of association agreed upon by the Member States in the ILO Conventions 87 and 98, whereby Art. 4 of ILO Convention 98 does not declare a right to collective bargaining, but only asks the signatory parties to encourage and promote collective negotiations. Similarly, Art. 8 of the International Covenant on Economic, Social and Cultural Rights establishes a right to form and join trade unions and to strike, but no expressive right to collective bargaining. The same is the case with Art. 22 of the International

¹⁹⁸ See BLAS LOPEZ, *supra* note 196, at pp. 23-31.

¹⁹⁹ See R. BLANPAIN, *European Labour Law*, 9th ed., Kluwer Law International, The Hague and others 2003, recital 965-974.

²⁰⁰ BLANPAIN, *supra* note 199, recital 1013. For the limited scope of European collective agreements see Commission of the European Communities, *Industrial Relations in Europe 2004*, *supra* note 161, at pp. 35 seq.

²⁰¹ Opinion 2/94, *supra* note 139, para. 33; *Booker Aquaculture*, *supra* note 139, para. 65.

²⁰² Case C-260/89, *ERT*, (1991) ECR I-2925, para. 41; Opinion 2/94, *supra* note 139, para. 33.

²⁰³ *National Union of Belgian Police v Belgium*, 27 October 1975, Eur. Court HR Rep., Series A, 19 (1975), para. 40.

²⁰⁴ *Schmidt and Dahlström v Sweden*, 6 February 1976, Eur. Court HR Rep., Series A, 21 (1976), para. 36.

Covenant on Civil and Political Rights. At the European level (Council of Europe), there exists Art. 6 of the European Social Charter, in which the parties to the Charter recognized "the effective exercise of the right to bargain collectively". At the Community level, No. 12 of the Community Charter of the Fundamental Rights of Workers declared: "Employers or employers' organisations, on the one hand, and workers' organisations, on the other, shall have the right to negotiate and conclude collective agreements under the conditions laid down by national legislation and practice".

In his 1999 opinion in the *Albany*-cases, AG *Jacobs* came to the controversial and heavily criticized²⁰⁵ conclusion that the above quoted provisions did not suffice to establish a fundamental right of collective bargaining at the Community level.²⁰⁶ He drew a distinction between: a) the right of association, b) the right to collective action and c) the right to collective bargaining. With regard to the Community Charter of the Fundamental Rights of Workers, the Advocate General pointed out that this Charter had little legal effect. It was not a legal act of the Community, but only a political declaration of eleven of the then twelve Member States.²⁰⁷ *Jacobs* admitted that Art. 6 ESC contained a provision concerning collective bargaining, yet he did not consider this provision to constitute an enforceable fundamental right, but rather a policy goal. With regard to the other international norms and treaties mentioned above, especially Art. 11 ECHR, he stated that they included a right of association and a right to collective action, yet no right to collective bargaining. He furthermore pointed out the absence of the recognition of a right to collective bargaining in the case-law of the European Court of Human Rights, referring to the judgment in *Gustafsson*.²⁰⁸ The Advocate General concluded that there was no commonly accepted fundamental right of collective bargaining in the international agreements or the constitutions of the Member States and thus no fundamental right of collective bargaining at the Community level.²⁰⁹ The Court avoided this topic by the creation of the non-statutory labor exemption and thus failed to establish an explicit fundamental right to collective bargaining.

However, it might be necessary to revise this conclusion with regard to recent legal developments. The Amsterdam Treaty inserted in Art. 136 EC an explicit reference to

²⁰⁵ See, for example, B. BERCUSSON, "Freedom of Association and Fundamental Trade Union Rights", Annex 2, in ETUI (ed.), *A Legal Framework for European Industrial Relations*, Brussels 1999, p. 7, at pp. 29-38; T. BLANKE, "Anmerkung zu EuGH Urt. v. 21.9.1999 – Rs. C-67/96", (2000) *AuR* 28, at 29.

²⁰⁶ Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 132-161.

²⁰⁷ See also KINGREEN, *supra* note 90, at p. 291.

²⁰⁸ *Gustafsson v Sweden*, 25 April 1996, R.J.D., 1996-II, No. 9.

²⁰⁹ Opinion of AG *Jacobs* in *Albany*, (1999) ECR-5751, 5787 seq., para. 132-161.

“fundamental social rights as those set out in the European Social Charter (...) and in the 1989 Community Charter of the Fundamental Rights of Workers”, hence, at least indirectly, referring to the fundamental right to collective bargaining in Art. 6 ESC and No. 12 CCFRW. Yet it must be noticed that this reference does not establish any subjective rights, nor does it make any of the Charters in question an integral part of Community law and it remains doubtful if the Charters can serve as guidelines for the interpretation of Community law.²¹⁰ The 1998 ILO Declaration of Fundamental Principles and Rights at Work expressly recognizes the right to collective bargaining in Art. 2(a). Though this declaration only includes soft-law,²¹¹ the ILO Member States are obliged to comply with the declared standards, even if they have not ratified the respective Conventions (Art. 2 of the Declaration). Thus the 1998 ILO Declaration is directly legally binding for all Member States of the ILO. The EC is not itself a member of the ILO, but its Member States are. It must be noted that so far the ECJ, when establishing fundamental rights at the Community level, has never referred to the Constitution of the ILO, the Philadelphia Declaration, the ILO Conventions or the 1998 Declaration. Its main reference has been the ECHR. In the same vein, Art. 6(2) Treaty on European Union (TEU) refers only to the ECHR and the constitutional traditions common to the Member States as sources of inspiration for fundamental Community rights. Yet taking into account that one source of fundamental rights in the EC is, according to the case-law, “the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories”²¹² and that Art. 6(2) TEU has not altered this jurisprudence,²¹³ there is no reason not to derive fundamental rights from the core labor rights declared in the 1998 ILO Declaration, which is binding for all Member States.²¹⁴

Furthermore, Art. 28 of the Charter of Fundamental Rights of the European Union now declares a fundamental right of workers or employers, or their respective organizations, to “negotiate and conclude collective agreements at the appropriate levels”. Since Art. 28 clearly declares a fundamental right and not a principle, – “workers and employers, or their respective organisations, *have (...) the right* to negotiate and conclude collective agreements”

²¹⁰ R. REBHAHN in SCHWARZE, *supra* note 85, Artikel 136, recital 10 seq.

²¹¹ For a critique of this new soft-law approach see P. ALSTON, ““Core Labour Standards” and the Transformation of the International Labour Rights Regime”, (2004) 15 *EJIL* 457.

²¹² Opinion 2/94, *supra* note 139, para. 33.

²¹³ *Booker Aquaculture*, *supra* note 139, para. 65 seq.; COSTELLO, *supra* note 144, at pp. 135 seq.

²¹⁴ P. O’HIGGINS, “The interaction of the ILO, the Council of Europe and European Union labor standards” in B. HEPPLER (ed.), *Social and Labour Rights in a Global Context*, CUP, Cambridge 2002, p. 55, at p. 63.

(Italics added by the author)- the debate concerning the legal meaning of *principle* is not relevant in this context.²¹⁵

Taking into account: the 1998 ILO Declaration of Fundamental Principles and Rights at Work; the importance the Amsterdam Treaty attached to the European Social Charter and the Community Charter of the Fundamental Rights of Workers; and the at least implicit effect of the Charter of Fundamental Rights of the European Union on the interpretation of Community law,²¹⁶ an overall view of these provisions leads to the conclusion that there is a fundamental right to collective bargaining at the Community level. In particular the impact of the 1998 ILO Declaration of Fundamental Principles and Rights at Work leads to the result that there is nowadays a fundamental Community right to collective bargaining.²¹⁷

De lege ferenda it is clear that Art. II-88 of the European Constitution will contain a fundamental right of collective bargaining.

Apart from the existence of a fundamental right of collective bargaining, there are other provisions in the EC Treaty which make it clear that the EC accepts and respects collective bargaining both at national and European level. As will be seen below,²¹⁸ both AG Jacobs²¹⁹ and the Court²²⁰ could refer in the *Albany* cases to Articles 2, 3(1)(j), 136, 138-140 EC (as they are now numbered) to show the importance Community law attaches to collective bargaining and to create a non-statutory exemption for collective agreements from competition law.²²¹ With the emergence of a fundamental right to collective bargaining at the Community level, the reference to those general provisions has become superfluous and only

²¹⁵ See for this discussion above at pp. 26 seq. For an overview of labor rights in the context of the Charter see LORBER, *supra* note 153, p. 211, especially at pp. 220 seq.

²¹⁶ B. FITZGERALD, "European Union Law and the Council of Europe Conventions", in C. COSTELLO (ed.), *Fundamental Social Rights- Current European Legal Protection & the Challenge of the EU Charter on Fundamental Rights*, Conference Proceedings September 2000 Trinity College Dublin, p. 95, at p. 103 states: "It is difficult to imagine either an Advocate General or the Court refusing to acknowledge a right to bargain collectively once it is included in the EU Charter."

²¹⁷ Von Wallwitz arrived at the same conclusion for the period before 1998, see VON WALLWITZ, *supra* note 51, at pp. 127-132.

²¹⁸ See below at pp. 71 seq.

²¹⁹ Opinion of AG Jacobs in *Albany*, *supra* note 2, para. 165-194. The AG states at para. 179 that the provisions promoting collective bargaining have the same rank as Art. 81 seq.

²²⁰ *Albany*, *supra* note 2, para. 54-60.

²²¹ The Court has been criticized for having used the *European Social Dialogue*, among others, to exempt *national collective agreements* from Community competition law, see S. SCIARRA, "Market freedom and fundamental social rights", in B. HEPPLER (ed.), *Social and Labour Rights in a Global Context*, CUP, Cambridge 2002, p. 95, at p. 107; S. VOUSDEN, "Albany, Market Law and Social Exclusion", (2000) *ILJ* 181, at 188. Yet the European Social Dialogue is only one example to demonstrate that the EC recognizes collective bargaining as a legitimate regulatory tool.

serves as an additional argument to emphasize the legal importance of collective bargaining within the Community.

4. Summary

Competition law, collective bargaining and social insurance have a prominent legal rank in Community law. While competition law is a keystone of the Community's economic constitution and legal order, collective bargaining and social insurance also have a constitutional rank in the EC Treaty. It is submitted that there is both a fundamental right to collective bargaining and a (negative) fundamental right/principle of access to social insurance at the Community level.

Competition law serves to protect economic freedom, the process of competition, market integration and efficiency. These objectives are to be achieved by, among other means, the prevention and/or control of monopolies and the prohibition of cartels. Social insurance aims to provide large parts of the population with insurance against the social risks of life by mechanisms of solidarity and redistribution of wealth. Social insurance can only maintain financial equilibrium by monopolization and/or the introduction of anticompetitive measures that ensure solidarity.²²² Collective bargaining protects workers in the labor market and fulfills the functions of creation of social peace, redistribution and ensuring order in industrial relations. In order to achieve its aims, collective bargaining necessarily involves the creation of cartels of workers in the labor market. Thus there seems to be an inherent contradiction between competition law on the one hand and collective bargaining as well as social insurance on the other hand.

Yet this is not necessarily the case. From an *ordoliberal* and *social market economy* point of view, competition law serves as a tool to create a humane market, which is based on economic freedom. This freedom should not be understood as an unrestricted *laissez-faire* freedom, but rather as a material freedom that provides equal opportunities for all. Social insurance provides the necessary material background for exercising freedom. Without

²²² For the theory of the downward spiral that would occur, if social insurance was subject to competition, see below at pp. 88 seq.

insurance against social risks, the very existence of human beings would be constantly threatened by contingent externalities. Underprivileged groups of society are in particular need of a system of social insurance, which protects them against these negative externalities and hence provides them with the indispensable material base for exercising their (economic) freedom.

The labor market, as illustrated above, involves a structural disadvantage for the workers, which can be mitigated by collective bargaining. Thus collective bargaining can serve as a means to create material freedom and independence of workers from their employers.

The question at stake here is how a possible legal collision between competition law, collective bargaining and social insurance can be dealt with. The following part of this thesis shall discuss the European Courts' approach to the relation between competition law, collective bargaining and social insurance in the Community's legal framework. Afterwards an original solution of how to solve this problem will be provided.

III. Critique of the current case-law of the ECJ and the CFI

Having identified the objectives of the different fields of law and the rank they have in EC law, it is now necessary to analyze and critique the case-law of the ECJ and the CFI concerning the collision between these fields of law.

1. The case-law in the field of social insurance and competition law

The two Courts sought to resolve the collision between social insurance law and competition law with a new definition of the term "undertaking" in the field of social security. The following section shall present an overview of the case-law, and then examine the problems of the approach taken by the Courts.

a) The relationship between the social insurance fund and the insured

There have been a number of cases dealing with the relationship between the insurance fund and the insured since 1993. The starting point of the case-law was the case *Poucet et Pistre*.²²³ Mr. Poucet and Mr. Pistre objected to a demand to pay obligatory contributions to a sickness and maternity insurance fund and to the National Independent Old-Age Insurance Fund for Craftsmen. They did not challenge compulsory insurance *per se*, but they did challenge the monopoly position of the funds in question. Both plaintiffs claimed that the funds held a dominant position enabling them to prevent other insurance companies from offering the insurance contracts in question in France, thus infringing Art. 82 EC. The national court referred the question to the ECJ of whether the funds could be considered undertakings for the purposes of EC competition law.²²⁴ In its findings the Court firstly emphasized that Community law did not detract from the powers of the Member States to organize their social security systems, referring to the case *Duphar v Netherlands*.²²⁵ The Court then referred to different features of the social insurance schemes in question:

²²³ *Poucet et Pistre*, *supra* note 1.

²²⁴ Report of the Hearing in *Poucet et Pistre*, *supra* note 1, 638 seq. and judgment 666 seq., para. 1-4.

²²⁵ *Poucet et Pistre*, *supra* note 1, para. 6; *Duphar v Netherlands*, *supra* note 137, para. 16.

1. The schemes pursued a social objective, i.e. they were intended to provide cover for all the insured against different risks, regardless of the financial situation and the state of health of the insured at the time of affiliation.²²⁶
2. They embodied the principle of solidarity. In the sickness and maternity scheme, the contributions were proportional to a person's income or retirement pensions. The benefits, on the other hand, were identical for all those who received them. In the old age insurance scheme, the solidarity was embodied in the fact that active workers financed the pensions of the retired by their contributions. Furthermore pensions were granted even in cases where no contributions had been made and pension rights were not proportional to the contributions paid. Additionally there was solidarity between the different funds, those in surplus contributed to the financing of those in difficulties.²²⁷
3. The compulsory contributions and affiliation were indispensable for the application of the principle of solidarity.²²⁸
4. The management of the schemes was entrusted by statute to social insurance funds, which were controlled by the state.²²⁹
5. In fulfilling their obligations, the funds merely applied the law. They could not influence the amount of the contributions, the use of assets and the fixing of the level of benefits.²³⁰

The Court defined the term "undertaking" according to the case *Höfner v Elser* as "every entity engaged in an economic activity, regardless of the legal status and the way it is financed."²³¹ Paying attention to the features described above, the Court came to the conclusion that the social insurance funds in this case could not be considered undertakings.²³² The ECJ claimed that the activity of the funds was not an economic activity, because they a) fulfilled an exclusively social function, b) the activity was based on the principle of national solidarity, c) the activity was entirely non-profit making and d) the benefits were statutory and had no relation to the amount of contributions (combining the feature of solidarity and of mere fulfilment of the law).²³³

²²⁶ *Poucet et Pistre*, *supra* note 1, para. 8 seq.

²²⁷ *Poucet et Pistre*, *supra* note 1, para. 10-12.

²²⁸ *Poucet et Pistre*, *supra* note 1, para. 13.

²²⁹ *Poucet et Pistre*, *supra* note 1, para. 14.

²³⁰ *Poucet et Pistre*, *supra* note 1, para. 15.

²³¹ Case C-41/90 *Höfner v Elser*, (1991) ECR I-1979, para. 21; *Poucet et Pistre*, *supra* note 1, para. 17.

²³² *Poucet et Pistre*, *supra* note 1, para. 19 seq.

²³³ *Poucet et Pistre*, *supra* note 1, para. 18 seq. For a deeper analysis of this case, see P. LAIGRE, "Les organismes de Sécurité sociale sont-ils des entreprises?", (1993) *Droit Social* 488.

It should be noted that the pension scheme in *Poucet et Pistre* was a statutory basic scheme and can thus be considered to belong to the first pillar of pension insurance. It was financed by the pay-as-you-go method and not by capitalization.

The next case in which the Court had to deal with competition law and social insurance was *Fédération Française*.²³⁴ The old-age insurance funds for farmers in question in this case differed in decisive points from those in *Poucet et Pistre*. The funds provided supplementary, optional insurance services and operated according to the principle of capitalization (second pillar scheme). The insured could choose to pay contribution rates of either 4.5% or 7.0% of their earned income. The benefits depended on these contribution rates. On the other hand, the funds were, like those in *Poucet et Pistre*, non-profit making and their management was subject to state control. Membership was regulated by law and independent from risks. The investment decisions of the fund were regulated by ministerial decision and were subject to supervision by the *Cour des Comptes*. Furthermore, the scheme exhibited additional features of solidarity: in the case of illness of more than six months duration, an exemption from or reduction of contributions could be granted, which was financed by a levy on the contributions. The payment of contributions could be suspended because of the economic situation of the insured's agricultural enterprise. The contributions were not linked to the different insured risks and in case of an early death of an insured his entitlements were placed at the disposal of the scheme.²³⁵

The Court had to again address the question of whether the fund in question was an undertaking in the sense of Art. 81 seq. EC. Referring to the definition in *Höfner v Elser*²³⁶ and to its judgment in *Poucet et Pistre*,²³⁷ the Court held in this case that the fund had to be considered an undertaking.²³⁸ It stressed that membership was optional, the scheme was based on capitalization and the benefits depended on the contributions paid by the insured and the results of the investments made by the fund. This placed the fund in (at least potential) competition with private life insurance companies and showed that the fund was engaged in an economic activity.²³⁹ The above-mentioned elements of solidarity in the scheme did not suffice for the Court to come to a different conclusion, because the optional character of the

²³⁴ *Fédération Française*, *supra* note 105.

²³⁵ For the different features of the fund, see in detail Opinion of AG Tesouro in *Fédération Française*, *supra* note 105, para. 6-9; Judgment of the Court, *Fédération Française*, *supra* note 105, para. 1-14.

²³⁶ *Höfner v Elser*, *supra* note 231, para. 21.

²³⁷ *Poucet et Pistre*, *supra* note 1, para. 17.

²³⁸ *Fédération Française*, *supra* note 105, para. 14, 22.

²³⁹ *Fédération Française*, *supra* note 105, para. 17.

scheme allegedly limited the scope of its solidarity.²⁴⁰ The Court added that the pursuit of a social purpose, the existing requirements of solidarity and the different legal rules governing the scheme did not prevent the fund's activity from being regarded as an economic activity.²⁴¹ The non-profit making character did not deprive this activity of its economic character either, because the activity might lead to behavior the competition rules try to prevent.²⁴²

Compared to *Poucet et Pistre*, it can be observed that neither the social purpose nor the non-profit making character of the fund, nor its restricted elements of solidarity and a certain influence of the state were decisive in this case. It appears rather that the Court made a distinction between statutory first pillar pension schemes, based on the pay-as-you-go principle, and supplementary, optional second pillar schemes, based on capitalization.

In the *Albany*,²⁴³ *Brentjens*²⁴⁴ and *Drijvende Bokken*,²⁴⁵ triplet of cases, the Court had to consider Dutch supplementary sectoral pension schemes established by collective agreements and made compulsory for all enterprises in the sector by ministerial decree at the request of the social partners (again, second pillar schemes). As opposed to *Fédération Française*, the insurance schemes were compulsory. The funds operated, similar to those in *Fédération Française*, according to the principle of capitalization, yet the level of contributions and benefits was fixed by the fund and not optional. The benefits depended on the costs of management, reserves and results of the investments. There were certain elements of solidarity involved: there was no selection of risks and the contributions were independent from the insured risk. Furthermore benefits, i.e. pension rights, were determined according to an average salary. An indexation mechanism and discharge of arrears of contributions by the fund in case of an employer's insolvency existed. An exemption from the duty to pay contributions was granted in the case of incapacity to work. Additionally, the funds were non-profit making and pursued the coverage of the Dutch working population with adequate insurance as a social objective.²⁴⁶

²⁴⁰ *Fédération Française*, *supra* note 105, para. 18 seq.

²⁴¹ *Fédération Française*, *supra* note 105, para. 20.

²⁴² *Fédération Française*, *supra* note 105, para. 21.

²⁴³ *Albany*, *supra* note 2.

²⁴⁴ *Brentjens*, *supra* note 2.

²⁴⁵ *Drijvende Bokken*, *supra* note 2.

²⁴⁶ See Opinion of AG Jacobs in *Albany*, *supra* note 2, para. 1-30 and his summary at para. 307 as well as Judgment in *Albany*, *supra* note 2, para. 3-24. In the following only the case *Albany* will be quoted, because the decisions in *Albany*, *Brentjens* and *Drijvende Bokken* have the same wording.

The Court partly followed its line of reasoning from *Fédération Française* and considered the funds to be undertakings.²⁴⁷ The Court again stressed that the pension funds were based on the principle of capitalization, i.e. the amount of benefits depended on the result of the investments; the funds also decided the level of contributions and benefits themselves.²⁴⁸ With regard to the investments, the funds were, like private insurance companies, subject to the supervision of the Insurance Board.²⁴⁹ Additionally, an exemption from compulsory affiliation had to be granted by the funds if a company had made available to its workers an equivalent pension scheme at least six months before the request to the competent minister to make affiliation compulsory was launched. An exemption could be granted where an employer provided his employees with insurance equivalent to the scheme and compensation was paid to the funds in case of withdrawal. This placed the funds in (at least possible) competition with private companies. Thus they pursued an economic activity.²⁵⁰ The Court again emphasized that the non-profit-making character of the funds, their social objective, certain elements of solidarity and restrictions in the choice of investments imposed by law were not sufficient to regard the funds as not being undertakings.²⁵¹ This time the Court considered the fact that affiliation was compulsory in order to guarantee the financing and solidarity of the scheme as irrelevant, contrary to its former case-law in *Poucet et Pistre* and *Fédération Française*.²⁵²

It follows that pension funds based on the principle of capitalization with benefits depending on the results of the investments and belonging to the so-called second pillar are, as opposed to first pillar pension funds based on pay-as-you-go, considered undertakings by the Court.

The very similar case of *Pavlov*²⁵³ was decided only one year later. The Court had to again deal with a supplementary pension fund in the Netherlands. The main difference with the earlier cases was that this fund was not a sectoral pension fund established by a collective agreement, but a pension fund set up by the representative body of a free profession. The fund did not select risks and was non-profit-making, but the pensions were financed by a

²⁴⁷ *Albany*, *supra* note 2, para. 87.

²⁴⁸ *Albany*, *supra* note 2, para. 81.

²⁴⁹ *Albany*, *supra* note 2, para. 82.

²⁵⁰ *Albany*, *supra* note 2, para. 83 seq.

²⁵¹ *Albany*, *supra* note 2, para. 85 seq.

²⁵² See D. GADBIN, "Les fonds de pension obligatoire face au droit communautaire de la concurrence: des positions dominantes à préserver dans le futur marché intérieur des services financiers", (2001) *Droit Social* 178, at 180 seq.; L. IDOT, "Droit social et droit de la concurrence: confrontation ou cohabitation? (À propos des quelques développements récents)", (11/1999) 9 *Europe* 4, at 5.

²⁵³ Joined Cases C-180/98 to C-184/98, *Pavlov*, (2000) ECR I-6451.

capitalization scheme, in which contributions and benefits were determined by the fund and the benefits depended on the results of the investments.²⁵⁴

Following its earlier line of reasoning in the triplet of *Albany* cases,²⁵⁵ the Court considered the fund in question to be an undertaking,²⁵⁶ because the fund itself determined the rate of contributions and benefits and worked according to the principle of capitalization. Additionally, the fund was with regard to its investments subject to the supervision of the Insurance Board, like a private insurer.²⁵⁷ The possibility of insuring the basic reference pension either with the fund or with a private insurer as well as the fund's power to grant exemptions from other components of the scheme in certain circumstances were also considered as indications that the fund was engaged in an economic activity in competition with private insurers.²⁵⁸ Again the Court considered the non-profit-making character of the fund, its aspects of solidarity such as lacking selection of risks and a disability scheme and the pursuit of a social objective as insufficient to exclude it from the definition of an undertaking.²⁵⁹

The next case concerning the definition of an undertaking in the field of social insurance was *Cisal*.²⁶⁰ This case can be considered as a turning point in the jurisprudence. Here the Court had to deal with an Italian scheme of social insurance against accidents at work and occupational diseases. The fund in question pursued a social purpose (providing insurance against accidents at work and occupational diseases, even where the employer was not liable and in exchange for relieving the employer from his civil liability), it was non-profit-making and insurance was mandatory. On the other hand, the contributions depended on the insured risk and on one's income. The benefits also depended partly on the income of the insured: benefits for temporary incapacity were a certain percentage of the average earning 15 days prior to the cessation of work, while benefits for permanent incapacity were calculated according to the average earning one year prior to the termination of work, but for the latter only incomes within a range of a maximum income of 30% above average and a minimum of 30% below average were taken into account. This meant that there was an indirect link

²⁵⁴ For the different features of the fund, see in detail Opinion of AG Jacobs in *Pavlov*, *supra* note 253, para. 5-49 and para. 166-180; Judgment of the Court in *Pavlov*, *supra* note 253, para. 3-41 and para. 103-107.

²⁵⁵ Meaning *Albany*, *Brenjens*, *Drijvende Bokken*, *supra* note 2.

²⁵⁶ *Pavlov*, *supra* note 253, para. 113, 119.

²⁵⁷ *Pavlov*, *supra* note 253, para. 112-114.

²⁵⁸ *Pavlov*, *supra* note 253, para. 112, 115 seq.

²⁵⁹ *Pavlov*, *supra* note 253, para. 117 seq.

²⁶⁰ *Cisal*, *supra* note 106.

between contributions and benefits via the wages, but this link was weakened by the fact that long-term benefits, as opposed to contributions, were only calculated according to a certain range of income. This feature, coupled with the fact that the payment of benefits occurred automatically, even if the employer had not paid the contributions, constituted elements of solidarity in the scheme. The fund was financed by a mixture of the redistribution method and of capitalization. While in the agricultural sector the current benefits were directly paid by current contributions, the scheme involved elements of capitalization in the industrial sector. There the level of the contributions was determined each year by a resolution of the fund, anticipating the upcoming expenditures including the capital value of the long-term pensions. This resolution had to be approved by the competent minister. Higher benefits due to an increase in average incomes were partly financed by an increase in contributions and partly through investments, very similar to private insurance. The fund was obliged by law to operate the insurance scheme according to sound economic and business practice and it was supervised by the competent ministry.²⁶¹ It must be stressed that following the introduction of the mandatory insurance scheme in 1965, Italian legislation twice considered compulsory private insurance a valid alternative to public insurance by the fund.²⁶²

In assessing the nature of the fund, the Court first made general statements on the role and importance of social law. It underlined that Community law did not affect the power of the Member States to organize their social security systems. It further stated that insurance against accidents at work and occupational diseases had been part of the social security schemes of the Member States for a long time.²⁶³ It then pointed out that the fund in question was authorized by Community law to coordinate the national social insurance schemes for accidents at work and occupational diseases for workers moving in the Community according to Regulations 1408/71 and 574/72.²⁶⁴ Here the Court obviously wanted to show that Community law accepted the scheme in question, even though the connection to competition law was not made clear. The Court continued by emphasizing the social purpose of the fund. In this context it mentioned the cover against risks of accidents at work and occupational diseases that did not depend on civil liability and the automatic payment of benefits.²⁶⁵ Furthermore, the Court identified different elements of solidarity in the scheme: the rate of

²⁶¹ For the different features of the fund, see in detail Opinion of AG Jacobs in *Cisal*, *supra* note 106, para. 3-26 and para. 50-76; Judgment of the Court in *Cisal*, *supra* note 106, para. 1-11.

²⁶² *Cisal*, *supra* note 106, para. 14.

²⁶³ *Cisal*, *supra* note 106, para. 31 seq.

²⁶⁴ *Cisal*, *supra* note 106, para. 33.

²⁶⁵ *Cisal*, *supra* note 106, para. 34-36.

contributions and the insured risk were not systematically proportionate, because there were certain maximum ceilings of the level of contributions and the earnings of the insured were taken into consideration as well in calculating the rate of contributions; benefits were not necessarily proportionate to the earnings because of the calculation of benefits according to a narrow range of incomes (30% above and 30% below national average); there was thus no direct link between contributions and benefits and better paid workers financed lower paid workers.²⁶⁶ Finally, the Court stressed that the State not only supervised the fund, but ultimately fixed the amount of benefits and contributions, the amount of benefits being imposed by law independent from investment results, the amount of contributions being approved by ministerial decree.²⁶⁷ The foregoing led the Court to conclude that the fund, "being engaged in one of the traditional branches of social security", fulfilled an exclusively social function and was hence not engaged in an economic activity.²⁶⁸

The latter point concerning the State's influence might have been decisive; it constituted a kind of State action defence²⁶⁹ and made clear that the benefits were not directly related to the results of the investments. However, the former points are of higher doctrinal interest. In *Cisal* the Court was faced with a social insurance scheme against accidents at work, and not a pension scheme as in the previous cases (except for *Poucet et Pistre*, where there was also a sickness and maternity scheme at stake). Thus a distinction between the first and second pillar could not be applied. Furthermore the scheme in *Cisal* was a hybrid, based on both capitalization and the redistribution method.²⁷⁰ The Court could not simply follow the clear-cut reasoning established in *Fédération Française*, *Albany*, *Brentjens*, *Drijvende Bokken* and *Pavlov*, distinguishing between funds based on the redistribution method (pay-as-you-go) and those based on capitalization, where benefits depended on the results of investments. The litmus test, whether competition between the fund and a private insurance company was (at least in principle) possible, was not mentioned by the Court either.²⁷¹ Rather it stated in very general terms the importance of social security and the competence of the Member States in organizing these schemes as well as the recognition of these schemes in Community law. Referring back to *Poucet et Pistre*, the Court weighed the degree of social purpose and solidarity involved in the scheme, which were treated rather negligently in the other cases.

²⁶⁶ *Cisal*, *supra* note 106, para. 38-42.

²⁶⁷ *Cisal*, *supra* note 106, para. 43 seq.

²⁶⁸ *Cisal*, *supra* note 106, para. 45.

²⁶⁹ For the State action defence see below at pp. 64 seq.

²⁷⁰ See Opinion of AG Jacobs, *Cisal*, (2002) ECR I-691, 707, para. 55-58.

²⁷¹ As opposed to *Fédération Française*, *supra* note 105, para. 17; *Albany*, *supra* note 2, para. 83 seq.; *Pavlov*, *supra* note 253, para. 112, 115 seq. and to the Opinion of AG Jacobs in *Cisal*, *supra* note 106, para. 38.

The first case in which the CFI was confronted with the problem of social insurance and competition law was *FENIN* in 2003.²⁷² Here the CFI had to deal with statutory health insurance in Spain. The main focus was on the relation between the fund and third parties (the suppliers of medical goods and services), which will be dealt with below.²⁷³ Nevertheless the judgment contained interesting statements concerning the definition of an undertaking in the field of social insurance. The CFI claimed that the approach taken in *Poucet et Pistre* had never been abandoned, but was only clarified by the later case-law. The CFI thus listed certain features that prevented a fund from being regarded as an undertaking: an exclusively social function, an activity based on the principle of national solidarity, the non-profit making character of the fund and the fact that benefits were not related to contributions. The CFI regarded the somewhat deviating decisions in *Fédération Française* and the triplet of *Albany* cases as a confirmation of the case-law, fine-tuning the feature of solidarity that must be assessed according to its degree. Applying these features to the funds in question, the CFI came to the conclusion that they could not be considered undertakings.²⁷⁴ It is striking that, while the ECJ neglected the social purpose, the existing features of solidarity and the non-profit making character in *Fédération Française* and the *Albany* cases, the later jurisprudence of the CFI seemed to return to the original case-law of *Poucet et Pistre*.

The most recent case dealing with competition law's treatment of social insurance was *AOK-Bundesverband*.²⁷⁵ Here the Court had to consider the statutory health insurance scheme in Germany. The main question concerned the relationship between the funds and the suppliers of medical goods and services.²⁷⁶ Yet the case also dealt with the question of whether these funds could be regarded as undertakings in their relation to the insured. The features of the insurance scheme were the following: employees had to affiliate to the scheme, if their income did not exceed a certain threshold and if they were not covered by any other statutory scheme (e.g. for civil servants). Contributions, paid by the insured and their employers, depended on the income of the insured. These contributions were not related to the basic benefits. The system was based on benefits in kind and not on reimbursement, meaning that the funds were in general required to purchase medical services and products directly and give them to the insured. A certain degree of competition existed between the funds and between

²⁷² Case T-319/99, *FENIN*, (2003) ECR II-357.

²⁷³ See below at p. 53.

²⁷⁴ *FENIN*, *supra* note 272, para. 38 seq.

²⁷⁵ *AOK-Bundesverband*, *supra* note 107.

²⁷⁶ See below at pp. 54 seq.

the funds and private insurers, which made the activity of the funds similar to the economic activity of private insurers. The funds themselves could determine the level of contributions and these levels varied between the different funds (by up to one third). Since employees were free to choose their fund, price competition existed between the funds. Yet despite this price competition, national solidarity was guaranteed by a system called *Risikostrukturausgleich*. This meant that profitable funds had to finance those funds that insured higher risks. Furthermore, there was competition with regard to services, since funds were allowed to offer special services in addition to the basic benefits. Funds and private insurers were in direct competition with regard to employees who exceeded the threshold of income and could choose between them.²⁷⁷

Advocate General *Jacobs* arrived at the conclusion that the funds in question constituted undertakings. They could determine for themselves the level of contributions, engaged in price and service competition with one another, and even competed with private insurers with regard to voluntary insurance. These elements of competition persuaded the Advocate General that the funds' activities were of an economic nature and that hence the competition rules should apply.²⁷⁸

The Court, on the other hand, came to the conclusion that the funds in question could not be considered undertakings.²⁷⁹ Having quoted the general definition of an undertaking in EC competition law from the *Höfner v Elser* case,²⁸⁰ the Court proceeded to define the term "in the field of social security".²⁸¹ This might mean that there is a special definition of the term "undertaking" with regard to social security. The Court held that social insurance funds were not engaged in an economic activity for the purposes of competition law, if they pursued an exclusively social purpose.²⁸² According to the ECJ, this occurs where funds managing compulsory insurance schemes are based on the principle of national solidarity, are non-profit-making, merely apply the law, and cannot influence the amount of the contributions, the use of assets and the fixing of the level of benefits. These statutory benefits must not be

²⁷⁷ For the different features of the scheme, see in detail Opinion of AG Jacobs in *AOK-Bundesverband*, *supra* note 107, para. 5-9, para. 36-42 and Judgment of the Court in *AOK-Bundesverband*, *supra* note 107, para. 4-11, 34-44.

²⁷⁸ Opinion of AG Jacobs in *AOK-Bundesverband*, *supra* note 107, para. 37-42.

²⁷⁹ *AOK-Bundesverband*, *supra* note 107, para. 57.

²⁸⁰ *Höfner v Elser*, *supra* note 231, para. 21.

²⁸¹ *AOK-Bundesverband*, *supra* note 107, para. 47.

²⁸² *AOK-Bundesverband*, *supra* note 107, para. 47, 58 seq.

directly linked to the amount the contributions.²⁸³ Thus the Court returned to its position in *Poucet et Pistre*, emphasizing long-neglected features like the social purpose and the non-profit-making character of the fund. On the other hand, referring to *Fédération Française* and *Albany*, the Court stated that the funds in these cases engaged in an economic activity in competition with private insurance companies.²⁸⁴ Regarding the German sickness funds, the Court emphasized the following features as relevant: they fulfil an exclusively social function, are entirely non-profit-making and are based on the principle of national solidarity. The law obliges them to offer basic benefits that are independent from the amount of contributions. Thus they cannot influence the level of these basic benefits. Additionally, the *Risikostrukturausgleich* facilitates a certain equalization of costs between the funds.²⁸⁵ The ECJ concluded that there was no competition among the funds or between the funds and private companies with regard to the grant of the obligatory benefits, which constituted their main function. Hence the funds were regarded as being similar to the bodies at issue in *Poucet et Pistre* and *Cisal*. Therefore the activity of the funds was considered non-economic in nature.²⁸⁶

The ECJ simply ignored the competition between the funds and private insurers with regard to employees who were not obliged to insure with the funds.²⁸⁷ It also ignored the competition with regard to additional services, since these did not belong to the funds' so-called main function of offering basic benefits.²⁸⁸ With regard to the competition in contribution rates, the Court plainly stated that this had been introduced by the German law to make the funds more effective and less costly, but that the pursuit of this objective could not alter the character of the funds' activity.²⁸⁹ This reasoning is idiosyncratic: social insurance can be made more efficient by the introduction of elements of competition, but competition law, whose very purpose is the protection of this competition, is not applicable.²⁹⁰ The simple negligence of these elements of competition, which make the activities of the funds similar to those of private insurers, makes the case-law of the ECJ unreliable. One can literally sense how the

²⁸³ AOK-Bundesverband, *supra* note 107, para. 47.

²⁸⁴ AOK-Bundesverband, *supra* note 107, para. 50.

²⁸⁵ AOK-Bundesverband, *supra* note 107, para. 51-53.

²⁸⁶ AOK-Bundesverband, *supra* note 107, para. 54 seq. contra the order of reference BGH, decision of 03.07.2001 – KZR 31/99, (2001) WRP 1331, 1335.

²⁸⁷ See U. M. GASSNER, "Arzneimittel-Festbeträge: Luxemburg locuta – causa finita", (2004) WuW 1028, at 1033.

²⁸⁸ See GASSNER, *supra* note 287, at 1032.

²⁸⁹ AOK-Bundesverband, *supra* note 107, para. 56.

²⁹⁰ See S. BELHAJ, J. W. VAN DE GRONDEN, "Some Room For Competition Does Not Make a Sickness Fund An Undertaking. Is EC Competition Law Applicable to the Health Care Sector? (Joined Cases C-264/01, C-306/01, C-453/01 and C-355/01 AOK)", (2004) ECLR 682, at 684 seq.; GASSNER, *supra* note 287, at 1037.

ECJ tried to avoid the application of competition law and thus political reason defeated legal doctrine.²⁹¹

In summary, the development of the case-law in this field is inconsistent.²⁹² In the beginning (*Poucet et Pistre*) and the end (*Cisal, AOK-Bundesverband*), the Court stressed the following features to exclude a fund from the definition of undertaking in EC competition law: exclusively social objective, compulsory schemes, based on the principle of national solidarity, i.e. involving elements of redistribution and providing statutory benefits that are independent from the contributions, non-profit-making character, and finally the strength of a State's influence via supervision or legally mandated requirements. The umbrella term for these features is the pursuit of an exclusively social objective that precludes an economic activity – at least in the field of social security.²⁹³ In the intervening cases (*Fédération Française, Albany cases, Pavlov*), it seemed that the Court would only distinguish between funds based on the redistribution method (pay-as-you-go) on the one hand and funds based on the principle of capitalization on the other hand. Yet the Court obviously abandoned this line of reasoning when faced with a hybrid scheme (*Cisal*) that involved both elements of the redistribution method and capitalization. Thus the Court takes into account the different features it first identified in *Poucet et Pistre* and tries to apply a *Gesamtbetrachtung* (overall view) weighing the different characteristics, especially with regard to the degree of solidarity involved.²⁹⁴ This creates wide latitude for the Court and causes damage to legal certainty.²⁹⁵ The impreciseness of this case-law can be seen in *AOK-Bundesverband*, where AG Jacobs considered the funds to be undertakings and the ECJ did not, though both applied the same criteria.

²⁹¹ GASSNER, *supra* note 287, at 1033 speaks of ideological bias. O. HUMPE, "Arrêts « Albany International », « Maatschappij Drijvende Bokken BV » et « Brentjens' Handelsonderneming BV »", (1999/4) *Revue du Marché Unique Européen* 200, at 205 and X. PRÉTOT, "La Cour de justice des Communautés européennes et les fonds de pension néerlandais – *Ad augusta per angusta...*", (2000) *Droit Social* 106, at 109 had already come to the same conclusion regarding the *Albany*-cases.

²⁹² W. BERG, "Neue Entscheidungen des EuGH zur Anwendung des EG-Kartellrechts im Bereiche der sozialen Sicherheit", (2000) *EuZW* 170, at 172 and C. KOENIG, C. SANDER, "Zur Vereinbarkeit des Festbetragssystems für Arzneimittel mit dem EG-Wettbewerbsrecht", (2000) *WuW* 975, at 980 describe the case-law as heterogeneous.

²⁹³ *AOK-Bundesverband*, *supra* note 107, para. 47, 58 seq. See also M. HELIOS, "EuG: Nationale Gesundheitssystemeinrichtungen sind keine Unternehmen", (2003) *EuZW* 283, at 288.

²⁹⁴ See BELHAJ, VAN DE GRONDEN, *supra* note 290, at 683 seq.; BERG, *supra* note 292, at 172; J. GUNDEL, "Europarechtliche Probleme der Bürgerversicherung", (2004) *EuR* 575, at 580; L. GYSELEN, "Case Law", (2000) 37 *CML Rev.* 425, at 439; J. W. VAN DE GRONDEN, "Purchasing Care: Economic Activity or Service of General (Economic) Interest?", (2004) *ECLR* 87, at 88.

²⁹⁵ For the same conclusion, see J. L. BUENDIA SIERRA, *Exclusive Rights and State Monopolies under EC Law. Art. 86 (formerly Art. 90) of the EC Treaty*, OUP, Oxford 1999, at pp. 54 seq.; IDOT, *supra* note 252, at 5; C. JENNERT, "Wirtschaftliche Tätigkeit als Voraussetzung für die Anwendbarkeit des europäischen Wettbewerbsrechts", (2004) *WuW* 37, at 45. GASSNER, *supra* note 287, at 1028 speaks of notorious legal uncertainty.

b) The relationship between the fund and third parties

So far there have been only two cases concerning the relationship between the funds and third parties, i.e. suppliers of medical goods and services. The first was the *FENIN* case in 2003.²⁹⁶ Here the applicant, an association of the major suppliers of medical products in Spain, complained about the fund's practice of not paying their debts for an average period of 300 days, although they paid their debts to other creditors within a reasonable period. The applicant asked the Commission to intervene because of an abuse of a dominant position (discriminatory practices) under Art. 82 EC, but the Commission refused, arguing that the funds did not act as undertakings. This refusal was challenged before the CFI.²⁹⁷ As mentioned above, the CFI considered the funds not to be undertakings in their relationship to the insured²⁹⁸ and came to the same conclusion regarding their relationship with the suppliers. The Court claimed that an economic activity was (only) the activity of *offering* goods and services on the market. A pure *purchase* activity could thus not be considered as an economic activity.²⁹⁹ According to the CFI, the activity of purchasing must always be regarded in connection with the subsequent use, i.e. the nature of the subsequent use is supposed to determine the nature of the purchasing activity.³⁰⁰ The CFI even admitted that the entity involved in a purchasing activity "may wield very considerable economic power, even giving rise to a monopsony", but was still not considered an undertaking because the subsequent activity was defined as non-economic.³⁰¹ Since the funds were allegedly engaged in a non-economic activity when providing medical goods to the insured, the act of purchasing was also considered to be non-economic. Thus the funds were not regarded as undertakings in their relationship with the suppliers.³⁰² The fact that the funds also used the purchased assets to provide services to private patients was not taken into account by the CFI due to procedural reasons.³⁰³ The impression again arises that the Court tried to use any means to preclude social insurance schemes from competition law.

²⁹⁶ *FENIN*, *supra* note 272.

²⁹⁷ *FENIN*, *supra* note 272, para. 1-8.

²⁹⁸ See above at p. 49.

²⁹⁹ *FENIN*, *supra* note 272, para. 36, quoting Case C-35/96 *Commission v Italy*, (1998) ECR I-3851, para. 36 and Case T-513/93, *Consiglio Nazionale degli Spedizionieri Doganali v Commission*, (2000) ECR II-1807, para. 36.

³⁰⁰ *FENIN*, *supra* note 272, para. 36.

³⁰¹ *FENIN*, *supra* note 272, para. 37.

³⁰² *FENIN*, *supra* note 272, para. 40.

³⁰³ The applicant challenged the Commission's decision, yet it only introduced this argument in its reply before the Court and not when it launched its complaint to the Commission under Art. 3 Council Regulation No 17/62. Hence the Commission did not have to take this fact into account and in judging whether the Commission's decision was erroneous, the CFI could not take it into account either.

In the decision *AOK-Bundesverband*,³⁰⁴ the ECJ had to consider the fixing of maximum amounts the German sickness funds would pay for a certain category of medicine in an insurance scheme based on benefits in kind. The different categories of medicine were determined by the Federal Committee of Doctors and Sickness Funds. The maximum amount applicable to each category, on the other hand, was jointly determined by the associations of sickness funds. Every price exceeding this amount had to be borne by the insured themselves, thus leading to the result that 93% of the medicine sold on the German markets were within the price range set by the national associations of sickness funds. This practice was challenged by medium-sized manufacturers of medicinal products alleging that the associations were infringing Art. 81 EC by jointly determining the maximum amounts.³⁰⁵

As mentioned above, the ECJ considered the funds not to be undertakings in their relation to the insured.³⁰⁶ Concerning the fixing of maximum amounts, and thus the relation to the suppliers, the Court stated that the associations of the funds performed a task that was imposed on them by law (§ 35 V SGB V). The law specified the procedure and laid down certain requirements with regard to quality and profitability. Furthermore, if the associations failed to determine the maximum amount, the competent minister would do so.³⁰⁷ Hence the discretion of the associations of funds was restricted to setting the precise level of the maximum amounts. In this context, the Court somewhat opaquely stated that “the discretion relates to the maximum amount paid by the sickness funds in respect of medicinal products which is an area where the latter do not compete”.³⁰⁸ A possible explanation of this statement, which is supported by the order of reference of the German BGH, is that the fixing of maximum amounts affects the relationship between the funds and the insured with regard to the statutory benefits, an area where the funds do not compete.³⁰⁹ This argument confuses the relationship between the fund and the suppliers on the one hand and between the fund and the insured on the other hand. Furthermore it is a circular argument, because the lack of competition with regard to the maximum amounts is the very problem in this case. The Court

³⁰⁴ Judgment of the Court of 16 March 2004 in joined cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK-Bundesverband*, not yet published.

³⁰⁵ Opinion of AG Jacobs in *AOK-Bundesverband*, *supra* note 107, para. 5-15; Judgment of the Court in *AOK-Bundesverband*, *supra* note 107, para. 12-30.

³⁰⁶ See above pp. 50-52.

³⁰⁷ *AOK-Bundesverband*, *supra* note 107, para. 61.

³⁰⁸ *AOK-Bundesverband*, *supra* note 107, para. 62.

³⁰⁹ See BGH, *supra* note 286, at 1336 and P. J. SLOT, “Applying the Competition Rules in the Healthcare Sector”, (2003) *ECLR* 580, at 586.

eventually argues that competition law is not applicable, because there is a restriction of competition.

The ECJ then stated that, when determining the fixed maximum amounts, the associations of funds did not pursue an interest separable from the funds' social objective. The determination of fixed maximum amounts was rather deemed to be "integrally connected with the activity of the sickness funds within the framework of the German statutory health insurance scheme".³¹⁰ According to the Court, the funds performed the task of managing the German statutory health insurance scheme imposed on them by law and were thus not engaged in an economic activity.³¹¹ The findings of the Court include both a State action defence argument (pure fulfillment of legal obligations) and also, similar to the CFI's *FENIN* judgment, the application of another *Gesamtbetrachtung* (overall view), claiming that the determination of maximum amounts could not be separated from the funds' main activity of providing social insurance.³¹² Thus one activity of an entity was declared the main activity that determined the nature of the entity, whereas the activity in question was considered a pure auxiliary activity.

c) Doctrinal Critique

aa) Social insurance as an economic activity

The foregoing analysis shows that the European Courts try to immunize social security from competition law by using the definition of the undertaking. It was also evident that this case-law is inconsistent, governed by political considerations rather than by legal doctrine, and that it is unpredictable and unreliable. A critique of this case-law thus has to focus on the concept of undertaking in Community competition law and has to ask, if the jurisprudence in the field of social insurance is in line with this definition.

Since the Treaty does not provide a definition of "undertaking", this definition must be derived by interpretation. The interpretation should focus on a teleological and systematic approach, taking into account the objectives of competition law. The teleological interpretation of the term "undertaking" was confirmed by the Court on several occasion,

³¹⁰ *AOK-Bundesverband*, *supra* note 107, para. 63.

³¹¹ *AOK-Bundesverband*, *supra* note 107, para. 64.

³¹² See C. KOENIG, C. ENGELMANN, "Das Festbetrags-Urteil des EuGH: Endlich Klarheit über den gemeinschaftsrechtlichen Unternehmensbegriff im Bereich der Sozialversicherung?", (2004) *EuZW* 682, at 684.

when it held that “Art. 85 (1) (now Art. 81 (1) EC – added by the author) applies to associations as far as their own activities or those of the undertakings belonging to them are calculated to produce the results to which it refers. To place any other interpretation on Art. 85 (1) would be to remove its substance”³¹³ and stating that the decisive feature in defining the term undertaking is that an “activity may give rise to conduct which the competition rules are intended to penalize”.³¹⁴ The objectives of competition law are the protection of economic freedom, market integration, the promotion of allocative, productive and dynamic efficiency on the market and the protection of competition as an economic learning process.³¹⁵ Hence competition law deals with (potential) markets and economic activities. Undertakings, as the subjects of competition law, must thus be (potential) actors in these markets, i.e. they must, at least potentially, perform an economic activity.³¹⁶ This is the initial point of the general definition of undertaking given by the Court in its *Höfner v Elser* case: “the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed”.³¹⁷ This definition is also confirmed by a systematic interpretation of the Treaty, because Art. 86 EC provides for “public undertakings and undertakings to which member states grant special or exclusive rights”, thus implying that neither the public law status nor the way of financing prevents an entity from being an undertaking.³¹⁸ This concept of an undertaking based on the activity rather than on the structure of the entity, is called the *functional* concept.³¹⁹

The decisive question now arises of what an economic activity is. The Court makes a distinction between economic activity and the exercise of *public authority (imperium)*³²⁰ by

³¹³ Case 71/74 *Frubo v Commission*, (1975) ECR 563, para. 30 seq.; joined Cases 96/82-102/82, 104/82, 105/82, 108/82 and 110/82, *IAZ v Commission*, (1983) ECR 3369, para. 20; Opinion of AG Jacobs in *Albany*, *supra* note 2, para. 313.

³¹⁴ *Fédération Française*, *supra* note 105, para. 21; For the teleological interpretation, see also Case 170/83, *Hydrotherm v Compact*, (1984) ECR I-2999, para. 11; KOENIG, SANDER, *supra* note 292, at 981; SLOT, *supra* note 309, at 584.

³¹⁵ Compare above at pp. 5-14.

³¹⁶ A. WINTERSTEIN, “Nailing the Jellyfish: Social Security and Competition Law”, (1999) *ECLR* 324, at 324.

³¹⁷ *Höfner v Elser*, *supra* note 231, para. 21. The Court repeated this definition in the context of social security in *Poucet et Pistre*, *supra* note 1, para. 17; *Fédération Française*, *supra* note 105, para. 14; *Albany*, *supra* note 2, para. 77; *Brentjens*, *supra* note 2, para. 77; *Drijvende Bokken*, *supra* note 2, para. 67; *Pavlov*, *supra* note 253, para. 74, 108; *Cisal*, *supra* note 106, para. 22; *FENIN*, *supra* note 272, para. 35; *AOK-Bundesverband*, *supra* note 107, para. 46.

³¹⁸ Particularly with regard to social insurance funds the argument is frequently brought forward that a consistent interpretation of Art. 86 EC must lead to the conclusion that they are engaged in an economic activity and thus undertakings, see GUNDEL, *supra* note 294, at 579.

³¹⁹ See, for example, Opinion of AG Jacobs in *Albany*, *supra* note 2, para. 214; JENNERT, *supra* note 295, at 37.

³²⁰ See, for example, P. AXER, “Europäisches Kartellrecht und nationales Krankenversicherungsrecht”, (2002) *NZS* 57, at 62; SLOT, *supra* note 309, at 584 seq. The term *imperium* is used by WINTERSTEIN, *supra* note 316, at 326.

stating with regard to employment procurement in *Höfner v Elser*: “The fact that employment procurement activities are normally entrusted to public agencies cannot affect the economic nature of such activities. Employment procurement *has not always been, and is not necessarily, carried out by public entities*” (emphasis added by the author).³²¹ The distinction between economic activity and public authority was further clarified by the Court in its *Eurocontrol* judgment, dealing with an international organisation in charge of, *inter alia*, collecting route charges for users of air space and controlling the air space on behalf of some of its Member States in certain regions in Europe: “(t)aken as a whole, Eurocontrol’s activities, by their nature, their aim and the rules to which they are subject, are connected with the *exercise of powers* relating to the control and supervision of air space which are *typically* those of *public authority*. They are not of an economic nature justifying the application of the Treaty rules of competition” (emphasis added by the author).³²² Hence the fulfillment of a classical State function that is based on the sovereignty of the state and its power of coercion over citizens (so-called *imperium* or *official authority*),³²³ cannot be considered an economic activity, because private companies could not possibly exercise this power by themselves.³²⁴ Yet it has to be noted that the exercise of *imperium* can be carried out by the State itself³²⁵ or that the State can entrust private actors with it. As the Court stated: “In that connection, it is of no importance that the State is acting directly through a body forming part of the State administration or by way of a body on which it has conferred special or exclusive rights”.³²⁶ The nature of the activity, and not the legal status of the acting entity, is hence relevant in accordance with the *functional* concept of an undertaking: “In order to make the distinction between the two situations (...) (between exercise of public authority and economic activity – added by the author), it is necessary to consider the nature of the activities carried on by the

³²¹ *Höfner v Elser*, *supra* note 231, para. 22.

³²² Case C-364/92, *SAT Fluggesellschaft v Eurocontrol*, (1994) ECR I-43, para 30.

³²³ The basic definition of *imperium* or *official authority* was given by AG Mayras in case C-2/74, *Reyners v Belgium*, (1974) ECR 631, 664 seq.: “Official authority is that which arises from the sovereignty and majesty of the State; for him who exercises it, it implies the power of enjoying the prerogatives outside the general law, privileges of official power and power of coercion over citizens. Connection with the exercise of this authority can therefore arise only from the State itself, either directly or by delegation to certain persons who may even be unconnected with the public administration.”

³²⁴ According to GYSELEN, *supra* note 294, at 440 and JENNERT, *supra* note 295, at 43-46 this negative definition of economic activity is the only valid definition, i.e. every activity is either the exercise of public authority or an economic activity. See also GUNDEL, *supra* note 294, at 577; WINTERSTEIN, *supra* note 316, at 326.

³²⁵ For example with regard to the grant of a funeral concession by a municipality, the ECJ held in case C-30/87, *Bodson v Pompes Funèbres des Régions libérées*, (1988) ECR 2479, para. 18 that Art. 85 did not apply to “communes acting in their capacity as public authorities.”

³²⁶ Case C-343/95, *Cali & Figli v SEPG*, (1997) ECR I-1547, para. 17. See also Case 118/85, *Commission v Italy*, (1987) ECR I-2599, para. 8; Case C-387/93, *Banchero*, (1995) ECR I-4663, para. 49.

public undertaking or body to which the State has conferred special or exclusive rights.”³²⁷ AG *Jacobs* deduced from this distinction between economic activity and *imperium* that an economic activity could be determined by the test of whether a private company could possibly be engaged in the activity itself: “The basic test is therefore whether the entity in question is engaged in an activity which could, at least in principle, be carried on by a private undertaking in order to make profit.”³²⁸ This test makes sense, because if private companies were not able to carry out the activity in question, there would be no need to protect (potential) competition between them. As AG *Jacobs* pointed out: “If there were no possibility for a private undertaking carrying on a given activity, there would be no purpose in applying the competition rules to it.”³²⁹

When applying this test to different social insurance schemes, *Jacobs* claimed that a pension scheme based on the redistribution method (meaning pay-as-you-go) is necessarily operated by the State and that it could not possibly be carried on by private companies, because nobody would affiliate without the guarantee that the upcoming generation would finance his pension.³³⁰ Similarly, he argued that the Italian insurance fund against accidents at work and occupational diseases in the agricultural sector, based on the redistribution method, was not an entity engaged in an economic activity, since the current pensions for workers incapable of working were financed by active workers.³³¹ Regarding the Italian social insurance scheme against accidents at work and occupational diseases in the industrial sector, which was partly financed by current contributions and partly by capitalization, the Advocate General argued that this activity could not be considered economic, because contributions and benefits were only linked on an aggregate level and not on an individual level: “An insured (or a third party paying contributions in respect of the insured) will be disposed to pay contributions only if he can expect in exchange the benefits which are related to the amount of contributions paid. In a

³²⁷ *Calì & Figli v SEPG*, *supra* note 326, para. 18. See also *Commission v Italy*, *supra* note 326, para. 7 and WINTERSTEIN, *supra* note 316, at 327.

³²⁸ Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 311; similarly *id.* in his Opinion in *Pavlov*, *supra* note 253, para. 173 and *AOK-Bundesverband*, *supra* note 107, para. 27. In his Opinion in *Cisal*, *supra* note 106, para. 38 he added that the activity “consists in offering goods and services on a given market”. See also opinion of AG *Cosmas* in *Commission v Italy*, *supra* note 299, para. 51 and the statement of AG *Tesaro* in *Fédération Française*, *supra* note 105, para. 13: “...the non-profit making status of the CNAVMA and the other agricultural social insurance funds is irrelevant, since the activity to which they are entrusted is undeniably capable of being carried on by a private undertaking with a view to gain within the meaning of the *Höfner and Elser* judgment...”. In the same vein GASSNER, *supra* note 287, at 1030; GUNDEL, *supra* note 294, at 577; JENNERT, *supra* note 295, at 45 seq.; H.-P. SCHWINTOWSKI, “Der Begriff des Unternehmens im europäischen Wettbewerbsrecht”, (1994) *ZEuP* 294, at 299; WINTERSTEIN, *supra* note 316, at 325.

³²⁹ Opinion of AG *Jacobs* in *AOK-Bundesverband*, *supra* note 107, para. 27.

³³⁰ Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 338. See WINTERSTEIN, *supra* note 316, at 330, agreeing with AG *Jacobs* on this point.

³³¹ Opinion of AG *Jacobs* in *Cisal*, *supra* note 106, para. 57.

free market no private undertaking could for example operate a health insurance scheme in which contributions were related to earnings, whilst benefits were identical for all insured.”³³² However it must be recalled that in this case (*Cisal*) there was at least an indirect and limited link between contributions and benefits, because both benefits and contributions were calculated according to earnings, even though only a limited range of earnings (below and above 30% of average) was taken into account for the calculation of benefits. Hence AG *Jacobs* had to balance the degree of solidarity, i.e. the strength of the link between benefits and contributions, involved.³³³ AG *Jacobs* himself uttered doubts as to the practicability of his test of an economic activity: “However, the application of that test in relation to certain fields of activity is by no means straightforward.”³³⁴ This led him to the conclusion that, especially in the field of social insurance and in determining the necessary degree of solidarity that renders the activity non-economic “(i)t is of course difficult to arrive at any precise statement of the point at which the redistributive component of a pension or insurance scheme will be so pronounced as to eclipse the economic activities which private pension and insurance providers compete to supply.”³³⁵

Apart from the problem of applying the test in the single case and weighing the elements of solidarity, *Jacob's* reasoning has a major general flaw. When considering whether the activities of social insurance funds are of an economic nature, *Jacobs* does not restrict his analysis to the services offered, but also takes into consideration the way in which they are financed and organized and treats them as one single activity that is to be assessed.³³⁶ It is not disputable that private companies can and do engage in health insurance,³³⁷ pension insurance³³⁸ and insurance against accidents at work and occupational diseases³³⁹.³⁴⁰ The only

³³² Opinion of AG *Jacobs* in *Cisal*, *supra* note 106, para. 62.

³³³ Opinion of AG *Jacobs* in *Cisal*, *supra* note 106, para. 66 seq. and para. 80. See also his opinion in *AOK-Bundesverband*, *supra* note 107, para. 35: “Classification is thus necessarily a question of degree.”

³³⁴ Opinion of AG *Jacobs* in *AOK-Bundesverband*, *supra* note 107, para. 28.

³³⁵ Opinion of AG *Jacobs* in *AOK-Bundesverband*, *supra* note 107, para. 35. See also GUNDEL, *supra* note 294, 580.

³³⁶ So AG *Jacobs* stated in his Opinion in *AOK-Bundesverband*, *supra* note 107, para. 33 with regard to redistributive pension funds: “In such a scheme, redistribution is not ancillary to some other activity that could exist independently of it. Rather, the scheme consists entirely of the State-compelled redistribution of resources from those currently employed to those who have retired.” Contra this reasoning GASSNER, *supra* note 287, at 1031.

³³⁷ For example in Germany for self-employed workers and for workers whose incomes exceed a certain level, compare Opinion of AG *Jacobs* in *AOK-Bundesverband*, *supra* note 107, para. 5 and judgment of the court in *AOK-Bundesverband*, *supra* note 107, para. 6.

³³⁸ Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 338: “...it is clear that the market has generated pension schemes operating on the basis of the capitalisation principle.”

³³⁹ For example in Belgium see Case C-206/98, *Commission v Belgium*, (2000) ECR I-3509 and opinion of AG *Jacobs* in *Cisal*, *supra* note 106, para. 54.

social insurance that definitely does not constitute an economic activity is unemployment insurance, because the risk of unemployment is not calculable on an actuarial basis and hence not insurable. It depends on too many contingent factors like economic development and the behavior of the employee and the employer.³⁴¹ With regard to the different forms of solidarity and redistribution, a distinction between the four groups of solidarity as identified above and the financing method of either pay-as-you-go or capitalization must be made.³⁴² The different elements of solidarity constitute an organizational choice³⁴³ which facilitates insuring large parts of the population with insurance against social risks under socially acceptable conditions. These elements of solidarity essentially constitute the way in which the social insurance is financed,³⁴⁴ i.e. the mechanisms of redistribution explained above,³⁴⁵ which facilitate the cross-subsidizing of bad risks and the less well-off. They are necessary so that the funds can fulfill their social objective. But the pursuit of a social objective itself, as settled by the case-law, cannot deprive the activity in question from being economic.³⁴⁶ The activity on the market, i.e. offering insurance services against the payment of contributions, has to be clearly distinguished from the additional social objective of providing large parts of the population with insurance under socially acceptable conditions. This social objective requires solidarity in the financing of the scheme. And this solidarity can only be maintained by certain anti-competitive measures like compulsory affiliation.³⁴⁷ But it is the very purpose of Art. 86(2) EC, and not of the definition of "undertaking" in Art. 81 EC, to justify anti-competitive behavior or state measures because of a general interest like the social objective in question here.³⁴⁸ In *Poucet et Pistre* the Court in fact applied a proportionality test to the anti-competitive measures when defining the term undertaking,³⁴⁹ while this test should be conducted in the framework of Art. 86(2) EC, which is intended for this very situation.³⁵⁰ Thus a systematic and teleological interpretation of the Treaty leads to the result that a

³⁴⁰ See WINTERSTEIN, *supra* note 316, at 327; GIESEN, *Sozialversicherungsmonopol*, *supra* note 94, at p. 125.

³⁴¹ GIESEN, *Sozialversicherungsmonopol*, *supra* note 94, at p. 125.

³⁴² See above pp. 18-20.

³⁴³ BERG, *supra* note 292, at 172.

³⁴⁴ BUENDIA SIERRA, *supra* note 295, at pp. 50, 58. AG Tesaro actually admits in his opinion in *Poucet et Pistre*, *supra* note 1, para. 9 with regard to the State fixing benefits and contributions of the insurance scheme in question: "In doing so, the State makes an economic policy choice which, while intended to ensure that the schemes in question are financed, also has consequences for the distribution of wealth in so far as, where necessary, it redistributes funds among the members of society." (emphasis added by the author).

³⁴⁵ See above at pp. 18-21.

³⁴⁶ See, for example, Case 155/73, *Sacchi*, (1974) ECR 409, para. 13 seq.; *Fédération Française*, *supra* note 105, para. 20 and also Case C-41/90, *Höfner v Elser*, *supra* note 231.

³⁴⁷ See above at p. 21.

³⁴⁸ Compare below at pp. 85-93, pp. 97-100 and BUENDIA SIERRA, *supra* note 295, at pp. 51, 58.

³⁴⁹ *Poucet et Pistre*, *supra* note 1, para. 8-13, 18 seq.

³⁵⁰ BERG, *supra* note 292, at 172; GIESEN, *Sozialversicherungsmonopol*, *supra* note 94, at pp. 123-127; GYSELEN, *supra* note 294, at 439 seq.

distinction must be made between the economic activity of offering insurance services on the market and the underlying social objective, which is attained by a certain solidaric financing mechanism. This argument is supported by the Court's decision in *Höfner v Elser*. Here the *Bundesanstalt für Arbeit* (German unemployment procurement agency) pursued a clear social objective in providing unemployment procurement, which was financed by contributions of employers and employees in the framework of the unemployment insurance.³⁵¹ This financing method exhibits a high degree of solidarity, because the working population and the employers finance procurement for the unemployed.³⁵² Nevertheless the Court considered the activity in question, i.e. employment procurement, to be of an economic nature.³⁵³ The decision of Member States to include certain elements of solidarity in their schemes cannot prevent the social insurance funds from being engaged in an economic activity and being considered undertakings.³⁵⁴ Rather solidarity has to be taken into account in the framework of Art. 86(2) EC, but not when defining the economic nature of an activity.³⁵⁵

With regard to the different financing methods in pension schemes, the conclusion of AG *Jacobs* is even more dismissible. The decision between the principle of pay-as-you-go and capitalization (or, in some cases, a mixed scheme) is a financing decision and Member States are currently moving away from the pay-as-you-go system, because the demographic development no longer allows for this method of financing.³⁵⁶ In this context it must be emphasized that schemes based on capitalization also can, and do, include strong elements of solidarity and redistribution like the lack of risk selection,³⁵⁷ independence of benefits from contributions and/or risks³⁵⁸ and hence compulsory affiliation^{359, 360}. Making the definition of

³⁵¹ *Höfner v Elser*, *supra* note 231, para. 19.

³⁵² See GIESEN, *Sozialversicherungsmonopol*, *supra* note 94, at p. 117.

³⁵³ *Höfner v Elser*, *supra* note 231, para. 21-23.

³⁵⁴ See HELIOS, *supra* note 293, at 288, who holds that the regulatory interventions of the State cannot prevent the activities of a social insurance fund from being economic. See also BERG, *supra* note 292, at 172; GASSNER, *supra* note 287, at 1031.

³⁵⁵ See BUENDIA SIERRA, *supra* note 295, at p. 58; GIESEN, *Sozialversicherungsmonopol*, *supra* note 94, at pp. 123-127; *id.*, *Die Vorgaben des EG-Vertrages*, *supra* note 138, at p. 131; GYSELEN, *supra* note 294, at 439 *seq.*

³⁵⁶ For example the introduction of the *Riester-Rente* in Germany. This concept means a shift of the German pension insurance scheme towards a three pillar system consisting of mandatory insurance, company pensions and private pensions. The German state subsidizes private insurance and grants certain tax advantages. To explain this shift in paradigm, the German Ministry of Health and Social Security argues that the redistributive mandatory scheme can no longer finance all pensions due to the demographic development, hence the promotion of schemes based on capitalization is necessary. See <http://www.bmgs.bund.de/deu/gra/themen/rente/4738.cfm>.

³⁵⁷ As in *Fédération Française*, *supra* note 105, para. 9 and para. 19; *Albany*, *supra* note 2, para. 75; *Pavlov*, *supra* note 253, para. 39 and para. 106.

³⁵⁸ Independence of benefits from risks was a factor in *Fédération Française*, *supra* note 105, para. 9 and para. 19; in *Albany* the benefits depended on the reserves and financial results of investments, but they were not linked to risks and contributions on an individual basis, i.e. the payment of average contributions led to benefits that were a certain percentage of the insured's former salary – Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para.

“economic activity” dependent on the question of capitalization or pay-as-you-go in pension schemes actually means that the Member States are able to determine the nature of an activity by a simple organizational decision. This clearly contradicts the general concept of an undertaking that involves every entity engaged in an economic activity, “regardless of the way in which it is *financed*.”³⁶¹

The negative definition of economic activity outlined above (economic activity is not exercise of public authority) has been supplemented with a positive definition by the CFI in *FENIN*. According to this definition, an economic activity consists of “offering goods and services on a given market”.³⁶² This supplementary definition was also used by AG *Jacobs* in his test of economic activity in *Cisal*.³⁶³ The positive definition of an economic activity is a generalization of a statement of the ECJ in *Commission v Italy*, where the Court had to make a distinction between economic activity and public authority. Regarding the body managing the tobacco monopoly in Italy, the AAMS, the Court stated that it “exercises an economic activity inasmuch as it offers goods and services on the market”³⁶⁴ and that “the State may act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature by offering good and services on the market”.³⁶⁵ It becomes obvious from the context that the Court defined the activity of offering goods and services as an economic activity, but did not want to imply the flipside of this definition, namely that an economic activity could only consist in the act of offering goods and services.³⁶⁶ In the former sense “that any activity consisting in offering goods and services on a given market is an economic activity” the definition has been constantly used in the case-law.³⁶⁷ The generalization and turn-around of this definition in *FENIN* is hence undue and very disputable,³⁶⁸ but it includes

306 and para. 343, where he incomprehensibly denies this feature, and the judgment of the Court in *Albany*, *supra* note 2, para. 74 seq.

³⁵⁹ Because of the missing link between contributions and benefits, compulsory affiliation was essential in *Albany*, *supra* note 2, para. 75. The same argument with regard to the missing link between insured risk (age, health) and the granted pensions was brought forward by the defendants in *Pavlov*, *supra* note 253, para. 106.

³⁶⁰ For a summary of elements of solidarity in activities that are considered economic, see WINTERSTEIN, *supra* note 316, at 330.

³⁶¹ *Höfner v Elser*, *supra* note 231, para. 21, emphasis added by the author.

³⁶² *FENIN*, *supra* note 272, para. 36.

³⁶³ Opinion of AG *Jacobs* in *Cisal*, *supra* note 106, para. 38.

³⁶⁴ *Commission v Italy*, (1987) *supra* note 326, para. 3.

³⁶⁵ *Commission v Italy*, (1987) *supra* note 326, para. 7.

³⁶⁶ Contra the interpretation of JENNERT, *supra* note 295, at 38 seq.

³⁶⁷ *Commission v Italy*, (1998) *supra* note 299, para. 36; *Pavlov*, *supra* note 253, para. 75; *Cisal*, *supra* note 106, para. 23; *Consiglio Nazionale degli Spedizionieri Doganali v Commission*, *supra* note 299, para. 36.

³⁶⁸ It is restricted to markets for goods and services, even though there are also technology markets (intellectual property and know-how) as well as innovation markets that are subject to the competition rules. Furthermore this definition is restricted to *offering* goods and service and excludes *purchasing*. This problem will be discussed in

at least the true thought that offering goods and services constitutes an economic activity. Since services also include insurance services,³⁶⁹ the application of this additional definition does not alter but confirms the conclusion that social insurance funds must be regarded as undertakings.

Another issue that is relevant in this context is the question of whether an entity which merely applies national law is engaged in an economic activity. The relevant case-law goes back to the *Ladbroke* decision of the ECJ, hence it is justified to speak of the *Ladbroke* doctrine.³⁷⁰ Here the Court set aside a judgment of the CFI³⁷¹ and argued against the opinion of AG *Cosmas*³⁷² that Articles 81 and 82 EC only apply to the behavior an undertaking is engaged in on its own initiative and that, if this conduct is imposed on the undertaking by national law or if national law itself eliminates the possibility to compete, the anti-competitive effects are not attributable to the autonomous conduct of the undertaking and hence these articles are not applicable.³⁷³ The Court could actually rely on a more than 20 year old tradition of case-law that (at least implicitly) always followed this doctrine.³⁷⁴ The underlying idea of the *Ladbroke* doctrine has also had a prominent impact on case-law concerning social security. Thus the ECJ decided in *Poucet et Pistre* that the insurance funds did not act as undertakings, because, among many other reasons, they were subject to control by the State and they merely applied the law in fixing benefits and contributions as well as in deciding upon the use of their assets.³⁷⁵ Similarly, the Court argued in the triplet *Albany* cases and in *Pavlov* that the funds in question were undertakings. It gave as one argument that the funds themselves (and not the State via the law) determined the amount of contributions and benefits.³⁷⁶ In *Cisal* the Court deemed the insurance fund not to be an undertaking, because the amount of benefits and contributions was ultimately fixed by the State.³⁷⁷ Finally, the Court decided in *AOK-*

detail below at pp. 67-70. JENNERT, *supra* note 295, at 42 criticizes that this definition is restricted to a given market, thus not being able to protect potential competition in monopolized sectors.

³⁶⁹ Compare above at pp. 59-62.

³⁷⁰ SLOOT, *supra* note 309, at 588 introduces this term.

³⁷¹ Case T-32/93, *Ladbroke Racing v Commission*, (1994) ECR II-1015.

³⁷² AG *Cosmas* argued in his opinion in joined cases C-359/95 P and C-379/95 P, *Commission and France v Ladbroke Racing*, (1997) ECR I-6265, para. 49-76 that the ECJ should confirm the judgment of the CFI and overturn its former case-law, because Articles 81 and 82 EC take precedence over national rules and have a direct vertical and horizontal effect, so undertakings must obey Community law and breach contradictory national law.

³⁷³ *Commission and France v Ladbroke Racing*, *supra* note 372, para. 33.

³⁷⁴ *Suiker Unie and Others v Commission*, *supra* note 43, para. 36-72, especially 65, 66, 71, 72; Case 41/83, *Italy v Commission*, (1985) ECR 873, para. 16-20; Case C-202/88, *France v Commission*, (1991) ECR I-1223, para. 55; Case C-18/88, *GB-Inno-BM*, (1991) ECR I-5941, para. 20.

³⁷⁵ *Poucet et Pistre*, *supra* note 1, para. 13 seq.

³⁷⁶ *Albany*, *supra* note 2, para. 81; *Brenijens*, *supra* note 2, para. 81; *Drijvende Bokken*, *supra* note 2, para. 71; *Pavlov*, *supra* note 253, para. 112-114.

³⁷⁷ *Cisal*, *supra* note 106, para. 43.

Bundesverband that the statutory German sickness funds did not constitute undertakings for the purposes of competition law, because, among other reasons, they were compelled by law to offer obligatory benefits independent of contributions.³⁷⁸

There are eventually two possibilities to deal with the *Ladbroke*-doctrine: either the conduct of merely applying national law can be deemed not to constitute an economic activity or the defendant can be granted a so-called State action defence, i.e. only accountability is interrupted. The difference is that, in the latter case, at least Art. 86(1) EC is applicable to the relevant state measures, which would otherwise be excluded, since the entities acting according to the national law would not constitute undertakings. Since an economic activity is considered to include at least the offering of goods and services and to exclude the exercise of *imperium*, it is more stringent to apply a State action defence, because the mere application of law does not automatically constitute the exercise of *imperium* and can well consist of the distribution of goods and services. The mere application of the law does not change the nature of the activity, but is only decisive in establishing accountability and responsibility for the activity.³⁷⁹ This solution is clearly in line with the wording of the *Ladbroke* judgment, where the Court stated that “the restriction of competition is not *attributable*, as those provisions (art. 81 seq.) implicitly require, to the *autonomous conduct of the undertakings*” (emphasis added by the author).³⁸⁰ In its *C.I.F.* judgment the Court confirmed this approach and restricted the effect of the *Ladbroke* doctrine to prevent an undertaking from penalization for past anti-competitive behavior, before the national legislation in question had been declared incompatible with Articles 81, 10, 3 EC by a national competition authority. The existence of the national legal obligations was deemed “a justification which shields the undertakings concerned from all the consequences of an infringement of Articles 81 EC and 82 EC.”³⁸¹ Even though the national law would remain in force, undertakings could no longer rely on the State action defence for preventing penalization for their future conduct after the decision of the competition authority had become definitive.³⁸² This clearly shows that the *Ladbroke* doctrine only interrupts accountability and does not prevent an activity from being economic

³⁷⁸ *AOK-Bundesverband*, *supra* note 107, para. 52.

³⁷⁹ WINTERSTEIN, *supra* note 316, at 327 also arrives at this conclusion with the argument that it has been held irrelevant by the Court if the State is directly involved in an economic activity or via a private entity endowed with special rights and enforcing the law.

³⁸⁰ *Commission and France v Ladbroke Racing*, *supra* note 372, para. 34.

³⁸¹ Case C-198/01, *C.I.F.*, (2003) ECR I-8055, para. 54.

³⁸² Judgment of the Court in *C.I.F.*, *supra* note 381, para. 55 against the Opinion of AG Jacobs, para. 55-60.

in nature.³⁸³ In the field of social security, on the other hand, the Court has obviously included the test of the State's influence in its definition of an undertaking, thus deviating from its other case-law.³⁸⁴

Another strand of case-law which became relevant in defining an undertaking/association of undertakings in the field of social insurance is the distinction between an association of undertakings and a public expert body.³⁸⁵ In *AOK-Bundesverband*, the fixed maximum amounts were set by the associations of sickness funds. The Court has constantly held that bodies consisting of independent experts who are not bound by orders or instructions of the undertakings and are obliged by law to take into account not only the interests of the undertakings concerned, but also general public interests, cannot be considered associations of undertakings, even if the concerned undertakings participate in appointing the experts (the term *Reiff* doctrine will subsequently be used).³⁸⁶ In *AOK-Bundesverband* the Court did not explicitly distinguish between independent expert bodies and associations of undertakings. Rather it considered if the setting of fixed maximum amounts constitutes an economic activity. In doing so, it seemed to employ elements of the *Ladbroke* doctrine when stating that the associations merely perform an obligation imposed on them by law and only have a very limited discretion that is restricted to an area in which the funds do not compete.³⁸⁷ The Court also seemed to apply elements of the *Reiff* doctrine when stating that in determining fixed maximum amounts the associations do not pursue a specific interest separable from the exclusively social objective of the funds,³⁸⁸ thus acting in the public interest like independent expert bodies. This wild mixture of different doctrines seems rather ludicrous. On the other hand, AG *Jacobs* (who thoroughly distinguished between the different questions) arrived, when applying the *Reiff* doctrine, at the clear result that the associations of sickness funds must be considered associations of undertakings. He regarded the German sickness funds as

³⁸³ See also BUENDIA SIERRA, *supra* note 295, at p. 50; GIESEN, *Sozialversicherungsmonopol*, *supra* note 94, at p. 123; contra C. ENGELMANN, *Kostendämpfung im Gesundheitswesen und EG-Wettbewerbsrecht. Am Beispiel der Versorgung mit Arzneimitteln und ärztlichen Leistungen in der deutschen und französischen gesetzliche Krankenversicherung*, Nomos-Verlags-Gesellschaft, Baden-Baden 2002, at p. 68 seq.

³⁸⁴ C. KOENIG, C. ENGELMANN, *supra* note 312, at 685. In *AOK-Bundesverband* AG *Jacobs* applied a State action defence to the activity of setting fixed maximum amounts, Opinion of AG *Jacobs*, *AOK-Bundesverband*, *supra* note 107, para. 73-85. The Court did not apply this defence.

³⁸⁵ See GASSNER, *supra* note 287, at 1034 seq.

³⁸⁶ Case C-185/91, *Reiff*, (1993) ECR I-5801, para. 15-19; Case C-153/93, *Delta Schiffahrts- und Speditionsgesellschaft*, (1994) ECR I-2517, para. 16-19; joined Cases C-140-142/94, *DIP and Others v Commune di Bassano del Grappa and Commune di Chioggia*, (1995) ECR I-3257, para. 16-19; *Commission v Italy*, (1998) *supra* note 299, para. 39-44.

³⁸⁷ *AOK-Bundesverband*, *supra* note 107, para. 61 seq.

³⁸⁸ *AOK-Bundesverband*, *supra* note 107, para. 63.

undertakings³⁸⁹ and their leading associations as associations of undertakings. He gave the following reasons for considering them associations of undertakings: they only consisted of representatives of the sickness funds, their decisions became directly effective without prior approval of the minister of health and the criteria of the procedure laid down by law only corresponded to the (economic) interest of the sickness funds to set maximum amounts at the lowest possible level.³⁹⁰ One must agree with the Advocate General that a body which only consists of representatives of the sickness funds who are bound to act on their behalf and have to fix purchase prices for these funds at as low a level as possible cannot be considered an independent expert body, but constitutes an association of undertakings.³⁹¹

In summary it can be said that, instead of observing the general principles described above, i.e. the general definition of an undertaking from the *Höfner v Elser* case, the State action defence (*Ladbroke* doctrine) and the *Reiff* doctrine, the Court introduced in its case-law a *Gesamtbetrachtung* (overall view) of a certain number of features that have to be taken into account when determining the nature of the activity of a social insurance fund. These features are: the exclusively social objective, a compulsory insurance, based on the principle of national solidarity, i.e. involving elements of redistribution and providing statutory benefits that are independent from the contributions, the non-profit-making character and finally the State's strong influence via supervision or requirements of the law, all of which can be summarized under the term "pursuit of an exclusively social function".³⁹² The Court weighs those features, paying special attention to the degree of solidarity involved,³⁹³ and then comes to a conclusion as regards the nature of the activity. It must also be borne in mind that the features just mentioned do not describe the activity of offering insurance services by the funds as such (as it should be according to *Höfner v Elser* and the *functional* concept of an undertaking), but rather characterize the organization of the scheme (*institutional* concept of an undertaking).³⁹⁴ This concept of undertaking is clearly not in line with the general concepts of competition law as outlined above. This is further illustrated by the fact that the non-profit-making character of an entity³⁹⁵ or its pursuance of a social, non-economic purpose³⁹⁶ are not

³⁸⁹ Opinion of AG Jacobs in *AOK-Bundesverband*, *supra* note 107, para. 37-42.

³⁹⁰ Opinion of AG Jacobs in *AOK-Bundesverband*, *supra* note 107, para. 52-61.

³⁹¹ See also *SLOT*, *supra* note 309, at 585 seq.

³⁹² See *HELIOS*, *supra* note 293, at 288.

³⁹³ See above at p. 52.

³⁹⁴ *BERG*, *supra* note 292, at 172. *GASSNER*, *supra* note 287, at 1030 seq. describes it as a paradigm shift from the *functional* to an *institutional* concept.

³⁹⁵ See, for example, Case 209/78 *Van Landewyck v Commission*, (1980) ECR 3125, para. 88; *Fédération Française*, *supra* note 105, para. 21; *BUENDIA SIERRA*, *supra* note 295, at pp. 32, 50; *SCHWINTOWSKI*, *supra* note 328, at 300.

usually relevant. It must be concluded that the Court has introduced a special definition of undertaking in the field of social security,³⁹⁷ which leads, because of the wide discretion of the Commission and the Court, to a high degree of legal uncertainty and eventually to arbitrary decisions.³⁹⁸

bb) Purchase as an economic activity

When considering if entities can be deemed undertakings because of purchase activities, it must be borne in mind that the concept of undertaking in EC competition law is a *functional* concept. This means that it is not the legal status of an entity which is decisive in determining whether it is an undertaking, but the activity it is involved in.³⁹⁹ The concept of an undertaking is thus a *relative* one, since an entity can be considered to constitute an undertaking being engaged in one activity and not to constitute an undertaking being engaged in another activity.⁴⁰⁰ The classical example is the role of the State as in the case of *Italy v Commission*: "...the State may act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature by offering goods and services on the market."⁴⁰¹

In *FENIN*, the CFI held that isolated *purchase* could not itself constitute an economic activity, because it only considered the *offering* of goods and services to be an economic activity.⁴⁰² As illustrated above,⁴⁰³ the Court's assumption was based on a misinterpretation of the case-law that always described offering of goods and services as an economic activity, but did not, as a consequence, exclude other activities from being economic in nature. The CFI went on to conclude that the nature of the subsequent use of the purchased items was decisive for the

³⁹⁶ See, for example, *Sacchi*, *supra* note 346, para. 13 seq.; *Fédération Française*, *supra* note 105, para. 20 ; *GADBIN*, *supra* note 252, at 180.

³⁹⁷ The ECJ itself seems to admit that there is a special definition in the field of social security, when it states in *AOK-Bundesverband*, *supra* note 107, para. 47: "*In the field of social security*, the Court has held that certain bodies (...) pursue an exclusively social objective and do not engage in economic activity." (emphasis added by the author). For the same conclusion see *BELHAJ, VAN DE GRONDEN*, *supra* note 290, at 683; *GUNDEL*, *supra* note 294, at 577; *HELIOS*, *supra* note 293, at 288; *VAN DE GRONDEN*, *supra* note 294, at 88 seq.; *WINTERSTEIN*, *supra* note 316, at 327.

³⁹⁸ *BUENDIA SIERRA*, *supra* note 295, at p. 54 seq.

³⁹⁹ See above at pp. 55 seq.

⁴⁰⁰ See, for example, *AOK-Bundesverband*, *supra* note 107, para. 58; Opinion of AG Jacobs in *Albany*, *supra* note 2, para. 207 and his Opinion in Case C-475/99, *Ambulanz Glöckner*, (2001) ECR I-8089, para. 72, in *Cisal*, *supra* note 106, para. 48; id. in *AOK-Bundesverband*, *supra* note 107, para. 45; *AXER*, *supra* note 320, at 61; *BELHAJ, VAN DE GRONDEN*, *supra* note 290, at 686; *GASSNER*, *supra* note 287, at 1033; *KOENIG, ENGELMANN*, *supra* note 312, at 683.

⁴⁰¹ *Commission v Italy*, (1987) *supra* note 326, para. 7.

⁴⁰² *FENIN*, *supra* note 272, para. 36.

⁴⁰³ See above at pp. 62 seq.

nature of the purchase activity.⁴⁰⁴ Firstly, this reasoning clearly deviates from the functional and relative concept of an undertaking, because every activity ought to be regarded separately.⁴⁰⁵ It is not possible to declare one activity as the main activity which determines the nature of subordinate activities.⁴⁰⁶ For example it is clear that the main activity of the State is the exercise of public authority, which does not prevent it from also being involved in economic activities, even though this economic behavior might only serve the exercise of public authority.⁴⁰⁷ Furthermore the CFI's interpretation is clearly contrary to teleological and economic considerations.⁴⁰⁸ The Court itself admits that the entities in question "...may wield considerable economic power, even giving rise to a monopsony...".⁴⁰⁹ Concentrated buying power can have very negative impacts on competition in a market. Prices and buying conditions can be dictated by the monopsony, restricting or even erasing the economic freedom of the suppliers. Important parameters of competition such as prices and quality as well as quantity of goods can be predetermined by the monopsony, thus eliminating all room for competition on the supply side.⁴¹⁰ The monopsony can abuse its dominant position by, for example, discrimination, thus causing a distortion of competition, because the economic performance of the suppliers is made subject to the disposal of the monopsony.⁴¹¹ The Court's argumentation is also contrary to the wording of Articles 81 and 82 EC. In Art. 81(1)(a) EC, the direct or indirect fixing of purchase prices is given as an example of a restriction or distortion of competition and in Art. 82(a) EC the direct or indirect imposing of unfair purchasing prices is given as an example of an abuse of a dominant position.⁴¹² Hence the Treaty clearly considers purchasing to be an economic activity and does not make a distinction on the basis of the subsequent use of the purchased items.⁴¹³

⁴⁰⁴ *FENIN*, *supra* note 272, para. 356.

⁴⁰⁵ See *AXER*, *supra* note 320, at 62; *BERG*, *supra* note 292, at 172; *ENGELMANN*, *supra* note 383, at pp. 70 seq.; *GASSNER*, *supra* note 287, at 1030 seq.; *KOENIG, SANDER*, *supra* note 292, at 981 seq.

⁴⁰⁶ *GYSELEN*, *supra* note 294, at 439.

⁴⁰⁷ *AXER*, *supra* note 320, at 62.

⁴⁰⁸ See *GASSNER*, *supra* note 287, at 1034.

⁴⁰⁹ *FENIN*, *supra* note 272, para. 37.

⁴¹⁰ For fixed maximum amounts see *AXER*, *supra* note 320, at 61; *KOENIG, SANDER*, *supra* note 292, at 980.

⁴¹¹ *HELIOS*, *supra* note 293, at 288 argues with regard to the negative repercussions for suppliers that at least the relationship between funds and suppliers should not be immunized from EC competition law, since it does not belong to the core objectives of social security. Similarly *KOENIG, SANDER*, *supra* note 292, at 981. Contra *VAN DE GRONDEN*, *supra* note 294, at 92 who claims that it is not the possible influence on the supply side, but the interest that an entity derives in its downstream selling market by its purchase on the upstream market which is decisive.

⁴¹² See *GASSNER*, *supra* note 287, at 1029; *KOENIG, SANDER*, *supra* note 292, at 980.

⁴¹³ *ENGELMANN*, *supra* note 383, at p. 66 seq. emphasizes that the purchase of medical supply is an economic activity, because it cannot be compared to private consumption, since the funds distribute the purchased supplies to their affiliated. See also *GIESEN, Die Vorgaben des EG-Vertrages*, *supra* note 138, at p. 114.

The ECJ partly followed the CFI⁴¹⁴ and decided in *AOK-Bundesverband*, regarding the setting of fixed maximum amounts for medical supply by the associations of German statutory sickness funds, that the interest the associations of funds pursue in this activity cannot be separated from the funds' exclusively social objective of insuring large parts of the population.⁴¹⁵ This appears to abolish the functional concept of an undertaking, because the exclusively social objective seems to be regarded as a characteristic of the entity, regardless of the particular action it is engaged in.⁴¹⁶ Furthermore, the Court ruled that the determination of fixed maximum amounts is "integrally connected" with the funds' main activity of providing statutory benefits.⁴¹⁷ This wording is a clear reference to the Court's case-law in *Eurocontrol* and *Calì*. In *Eurocontrol*, the Court held that the collection of route charges for airplanes carried out by Eurocontrol (an international organisation for the supervision of air traffic) on behalf of its Member States "cannot be separated from its other activities".⁴¹⁸ It must be noted that the route charges were applied for the use of air navigation control facilities and "services" which were deemed not to constitute an economic activity, but the exercise of public authority.⁴¹⁹ In *Calì* the Court ruled that the levying of charges for anti-pollution surveillance in the port of Genova "is an integral part of its (the entity's) surveillance activity", which was deemed exercise of public authority and not an economic activity.⁴²⁰

There is one major difference between these cases and *AOK-Bundesverband*, which forbids a simple transfer of the arguments. A market is governed by the quantity and quality of the products and services offered and the prices demanded. Demand of price and offering of services are two sides of the same coin. This, of course, does not imply that the nature of a service can be determined by its remuneration or the way the entity is financed.⁴²¹ Otherwise the Member States could determine what an economic activity is by deciding if services are financed according to private or public law (in the form of fees and taxes). On the other hand, if a "service" is in a certain case not a real service, but rather the exercise of public authority, the remuneration for this "service" and the respective collection of charges must also constitute the exercise of public authority, since it forms part of the coercion of citizens. This

⁴¹⁴ See GUNDEL, *supra* note 294, at 581; KOENIG, ENGELMANN, *supra* note 312, at 685. Contra GASSNER, *supra* note 287, at 1034 who claims that the ECJ returns to a relative concept of undertaking and thus contradicts the CFI in *FENIN*.

⁴¹⁵ Judgment in *AOK-Bundesverband*, *supra* note 107, para. 63 and also Opinion of AG Jacobs in *AOK-Bundesverband*, *supra* note 107, para. 43-46.

⁴¹⁶ BERG, *supra* note 292, at 172. GASSNER, *supra* note 287, at 1030 seq.

⁴¹⁷ *AOK-Bundesverband*, *supra* note 107, para. 63.

⁴¹⁸ *SAT Fluggesellschaft v Eurocontrol*, *supra* note 322, para. 28.

⁴¹⁹ *SAT Fluggesellschaft v Eurocontrol*, *supra* note 322, para. 24-31.

⁴²⁰ *Calì & Figli v SEPG*, *supra* note 326, para. 23 seq.

⁴²¹ See above at pp. 55 seq. and at pp. 59-62.

situation is comparable to the collection of taxes which is undoubtedly the exercise of public authority.⁴²² The situation in *AOK-Bundesverband* is fundamentally different. The fixed amounts in question here are not remuneration for providing social insurance, which was considered a non-economic activity by the Court. Remuneration for insurance is rather the contributions of the insured. The fixed amounts determine the prices on the upstream market of medical goods and services as opposed to the downstream market of providing insurance. Hence it cannot be said that the determination of fixed amounts is “integrally connected” with the funds’ main activity of providing statutory benefits as charges and corresponding public “services” are connected. They are two different activities, in two different markets, with different economic outcomes.⁴²³

Even though the ECJ did not explicitly follow the CFI, which generally considered purchasing itself not to be an economic activity, the result is nevertheless very similar. The Court ruled in this particular case that the activity of fixing maximum purchase prices could not be separated from the subsequent use of providing statutory benefits.⁴²⁴ Hence the same arguments can be brought forward against this decision as against *FENIN*. The leading associations of the German sickness funds must be considered associations of undertakings when determining the fixed maximum amounts, because the funds constitute undertakings in their activity of demanding medical supply on the market.⁴²⁵

The decisions in *FENIN* and *AOK-Bundesverband* involve abandoning the functional concept of an undertaking without providing a new solution to define this term in competition law. It is a clear contradiction of the wording of the Treaty in Articles 81 and 82 EC and it is highly detrimental to the functioning of the market and to competition. The new concept of “undertaking” in the field of social security, especially in the relationship between funds and third parties, might also have negative repercussions for other areas of competition law, which are subject to strong political pressures, making the application of competition law unpredictable.

⁴²² See Opinion of AG Tesouro in *SAT Fluggesellschaft v Eurocontrol*, *supra* note 322, para. 14: “...those charges undoubtedly constitute a tax burden, since they are a sort of financial contribution to the costs incurred by the States, payable by the individual for the benefit he has received, as a result of a specific administrative activity carried on chiefly in the interest of the community.”

⁴²³ See also WINTERSTEIN, *supra* note 316, at 332 seq.

⁴²⁴ *AOK-Bundesverband*, *supra* note 107, para. 54, 63. Against a restriction to considering a so-called main activity in this case when determining the nature of the other activities, see GASSNER, *supra* note 287, at 1032.

⁴²⁵ ENGELMANN, *supra* note 383, at pp. 79-82.

2. The case-law in the field of collective bargaining and competition law

a) The non-statutory labor exemption

While the Court approached the problem of the collision of competition law and social insurance by creating a new category of the concept of undertaking, thus giving rise to a *de facto* exemption for certain types of social insurance schemes, the approach in dealing with the collision of competition law and collective bargaining is different.

The Court was confronted with this problem for the first time in the triplet of *Albany* cases,⁴²⁶ which concerned sectoral pension funds set up by collective agreement. Regarding the collective agreements establishing the funds and requesting the public authorities to make affiliation to the same compulsory, the Court ruled “that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives (i.e. social policy objectives – added by the author) must, by virtue of their nature and purpose, be regarded as falling outside the scope of Art. 85(1) (now Art. 81(1) – added by the author).”⁴²⁷ The Court thus established a non-statutory exemption for certain collective agreements. It arrived at this new dogmatic figure by “an interpretation of the provisions of the Treaty as a whole which is both effective and consistent”.⁴²⁸ On the one hand, the Court considered the importance the Treaty attaches to competition law. Conduct prohibited by Art. 81(1) EC is considered so detrimental to the economy that the authors of the Treaty expressly declared the respective agreements and decisions to be void in Art. 81(2) EC. Furthermore Art. 3(1)(g) EC provides that the Community is to establish a “system ensuring that competition in the internal market is not distorted.”⁴²⁹ On the other hand, the Court pointed out the value the Treaty ascribes to a social policy in general and to collective bargaining in particular. It mentioned that Art. 3(1)(j) EC provides that the activities of the Community shall include “a policy in the social sphere”. Art. 2 EC describes the promotion of “a high level of employment and social protection” and “a harmonious and balanced development of economic activities” to be one of the tasks of the Community. The Court further mentioned Art 118 EC Treaty (now Art. 140 EC) which imposes a duty on the Commission to encourage

⁴²⁶ Meaning *Albany*, *supra* note 2; *Brentjens*, *supra* note 2, and *Drijvende Bokken*, *supra* note 2. In the following the *Albany* case will be quoted, whose judgment has the same wording as the other two cases.

⁴²⁷ *Albany*, *supra* note 2, para. 60.

⁴²⁸ *Albany*, *supra* note 2, para. 60.

⁴²⁹ *Albany*, *supra* note 2, para. 53 seq.

cooperation between Member States in all social policy fields, especially with regard to the right of association and collective bargaining between workers and employers. The Court also drew attention to Art. 118 b EC Treaty (now Articles 138 and 139 EC) which provides that the Commission is to promote the dialogue between management and labour at European level which can eventually lead to contractual relations. Finally, the ECJ referred to the Agreement on Social Policy⁴³⁰ whose Art. 1 named as objectives to be pursued by the Community and the Member States, among others: improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion – this provision has now become part of the Treaty in Art. 136 EC. The Court also referred to Art. 4(1) and (2) of the Agreement which made it possible that the dialogue between management and labor led to agreements, which could be implemented either in accordance with the procedures and practices specific to management and labor and the Member States, or, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission - this provision has by now become part of the Treaty in Art. 139 EC.⁴³¹ The Court admitted that certain restrictions of competition are inherent to collective agreements, but that the social objectives of these agreements would be undermined if they were made subject to competition rules.⁴³²

The formulation used by the Court, however, makes it clear that not all collective agreements are to be exempted from the scope of competition law.⁴³³ Collective agreements are exempted “by virtue of their nature and purpose”.⁴³⁴ This imprecise condition can be interpreted taking into consideration the other statements of the Court. With regard to the *nature* of the agreements, the Court restricts the exemption to “agreements concluded in the context of collective negotiations between management and labour”.⁴³⁵ As can be seen from the later case-law, the Court also requires the agreement to have the form of a collective agreement.⁴³⁶ With regard to the *purpose* of the agreement, the Court demands that it has to be “in pursuit of such objectives”.⁴³⁷ The scope of this condition is very unclear.⁴³⁸ The Court speaks in the

⁴³⁰ OJ 1992 C191/91.

⁴³¹ *Albany*, *supra* note 2, para. 54-58.

⁴³² *Albany*, *supra* note 2, para. 59.

⁴³³ GYSELEN, *supra* note 294, at 441 writes: “The only safe (and interesting) conclusion that can be drawn from the judgment is that the Court does not rule out that Art. 81(1) might apply to certain types of collective agreements.”

⁴³⁴ *Albany*, *supra* note 2, para. 60.

⁴³⁵ *Albany*, *supra* note 2, para. 60.

⁴³⁶ Case 222/98, *Van der Woude*, (2000) ECR I-7111, para. 24.

⁴³⁷ *Albany*, *supra* note 2, para. 60.

preceding paragraph of “the social policy objectives pursued by such agreements”.⁴³⁹ It further speaks of a situation in which management and labor seek “jointly to adopt measures to improve conditions of work and employment”.⁴⁴⁰ It was not made clear whether social policy objectives are restricted to the improvement of conditions of work and employment. The later case-law and *van der Woude*⁴⁴¹ and *Pavlov* clarified that the agreements must be “aimed at improving employment conditions”.⁴⁴² Taking into consideration the decision in the triplet of *Albany* cases, there is some evidence that the Court prefers a broad interpretation of the requirement “to improve conditions of work and employment” and thus gives a wide discretion to the social partners in determining the content of collective agreements. Thus the establishment of a supplementary pension scheme was deemed to contribute “directly to improving one of their (the workers’ – added by the author) working conditions, namely their remuneration.”⁴⁴³

The Court was given a chance to clarify its reasoning in the two later decisions in *Pavlov* and *van der Woude*. In *Pavlov* the Court held that a decision of a liberal profession’s representative body to set up a pension scheme very similar to the one at issue in *Albany* and to request the public authorities to make affiliation compulsory was subject to the competition rules, because it was “not concluded in the context of collective bargaining between employers and employees.”⁴⁴⁴ This clarifies that an agreement must both by its *purpose* (the Court did not doubt the social objective of the agreement at issue in *Pavlov*)⁴⁴⁵ and by its *nature*, which is strictly limited to classical collective agreements between management and labor, fall outside the scope of the competition rules. The Court stressed in that context that there were no provisions in the Treaty encouraging the members of liberal professions to conclude collective agreements.⁴⁴⁶

In *van der Woude*⁴⁴⁷ the Court was faced with a collective agreement which established a sectoral health insurance scheme. Here it was not the *nature* of the agreement that was

⁴³⁸ Compare BRUUN, HELLSTEN (eds.), *supra* note 162, at pp. 45 seq., recital 89.

⁴³⁹ *Albany*, *supra* note 2, para. 59.

⁴⁴⁰ *Albany*, *supra* note 2, para. 59.

⁴⁴¹ *Van der Woude*, *supra* note 438, para. 22.

⁴⁴² *Pavlov*, *supra* note 253, para. 67; BRUUN, HELLSTEN (ed.), *supra* note 162, at pp. 55 seq., recital 113-117 interpret the case-law as referring to all social objectives named in Art. 136 EC, thus giving the exemption a much broader scope. The clear wording of *Pavlov* and *van der Woude* strongly contradicts this interpretation.

⁴⁴³ *Albany*, *supra* note 2, para. 63.

⁴⁴⁴ *Pavlov*, *supra* note 253, para. 68.

⁴⁴⁵ *Pavlov*, *supra* note 253, para. 68.

⁴⁴⁶ *Pavlov*, *supra* note 253, para. 69.

⁴⁴⁷ *Van der Woude*, *supra* note 436.

problematic - it was concluded in the context of collective bargaining between trade unions and employers - but the purpose. The Court confirmed its broad interpretation of the term “improving the working conditions” by subsuming the establishment of the health insurance scheme under this condition, since this ensured that workers had the necessary means to meet medical expenses and reduced the costs borne by the employees.⁴⁴⁸ It further clarified that the fact that the insurance business was outsourced to a private insurance company, i.e. not carried out by the administrative body of the social partners itself, did not exclude the application of the non-statutory exemption, because the social partners must be allowed to create a body to implement the agreement and this body itself must be allowed to entrust third parties with the specific tasks.⁴⁴⁹

b) Doctrinal Critique

The first point of criticism against the creation of a non-statutory exemption is that it does not fit into the competition law system of the Treaty and constitutes an inconsistency in the traditional case-law.⁴⁵⁰ The Court has constantly held that “where the Treaty intended to remove certain activities from the ambit of the competition rules, it made an express derogation to that effect”.⁴⁵¹ Examples include Art. 36 EC concerning agriculture, Art. 296 EC concerning military equipment, and the limited exemption of Art. 86(2) EC concerning certain undertakings engaged in a service of general economic interest. The Court applied competition law to sectors that receive special treatment in some Member States like transport,⁴⁵² energy,⁴⁵³ banking,⁴⁵⁴ insurance,⁴⁵⁵ and technology transfer^{456 457}. It even applied competition law to the labor market with regard to public employment procurement.⁴⁵⁸ The

⁴⁴⁸ *Van der Woude*, *supra* note 436, para. 25.

⁴⁴⁹ *Van der Woude*, *supra* note 436, para. 26.

⁴⁵⁰ BRUUN, HELLSTEN (eds.), *supra* note 162, at p. 41, recital 81 describe the Court’s interpretation as “certainly rare”.

⁴⁵¹ Joined Cases 209/84 to 213/84, *Ministère Public v Asjes*, (1986) ECR 1425, para. 40; Case 45/85, *Verband der Sachversicherer v Commission*, (1987) ECR 405, para. 12. See also Opinion of AG Jacobs in *Albany*, *supra* note 2, para. 123.

⁴⁵² *Ministère Public v Asjes*, *supra* note 451, para. 40-42; Case 66/86, *Ahmed Saaed Flugreisen and others v Zentrale zur Bekämpfung unlauteren Wettbewerbs*, (1989) ECR 803.

⁴⁵³ *Almelo*, *supra* note 44.

⁴⁵⁴ *Züchner v Bayerische Vereinsbank*, *supra* note 44, para. 6-9.

⁴⁵⁵ *Verband der Sachversicherer v Commission*, *supra* note 451, para. 7-16.

⁴⁵⁶ See, for example, Case C 258/78, *Nungesser v Commission*, (1982) ECR 2015, para. 23-43.

⁴⁵⁷ See also Opinion of AG Jacobs in *Albany*, *supra* note 2, para. 122 seq.

⁴⁵⁸ *Höfner v Elser*, *supra* note 231; Case 55/96, *Job Center*, (1997) ECR I-7119. See also Opinion of AG Jacobs in *Albany*, *supra* note 2, para. 127. AG Lenz in his Opinion in Case C-415/93, *Bosman*, (1995) ECR I-4921, para. 273 seq. and H. FLEISCHER, “Tarifverträge und Europäisches Wettbewerbsrecht - Besprechung der Albany-International-Entscheidung des EuGH”, (2000) *DB* 821, at 822 hold that there is no general non-statutory labor exemption in EC competition law.

Court never took the view that the existence of special Community objectives mentioned in the Treaty, for example a common policy in the sphere of transport in Art. 3(1)(f) EC, the promotion of coordination between employment policies of the Member States with a view to enhancing their effectiveness in Art. 3(1)(i) EC, the promotion of research and technological development in Art. 3(1)(n) EC and measures in the sphere of energy in Art. 3(1)(t) EC could prevent the application of the competition rules.⁴⁵⁹ Rather, the ECJ held that the competition rules provided other tools like Art. 81(3) EC “to take account of the particular nature of different branches of the economy and the problems peculiar to them”⁴⁶⁰.⁴⁶¹ The contradiction of the case-law in other fields becomes especially obvious in the field of social security. In spite of the provisions in Articles 2, 3(j), 136, 137(1)(c) and (k), Articles 137(4), 140 and 144 EC, which clearly show that the Treaty respects and promotes the social security schemes of the Member States, the Court refused to establish a non-statutory social exemption. The perverse results of this inconsistency become apparent when comparing *Albany* and *Pavlov*. The agreements in both cases had as their objective the creation of a supplementary pension scheme. In *Albany* a non-statutory exemption was applied, whereas the agreement in *Pavlov* was fully subject to Art. 81 EC.⁴⁶²

Secondly, the limits of the exemption are not clearly drawn. The formal requirements, i.e. the “nature” of the agreement is well defined, whereas the substantive requirements, i.e. “the pursuit of social objectives” consisting in the “improvement of working and employment conditions” is not that clear.⁴⁶³ Is it an improvement of working conditions to forbid subcontracting tasks which are usually carried out by employees? Can collective agreements which forbid the introduction of new technologies in order to secure jobs be regarded as an improvement of working conditions or do they rather concern entrepreneurial decisions that must be scrutinized under Art. 81 EC? The same question arises with regard to opening hours, especially taking into consideration the Commission’s decision in *Irish Banks’ Standing Committee*, in which the Commission held that Art. 81(1) EC applied to an agreement between Irish banks and trade unions concerning opening hours.⁴⁶⁴

⁴⁵⁹ See Opinion of AG Jacobs in *Albany*, *supra* note 2, para. 126.

⁴⁶⁰ *Verband der Sachversicherer v Commission*, *supra* note 451, para. 15.

⁴⁶¹ PRÉTOT, *supra* note 291, at 109 seq. argues that the Court could not preclude the application of the competition rules by referring to merely programmatic norms. An application and proper interpretation of the competition rules would have been more consistent.

⁴⁶² GADBIN, *supra* note 252, at 182.

⁴⁶³ See BERG, *supra* note 292, at 171.

⁴⁶⁴ Commission Decision of 30.09.1986, *Irish Banks’ Standing Committee*, OJ 1986 L295/28.

A final criticism relates to the protection of competition. The non-statutory labor exemption creates a very broad exemption for collective agreements without taking into account the objectives of competition law. It is biased in favor of collective agreements and does not try to balance the different interests involved by, for example, a comprehensive test of proportionality. This is particularly true for the effects on third parties and third markets. Undoubtedly, collective agreements can have negative effects on third parties. Examples include the exclusion of third providers by the establishment of sectoral insurance funds,⁴⁶⁵ the effects on suppliers of agreements banning rationalization, the effects on subcontractors of agreements forcing a manufacturer to subcontract only to companies that are bound by collective agreement⁴⁶⁶ or by agreements prohibiting the subcontracting of tasks that are usually carried out by employees.⁴⁶⁷ There have even been collective agreements in Denmark excluding certain types of consumers from the supply of cheaper clothes.⁴⁶⁸ In Germany consumers were affected by shop opening hours fixed by collective agreements.⁴⁶⁹ Furthermore, certain collective agreements can have negative effects on markets other than product markets. Agreements banning rationalization can have impacts upon innovation markets, technology markets and markets for research and development. Additionally, collective agreements which allegedly serve to improve working conditions can be a sham to enable employers to conclude restrictive agreements that would otherwise infringe Art. 81 EC, thus perverting the sense of collective agreements.⁴⁷⁰

Considering these problems, AG *Jacobs* in his opinion in *Albany* came up with the solution of distinguishing between the application of competition law *ratione materiae* (a non-statutory

⁴⁶⁵ According to AG *Jacobs*, this was not the case in *Albany*, because affiliation to the fund was allegedly not made compulsory by the collective agreement, but by the minister's decision on general applicability and compulsory affiliation. See Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 276-286.

⁴⁶⁶ For this example see the case of *Connell Construction Co. v Plumbers & Steamfitters Local Union No. 100*, 2 June 1975, 421 U.S. 616.

⁴⁶⁷ For this example, see Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 84, who refers to the Finnish case KHO taltio 1586, 11 April 1995.

⁴⁶⁸ For this example, see Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 84 referring to the Danish case Ufr. 1965.634H cf. Ufr. 1965B.260.

⁴⁶⁹ While the highest German labor court (BAG) in its judgment of 27.06.1989 BAGE 62, 171, at 183-190 deemed competition law not applicable to these agreements, the *Bundeskartellamt* was in favor of applying competition law – *Bundeskartellamt WuW* 1989, 563. For the discussion in Germany, see U. IMMENGA, *Grenzen des kartellrechtlichen Ausnahmebereichs Arbeitsmarkt – Zur Zulässigkeit tarifvertraglicher Regelung von Ladenschlußzeiten*, C.H. Beck, München 1989; M. KULKA, "Die kartellrechtliche Zulässigkeit von Tarifverträgen über das Ende der täglichen Arbeitszeit im Einzelhandel", (1988) *RdA* 336.

⁴⁷⁰ See GYSELEN, *supra* note 294, at 443; BRUUN, HELLSTEN (eds.), *supra* note 162, at p. 42 seq., recital 84 claim that the non-statutory exemption is not applicable to collective agreements which only cover an intentional distortion of competition. Hence the benefit of the exemption can be, comparable to block exemptions, withdrawn.

exemption) and *ratione personae*. For the exemption of collective agreements *ratione materiae* he formulated three conditions:

- the agreement must be made within the formal framework of collective bargaining between both sides of the industry.
- the agreement should be concluded in good faith, so that the employers cannot abuse it.
- the agreement must concern core subjects of collective bargaining like wages and working conditions and must not directly affect third parties or markets.⁴⁷¹

For agreements that directly affect third parties and markets, AG *Jacobs* proposed to balance the different interests involved in the framework of Art. 81(3) EC and to grant an exemption where appropriate, applying a broad interpretation of Art. 81(3) EC which takes social policy objectives into consideration.⁴⁷² Regarding the application of Art. 81 EC to collective agreements *ratione personae*, AG *Jacobs* distinguished between employees, trade unions and employers, while he only considered the latter undertakings in the sense of competition law.⁴⁷³

The exemption *ratione materiae* proposed by AG *Jacobs* is to be criticized as well. Apart from the general critique against the creation of a non-statutory exemption, there are also specific points of critique against the exemption AG *Jacobs* suggested. The second condition, the requirement of good faith, is obviously derived from the American case-law.⁴⁷⁴ AG *Jacobs* did not take into consideration that, as opposed to section 1 Sherman Act in its alternative of a “conspiracy in restraint of trade or commerce”, Art. 81 EC lacks any subjective criterion and does not require intention in any of its alternatives. The object (or effect) of preventing, restricting or distorting competition is a purely objective criterion.⁴⁷⁵ Thus the requirement of good faith is foreign to Community competition law. The condition that the collective agreement must not directly affect third parties and markets is flawed as well. It seems difficult, if not impossible, to draw a clear divide between direct and indirect effect⁴⁷⁶ and one could well argue that an agreement on wages has a direct effect on the markets for goods and services by raising costs of production. Hence an exemption *ratione materiae* as created by *Jacobs* cannot constitute a solution either.

⁴⁷¹ Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 191-194.

⁴⁷² Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 193.

⁴⁷³ Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 209-236.

⁴⁷⁴ See *United Mine Workers of America v James M. Pennington*, 7 June 1965, 381 U.S. 657, at 665 seq.; *Meat Cutters Union v Jewel Tea Co.*, 7 June 1965, 381 U.S. 676, at 690.

⁴⁷⁵ See, for example, V. EMMERICH in U. IMMENGA, E.-J. MESTMÄCKER (eds.), *EG-Wettbewerbsrecht: Kommentar, Band I*, C.H. Beck, München 1997, Art. 85 Abs. 1, recital 240 seq.

⁴⁷⁶ See FLEISCHER, “Tarifverträge und Europäisches Wettbewerbsrecht”, *supra* note 458, at 824 seq.

3. Summary

The above analysis and criticism show that the ECJ has developed two different methods to deal with the collision of competition law with the fields of social insurance and collective bargaining. On the one hand, it has introduced a new definition of undertaking which only awkwardly fits into the general principles and doctrine of competition law and thus causes legal uncertainty and might have negative repercussions in other fields of competition law. On the other hand, it has established a non-statutory exemption for collective agreements without properly defining the limits of this exemption. This fuzzy concept also causes legal uncertainty and leads to inconsistent results, especially compared with other social objectives which are not covered by the exemption. Furthermore, the non-statutory exemption is not able to take into consideration the objectives of competition law, particularly with regard to the effects of collective agreements on third parties and markets. Hence a new solution must be found which can take into consideration the objectives of all three areas - competition law, social security and collective bargaining – and which is consistent with the general concepts of law.

IV. The Trade-off: Applying competition law, respecting fundamental rights and general principles of law

Having described the case-law and having identified its major flaws, this author's solution of how to deal with the relation of competition law with social insurance and collective bargaining will be presented. The underlying idea is that it should first be considered whether competition law can simply be applied to social insurance schemes and collective agreements without causing a conflict between these fields of law. Only where the application of competition law would eventually lead to an impediment of social insurance and/or collective bargaining, a balanced trade-off must be found between the colliding fields, whereby special attention will be paid to both the fundamental role competition law plays in the EC Treaty and to the importance of social protection and collective bargaining in the Community legal order.

1. The Art. 86(2) EC solution in the field of social insurance – avoiding confrontation, safeguarding proportionality

Regarding the relation between social insurance and competition law, the ECJ and the CFI seek to find a balance by weighing the diverse features of solidarity when defining the term “undertaking”. The discussion above showed that this approach is flawed.⁴⁷⁷ In this section, we shall examine whether the application of competition law to social insurance schemes really leads to a clash. Only where this is the case must a method be found to resolve the conflict. Due consideration will be given to the competence of the Member States in the field of social security, the insufficient integration of the Community in this field, and the fundamental right of access to social security.⁴⁷⁸ For the purpose of the analysis, a distinction shall be drawn between the relationship of the insurance funds to their affiliated and the relationship of the insurances funds to third parties, e.g. suppliers of medical goods and services.

⁴⁷⁷ See above at pp. 55-70.

⁴⁷⁸ Compare above pp. 22-28.

a) The relationship between the funds and the affiliated

aa) Possible infringements of competition law: Art. 82 EC and Art. 86(1) EC in conjunction with Art. 82 EC

Firstly we shall question to what extent infringements of competition law can occur in the relation between the social insurance funds and their affiliated.

An infringement of Art. 82 EC is possible where the funds themselves abuse a dominant position. Social insurance funds, be it at national or sectoral level, usually hold a dominant position in the relevant market of insurance against the specific risk. This dominant position can result from compulsory affiliation⁴⁷⁹ or from special rights granted to the funds, which make an affiliation with such funds more attractive or even the only possible choice for the insured.⁴⁸⁰ The Court ruled in *Albany* and *Pavlov* that the funds held a (collective) dominant position, because they had the exclusive right to manage supplementary pension schemes in a certain sector in a Member State and hence in a substantial part of the common market.⁴⁸¹

Abuses of that dominant position which might occur include: imposing unfair contributions or insurance conditions on the affiliated according to Art. 82(a) EC; limiting the provision of insurance services contrary to Art. 82(b) EC; or discriminating between the affiliated when granting individual exemptions to compulsory affiliation in the sense of Art. 82(c) EC. The issue of unfair contribution rates or insurance conditions within the meaning of Art. 82(a) EC can occur in any context, in which the fund is a monopolist and itself determines the rate of contributions and benefits. In *Poucet et Pistre*, for example, the plaintiffs contended that private insurers offered wider insurance cover for lower premium rates.⁴⁸² An example of limiting insurance services according to Art. 82(b) EC is given in *Albany*, where the funds only provided an average pension of 70% of the former income and did not provide for additional pensions. Because of compulsory affiliation, there was no opportunity to entrust a single insurer with the complete provision of pensions at a higher level.⁴⁸³ Discriminatory

⁴⁷⁹ See Opinion of AG Jacobs in *Albany*, *supra* note 2, para. 381-383 and his Opinion in *Pavlov*, *supra* note 253, para. 34.

⁴⁸⁰ See Opinion of AG Tesauro in *Fédération Française*, *supra* note 105, para. 4.

⁴⁸¹ *Albany*, *supra* note 2, para. 92; *Pavlov*, *supra* note 253, para. 125 seq. See the criticisms of GYSELEN, *supra* note 294, at 444 seq.

⁴⁸² The plaintiffs argued that the dominant position occupied by the funds enabled them to fix prices and trading conditions unilaterally and that they therefore operated under conditions that they would not have been able to obtain in a competitive market. See Report of the Hearing in joined *Poucet et Pistre*, *supra* note 1, at 641.

⁴⁸³ *Albany*, *supra* note 2, para. 96 seq. It must be noted that in this context Art. 86(1) in conjunction with Art. 82, and not Art. 82(b), was analyzed.

practice according to Art. 82(c) EC can also be seen in the *Albany* cases, where the plaintiffs complained that the funds should have granted them an individual exemption from compulsory affiliation.⁴⁸⁴ Even though this was not explicitly done so in the respective cases, this practice can be interpreted as discrimination, if others were granted exemptions under similar conditions. Another abuse that might occur in the exercise of the right to grant exemptions is that the funds themselves can determine the degree of competition they are exposed to.⁴⁸⁵ Discrimination might also occur where the funds can suspend payment of contributions or exempt the affiliated from payment of contributions for specific reasons, e.g. economic difficulties of the affiliated or its undertaking,⁴⁸⁶ and use their discretion in a discriminatory way.

Furthermore, Art. 82 EC requires that the abusive behavior has a (potential) effect on trade between Member States. Since national and sectoral insurance schemes are nationally bounded, their behavior can have an effect on trade between Member States with regard to the provision of cross-boundary insurance or of cross-boundary supplies purchased by insurance funds.

In the given context, the *Ladbroke* doctrine, which was discussed intensively above,⁴⁸⁷ plays a crucial role. If the funds are given a certain discretion in determining the contributions, benefits or services vis-à-vis the affiliated,⁴⁸⁸ or in granting exemptions from compulsory affiliation,⁴⁸⁹ they themselves can be held liable for abuse of their dominant position. If, on the other hand, the funds merely apply the law without discretion, they cannot be made responsible for the anti-competitive behavior.⁴⁹⁰ For example, in *Poucet et Pistre*, the rate of the contributions and the amount of benefits was proscribed by law or by decree, leaving no discretion to the funds in question.⁴⁹¹ Art. 82 EC can only apply to social insurance funds in their relationship with their affiliated: if they themselves impose unfair contributions or insurance conditions on the affiliated; if they are responsible for limiting the supply of insurance services on the market by refusing to offer additional services and/or benefits; or if

⁴⁸⁴ See, for example, *Albany*, *supra* note 2, para. 25-37, especially para. 33.

⁴⁸⁵ See Opinion of AG Jacobs in *Albany*, *supra* note 2, para. 442.

⁴⁸⁶ This right existed for example *Fédération Française*, *supra* note 105, see Opinion of AG Tesaura at para. 7. A similar provision existed in *Pavlov*, see Opinion of AG Jacobs in *Pavlov*, *supra* note 253, para. 34.

⁴⁸⁷ See above at pp. 63-65.

⁴⁸⁸ As, for example, in the German statutory health insurance scheme, see Opinion of AG Jacobs in *AOK-Bundesverband*, *supra* note 107, para. 38, 40.

⁴⁸⁹ As, for example, in the *Albany* cases, see Opinion of AG Jacobs in *Albany*, *supra* note 2, para. 354.

⁴⁹⁰ See *Commission and France v Ladbroke Racing*, *supra* note 372, para. 33 seq.; *C.I.F.*, *supra* note 381, para. 54 seq.; GIESEN, *Die Vorgaben des EG-Vertrages*, *supra* note 138, at pp. 114 seq.

⁴⁹¹ *Poucet et Pistre*, *supra* note 1, para. 15.

they engage in discriminatory behavior on their own, exercising discretion, by refusing to grant individual exemptions or suspension of/exemption from payment to their affiliated.

Even if the *Ladbroke* doctrine is applicable, an infringement of competition law may still exist, not by the undertaking concerned, but rather by the Member State. According to Art. 86(1) EC, a Member State shall neither enact nor maintain in force any measure contrary to the rules contained in the EC Treaty, especially Articles 81-89, with regard to public undertakings or undertakings to which the Member State grants special or exclusive rights. In this context, an infringement of Art. 86(1) EC in conjunction with Art. 82 EC might be of relevance. The application of Art. 82 EC does not preclude the application of Art. 86(1) in conjunction with Art. 82 EC, both provisions can be applied at the same time.⁴⁹² On the other hand, the provision of Art. 3(g), 10, 82 EC, which obliges Member States not to adopt or maintain in force any measures which could deprive the competition rules of their effectiveness,⁴⁹³ is not applicable in cases where Art. 86(1) EC is applicable, the latter being a *lex specialis* provision.⁴⁹⁴

The first objection against the applicability of Art. 86(1) EC, brought forward by the Netherlands Government in the *Albany* cases, is that social insurance funds are not granted special rights, but that only a certain group (in this case undertakings in a given industrial sector) is obliged to affiliate with the fund in question.⁴⁹⁵ Yet this argument is to be rejected, because compulsory affiliation also means that only the respective funds are able to raise contributions and provide social insurance services in a given sector, thus conferring an effective monopoly on the funds, which constitutes an exclusive right.⁴⁹⁶ In the *Albany* cases the funds also enjoyed the exclusive right of granting exemptions to compulsory affiliation.⁴⁹⁷ Therefore social insurance funds to which affiliation is somehow made compulsory by state measures enjoy exclusive rights.⁴⁹⁸

⁴⁹² BUENDIA SIERRA, *supra* note 295, at pp. 150 seq. and p. 290.

⁴⁹³ Case 13/77, *Inno v ATAB*, (1977) ECR 2115, para. 30 seq.; *Ahmed Saaed Flugreisen*, *supra* note 452, para. 48; Opinion of AG Jacobs in *Albany*, *supra* note 2, para. 371.

⁴⁹⁴ Case C-323/93, *Centre d'insémination de la Crespelle v Coopérative de la Mayenne*, (1994) ECR I-5077, para. 15; Opinion of AG Jacobs in *Albany*, *supra* note 2, para. 371; BUENDIA SIERRA, *supra* note 295, at p. 266.

⁴⁹⁵ See Opinion of AG Jacobs in *Albany*, *supra* note 2, para. 374.

⁴⁹⁶ The mere fact of compulsory affiliation takes away any incentive to conclude an additional insurance contract with private companies, thus conferring an effective monopoly on the insurance funds. *Albany*, *supra* note 2, para. 90 and Opinion of AG Jacobs in *Albany*, *supra* note 2, para. 375.

⁴⁹⁷ See Opinion of AG Jacobs in *Albany*, *supra* note 2, para. 376.

⁴⁹⁸ See also *Pavlov*, *supra* note 253, para. 122.

The addressees of Art. 86(1) EC are the Member States. Where only the undertakings themselves are responsible for a breach of competition law, Art. 86(1) EC is not applicable.⁴⁹⁹ Therefore there must be a causal link between the state measure and the anti-competitive behavior the undertakings are engaged in; the abusive behavior must be a direct consequence of the Member State's legal framework.⁵⁰⁰ This is, as AG *Jacobs* recognized, "... one of the reasons for the fundamental dilemma in the application of Art. 90(1) (now Art. 86(1) EC – added by the author)".⁵⁰¹ Art. 86(1) EC implies that Member States are allowed to grant the special or exclusive rights in question to certain undertakings, thus creating statutory monopolies.⁵⁰² Therefore the creation of a dominant position by granting these rights as such does not constitute an infringement of the competition rules.⁵⁰³ There must be additional circumstances leading to the conclusion that there is an infringement of the Treaty's provisions on competition (in this case Art. 82 EC), which is directly caused by the exclusive right.⁵⁰⁴ According to the Courts, this occurs under certain conditions where the mere exercise of this right necessarily and unavoidably involves the abuse of a dominant position;⁵⁰⁵ or if the exclusive right is liable to create a situation in which the respective undertaking is induced to commit such abuses;⁵⁰⁶ or if state measures enable the undertaking which is granted an exclusive right to abuse its dominant position.⁵⁰⁷ The case-law in this field can be roughly divided into three strands.⁵⁰⁸

First there are what AG *Jacobs* calls the *ERT*-type cases.⁵⁰⁹ Here the exclusive right is connected to additional (structural) features and this leads to abusive behavior or makes it

⁴⁹⁹ Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 388.

⁵⁰⁰ *Centre d'insémination de la Crespelle v Coopérative de la Mayenne*, *supra* note 494, para. 20; Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 388.

⁵⁰¹ Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 389.

⁵⁰² See, for example, Case C-320/91, *Corbeau*, (1993) ECR I-2533, para. 12-14.

⁵⁰³ See, for example, Case 311/84, *CBEM v CLT and IPB*, (1985) ECR 3261, para. 17; *Höfner v Elser*, *supra* note 231, para. 29; Case C-179/90, *Merci Convenzionali Porto di Genova*, (1991) ECR I-5889, para. 16; *Centre d'insémination de la Crespelle v Coopérative de la Mayenne*, *supra* note 494, para. 18; *Albany*, *supra* note 2, para. 93; *Pavlov*, *supra* note 253, para. 127; Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 389-391.

⁵⁰⁴ Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 392.

⁵⁰⁵ *Höfner v Elser*, *supra* note 231, para. 29; *Centre d'insémination de la Crespelle v Coopérative de la Mayenne*, *supra* note 494, para. 18; *Pavlov*, *supra* note 253, para. 127.

⁵⁰⁶ *ERT*, *supra* note 202, para. 37; *Merci Convenzionali Porto di Genova*, *supra* note 503, para. 17; *Pavlov*, *supra* note 253, para. 127.

⁵⁰⁷ *GB-Inno-BM*, *supra* note 374, para. 20; Case C-203/96, *Dusseldorp and others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer*, (1998) ECR I-4075, para. 61.

⁵⁰⁸ Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 395. For a division into at least four strands, including the additional category "extension of the dominant position doctrine": BUENDIA SIERRA, *supra* note 295, at pp. 163-176.

⁵⁰⁹ Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 395-405. BUENDIA SIERRA, *supra* note 295, at pp. 165 seq. speaks of the "conflict of interests doctrine".

very likely.⁵¹⁰ This usually involves an inherent conflict of interests. For example in the *ERT* case, a broadcasting company was assigned the exclusive right to broadcast its own programmes and to retransmit foreign broadcasts, which led to discrimination in favor of its own programmes.⁵¹¹ In *Raso*, certain dock-work companies were granted the exclusive right to supply temporary labor to other companies, while they were also allowed to compete with the latter companies.⁵¹² In *GB-Inno-BM*, an undertaking which marketed telephone equipment was granted the exclusive right of drawing up the specifications for such equipment, monitoring their application and granting type-approval, thus determining which products were allowed to compete with its own products.⁵¹³ According to the opinion of AG *Jacobs*, one example from the field of social insurance is the exclusive right of the funds to grant an exemption to compulsory affiliation in the *Albany* cases. The funds had discretion to grant exemptions, were only subject to marginal judicial review and could thus themselves determine the degree of competition to which they were exposed. The exclusive right of granting individual exemptions thus caused an inherent conflict of interests.⁵¹⁴

The second strand of case-law is the *Höfner*-type cases, as AG *Jacobs* calls them.⁵¹⁵ In these cases, Member States create a situation by granting exclusive rights that inevitably leads to the abuse of a dominant position under Art. 82(b) EC when the right is exercised by the monopoly undertaking, because the monopoly undertaking is manifestly not in a position to satisfy demand on the respective market.⁵¹⁶ In the field of social insurance, the Court found this to be the case in the three *Albany* cases, where every worker affiliated to the scheme received an aggregate pension of 70% of his final salary. Since some undertakings intended to provide their employees with higher pensions, but could not entrust it to a single insurer (which would have been more efficient and would have caused less administrative costs), the Court regarded the situation as a *Höfner*-type case, in which the undertaking was not able to satisfy the existing demand.⁵¹⁷

⁵¹⁰ Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 400.

⁵¹¹ *ERT*, *supra* note 202, para. 37 seq.

⁵¹² Case C-163/96, *Raso and others*, (1998) ECR I-533, para. 28-32.

⁵¹³ *GB-Inno-BM*, *supra* note 374, para. 24-28.

⁵¹⁴ Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 441-465.

⁵¹⁵ Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 406-416. BUENDIA SIERRA, *supra* note 295, at pp. 163-165 speaks of the "demand limitation doctrine".

⁵¹⁶ *Höfner v Elsner*, *supra* note 231, para. 29-31; *Job Centre*, *supra* note 458, para. 31-35.

⁵¹⁷ *Albany*, *supra* note 2, para. 94-97.

A third type of case is the *Corbeau* cases as identified by AG Jacobs.⁵¹⁸ Here the Court did not analyze an infringement of Art. 86(1) EC, but stated that this provision had to be read in conjunction with Art. 86(2) EC. It moved directly to assessing the justification of Art. 86(2) EC.⁵¹⁹ One example of an infringement of Articles 86(1) and 82 EC, which cannot be clearly attributed to the former two strands of case-law, is the exclusive right of tax deductibility of contributions granted to the funds in the case *Fédération Française*.⁵²⁰ This right, combined with the possibility that the supplementary scheme could use the assets of the statutory scheme, constituted an abusive impediment of the competitors and could also be regarded as a form of predatory pricing.

In summary, there are cases where either Art. 82 EC or Art. 86(1) in conjunction with Art. 82 EC can be infringed in the relation between the funds and the affiliated. The question then arises if Art. 86(2) EC as a justification or exemption is fulfilled, which is applicable both to Art. 82 EC and Art. 86(1) EC infringements.⁵²¹

bb) The justification/exemption according to Art. 86(2) EC

The essential question is whether the anticompetitive behavior of the funds and the Member States can be exempted from the competition rules under Art. 86(2) EC. This article is designed to find a compromise between the grant of special rights to undertakings by the Member States in order to fulfill tasks of *service public* (service of general interest) and the Community's interest in undistorted competition in the common market.⁵²² According to Art. 86(2) EC, the competition rules are only applicable to these undertakings as long as their application does not obstruct the performance, in law or in fact, of the particular tasks

⁵¹⁸ Opinion of AG Jacobs in *Albany*, *supra* note 2, para. 417-440. See also BUENDIA SIERRA, *supra* note 295, at pp. 173-176.

⁵¹⁹ *Corbeau*, *supra* note 502, para. 12-14; Case C-266/96, *Corsica Ferries France*, (1998) ECR I-3949, para. 40-47. AG Jacobs in his Opinion in *Albany*, *supra* note 2, para. 419 claimed that even the case of *Sacchi* may fall in this group – see the assessment of the Court in *Sacchi*, *supra* note 346, para. 12-18 in connection with the Opinion of AG Reischl, at p. 443 seq.

⁵²⁰ *Fédération Française*, *supra* note 105.

⁵²¹ This is consistent in the case-law, see for example *Corbeau*, *supra* note 502, para. 12-14 and the summary by BUENDIA SIERRA, *supra* note 295, at pp. 288-299, particularly pp. 292-298; critical GIESEN, *Sozialversicherungsmonopol*, *supra* note 94, at pp. 88-91 and p. 95, who wants to apply Art. 86(2) EC, because of its wording that is addressed to undertakings, only indirectly to the Member States in the context of Art. 86(1) EC by justifying the required anti-competitive conduct of the undertakings and thus also justifying the measure of the Member States. A direct application should only be possible where the legislation itself restricts competition and substitutes the economic behavior of an undertaking. This eventually leads to the same results as a direct application.

⁵²² See, for example, *France v Commission*, *supra* note 374, para. 12; Case C-157/94, *Commission v Netherlands*, (1997) ECR I-5699, para. 39; *Albany*, *supra* note 2, para. 103; Opinion of AG Jacobs in *Albany*, *supra* note 2, para. 436.

assigned to them. This implies a trade-off subject to the principle of proportionality.⁵²³ restrictions of competition as well as abuses of a dominant position are allowed, in so far as they are necessary for the provision of a *service public* and trade is not affected to an extent that would be contrary to the interest of the Community.

aaa) Entrusted with the operation of services of general economic interest

Art. 86(2) EC firstly requires that the funds are undertakings entrusted with the operation of services of general economic interest. As discussed in detail above, the funds constitute undertakings and offer a service – social insurance.⁵²⁴ The question is whether social insurance is a service of general *economic* interest. It might be argued that the provision of social insurance is of general *social* interest and not of general *economic* interest. Yet there are good reasons to reject such an argument. The requirement of a general economic interest is usually interpreted broadly by the Court, which only demands a general interest and omits the term *economic*.⁵²⁵ Furthermore it is argued that “services of general *economic* interest” is an incorrect formulation which is not to be interpreted literally, but rather teleologically.⁵²⁶ The interest envisioned by Art. 86(2) EC is supposed to be of a social, cultural or similar nature, because the mere aim of attaining economic benefits for the public undertaking or the state cannot of itself constitute a general interest in the sense of Art. 86(2) EC (the economic interest of the undertaking and the Member States is rather protected by the second alternative of Art. 86(2) EC: revenue-producing monopoly).⁵²⁷ Art. 86(2) first alternative EC was created for the maintenance of *service public* in the Member States⁵²⁸ and not to protect the Member

⁵²³ Art. 86(2) involves a classical test of proportionality: competition can be restricted (or even erased) if there is:
I. a legitimate purpose: the task assigned to the undertaking (in our case the provision of services of general economic interest).

II. necessity: the anticompetitive measure must be necessary to perform the particular task under economically acceptable conditions.

III. proportionality in a narrower sense: the effect on trade must not be so strong as to be contrary to the interests of the Community.

AG Jacobs in his Opinion in *Albany*, *supra* note 2, para. 417 describes the test under Art. 86(2) as a balancing process on the justification of the scope of the monopoly. In *AOK-Bundesverband* he even speaks of a test of proportionality with regard to Art. 86(2), see Opinion of AG Jacobs in *AOK-Bundesverband*, *supra* note 107, para. 90. See also BUENDIA SIERRA, *supra* note 295, at pp. 300-341; ENGELMANN, *supra* note 383, at p. 72; GIESEN, *Sozialversicherungsmonopol*, *supra* note 94, at p. 93 (Art. 86(2) as an expression of the Community principle of proportionality).

⁵²⁴ See above at pp. 55-67.

⁵²⁵ In *Albany*, *supra* note 2, para. 98, the Court speaks of “a particular *social* task of general interest”. In *Corsica Ferries France*, *supra* note 519, para. 45 the Court identified public security as a general economic interest. See also BUENDIA SIERRA, *supra* note 295, at pp. 277 seq..

⁵²⁶ See BERG, *supra* note 292, at 173.

⁵²⁷ BUENDIA SIERRA, *supra* note 295, at p. 278, similarly GIESEN, *Sozialversicherungsmonopol*, *supra* note 94, at p. 92.

⁵²⁸ BUENDIA SIERRA, *supra* note 295, at p. 279.

States from economic difficulties experienced because of the removal of trade-barriers.⁵²⁹ Therefore it is argued that the term "economic" refers to the activity in question and not to the interest pursued and that the correct wording should be: "economic services of general interest".⁵³⁰

The funds pursue a social objective, because they cover large parts of the population with insurance against social risks under socially acceptable conditions for the individual.⁵³¹ This objective is also in the *general* interest, since large parts of the population are covered with social insurance and this contributes to social peace and justice in the entire society. With regard to supplementary occupational pension funds (second pillar), AG *Jacobs* argued in the *Albany* cases that the funds clearly have a social objective, because they provide additional pensions beyond the minimum pensions of the statutory scheme for large parts of the population. Thus they do not primarily act in their own or the affiliated members' interest, but in the general interest.⁵³² The ECJ followed the opinion of its Advocate General.⁵³³ However even a literal interpretation of the term "general *economic* interest" would come to the same result. Social insurance provides for the material background which enables each individual to exercise his economic freedom without the constant constraint and threat of incalculable social risks.⁵³⁴ Social insurance contributes to national economies as a whole, since it prevents the impoverishment of those whose ability to work is impeded or erased by the occurrence of social risks (including the inevitable occurrence of age) and who would otherwise have to live on social assistance. Hence the provision of social insurance is in the general economic interest. The funds are furthermore *entrusted* with this interest by the Member States, because either national legislation or the state-approved statutes governing them determine the provision of social insurance as their task.⁵³⁵

bbb) No obstruction of the particular task assigned to the funds

Art. 86(2) EC also requires that the application of the competition rules must not obstruct the performance, in law or in fact, of the particular tasks assigned to the undertakings in question. The term *obstruct* is interpreted broadly by the Courts. Taking into consideration the wording (*obstruct*) and the telos (reconciling the Member States' interest in *service public* with the

⁵²⁹ BUENDIA SIERRA, *supra* note 295, at p. 303.

⁵³⁰ BUENDIA SIERRA, *supra* note 295, at p. 278.

⁵³¹ See above at pp. 18-22. See also GIESEN, *Die Vorgaben des EG-Vertrages*, *supra* note 138, at p. 134.

⁵³² Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 423 seq.

⁵³³ *Albany*, *supra* note 2, para. 105.

⁵³⁴ See above at pp. 39 seq.

⁵³⁵ Critical with regard to the Dutch legislation in the *Albany* cases GYSELEN, *supra* note 294, at 445 seq.

Community's interest in undistorted competition) of the rule, the ECJ ruled that it is not necessary that the survival of the undertaking is threatened.⁵³⁶ Rather it suffices that the maintenance of exclusive rights is necessary to enable the undertaking to perform the tasks of general economic interest assigned to it under economically acceptable conditions.⁵³⁷ When describing the objectives of social insurance above, it was explained that in order to provide large parts of the population with insurance under socially acceptable conditions, the respective schemes must involve certain degrees of solidarity to cross-subsidize bad risks, the worse-off and the individual. Otherwise underprivileged groups in society - the poor, the old and the sick – could not afford insurance or would not even be accepted in the insurance scheme.⁵³⁸ The maintenance of the financial equilibrium of the schemes based on solidarity requires compulsory affiliation or other restrictive measures.⁵³⁹ Without compulsory affiliation, the good risks would leave the scheme, looking for more advantageous insurance conditions in the private market (where they do not have to finance the bad risks), and only bad risks would remain in the scheme. This would inevitably lead to increased costs for the funds and thus to an increase in contributions. In the end it would become more difficult or even impossible to insure the bad risks at acceptable prices.⁵⁴⁰ With regard to solidarity between the different income groups, the same effect would occur without compulsory affiliation. The better-off would leave the scheme seeking more advantageous insurance with private suppliers, so that their contributions could not be used to subsidize the worse-off.⁵⁴¹ The same argument can also be applied to the third group of solidarity between the community and the individual and to the fourth group of intergenerational solidarity (be it in a scheme based on pay-as-you-go or capitalization), which also involve a redistribution of wealth. The concept that the good risks subsidize the bad risks, the better-off the worse-off,

⁵³⁶ *Commission v Netherlands*, *supra* note 522, para. 38-43. See also Opinion of AG Jacobs in *Albany*, *supra* note 2, para. 438. A literal interpretation of the English version (*obstruct*) and the French version (*faire échec*) clearly supports the broad interpretation chosen by the Court. Yet the German version “verhindern” (prevent) is more restrictive and a literal interpretation of the term would not allow for the broad interpretation. Therefore the Court formulated its decision in a way that gives at the same time semantic and teleological reasons for the broad interpretation of Art. 86 (2) EC.

⁵³⁷ *Corbeau*, *supra* note 502, para. 14-16; *Commission v Netherlands*, *supra* note 522, para. 53; *Albany*, *supra* note 2, para. 107.

⁵³⁸ See above at pp. 18-21.

⁵³⁹ See above at p. 21 and *Poucet et Pistre*, *supra* note 1, para. 13: “a system of compulsory contribution (...) is indispensable for application of the principle of solidarity and the financial equilibrium of those schemes.”

⁵⁴⁰ See the opinion of the Commission in Report of the Hearing in *Poucet et Pistre*, *supra* note 1, at pp. 656 seq. This was also the argument of the funds and the Netherlands government in the *Albany* cases, which the ECJ followed. *Albany*, *supra* note 2, para. 108; Opinion of AG Jacobs in *Albany*, *supra* note 2, para. 427. See also BUENDIA SIERRA, *supra* note 295, at pp. 305 seq., who uses the French term *écrémage* to describe this phenomenon; GIESEN, *Die Vorgaben des EG-Vertrages*, *supra* note 138, at p. 134 seq.; WINTERSTEIN, *supra* note 316, at 330.

⁵⁴¹ See the opinion of the Commission in Report of the Hearing in *Poucet et Pistre*, *supra* note 1, at pp. 656 seq. In the same vein the argument of the funds and the Netherlands government in *Albany*, Opinion of AG Jacobs in *Albany*, *supra* note 2, para. 428.

the community the individual and the generations each other would be rendered unworkable. In the *Albany* cases, the Court explicitly referred to the elements of solidarity in the respective schemes to justify the anticompetitive measures under Art. 86(2) EC.⁵⁴² Thus compulsory affiliation to the funds is necessary to maintain the financial equilibrium of social insurance and to prevent a “downward spiral”.

The plaintiffs in the *Albany* cases contended that compulsory affiliation to the scheme was not necessary to maintain its financial equilibrium. They argued that collective agreements containing minimum requirements for pensions would suffice, that the law could impose minimum requirements, i.e. by forbidding risk selections, and that many sectoral pension funds in the Netherlands functioned without compulsory affiliation.⁵⁴³ This actually led AG *Jacobs* to conclude that the question of whether compulsory affiliation was necessary had to be left to the national courts.⁵⁴⁴ The ECJ, on the other hand, employed the argument of the “downward spiral”, as described above, and found that the requirements of Art. 86(2) EC were fulfilled.⁵⁴⁵ The judgment of the ECJ deserves approval.⁵⁴⁶ Firstly, it is doubtful that the alternative suggestions of the plaintiffs, i.e. only requiring minimum standards, would suffice to maintain a social insurance scheme, because solidarity and redistribution, essential for the functioning of such schemes, can best be guaranteed by compulsory affiliation. Another factor must also be taken into account. As discussed previously, Community competence in the field of social protection is limited to coordination and a minimum degree of harmonization. The organization of social insurance schemes clearly lies within the competence of the Member States.⁵⁴⁷ This does not mean that Community law cannot address social insurance issues at all.⁵⁴⁸ But when applying Community law to social insurance schemes, the competence of the Member States in this field is to be given due regard.⁵⁴⁹ This means that the Member States must be given a relatively wide margin of appreciation in the organisation of their social insurance schemes and that any interference by the European Courts must be restricted to

⁵⁴² *Albany*, *supra* note 2, para. 109 seq.

⁵⁴³ *Albany*, *supra* note 2, para. 99 seq.; Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 430–432.

⁵⁴⁴ Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 433–435.

⁵⁴⁵ *Albany*, *supra* note 2, para. 108–111.

⁵⁴⁶ Contra GYSELEN, *supra* note 294, at 447 seq.

⁵⁴⁷ See above at pp. 22 seq.

⁵⁴⁸ AXER, *supra* note 320, at 60; ENGELMANN, *supra* note 383, at p. 77.

⁵⁴⁹ For the application of Art. 28, see, for example, *Duphar v Netherland*, *supra* note 137, para. 16; for the application of competition law see *Poucet et Pistre*, *supra* note 1, para. 6; Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 437; U. BÜDENBENDER, “Anmerkung zu EuGH Urt. v. 21.9.1999 – Rs. C-67/96”, (2000) ZIP 44, at 47; GIESEN, *Die Vorgaben des EG-Vertrages*, *supra* note 138, at p. 122; GIESEN, *Sozialversicherungsmonopol*, *supra* note 94, at pp. 159 seq.

clear infringements of Community law.⁵⁵⁰ Such an infringement cannot be seen in compulsory affiliation, which is the most effective way to ensure solidarity and thus the financial equilibrium of social insurance schemes.

Furthermore, the plaintiffs in *Albany*, supported by AG *Jacobs*, contended that the exclusive right of the funds to grant individual exemptions to compulsory affiliation (in which they enjoyed discretion and judicial review was only marginal) constituted an infringement of Art. 86 (1) in conjunction with Art. 82 EC. The possibility to grant exemptions as such, which is necessary for fairness in the single case, was not at issue but the fact that this right was granted to the funds and not to an independent entity.⁵⁵¹ The ECJ, on the other hand, ruled that there was no infringement. The Court analyzed the right to grant exemptions in conjunction with compulsory affiliation. It read Articles 86(1), 82 EC in connection with Art. 86(2) EC, as is its constant practice in the *Corbeau*-type cases.⁵⁵² Since the exemption from compulsory affiliation must not threaten the financial equilibrium of the scheme, the ECJ recognized that such a decision involves a complex analysis of actuarial data, which necessarily involves a wide margin of appreciation. Because of this complex analysis, the ECJ accepted the Member State's decision to entrust this task to the funds themselves, which have the best expertise, and not to a separate entity. The only condition was that those decisions were subject to judicial review in order to prevent arbitrary decisions and to safeguard the principle of non-discrimination.⁵⁵³ This judgment is to be welcomed. The Court respected the competence of the Member States in the field of social security and their respective margin of appreciation, while at the same time demanding judicial measures in order to prevent arbitrary decisions by the funds.⁵⁵⁴ The same solution should be applied to other exemptions that can be granted by the funds for reasons of social justice in the single case, like the exemption from, or suspension of, payment of contributions in cases of financial difficulties.

The next question to be addressed is whether compulsory affiliation can also be justified with regard to the financing system of pay-as-you-go in pension schemes, which does not necessarily involve greater or lesser solidarity than the schemes based on capitalization. Firstly, it must be observed that social insurance is within the competence of the Member

⁵⁵⁰ *Albany*, *supra* note 2, para. 122.

⁵⁵¹ Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 441-465.

⁵⁵² See above at p. 85.

⁵⁵³ *Albany*, *supra* note 2, para. 119-121.

⁵⁵⁴ See the critique of GADBIN, *supra* note 252, at 184, who doubts that the national courts can guarantee that the funds' decisions are non-discriminatory.

States and that they therefore enjoy a margin of discretion in the organization of their schemes. Even though there might be good arguments against pay-as-you-go, e.g. Europe's demographic development, there are also some arguments in favor of this system. It does not expose pensions to the volatility of the capital markets and does not make pensions dependent on macroeconomic development. Furthermore, a change from a system of pay-as-you-go to capitalization involves major difficulties. It is very expensive to simultaneously pay, during an initial phase, both redistributive pensions and to create a capital stock. Additionally, the high accumulation of capital in pension funds might cause macroeconomic distortions.⁵⁵⁵ Thus there are legitimate reasons for a state to maintain its pension scheme based on the redistribution method. It is obvious that the functioning of such a scheme necessarily depends on compulsory affiliation, which guarantees that the working generation finances the retired and that future generations will finance the present working generation.⁵⁵⁶ Without compulsory affiliation, the funds based on pay-as-you-go would not be able to provide pension insurance. Therefore the feature of financing by pay-as-you-go can also serve as a justification under Art. 86(2) EC.

An example of an exclusive right granted to a social insurance fund, which is different from compulsory affiliation, is the possibility for the insured to deduce their contributions from taxable earned income, as was the case in *Fédération Française*.⁵⁵⁷ Even though this right was granted to the insured rather than to the fund, the fund directly and exclusively profited from it because only the contributions to this fund were deductible from taxes. Thus it can be interpreted as the exclusive right of the fund to offer tax deductibility. The strong incentive thus provided to affiliate with the fund conferred an effective monopoly on it.⁵⁵⁸ Since the fund in question also exhibited certain features of solidarity: for example the possibility of exemption from contributions in the event of illness; the suspension of payment in case of economic hardship;⁵⁵⁹ no selection of risks;⁵⁶⁰ the independence of contributions from risks⁵⁶¹ and was clearly intended to cover a large, underprivileged part of the population with insurance against social risks,⁵⁶² it might well be argued that the exclusive right conferred on

⁵⁵⁵ GIESEN, *Die Vorgaben des EG-Vertrages*, *supra* note 138, at p. 135.

⁵⁵⁶ See Opinion of AG Jacobs in *Albany*, *supra* note 2, para. 338; GIESEN, *Die Vorgaben des EG-Vertrages*, *supra* note 138, at p. 135.

⁵⁵⁷ *Fédération Française*, *supra* note 105.

⁵⁵⁸ Opinion of AG Tesauro in *Fédération Française*, *supra* note 105, para. 4.

⁵⁵⁹ Opinion of AG Tesauro in *Fédération Française*, *supra* note 105, para. 7.

⁵⁶⁰ *Fédération Française*, *supra* note 105, para. 9.

⁵⁶¹ *Fédération Française*, *supra* note 105, para. 19.

⁵⁶² *Fédération Française*, *supra* note 105, para. 8.

it was necessary in the sense of Art. 86(2) EC to maintain its financial equilibrium.⁵⁶³ The ECJ indicated some support for this position.⁵⁶⁴ Since the facts provided in the judgment are relatively rare, a definite answer as to the necessity of the exclusive right of tax deductibility for the financial equilibrium of the fund and the accomplishment of its social objective cannot be given here.

ccc) The development of trade must not be affected to such an extent as would be contrary to the interest of the Community

The final requirement of Art. 86(2) EC is that the development of trade must not be affected to such an extent as would be contrary to the interest of the Community. The interpretation of this term is highly controversial. The exact content of this provision is disputed, especially the meaning of the term “interests of the Community”. One opinion argues in favor of an objective interpretation which relies on the objectives in Art. 2 EC in order to identify the Community interests. Some went even further and restricted the interests of the Community to the maintenance of a common market in which competition freely operates.⁵⁶⁵ Yet this narrow interpretation cannot be upheld today with regard to the development of the Community after Maastricht and Amsterdam. A more flexible approach advocates a subjective interpretation, considering Art. 86(2) EC a mainly political norm.⁵⁶⁶ Furthermore the question was discussed of whether the second sentence of Art. 86(2) EC was directly applicable or if it was a sub-exception to the first sentence, only applicable by the Commission.⁵⁶⁷ The ECJ directly applies Art. 86(2) EC, but simply ignores the second sentence of this provision. This can be interpreted as suggesting that the second sentence is only a clarification of the first sentence and lacks any independent meaning.⁵⁶⁸

The interpretation favored here is that the provision of Art. 86(2) – second clause - EC is part of a comprehensive test of proportionality in the framework of Art. 86(2) EC, which is directly applicable. While the first sentence assures that the restrictions of competition serve a legitimate aim - the fulfillment of a general interest - and that they are necessary to attain this purpose, the second sentence introduces a test of proportionality in the narrow sense. It is

⁵⁶³ GIESEN, *Die Vorgaben des EG-Vertrages*, *supra* note 138, at p. 138 seq.

⁵⁶⁴ *Fédération Française*, *supra* note 105, para. 20.

⁵⁶⁵ See BUENDIA SIERRA, *supra* note 295, at pp. 342 seq.

⁵⁶⁶ BUENDIA SIERRA, *supra* note 295, at p. 343 seq.

⁵⁶⁷ Compare BUENDIA SIERRA, *supra* note 25, at pp. 344 seq. See also the doubts AG Jacobs had with regard to direct applicability in his Opinion in *Albany*, *supra* note 2, para. 433-435.

⁵⁶⁸ See, for example, the overview by BUENDIA SIERRA, *supra* note 295, at pp. 348-352. A clear example from the case-law is *Albany*, *supra* note 2, para. 103-123.

undisputable that the Member States have at least a broad margin of discretion in defining the general interest and that the very purpose of Art. 86(2) EC is to take into account the Member States' *service public*.⁵⁶⁹ The second clause of Art. 86(2) EC guarantees that the interests and objectives of the Community are not completely undermined by consideration of the *service public*. In the case of social insurance, it must be borne in mind that social security and social protection are considered objectives of the Community (see Articles 2, 3(j), 136 seq. EC) and that it can even be assumed that there is a fundamental right of access to social insurance on the Community level.⁵⁷⁰ Thus social protection and security themselves constitute major Community interests and their consideration cannot possibly be contrary to the interests of the Community.

cc) Summary

The above analysis shows that, in the relation between social insurance funds and their affiliated, the respective anti-competitive measures are generally justified under Art. 86(2) EC. Compulsory affiliation and the creation of monopolies in the field of social insurance are necessary to maintain the financial equilibrium of the schemes and the features of solidarity involved in them. Certain additional rights granted to the funds which are necessary for social justice in the single case, like the right to grant exemptions from compulsory affiliation or the right to grant suspension of payment under certain conditions, are justified as well. These exemptions directly affect the financial equilibrium of the funds and thus require a complex actuarial analysis. A Member State must be allowed to entrust the funds with these decisions, because they have the highest expertise in deciding if an exemption is justified and financially feasible. Here the competence of the Member States in the field of social security must be respected by granting them a wide margin of appreciation. Only arbitrary decisions should be avoided by guaranteeing judicial review.

⁵⁶⁹ *Albany*, *supra* note 2, para. 103 seq.; BUENDIA SIERRA, *supra* note 295, at p. 281 and p. 331.

⁵⁷⁰ See above at pp. 23-28.

b) The relationship between the funds and third parties

The next section deals with the application of competition law in the relation between the funds and third parties (e.g. suppliers of medical goods and services). The examples used will be confined to those stemming from the case-law.

aa) Possible infringements of competition law: Art. 81 EC, Art. 82 EC, Art. 86(1) EC in conjunction with Art. 81 EC and Articles 3(g), 10 and 81 EC

The first example from the case *FENIN* concerns the abuse of a dominant position by statutory health insurance funds.⁵⁷¹ In Spain, 26 organizations were entrusted with the management of the national health insurance scheme. Since those organisations had the exclusive right to manage the scheme and they behaved as a collective entity on the market, they had a collective dominant position in a substantial part of the market.⁵⁷² They were accused of discrimination in the sense of Art. 82(c) EC, because they systematically took an average of 300 days to pay their debts to the plaintiffs, providers of medical goods and equipment used in Spanish hospitals, while they settled their debts with other creditors in a far more reasonable period of time. This discrimination was attributed to their dominant position, which enabled the funds to delay payment without the threat of commercial pressure by the suppliers.⁵⁷³

Another case concerning the relation between social insurance funds and the suppliers of medical goods and services was *AOK Bundesverband*.⁵⁷⁴ Here the leading associations of statutory sickness funds in Germany jointly determined the so-called “fixed amounts”, fixed maximum amounts that would be paid for the purchase of a certain category of medicine.⁵⁷⁵ The German statutory health insurance system is based on benefits in kind and the insured were only reimbursed for the purchase of the respective medicine up to the level of the fixed maximum amount. The excess costs had to be borne by the insured themselves.⁵⁷⁶ This joint determination of the fixed maximum amounts by the leading associations of funds constituted a purchase price fixing decision in the sense of Art. 81(1)(a) EC. Usually price fixing decisions are regarded as having the restriction of competition as their *objective*, without a

⁵⁷¹ *FENIN*, *supra* note 272.

⁵⁷² For the concept of collective dominance in Art. 82, see joined Cases C-395, 396/96 P, *Compagnie Maritime Belge Transports and other v Commission*, (2000) ECR I-1365, para. 36.

⁵⁷³ *FENIN*, *supra* note 272, para. 1.

⁵⁷⁴ *AOK Bundesverband*, *supra* note 107.

⁵⁷⁵ Opinion of AG Jacobs in *AOK Bundesverband*, *supra* note 107, para. 1.

⁵⁷⁶ See Opinion of AG Jacobs in *AOK Bundesverband*, *supra* note 107, para. 9.

further consideration of the actual *effects* on competition being necessary.⁵⁷⁷ Although in theory the suppliers of medical products remained free to set prices above the level of the fixed amounts, only 7% of medical products to which the price fixing applied were sold at a higher price.⁵⁷⁸ This additionally showed a restrictive *effect* of the decision. Therefore the decisions of the leading associations had both the *objective* and the *effect* of restricting competition.⁵⁷⁹ Since the entire German market of medical supply was affected, competition in a substantial part of the common market was restricted and trade between Member States was affected.⁵⁸⁰

It was very controversial in this case whether the associations of funds themselves could be held responsible for this conduct or if they only applied national law (§ 35 (3) SGB V), whereby accountability would be interrupted according to the *Ladbroke* doctrine.⁵⁸¹ The restriction of competition would be attributable to the leading associations of the funds, if it was either wholly attributable to the manner in which they had exercised a given discretion or if their choices had exacerbated the restrictive effects.⁵⁸² The first possibility could be excluded, since the German law required the leading associations to set the fixed amounts on the basis of the lowest sale prices. Therefore they could not have avoided any restriction of competition.⁵⁸³ The question of whether the second alternative was fulfilled was answered in different ways by the national courts. The German *Bundesgerichtshof* (BGH) was in favor of applying the *Ladbroke* doctrine, because § 35 (3) SGB V imposed an obligation on the associations of funds to set the maximum amounts; it obliged them to review their decisions at least once a year; the funds were compelled to set the fixed amounts on the basis of the lowest pharmacy sales price; the law laid down certain requirements for the decisions as to quality and profitability; the decisions were subject to judicial review and, finally, if the associations of funds failed to make a decision, the competent minister would do so. Hence the *Bundesgerichtshof* concluded that the funds had no discretion of their own allowing them to exacerbate the restrictive effects of the determination of fixed amounts.⁵⁸⁴ The *Oberlandesgericht* (OLG) Düsseldorf, on the other hand, came to the conclusion that the

⁵⁷⁷ Case 123/83, *BNIC/Clair*, (1985) ECR 391, para. 22; Opinion of AG Jacobs in *AOK Bundesverband*, *supra* note 107, para. 69.

⁵⁷⁸ Opinion of AG Jacobs in *AOK Bundesverband*, *supra* note 107, para. 10.

⁵⁷⁹ Opinion of AG Jacobs in *AOK Bundesverband*, *supra* note 107, para. 63-70.

⁵⁸⁰ Opinion of AG Jacobs in *AOK Bundesverband*, *supra* note 107, para. 71.

⁵⁸¹ For the *Ladbroke* doctrine see above at pp. 63-65.

⁵⁸² Opinion of AG Jacobs in *AOK Bundesverband*, *supra* note 107, para. 82 and judgment in *C.I.F.*, *supra* note 381, para. 66.

⁵⁸³ Opinion of AG Jacobs in *AOK Bundesverband*, *supra* note 107, para. 83.

⁵⁸⁴ BGH, *supra* note 286, (2001) WRP 1331, at 1337 seq.

funds were engaged in autonomous conduct restricting competition, because they possessed discretion with regard to the exact level of the maximum amounts and with regard to the time when to determine such amounts, thus having enough power to adversely affect competition on the relevant market.⁵⁸⁵ One example of the discretion of the funds was that they could appreciably lower the maximum amounts by changing the method of calculation.⁵⁸⁶ With regard to the restrictive application of the State action defense in the case-law and the need to protect the remaining competition,⁵⁸⁷ the view of the OLG *Düsseldorf* is preferable. The leading associations of the funds had enough discretion to themselves exacerbate the negative effects on competition. This is even truer with regard to the case-law in *Consiglio Nazionale degli Spedizioneri Doganali v Commission*, where the Court decided that the legal obligation to fix prices is irrelevant as long as the undertakings have an, albeit limited, discretion left.⁵⁸⁸

Furthermore, Art. 86(1) EC in conjunction with Art. 81 EC might be applicable in this case. The question is whether the leading associations of the funds enjoy an exclusive right with regard to the determination of fixed amounts. § 35 (3) SGB V imposes on the leading associations of sickness funds the obligation to jointly determine the fixed amounts. This obligation can also be interpreted as a right to form a purchase cartel. An obligatory cartel, as exists in the case of the determination of fixed amounts, is a classical example for the application of Art. 86(1) in conjunction with Art. 81 EC.⁵⁸⁹ Yet even if § 35 (3) SGB V cannot be regarded as an exclusive right granted to the funds, Articles 3(g), 10 and 81 EC as the *lex generalis* can still be applicable. These provisions were mentioned by AG *Jacobs* with regard to the determination of fixed amounts.⁵⁹⁰ The provisions of Articles 3(g), 10 and 81 EC require Member States not to introduce or maintain in force measures, even of legislative or regulatory nature, which may render the competition rules ineffective. This is particularly the case where a Member State requires or favors the adoption of agreements, decisions or concerted practices contrary to Art. 81 EC, reinforces their effects, or where it deprives its own rules of the character of legislation by delegating to private economic operators

⁵⁸⁵ OLG *Düsseldorf*, decision of 27.07.1999, U (Kart) 36/98. In the same vein *AXER*, *supra* note 320, at 62; *ENGELMANN*, *supra* note 383, at pp. 81 seq.; *KOENIG/SANDER*, *supra* note , at 980; *SLOT*, *supra* note 309, at 588 seq.

⁵⁸⁶ OLG *Düsseldorf*, judgment of 18.05.2001, U (Kart) 28/00, at p. 9; *ENGELMANN*, *supra* note 383, at p. 81.

⁵⁸⁷ See *Van Landewyck v Commission*, *supra* note 395, para. 106-134; joined Cases 240 to 242, 261, 262, 268 and 269/82, *Stichting Sigarettenindustrie v Commission*, (1985) ECR 3831, para. 13-45; Case C-219/95 P, *Ferriere Nord v Commission*, (1997) ECR I-4411, para. 22-25; *Consiglio Nazionale degli Spedizioneri Doganali v Commission*, *supra* note 299, para. 41-75.

⁵⁸⁸ *Consiglio Nazionale degli Spedizioneri Doganali v Commission*, *supra* note 299, para. 41-75. See also Opinion of AG *Jacobs* in *C.I.F.*, *supra* note 381, para. 61-74.

⁵⁸⁹ *BUENDIA SIERRA*, *supra* note 295, at p. 190.

⁵⁹⁰ Opinion of AG *Jacobs* in *AOK Bundesverband*, *supra* note 107, para. 85.

responsibility for taking decisions affecting the economic sphere.⁵⁹¹ It must be pointed out in this context that Articles 3(g), 10 and 81 EC are also applicable where the anti-competitive behavior is imposed on the undertakings by national legislation and the infringements of Articles 81 and 82 EC are not attributable to the undertakings because of the *Ladbroke* doctrine.⁵⁹² In the given case the German legislation clearly required the leading associations of sickness funds to set fixed amounts on the basis of the lowest pharmacy sale price, thus requiring decisions contrary to Art. 81 EC.⁵⁹³

bb) The justification/exemption according to Art. 86(2) EC

The next question is whether the infringements of competition law can be justified under Art. 86(2) EC. As described above,⁵⁹⁴ the funds provide services of general economic interest – social insurance. The particular task assigned to them is the coverage of large parts of the population with insurance against social risks under socially acceptable conditions for the individual. The main question in the given context is whether the application of the competition rules obstructs, in law or in fact, the performance of this task.

In the *FENIN* case, it is difficult to see why delaying payment towards certain undertakings should be necessary to enable the social insurance scheme to perform its social task under economically acceptable conditions. Unfortunately the case does not provide further details, but a first assessment leads to the conclusion that the funds' behavior is not justified under Art. 86(2) EC and thus constitutes an infringement of Art. 82(c) EC.⁵⁹⁵

The situation is different in *AOK Bundesverband*. The bearing of costs by the insurance causes the problem that neither doctors nor patients, i.e. the insured, care about the prices of medical supply. The affiliated or the prescribing physicians can choose the medicine freely and they do not have to pay for it. Since the insured do not bear the costs themselves, they do not develop an awareness of prices.⁵⁹⁶ This can also lead to a *moral hazard*, i.e. the temptation

⁵⁹¹ Case 267/86, *Van Eycke v ASPA*, (1988) ECR 4769, para. 16; *Reiff*, *supra* note 386, para. 14; *Delta Schiffahrts- und Speditionsgesellschaft*, *supra* note 386, para. 14; Case C-96/94, *Centro Servizi Spediporto v Spedizioni Marittima del Golfo*, (1995) ECR I-2883, para. 20 seq.; *C.I.F.*, *supra* note 381, para. 45 seq.; Opinion of AG Jacobs in *AOK Bundesverband*, *supra* note 107, para. 85.

⁵⁹² *C.I.F.*, *supra* note 381, para. 50 seq.; Opinion of AG Jacobs in *AOK-Bundesverband*, *supra* note 107, para. 85. Contra ENGELMANN, *supra* note 383, at p. 68.

⁵⁹³ See also AXER, *supra* note 320, at 62 seq.; SLOT, *supra* note 309, at 590-592.

⁵⁹⁴ See above at pp. 86 seq.

⁵⁹⁵ See also the opinion of the plaintiffs in *FENIN*, *supra* note 272, para. 24.

⁵⁹⁶ *AOK-Bundesverband*, *supra* note 107, para. 3.

of the insured to make excessive use of the insurance services.⁵⁹⁷ Consequently the suppliers of medical goods were never exposed to any pressure from the demand side to lower their prices.⁵⁹⁸ The opposite was often the case, because many patients consider the more expensive medicine the better medicine and have no incentive to save money on it.⁵⁹⁹ Another special feature of the market for medical supply is its intransparency. Patients are seldom aware of what alternatives exist to a certain medicine, because of the high degree of differentiation in this market and it is difficult for them to compare the different qualities.⁶⁰⁰ This led to a lack of price competition in the German market for medical supplies which almost caused the financial collapse of the German statutory health insurance scheme.⁶⁰¹

The fixed amounts, being based on the lowest prices in the respective category of medicine, enable the funds to save money with regard to the purchase of medicine.⁶⁰² They furthermore cause the insured to develop an awareness of prices, because they have to bear the excessive costs for medicine themselves. The introduction of the system of fixed amounts was a necessary reply to the inherent structural failures in the market for medical supplies. It is an indispensable measure to maintain the financial equilibrium of the funds and so enable them to perform the task entrusted to them: the coverage of large parts of the population with insurance against sickness under socially acceptable conditions. The counterargument that there might be other means to maintain financial equilibrium or that the determination of fixed amounts should be entrusted to an independent authority like the German Minister of Health⁶⁰³ can be answered with the consideration from the *Albany* cases:⁶⁰⁴ the Member States enjoy a margin of discretion in organizing their social insurance system.⁶⁰⁵ There is no evidence that other means would be as efficient as, but less restrictive of competition than, the fixed amounts. It is not obviously disproportionate to entrust the funds themselves with determining the fixed amounts, because they have the highest expertise in maintaining their financial equilibrium.⁶⁰⁶ As long as sufficient judicial review is guaranteed in order to avoid

⁵⁹⁷ ENGELMANN, *supra* note 383, at p. 21 seq.; GIESEN, *Die Vorgaben des EG-Vertrages*, *supra* note 138, at p. 126.

⁵⁹⁸ AOK-Bundesverband, *supra* note 107, para. 3; ENGELMANN, *supra* note 383, at p. 22.

⁵⁹⁹ GIESEN, *Die Vorgaben des EG-Vertrages*, *supra* note 138, at p. 126.

⁶⁰⁰ ENGELMANN, *supra* note 383, at p. 21; GIESEN, *Die Vorgaben des EG-Vertrages*, *supra* note 138, at p. 125 seq.

⁶⁰¹ AOK-Bundesverband, *supra* note 107, para. 3.

⁶⁰² AOK-Bundesverband, *supra* note 107, para. 3.

⁶⁰³ Opinion of AG Jacobs in *AOK-Bundesverband*, *supra* note 107, para. 86.

⁶⁰⁴ AXER, *supra* note 320, at 64; KOENIG, SANDER, *supra* note 292, at 984.

⁶⁰⁵ Opinion of AG Jacobs in *AOK Bundesverband*, *supra* note 107, para. 95.

⁶⁰⁶ Opinion of AG Jacobs in *AOK Bundesverband*, *supra* note 107, para. 96-100.

arbitrary decisions,⁶⁰⁷ the procedure of determining fixed amounts can be justified under Art. 86(2) EC.⁶⁰⁸

As outlined above,⁶⁰⁹ the maintenance of social insurance also constitutes a Community interest, so that the requirement of the second sentence of Art. 86(2) EC is fulfilled as well.

cc) Summary

The above analysis shows that anti-competitive behavior on third markets, in this case the upstream markets for medical supplies and services, can be justified under Art. 86(2) EC. As long as breaches of competition law are necessary to facilitate the social task of social insurance funds, they are accepted by EC law. Only where the infringements of competition law do not pass the test of proportionality under Art. 86(2) EC, as may be the case with arbitrary discrimination against certain suppliers, will they be forbidden under EC competition law.

c) The results found in light of the fundamental right of access to social security and the Constitutional Treaty

As illustrated above,⁶¹⁰ there is a negative fundamental right/principle of access to social security on the Community level. Since the Art. 86(2) EC test ensures that competition law is only applicable to social insurance schemes, if it does not impede the provision of social insurance under economically acceptable conditions, the application of competition law can never lead to a limitation of this fundamental right. The only case found where the behavior of the funds is not justifiable under Art. 86(2) EC is arbitrary discrimination which is unnecessary for the functioning of the scheme under economically acceptable conditions.

Furthermore the results found will also satisfy the requirement of the cross-sectional clause in Art. III-117 of the future Constitution, which obliges the institutions of the Union to take into account the guarantee of social protection in defining and implementing the policies of Part III of the Constitution, including competition law. Art. 86(2) EC (the future Art. III-166(2)) provides the tool for taking account of the guarantee of adequate social protection by ensuring

⁶⁰⁷ See Opinion of AG Jacobs in *AOK Bundesverband*, *supra* note 107, para. 101.

⁶⁰⁸ See also AXER, *supra* note 320, at 63 seq.; contra SLOT, *supra* note 309, 592 seq.

⁶⁰⁹ See above at pp. 92 seq.

⁶¹⁰ See above at pp. 23-28.

that schemes of social protection are not subject to competition law where it would be economically detrimental to them. Furthermore the solution put forward takes into account the principle of subsidiarity by granting Member states a margin of appreciation in organizing their social insurance schemes and by respecting their competence in this field.

d) Summary

While the ECJ and the CFI try to find a balance between competition law and social insurance by weighing the diverse features of the funds, in particular the degree of solidarity, when defining the term undertaking,⁶¹¹ it is submitted that the more appropriate tool to find the right balance is Art. 86(2) EC.⁶¹² The application of Art. 86(2) EC to social insurance schemes has three major advantages. The first one is that the application of the principle of proportionality leads to results that meet the objectives of both competition law and social insurance: anti-competitive behavior is generally forbidden, but exceptionally allowed, where the purpose of social insurance requires it.⁶¹³ The second advantage is that the application of Art. 86(2) EC is more appropriate in light of the modernization of the welfare state. The existing case-law has generally excluded pension schemes that belong to the first pillar and are financed by the redistribution method from the ambit of competition law, whereas occupational schemes, based on capitalization, were made subject to the justification of Art. 86(2) EC.⁶¹⁴ Since the second and third pillar will gain more importance because of Europe's demographic development,⁶¹⁵ equal treatment of the different pillars with regard to the purpose of covering large parts of the population with insurance against social risks is justified. Third, it was evident that the general exemption of certain social insurance schemes from competition law can lead to detrimental effects on third (upstream) markets.⁶¹⁶ Here an application of Art. 86(2) EC guarantees that these anti-competitive effects are only allowed where they are indispensable to the functioning of the insurance schemes. Thus Art. 86(2) EC, as an expression of the general legal principle of proportionality, provides the appropriate tool for striking the right balance between competition law and social insurance.

⁶¹¹ See above at p. 52.

⁶¹² See BELHAJ, VAN DE GRONDEN, *supra* note 290, at 687; BERG, *supra* note 292, at 172; BUENDIA SIERRA, *supra* note 295, at p. 58; ENGELMANN, *supra* note 383, at p. 72; GIESEN, *Die Vorgaben des EG-Vertrages*, *supra* note 138, at p. 131; GIESEN, *Sozialversicherungsmonopol*, *supra* note 94, at pp. 123-127; GYSELEN, *supra* note 294, at 439 seq.; WINTERSTEIN, *supra* note 316, at 329 seq.

⁶¹³ See BERG, *supra* note 292, at 173; ENGELMANN, *supra* note 383, at p. 72.

⁶¹⁴ See the analysis of the case-law above at pp. 41-52.

⁶¹⁵ See above at pp. 21 seq. and Commission of the European Communities, *Adequate and sustainable pensions*, *supra* note 120, at p. 70-79.

⁶¹⁶ See above at p. 68.

2. The solution in the field of collective bargaining – actors, justifications and fundamental rights

As outlined above,⁶¹⁷ the solution to a possible collision of competition law and collective bargaining was solved by the ECJ with the creation of a non-statutory exemption for collective agreements. Since this solution is doubtful from a doctrinal point of view, causes legal uncertainty and is prejudiced in favor of collective bargaining and against the objectives of competition law,⁶¹⁸ a different solution will be proposed in the following section, which seeks to reconcile the objectives of competition law and collective bargaining. Firstly we shall examine to what extent collective agreements can actually infringe Community competition law. If such infringements occur, a method to strike the right balance between competition law and collective bargaining will be proposed.

a) Employees and employers, trade unions and employers' associations – are they undertakings?

The first requirement of competition law is that the parties to an agreement, in our case trade unions, employers' associations and single employers, constitute undertakings or associations of undertakings.

In order to answer the question if trade unions are associations of undertakings, it is necessary to ask if employees can be considered undertakings.

The definition of the term undertaking must focus on a teleological interpretation in order to provide for the *effet utile* of the competition rules.⁶¹⁹ For this interpretation the formula from *Höfner v Elser* can be employed, as discussed above⁶²⁰: “the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed”.⁶²¹ The main feature of the functional, relative concept of undertaking in EC competition law is engagement in an economic activity.

⁶¹⁷ See above at pp. 71-74.

⁶¹⁸ See above at pp. 74-77.

⁶¹⁹ KORDEL, *supra* note 182, at pp. 25 seq.

⁶²⁰ See above at pp. 55 seq.

⁶²¹ *Höfner v Elser*, *supra* note 231, para. 21.

Employees might be engaged in an economic activity, because they offer their work in the labor market in exchange for remuneration.⁶²² Yet the “services” they offer are those of dependent work and hence fundamentally differ from other services. AG *Jacobs* identified certain features which distinguish dependent work from regular service: employees usually do not bear the financial risks of transactions, they only work for a single employer, do not offer services to a variety of clients and they are subject to the orders of their employer.⁶²³ Guido Kordel criticizes this assessment, claiming that employees bear the financial risk of their transactions in the labor market.⁶²⁴ This is not exactly true. Certainly, employees bear the consequences of infringements of their labor contract because of bad performance.⁶²⁵ Yet they receive their salary or wages independent of the fact that the goods they produce are sold or the services they provide are used by customers in the single case. It is the employer, and not the employee, who bears the risk of the economic performance of the undertaking. Of course, the employee also bears the risk that the undertaking he works for is efficient, otherwise he will be made redundant in order to lower production costs. Yet this is not a direct risk of his transaction to offer labor, but rather a risk of the employer who has to perform efficiently in the market. Hence it cannot be said that the employee bears the financial risk of his own transactions, but rather the employer’s risk of good performance in the market.

Regarding the dependence of the employee on the employer, Kordel argues that the employee can terminate the labor contract and offer his labor to other employers.⁶²⁶ With regard to this argument it must be remarked that usually the employee can only offer his labor to one employer at a time, thus constituting a fundamental difference with the provision of independent services. In addition, the termination of a labor contract involves legal difficulties and economic risks that do not exist in a market for normal services.⁶²⁷

Yet the main difference with an economic activity in the usual sense of competition law is the special features of the labor market which fundamentally distinguish it from other markets. These special features include the limited exit option of the employees due to the dependence of the individual on his job, high entry costs due to the immobility of human capital and to

⁶²² Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 211 seq. See also KORDEL, *supra* note 182, at pp. 32 seq.

⁶²³ Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 214 seq.

⁶²⁴ KORDEL, *supra* note 182, at p. 33.

⁶²⁵ See KORDEL, *supra* note 182, at p. 33, Fn. 152.

⁶²⁶ KORDEL, *supra* note 182, at pp. 33 seq.

⁶²⁷ For example the termination period, duties of loyalty towards the former employer, the difficulty of finding an appropriate new job in times of high unemployment and the immobility of human capital.

education and vocational training, and consequently an anomalous supply function which can – at least in cases of high demand elasticity – eventually lead to a race to the bottom with wages not covering the marginal costs of living. This is especially true for under-qualified workers in times of high unemployment.⁶²⁸ Thus dependent work cannot be considered a normal service or economic activity.⁶²⁹ As Art. I(a) of the ILO Declaration of Philadelphia and § 6 of the U.S. Clayton Act state: “Labor is not a commodity.”

In the same vein, the ECJ ruled in *Becu and Others* that Belgian dock workers did not constitute “undertakings” for the purposes of EC competition law, because they worked for certain undertakings under employment contracts and under the direction of these undertakings and they were incorporated in these undertakings so to form an economic unit with them. Since they fell under the definition of workers in Art. 39 EC, they could not be considered undertakings in the sense of EC competition law.⁶³⁰ In *Pavlov*, on the other hand, the Court ruled that self-employed, independent medical specialists constitute undertakings, because they are economic actors, provide services on the market, are paid by their customers (i.e. by different cu) and assume the financial risk attached to their activity.⁶³¹

A systematic interpretation of the Treaty leads to the same result. The Treaty distinguishes between freedom of services in Articles 49 and 50 EC and freedom of establishment of enterprises and companies in Articles 43 and 48 EC on the one hand, and free movement of workers in Art. 39 on the other hand, thus recognizing the fundamental difference between dependent work and independent activities on regular markets. Furthermore, Art. 81 EC lists as typical restrictions of competition the fixing of “purchase and selling prices or any other trading condition” and not of wages and working conditions. Art. 81 EC also provides the example of the limiting or controlling of “production, markets, technical development and investment” and not the limiting of labor or working time. As AG *Jacobs* pointed out, the formulations of Art. 81 EC clearly show that it is not designed for dependent work.⁶³²

A final argument can be drawn from a semantic interpretation of the term “undertaking”. A semantic interpretation finds that employees work for undertakings, but are not undertakings themselves, because they do not offer goods and independent services on a market. In English

⁶²⁸ See above at p. 32.

⁶²⁹ Contra KORDEL, *supra* note 182, at p. 33 who considers dependent work as a normal service.

⁶³⁰ Case C-22/98, *Becu and Others*, (1999) ECR I-5665, para. 24-30.

⁶³¹ *Pavlov*, *supra* note 253, para. 76 seq.

⁶³² Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 216.

(undertaking/worker or employee), French (*entreprise/employé* or *salarié*) and German (*Unternehmen/Arbeitnehmer*) there is a clear difference between these terms and they exclude each other.

For these reasons employees cannot be considered undertakings under the Treaty's competition rules, and trade unions cannot be considered associations of undertakings.⁶³³ The next question is whether trade unions, if they are engaged in collective bargaining, constitute undertakings themselves. Certainly trade unions can act as undertakings, if they are engaged in economic activities like trade union banks, supermarkets or as investors in the capital market and as shareholders of third companies. However in their function as representatives of the employees in collective agreements, they cannot be considered undertakings. They do not act in their own right, but only execute the collective will of their members. Hence they merely act as agents in the interest of the employees on the labor market. Thus trade unions are not undertakings in their function as negotiators of collective agreements.⁶³⁴

The different employers, on the other hand, negotiate with the trade unions concerning wages, working conditions and other issues. These are essential cost factors for their production and offering of goods and services; human work is one of the most important input factors. Therefore they negotiate about issues that are part of their economic activity of producing and offering goods and services. Thus they act as undertakings in collective bargaining about cost factors. The same is true for their organizations, which constitute associations of undertakings.⁶³⁵

For the application of Art. 81 EC, the results found have the following implications: collective agreements themselves are not agreements in the sense of Art. 81 EC, because they are not agreements between undertakings (the trade unions lack this characteristic). For multi-employer collective agreements, this means that only the underlying agreements between the different employers or the decision of the employers' association to conclude a collective agreement can fall within the scope of Art. 81 EC.⁶³⁶ This also means that single-employer

⁶³³ See for the same result Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 217 seq.; H. FLEISCHER, "Absprachen im Profisport und Art. 85 EGV", (1996) *WuW* 473, at 485; contra KORDEL, *supra* note 182, at pp. 37 seq.

⁶³⁴ See the argumentation of AG *Jacobs* in his Opinion in *Albany*, *supra* note 2, para. 220-227. See also KORDEL, *supra* note 182, at pp. 38 seq.

⁶³⁵ See the argumentation of AG *Jacobs* in his Opinion in *Albany*, *supra* note 2, para. 228-236 and KORDEL, *supra* note 182, at p. 41.

⁶³⁶ See also Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 237-244.

collective agreements can never come under the ambit of Art. 81 EC, because there is only one undertaking involved. This solution has the advantage that trade unions and employees will never be made subject to competition law, but only the employers. Furthermore it creates a method to tackle anti-competitive agreements between the employers that are not related to the labor market and are hidden under the disguise of a collective agreement without punishing the trade unions.

This result, which was also proposed by AG *Jacobs* in the *Albany* cases,⁶³⁷ was criticized by *Gyselen*. Admitting that the difference might be of a purely semantic nature, he argued that the restrictions of competition (for example the coordination of costs of production between employers) were not the direct result of the underlying agreement between the employers, but of the collective agreement. The additional "screen" of the consent of the trade unions allegedly interrupts causality. He compared the situation to the minister's decree in *Albany*, which made affiliation to the pension funds compulsory. *Gyselen* referred to AG *Jacobs* opinion⁶³⁸ that the collective agreement to apply to the minister for compulsory affiliation did not cause a restriction of competition, rather the minister's decree did, which was not attributable to the undertakings. Hence he concluded that both the minister's decree and the consent of the trade unions to a collective agreement constitute "screens" which interrupt accountability.⁶³⁹

There are different arguments against this point of view. First, the decision of the employers' association to sign the collective agreement is a *condition sine qua non* for its validity, hence being directly causal for its effects.

Second, the decree of the minister constitutes an exercise of public authority (*imperium*), whereas the consent of the trade unions is part of a bargaining procedure between private actors. The democratic right to apply jointly to State authorities for certain political and legal actions, referred to by AG *Jacobs* to justify the interruption of accountability,⁶⁴⁰ cannot be compared to an alliance between private actors with a view to restricting competition. This argument is supported by the judgment of the Court in *Pavlov*. There the Court held that a request of a professional association to make affiliation to a pension fund compulsory did not

⁶³⁷ Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 205-244.

⁶³⁸ Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 287-294.

⁶³⁹ GYSELEN, *supra* note 294, 441-443.

⁶⁴⁰ See the Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 293.

constitute an infringement of Art. 81 EC, because it was made under a scheme of national law concerning the regulatory authority in the social sphere. The Court argued that those schemes were designed to promote second pillar pension insurance and included procedural safeguards. For these reasons the request of the professional association could not infringe Art. 81 EC.⁶⁴¹ Instead of relying on the fuzzy idea of direct and indirect causality as advocated by *Gyselen*, the Court created another non-statutory exemption in the social field.

Third, the ECJ ruled in *BNIC/Clair* that a price-fixing agreement by a board of wine-growers and dealers, which was made generally binding upon request of the association by ministerial order, infringed Art. 81 EC. The counterargument that the anti-competitive effects were not caused by the agreement in question, but by the ministerial order, was rejected by the Court. The Court ruled that the actual effects of the agreement did not have to be taken into account, as long as its object was the restriction of competition: "By its very nature, an agreement fixing a minimum price for a product which is submitted to the public authorities for the purpose of obtaining approval for that minimum price, so that it becomes binding on all traders on the market in question, is intended to distort competition on the market."⁶⁴² The very purpose of a collective agreement and the underlying decision of the employers' organization is to erase competition between employers with regard to wages and employment conditions as input costs.⁶⁴³ It clearly has as its object a restriction of competition, so that the actual effects do not have to be taken into account.

Fourth, there is a contradiction in *Gyselen's* reasoning itself. Even though he claims that the implied agreement of the employers (or the decision of the employers' association) cannot have a restrictive effect on the market, he nevertheless wants to apply Art. 81 EC to collective agreements which are a "sham", i.e. only serve as a cover-up for restrictive agreements of employers. He argues that, in this case, the underlying agreements are *explicit* as opposed to *implicit* and can hence be caught by Art. 81 EC.⁶⁴⁴ Apart from the fact that a decision of an employers' association to conclude a collective agreement is also *explicit*, Art. 81 EC does not distinguish between *explicit* and *implicit* agreements. It covers both agreements and concerted practices (which are always *implicit*) and treats them equally. For these reasons the critique of *Gyselen* is to be rejected.

⁶⁴¹ Pavlov, *supra* note 253, para. 98.

⁶⁴² *BNIC/Clair*, *supra* note 577, para. 22.

⁶⁴³ See above at pp. 32 seq.

⁶⁴⁴ GYSELEN, *supra* note 294, at 443.

The decision of the employers' association or the concerted practice/agreement of the employers about certain conditions of employment necessarily has as its object the restriction of competition, because competition on certain cost factors is to be erased in the relevant market. In case of sectoral or national agreements it is beyond doubt that those agreements significantly impede competition and affect trade between Member States.

b) The decision of the employers' association – an ancillary restraint under a “Community style rule of reason”?

The next question is whether the agreement/concerted practice of the employers or the decision of the employers' association which are necessary for the conclusion of a collective agreement can be regarded as an ancillary restraint under the so-called “Community style rule of reason”.⁶⁴⁵

The idea of ancillary restraints can be employed both in the field of mergers⁶⁴⁶ and under Art. 81 EC. Only the latter is of interest here. The Commission explained in its *Guidelines on the application of Art. 81(3) of the Treaty* that: “If an agreement in its main parts, for instance a distribution agreement or a joint venture, does not have as its object or effect the restriction of competition, then restrictions, which are directly related to and necessary for the implementation of this transaction, also fall outside Article 81(1).”⁶⁴⁷

This concept of ancillary restraints has been employed by the CFI and the ECJ on several occasions.⁶⁴⁸ In all of these cases, the main part of the agreement involved an *economic* transaction or decision which had neither as its object nor effect the restriction of competition. The case with collective agreements is different. First of all, collective bargaining cannot be regarded as a normal *economic* transaction from the perspective of the trade unions. They are only representatives of the employees and negotiate wages, working conditions and other

⁶⁴⁵ This solution is proposed by BERG, *supra* note 292, at 171.

⁶⁴⁶ See Art. 6 (1) (b), 8 (1) and 8 (2) Regulation No 139/2004 and *Commission Notice on restrictions directly related and necessary to concentrations*, (2005) OJ C56/24.

⁶⁴⁷ *Guidelines on the application of Art. 81 (3) of the Treaty*, (2004) OJ C101/97, para. 29.

⁶⁴⁸ See especially the CFI's interpretation of ancillary restraints in Case T-112/99, *M6 and Others v Commission*, (2001) ECR II-2459, para. 104-117 and also Case 56/65, *Société Technique Minière v Maschinenbau Ulm*, *supra* note 49, at 250 ; Case 42/84, *Remia v Commission*, *supra* note 67, para. 17-20; Case 161/84, *Pronuptia*, (1986) ECR 353, para. 9-27; Case C-250/92, *Gottrup-Klim v Dansk Landbrugs Grovvarerelskab AmbA*, (1994) ECR I-5641, para. 28-45; Case C-399/93, *Oude Luttikhuis and Others v Coberco*, (1995) ECR I-4515, para. 9-20.

issues related to their jobs. As explained above,⁶⁴⁹ these transactions in the labor market cannot be regarded as typical *economic* activities. Thus the collective agreement is not an agreement in the sense of Art. 81(1) EC, but only the underlying agreement between the employers⁶⁵⁰ constitutes such an agreement.⁶⁵¹ This means that the agreement between the employers cannot be considered a mere ancillary restraint in one main agreement. Furthermore, it is the very purpose of both collective agreements and the underlying agreements of the employers to erase competition on wages and working conditions.⁶⁵² Therefore a collective agreement does not constitute an agreement which has in its main parts neither the object nor the effect to restrict competition and hence the agreement between the employers is not an ancillary restraint.⁶⁵³

Yet the agreement between the employers may be regarded as an ancillary restraint under the so-called "Community style rule of reason".⁶⁵⁴ This expression is a misleading term. While the *rule of reason* in US antitrust law means a trade-off between efficiency gains and losses in assessing the effects of a restrictive agreement on the market,⁶⁵⁵ efficiency considerations can only play a role under Art. 81(3) EC in EC competition law.⁶⁵⁶ The so-called "Community style rule of reason" has a completely different function. It was applied for the first time in the case *Wouters and others*.⁶⁵⁷

In *Wouters*, the Court ruled that a regulation of the Netherlands Bar (a decision of an association of undertakings) forbidding lawyers to enter into partnerships with accountants had an adverse effect on competition and affected trade between Member States.⁶⁵⁸ Yet it then pointed out an objective of the regulation in question which was outside the field of competition law: "The aim of the (...) regulation is therefore to ensure that, in the Member State concerned, the rules of professional conduct for members of the Bar are complied with,

⁶⁴⁹ See above at pp. 102-104.

⁶⁵⁰ In the following, the term "agreement" between employers will be used to refer to the underlying decisions of employers' organizations, agreements and concerted practices between employers.

⁶⁵¹ See above at pp. 104-107.

⁶⁵² See VON WALLWITZ, *supra* note 51, at p. 125.

⁶⁵³ See for the same result KORDEL, *supra* note 182, at pp. 99 seq.

⁶⁵⁴ This term is used by KORDEL, *supra* note 182, at pp. 100 seq. MONTI, *supra* note 42, at 1088 calls it a "European style rule of reason".

⁶⁵⁵ See VON WALLWITZ, *supra* note 51, at pp. 123 seq.; WESSELING, *supra* note 46, at pp. 102-105.

⁶⁵⁶ For this controversial opinion, compare above at pp. 11 seq. and see Case T-112/99, *M6 and Others v Commission*, *supra* note 648, para. 107; contra W.-H. ROTH, T. ACKERMANN, Art. 81 EG-Vertrag Grundfragen, in: H. GLASSEN and others (eds.), *Frankfurter Kommentar zum Kartellrecht - Mit Kommentierung des GWB, des EG Kartellrechts und einer Darstellung ausländischer Kartellrechtsordnungen*, Band VI, O. Schmidt, 57. EL, Köln Juni 2005, recital 254-264.

⁶⁵⁷ *Wouters and Others*, *supra* note 44.

⁶⁵⁸ *Wouters and Others*, *supra* note 44, para. 86-94.

having regard to the prevailing perceptions of the profession in that State.”⁶⁵⁹ The Court then examined whether the regulation in question was “necessary in order to ensure the proper practice of the legal profession, as it is organized in the Member State concerned.”⁶⁶⁰ Since it could be considered necessary, the Court concluded that the regulation did not infringe Art. 81(1) EC.⁶⁶¹ Thus the “Community style rule of reason” is rather a trade-off between the Community’s interest in undistorted competition and the legitimate public interests of Member States, similar to the test of *Cassis de Dijon*⁶⁶² which the Court applied in the field of the free movement of goods.⁶⁶³ Restrictions of competition are considered “ancillary restraints” to objectives outside the economic sphere. It must also be noted that the Member States were granted a broad margin of discretion with regard to the organization of their legal professions and the measures they consider necessary to guarantee their functioning.⁶⁶⁴ In the following discussion, the term *Wouters* doctrine will be used to avoid the misleading term “rule of reason”.

There are general points of critique against the *Wouters* doctrine.⁶⁶⁵ It does not specify which interests of the Member States can be taken into account and whether there is a hierarchy between the different possible national interests and the Community’s interest in undistorted competition. The test lacks legal certainty. Since national authorities and courts will play a crucial role in the enforcement of competition law under Regulation 1/2003, the lack of guidance and precision can undermine the *effet utile* of the competition rules if the national institutions apply a broad interpretation of the *Wouters* doctrine. The *Wouters* doctrine opens economic competition law to political considerations of national interest, thus undermining the Community’s principle of an open market economy with free competition (Art. 4(1) EC). Competition law, which serves to protect the economic constitution,⁶⁶⁶ would be downgraded to a political tool of intervention in the market.

Apart from this general criticism against the *Wouters* doctrine, there is an additional argument with regard to its application in the field of collective bargaining. This argument is essentially the same as that put forward above against the non-statutory labor exemption: the *Wouters*

⁶⁵⁹ *Wouters and Others*, *supra* note 44, para. 105.

⁶⁶⁰ *Wouters and Others*, *supra* note 44, para. 107.

⁶⁶¹ *Wouters and Others*, *supra* note 44, para. 110.

⁶⁶² Case 120/78, *Rewe v Bundesmonopolverwaltung für Branntwein*, (1979) ECR 649, para. 14.

⁶⁶³ MONTI, *supra* note 42, at 1087 seq.

⁶⁶⁴ *Wouters and Others*, *supra* note 44, para. 108.

⁶⁶⁵ In favor of the doctrine, see MONTI, *supra* note 42, at 1088-1090, who considers it a logical convergence of the case-law in the field of competition law and free movement.

⁶⁶⁶ This is the *ordoliberal* point of view, compare above at pp. 5-8.

doctrine is biased in favor of collective agreements and does not provide the appropriate tool to strike the right balance between collective bargaining and competition law. The *Wouters* doctrine would create an exemption for collective agreements, without providing for a test of proportionality in the narrow sense between the objectives of collective bargaining and competition law (the Court was satisfied in *Wouters* to verify that the restrictions of competition were “necessary” to attain the legitimate national interest and did not engage in a balancing procedure).⁶⁶⁷

For these reasons neither the concept of ancillary restraints nor the *Wouters* doctrine are the appropriate means to deal with collective agreements under EC competition law.

c) The applicability of Art. 81(3) EC

As discussed above,⁶⁶⁸ the Commission and the Courts have frequently taken into account public policy considerations when applying the Art. 81(3) EC exemption. For this reason, the question arises whether the agreements of the employers might be exempted under Art. 81(3) EC in conjunction with the cross-sectional clause of Art. 127(2) EC, which obliges the institutions of the Community to promote a high level of employment. It must be emphasized that public policies might constitute additional considerations in the assessment of Art. 81(3) EC, but this does not discharge them from being subsumed under the four requirements of Art. 81(3) EC.⁶⁶⁹ This is especially true under the ambit of Regulation 1/2003, where it is crucial that national courts and authorities have clear legal standards in order to apply Art. 81(3) EC.⁶⁷⁰ The Commission emphasizes in its *Guidelines on the application of Art. 81 (3) of the Treaty*: “Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Art. 81 (3).”⁶⁷¹ Thus the cross-sectional clause of Art. 127(2) EC should be taken into account when subsuming considerations under Art. 81(3) EC, because it clearly obliges the institutions of the

⁶⁶⁷ *Wouters and Others*, *supra* note 44, para. 105-110.

⁶⁶⁸ See above at pp. 12-14.

⁶⁶⁹ KORDEL, *supra* note 182, at p. 105; similarly MONTI, *supra* note 42, at 1077 seq.; contra WESSELING, *supra* note 46, at pp. 104-112, who wants to use Art. 81(3) as a tool to take into consideration public policy considerations other than competition (so-called *political* rule of reason) and who wants to assess efficiency gains and losses in the framework of Art. 81(1), applying an *economic* rule of reason. This is clearly against the wording of Art. 81 and its *ordoliberal* roots and exegesis.

⁶⁷⁰ For this effect see MONTI, *supra* note 42, at 1092 seq., 1095 seq.; WESSELING, *supra* note 46, at p. 112.

⁶⁷¹ *Guidelines on the application of Art. 81 (3) of the Treaty*, (2004) OJ C101/97, para. 42.

Community to take into consideration the objective of a high level of employment when implementing the Community's policies and activities.⁶⁷²

Art. 81(3) EC must be applied to each relevant market to which the agreement in question relates.⁶⁷³ It was shown above⁶⁷⁴ that the labor market cannot be regarded as a regular economic market for the employees who offer their work. Yet it is an economic market for employers, who purchase input for production and services. Since this input also directly influences the downstream market for goods and services, the agreements between the employers affect these markets as well.⁶⁷⁵ The same is true for third upstream markets for input like technology markets or markets for production machinery. These are the relevant markets that will be taken into account in the following section.

aa) The first requirement: contribution to the improvement of the production or distribution of goods or to the promotion of technical or economic progress

Art. 81(3) EC requires that the practice in question contributes to improving the production or distribution of goods or to promoting technical or economic progress. This requirement essentially demands efficiency gains, whereby all objective economic efficiencies can be taken into account.⁶⁷⁶ The efficiencies in question are generally productive or dynamic efficiencies, which lead to allocative efficiencies.⁶⁷⁷ The Commission makes a broad distinction between cost efficiencies, i.e. reducing costs of production and distribution of goods and services,⁶⁷⁸ and qualitative efficiencies, i.e. the generation of improved or new products or services by technological and economic progress.⁶⁷⁹

It is very controversial whether collective agreements, and thus the underlying agreements between employers, can give rise to such efficiency gains. Some economists (*neo-classical* approach) argue that the monopolization of supply and demand on the labor market leads to wages over the competitive level – the so-called *union wage premium*. The result is a decrease in productive efficiency in the markets for goods and services. Marginal costs of production

⁶⁷² To this effect see also MONTI, *supra* note 42, at 1093. For the situation before the introduction of Art. 127(2) see VON WALLWITZ, *supra* note 51, at pp. 184 seq.

⁶⁷³ *Guidelines on the application of Art. 81 (3) of the Treaty*, (2004) OJ C101/97, para. 43.

⁶⁷⁴ See above at pp. 102 seq.

⁶⁷⁵ For the consideration of downstream markets in the case of purchasing agreements, see *Guidelines on the application of Art. 81(3) of the Treaty*, (2004) OJ C101/97, para. 43.

⁶⁷⁶ *Guidelines on the application of Art. 81(3) of the Treaty*, (2004) OJ C101/97, para. 50, 59, 105. See also MONTI, *supra* note 42, at 1063 seq.

⁶⁷⁷ For the different sorts of efficiencies see above at pp. 10 seq.

⁶⁷⁸ For examples see *Guidelines on the application of Art. 81(3) of the Treaty*, (2004) OJ C101/97, para. 64-68.

⁶⁷⁹ For examples see *Guidelines on the application of Art. 81(3) of the Treaty*, (2004) OJ C101/97, para. 69-72.

are too high because of anti-competitive wages and the employer has to reduce the number of employees or cannot hire new employees, thus reducing economies of scale. Additional costs of production are passed on to the consumers of goods and services. This leads to a decrease in demand on those markets, which lowers the employers' incentive to invest in additional labor or which forces him to dismiss workers. Clauses that forbid outsourcing or the introduction of new, cost-saving technologies (anti-rationalization clauses) further enhance the detrimental effect on both productive and dynamic efficiency. Furthermore, it is claimed that collective bargaining wages as uniform wages prevent the employees from seeking jobs that represent their productive level, thus leading to a misallocation of the workforce as an input, causing productive inefficiency.⁶⁸⁰

Other economists, who can be grouped under the term *bargaining model*, emphasize the positive effects of collective bargaining, claiming that these outweigh the negative effects.⁶⁸¹ These models take as their starting point the imperfection of the labor market due to the immobility of human capital, which is caused by high transaction costs (financial and also emotional costs of moving for example), the resulting lack of transparency on the labor market and its high barriers to entry (education, vocational training). It is claimed that the collective action of trade unions can mitigate the imperfections of the labor market.⁶⁸² The intransparency of the market can be overcome by trade unions which articulate the preferences of the employees and also provide the employees with information about job opportunities and vocational training (theory of *collective voice*). This leads to a better allocation of labor, thus enhancing productive efficiency.⁶⁸³ Collective agreements also lower the transaction costs related to the conclusion and readjustment of employment contracts, because otherwise the employer would have to negotiate with every single employee.⁶⁸⁴ Additionally, collective bargaining is a device to articulate the need of employees for *public goods*⁶⁸⁵ (facilities for the workers in the undertaking) and to create them, thus reducing the

⁶⁸⁰ For a summary of these economic models, which are mainly based on neo-classical ideas, see KORDEL, *supra* note 182, at pp. 73-78 and also VAN DEN BERGH, CAMESASCA, *supra* note 189, at 503-505.

⁶⁸¹ For a summary of these economic models, which are grouped under the term *bargaining model*, see KORDEL, *supra* note 182, at pp. 78-84 and also VAN DEN BERGH, CAMESASCA, *supra* note 189, at 502 seq.

⁶⁸² See KORDEL, *supra* note 182, at pp. 78 seq.

⁶⁸³ See KORDEL, *supra* note 182, at pp. 79 seq. Contra MÖSCHEL, *supra* note 183, at 709 seq., who claims that competition would be the best tool to provide information. Möschel does not take into consideration the high transaction costs of workers and the lack of mobility of human capital.

⁶⁸⁴ Contra MÖSCHEL, *supra* note 183, at 710, who rejects this argument, claiming that the monopolization of the labor market is a disproportionate response.

⁶⁸⁵ *Public goods* are common goods that are non-competitive in consumption, i.e. several people can use them without decreasing the utility of the individual, and they are non-exclusive, i.e. everybody has access to them. See KORDEL, *supra* note 182, at p. 80, Fn 414.

number of employees who quit at inconvenient times because of unsatisfactory working conditions.⁶⁸⁶

Furthermore, employees gain plant-specific know-how and skills during their working life, which is a valuable resource and contributes to productive efficiency. Since this plant-specific know-how makes it more difficult to change the employer, employees might be reluctant to train young employees properly in order not to endanger their own job. The solution of this problem is a long-term contract which rewards the employee for the attainment of plant-specific know-how and thus makes him recoup his sunk costs (invested time and training). This contract, which guarantees the employee both his job and his wages, including increases of wage with age, gives him an incentive to train new employees and thus prevents opportunistic behavior on the part of the employee. It also prevents opportunistic behavior by the employer, who might be prone to dismiss the employee before he reaches the highest level of wages and is not profitable for the employer any more because of his age. The trade unions are entrusted with creating and safeguarding such a contract, because only they have the power to protect the employee from opportunistic behavior by the employer and to guarantee the prevention of opportunistic behavior by the employee. Therefore they promote investment in plant-specific know-how and skills, prevent shirking of the employee and enhance employee morale.⁶⁸⁷ On the other hand, it must be noted that long-term contracts that are not limited might have very negative economic effects with regard to the flexibility of the employer to react to external shocks and with regard to the introduction of new technologies.⁶⁸⁸

The model of *union shock effect* claims that collective agreements contribute to productive and dynamic efficiency, because the employer, faced with higher labor costs, has to introduce more efficient methods of organization and production to lower his production costs.⁶⁸⁹

It is also claimed that the *union wage premium* is not necessarily financed by an increase of prices on the product market, but by the revenues of the undertaking, thus simply leading to a redistribution of profit between employer and employees and not causing higher costs for the

⁶⁸⁶ VAN DEN BERGH, CAMESASCA, *supra* note 189, at 503.

⁶⁸⁷ See KORDEL, *supra* note 182, at pp. 80-82; VAN DEN BERGH, CAMESASCA, *supra* note 189, at 502 seq. Contra MÖSCHEL, *supra* note 183, at 710, who thinks that opportunistic behavior should rather be avoided by legal protection.

⁶⁸⁸ See in detail below at p. 123.

⁶⁸⁹ See KORDEL, *supra* note 182, at p. 82.

consumers of goods and services.⁶⁹⁰ Yet it must be noticed that this explanation assumes a market for goods and services that is not very competitive and leaves enough room for high profits for the undertakings.

Recent research from the field of *behavioral economics* emphasizes mutual trust as an important factor in labor relations. Advantages granted to the employees, because of trade union intervention and collective agreements, enhance mutual trust and cooperation and thus have a positive impact on productive efficiency, because employees better identify with their undertaking.⁶⁹¹ Lastly, it must be emphasized that the neo-classical model and the bargaining model do not exclude each other, but that the different results depend on an economic analysis in the single case. Both approaches can be regarded as the extreme poles in a *sliding scale* model.⁶⁹²

In summary, it can be said that the effects of collective bargaining on economic efficiency are ambiguous. Even though the choice of the *bargaining model* might be justified as an assumption with a view to the importance of collective bargaining in the EC Treaty (especially with regard to the provisions on social dialogue), it is clear that the predictions of this model are only applicable to certain constellations. It is a question for each individual case whether collective agreements and thus the underlying agreements between the employers have positive or negative effects on efficiency.⁶⁹³

Within the assessment of the first requirement of Art. 81(3) EC, the cross-sectional clause of Art. 127(2) EC can be taken into account. Thus it can be argued that a high level of employment contributes to the general improvement of production⁶⁹⁴ or generally to economic progress.⁶⁹⁵ The question of whether collective agreements have positive effects on the level of employment is also highly controversial. *Neo-classical* economists argue that collective agreements are detrimental to the rate of employment, because the uncompetitive level of wages forces employers to either switch to cheaper substitutes for production or to

⁶⁹⁰ See KORDEL, *supra* note 182, at pp. 82 seq.

⁶⁹¹ See KORDEL, *supra* note 182, at pp. 83 seq.

⁶⁹² KORDEL, *supra* note 182, at pp. 84-86.

⁶⁹³ See also KORDEL, *supra* note 182, at pp. 106 seq.

⁶⁹⁴ *Metro v Commission*, *supra* note 67, para. 43; *Remia v Commission*, *supra* note 67, para. 42; VON WALLWITZ, *supra* note 51, at p. 184.

⁶⁹⁵ KORDEL, *supra* note 182, at p. 111.

curb their production. This leads to a decrease in the demand for labor and to dismissals.⁶⁹⁶ In the case of Germany, sector-wide collective agreements led to a situation in which increases in real wages (labor costs) rose faster than productivity growth per hour. This situation is called “wage overshooting”. Since the trade unions did not follow the advice of the German Council of Economic Advisers to align real wages with productivity growth (taking into consideration the high unemployment rate and the high costs of labor in Germany), demand for labor decreased and unemployment was even enhanced by the trade unions’ behavior. This development affected in particular less qualified workers, whose wages remained stable in spite of the dramatic rise in unemployment.⁶⁹⁷

The *bargaining model*, on the other hand, assumes that collective agreements can contribute to a high level of employment by a better allocation of labor through the articulation of *collective voice* and that *union wage premia* do not necessarily lead to dismissals, because they are financed by revenues and the respective undertaking is not interested in lowering its productivity by dismissing employees, since it can still make profits. The latter assumption is based on a highly uncompetitive market of goods and services, because revenues need to be high enough to finance higher wages (monopoly revenues).⁶⁹⁸ Certain anti-rationalization clauses may also contribute to a higher level of employment,⁶⁹⁹ even though here a trade-off must be made between the effects on the market of production of goods and services and the effects on the upstream market of production of technologies (or input in general), where jobs might be destroyed. Again, assessing whether the agreement contributes to a higher level of employment is a question for the single case.⁷⁰⁰ At least with regard to the German labor market, it must be concluded that in most cases it does not.

bb) The second requirement: indispensability

The next (logical) requirement of Art. 81(3) EC is that the restrictive agreements in question are indispensable for acquiring efficiency gains. This means, according to the *Guidelines on the application of Art. 81(3) of the Treaty*, that the restrictive agreement must be reasonably necessary to achieve the efficiencies and that the individual restriction of competition is also reasonably necessary for the attainment of the efficiencies. Thus the agreement and the

⁶⁹⁶ KORDEL, *supra* note 182, at pp. 73-75; MÖSCHEL, *supra* note 183, at 705; VAN DEN BERGH, CAMESASCA, *supra* note 189, at 503 seq.

⁶⁹⁷ H. SIEBERT, “Why the German Labor Market is Failing”, (2004) *IJCLIR* 489, at 499-507; see also MÖSCHEL, *supra* note 183, at 705 seq.

⁶⁹⁸ KORDEL, *supra* note 182, at pp. 78-83.

⁶⁹⁹ See KORDEL, *supra* note 182, at pp. 111; VON WALLWITZ, *supra* note 51, at pp. 186 seq.

⁷⁰⁰ See also VON WALLWITZ, *supra* note 51, at pp. 186 seq.

restriction must cause more efficiencies than would have existed in their absence.⁷⁰¹ This is a question for determination in the single case.⁷⁰²

cc) The third requirement: fair share for the consumers

Furthermore Art. 81(3) EC demands that consumers must be allowed a fair share of the resulting benefit. The *Guidelines on the application of Art. 81(3) of the Treaty* define consumers as all direct or indirect users of the products covered by the agreement, including producers that use the product as an input.⁷⁰³ The agreements of the employers, underlying the collective agreements, deal primarily with work as an input for production. The employers are themselves the consumers of labor and can hence not be included in the context of Art. 81(3) EC. Yet by determining the cost factors of production, the agreements of the employers also have an effect on the downstream markets for goods and services. Therefore consumers within the meaning of Art. 81(3) EC, are the consumers on the downstream markets in this case.

The concept of a “fair share” means, according to the *Guidelines*, that consumers must be at least compensated for any negative impact the restriction of competition may have on them.⁷⁰⁴ Partly, even net gains for the consumers are demanded.⁷⁰⁵ According to the *neo-classical* model, consumers have to bear the costs of the collective agreements that are passed on to them by increased prices. The *bargaining* model, on the other hand, assumes the *union wage premia* are financed by revenues, so that the situation for consumers remains at least neutral.⁷⁰⁶ Only in exceptional circumstances there might be net gains for the consumers, as for example higher product quality or better supply (social peace function of collective agreements), caused by collective agreements according to the *bargaining* model.⁷⁰⁷ Hence the question of the fair share for consumers depends, according to the idea of a *sliding scale* between the *neoclassical* and the *bargaining* model, on the specificities of the single case and the structure of downstream markets.

⁷⁰¹ *Guidelines on the application of Art. 81(3) of the Treaty*, (2004) OJ C101/97, para. 73 seq.

⁷⁰² See KORDEL, *supra* note 182, at p. 115 and VON WALLWITZ, *supra* note 51, at pp. 188 seq., who assume that the fulfillment of this requirement is highly unlikely, except for the attainment of a high level of employment.

⁷⁰³ *Guidelines on the application of Art. 81(3) of the Treaty*, (2004) OJ C101/97, para. 84.

⁷⁰⁴ *Guidelines on the application of Art. 81(3) of the Treaty*, (2004) OJ C101/97, para. 85.

⁷⁰⁵ H. SAUTER in IMMENGA, MESTMÄCKER, *EG-Wettbewerbsrecht Kommentar*, *supra* note 475, Art. 85 Abs. 3 C., para.20.

⁷⁰⁶ KORDEL, *supra* note 182, at p. 111.

⁷⁰⁷ KORDEL, *supra* note 182, at pp. 112 seq. See also VON WALLWITZ, *supra* note 51, at pp. 187 seq.

dd) The fourth requirement: no possibility to eliminate competition in respect of a substantial part of the products in question

Lastly Art. 81(3) EC requires that there must be no possibility for the undertakings concerned to eliminate competition in respect of a substantial part of the products in question. According to the *Guidelines*, all agreements are caught by this requirement that would constitute an abuse of a dominant position in the sense of Art. 82 EC.⁷⁰⁸ Furthermore, it is explained that the question of whether competition can be eliminated is a matter of degree taking into consideration the characteristics of the different markets in question.⁷⁰⁹ This means for the agreement between the employers that competition with regard to demand for labor is restricted because of the fixing of minimum wages or minimum standards of work. Yet there is still competition left with regard to higher wages or better working conditions.⁷¹⁰ Taking into consideration the downstream markets for goods and services, competition is only restricted with regard to certain input factors, which may not even constitute the main part of costs of production. With regard to upstream markets of technology or other inputs, anti-rationalization agreements might erase part of the demand, which might even lead to the destruction of entire highly specialized industries. It must again be determined in the single case whether the respective agreements would substantially eliminate competition on a certain market.⁷¹¹

ee) Conclusion

The above considerations show that there might be agreements between employers underlying collective agreements that fulfill the conditions of Art. 81(3) EC and are exempted from the prohibition of Art. 81(1) EC. But the analysis also shows that in most cases agreements between the employers cannot be exempted, because the requirements of Art. 81(3) EC are not fulfilled.⁷¹² The application of Art. 81(3) EC cannot therefore constitute a general solution for the collision between collective bargaining and competition law.⁷¹³

⁷⁰⁸ *Guidelines on the application of Art. 81(3) of the Treaty*, (2004) OJ C101/97, para. 106.

⁷⁰⁹ *Guidelines on the application of Art. 81(3) of the Treaty*, (2004) OJ C101/97, para. 107 seq.; H. SAUTER in IMMENGA, MESTMÄCKER, *EG-Wettbewerbsrecht Kommentar*, *supra* note 475, Art. 85 Abs. 3 C., para.28 seq.

⁷¹⁰ Contra KORDEL, *supra* note 182, at pp. 116 seq.

⁷¹¹ Compare also VON WALLWITZ, *supra* note 51, at p. 190.

⁷¹² See also KORDEL, *supra* note 182, at p. 117.

⁷¹³ See also VON WALLWITZ, *supra* note 51, at pp. 190 seq.

d) The fundamental right to collective bargaining as a yardstick – finding a trade-off under the ambit of proportionality

As explained above,⁷¹⁴ there is a fundamental right to collective bargaining on the Community level for both trade unions and employers' associations.⁷¹⁵ Therefore the underlying agreements between the employers can be protected by this fundamental right. This means, on the one hand, that competition law cannot simply interfere with this right, but it also means that the guarantee of collective bargaining is not limitless.⁷¹⁶ The limits of fundamental rights are consistently defined in case-law in the following terms: "...it is well-established case-law of the Court that restrictions may be imposed on the exercise of those rights (fundamental rights – added by the author), in particular in the context of a common organization of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights."⁷¹⁷ This case-law has been codified by the Charter of Fundamental Rights in Art. 52(1) (future Art. II-112 of the Constitution): "Any limitation of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

This means that a limitation of the fundamental right of collective bargaining is subject to a comprehensive test of proportionality.⁷¹⁸ Regarding the collision between collective bargaining and competition law, the following conclusions can be drawn:

⁷¹⁴ See above at pp. 35-38.

⁷¹⁵ See also BLANKE, *supra* note 205, at 29.

⁷¹⁶ See Opinion of AG Jacobs in *Albany*, *supra* note 2, para. 162 seq.

⁷¹⁷ Case C-292/97, *Karlsson and Others*, (2000) ECR I-2737, para. 45. See also, using a different wording, Case 44/79, *Hauer v Land Rheinland-Pfalz*, (1979) ECR 3727, para. 23; Case 265/87, *Schröder v Hauptzollamt Gronau*, (1989) ECR 2237, para. 15; Case 5/88, *Wachauf v Bundesamt für Ernährung und Forstwirtschaft*, (1989) ECR 2609, para. 18; Case C-62/90, *Commission v Germany*, (1992) ECR I-2575, para. 23; Case C-404/92 P, *X v Commission*, (1994) ECR I-4737, para. 18.

⁷¹⁸ See *Karlsson and Others*, *supra* note 717, para. 58. Contra VON WALLWITZ, *supra* note 51, at pp. 128-130, who interprets the case-law of the Court so that only the essence of a fundamental right is protected from interference. Yet even the wording of the judgments "...provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights." (emphasis added by the author) does not necessarily support this conclusion. In particular the term "with regard to the aim pursued" must be interpreted as demanding a comprehensive test of proportionality between the different interests. Furthermore, every infringement of the essence of a fundamental right would be disproportionate *per se*, because it would completely deprive this right of its meaning. Thus proportionality must have an additional

1. The application of competition law must respect the essence (or very substance) of the right to collective bargaining. Because of the different national scopes of collective bargaining, it is not an easy task to define the essence of this right.⁷¹⁹ But the above considerations⁷²⁰ have shown that, because of its function to protect employees in the labor market and to strengthen their bargaining position against employers by cartelization of the supply of labor, the following contents of collective bargaining at least belong to the essence of the fundamental right: wages, including pensions and other forms of remuneration,⁷²¹ and working conditions, including working time, holidays, seniority rules and safety at the workplace.

2. If competition law collides with collective agreements which do not deal with the essence of the right to collective bargaining, any limitation of this right is subject to a strict and comprehensive test of proportionality. There is no doubt that such limitations by competition law are provided for by law (even primary Community law – Art. 81 seq. EC). Furthermore, a free market with undistorted competition is one of the most fundamental objectives of general interest pursued by the Community.⁷²² It is also submitted that the prohibition of restrictive agreements by Art. 81(1) and (2) EC is necessary to meet the objective of a free market with undistorted competition. Yet the limitation of the right of collective bargaining must also be proportionate in a narrow sense. This means that in the single case a trade-off must be made between the fundamental right to collective bargaining and the “constitutional” principle of free competition, whereby each of the colliding field must be granted its optimal effectiveness (this test is called *practical concordance* in German constitutional law)^{723 724}.

In the following discussion, different kinds of agreements between employers, leading to collective agreements, will be analyzed according to the above principles.

significance. The codification of the case-law in Art. 52(1) of the Charter, even though not legally binding, supports the view that both the essence of fundamental rights is protected and any limitations must be strictly proportional. VON WALLWITZ, on the other hand, at pp. 130 and 177, wants to conduct the test of proportionality in the framework of Art. 81(3) EC. It was shown above, pp. 11-14, that Art. 81(3) EC deals with economic efficiencies, and not with other public policies, thus being the wrong place for a comprehensive test of proportionality.

⁷¹⁹ Compare above at pp. 29 seq.

⁷²⁰ See above at pp. 29-34.

⁷²¹ For pensions as a form of remuneration see Case C-262/88, *Barber*, (1990) ECR I-1889, para. 21-30; *Albany*, *supra* note 2, para. 63 and *KORDEL*, *supra* note 182, at p. 181.

⁷²² For the legal rank of competition law in EC law, see above pp. 14 seq. See also Opinion of AG *Jacobs* in *Albany*, *supra* note 2, para. 162.

⁷²³ For the principle of *practical concordance* in German constitutional law, see, for example, B. PIEROTH, B. SCHLINK, *Grundrechte Staatsrecht II*, 16th ed., C.F. Müller Verlag, Heidelberg 2000, para. 325-329.

⁷²⁴ *BLANKE*, *supra* note 205, at 30. Such a test of proportionality is also proposed by *KORDEL*, *supra* note 182, at pp. 178-182, who wants to conduct it in the framework of the *Wouters* doctrine.

First there are agreements fixing wages, individual working hours and working time, conditions of the workplace (especially safety at the workplace), rules of termination of the labor contract and rules of seniority. These agreements constitute cartels of the employers with regard to the costs of production. Yet they can be considered to belong to the essence of the right to collective bargaining, since they deal with wages and working conditions. Hence they are protected by the employers' fundamental right to collective bargaining and are immune from competition law.⁷²⁵

Secondly, there are agreements which fix the opening hours of shops. The treatment of these agreements has been very controversial, especially in Germany,⁷²⁶ because it eliminates the freedom of wholesalers and retailers to compete after a certain hour.⁷²⁷ Yet it must be taken into consideration that shopkeepers can compete in many other respects, including price, variety and quality of products and service. The end of daily opening hours directly affects the working time of the employee. He only has to work until, for example, 18.00 every day and can then go home. This is an essential working condition and the employee has a legitimate interest in regular leisure-time, especially with regard to his family life. It can hence be considered to belong to the essence of collective bargaining.⁷²⁸ Therefore agreements between employers leading to collective agreements about fixed opening hours are immune from competition law.⁷²⁹

The third kind of agreements is agreements leading to the establishment of sectoral social insurance schemes, for example in the *Albany* cases⁷³⁰ and in *van der Woude*.⁷³¹ It is unproblematic that employers grant their employees minimum pensions or contributions to

⁷²⁵ Kordel arrives at a similar result: KORDEL, *supra* note 182, at pp. 182-184, who argues with efficiency gains of multi-employer bargaining and proposes an exemption under Art. 81(3) EC.

⁷²⁶ For the situation in Germany, see *supra* note 469. For a comparable case in the United States, see *Meat Cutters Union v Jewel Tea Co.*, 7 June 1965 381 U.S. 676.

⁷²⁷ See KORDEL, *supra* note 182, at p. 89 and p. 200; VON WALLWITZ, *supra* note 51, at pp. 140-142.

⁷²⁸ The Berlin Kammergericht arrives at the same result with regard to the German fundamental right to collective bargaining (Art. 9 III of the basic law) – KG, judgment of 21.02.1990 Kart U 4357/89, WuW/E OLG 4531, at 4534-4537.

⁷²⁹ Contra KORDEL, *supra* note 182, at pp. 201-203, who considers the fixing of opening hours disproportionate, because there are less restrictive alternatives like fixing daily working hours for members of the trade unions or by clauses fixing the amount of working hours, not the exact time of work, which is kept flexible. Against the first argument, it can be pointed out that not all workers in the undertaking profit from it and that in practice the trade unions cannot effectively supervise whether their members are not pushed by the employer to work longer and take evening shifts. Against the second argument, it can be argued that the fixing of daily or weekly hours does not protect the workers' interest in regular working hours.

⁷³⁰ *Albany*, *Brentjens* and *Drijvende Bokken*, *supra* note 2.

⁷³¹ *Van der Woude*, *supra* note 436.

health insurance in collective agreements, because these benefits can be considered remuneration,⁷³² thus being covered by the essence of the fundamental right of collective bargaining. Yet a problem arises where the collective agreement sets up a sectoral pension fund by the employers (in the form of a joint venture) or entrusts the sectoral insurance to (only) one provider and if the employers commit themselves to conclude insurance contracts only with the respective fund (this was allegedly not the case in *Albany*)⁷³³ and agree to launch a request to the competent minister to make affiliation to these funds compulsory for the entire sector.

This problem brings into play the test of proportionality in the narrow sense. The clauses in question have as their object and/or effect the restriction of competition. They (aim to) restrict the freedom of the employers to conclude insurance agreements for their employees with other insurance companies, which offer better conditions and/or higher benefits. They also exclude third providers of insurance from a relevant market⁷³⁴ and hinder market integration, because sectoral agreements are nationally bordered. On the other hand, they may have pro-competitive effects, since they might lead to productive efficiency, especially because of actuarial risk calculation and the lowering of administrative costs.⁷³⁵

It was shown above in the framework of Art. 86(2) EC,⁷³⁶ i.e. with regard to exclusive rights granted by the State, that monopolization and compulsory affiliation to schemes in the social insurance sector can be indispensable in order to maintain their financial equilibrium. This is the case where the funds in question exhibit certain features of solidarity. Here the situation is different, because the underlying agreement of the employers is a private action and not a State measure as in Art. 86(2) EC. Nevertheless, the argument can be transferred to this case. The parties to the collective agreement have a legitimate interest not only in providing insurance to the employees, but also in establishing a social insurance scheme with elements of solidarity, so that the employees can be covered with insurance under socially acceptable conditions. In order to achieve this aim, monopolization and compulsory affiliation are necessary. Furthermore, the social partners are entrusted by national law with setting up

⁷³² *Barber*, *supra* note 721, para. 21-30; *Albany*, *supra* note 2, para. 63 and Opinion of AG Jacobs in *Albany*, *supra* note 2, para. 198.

⁷³³ Opinion of AG Jacobs in *Albany*, *supra* note 2, para. 276-286.

⁷³⁴ See KORDEL, *supra* note 182, at p. 89 and p. 195.

⁷³⁵ Compare Opinion of AG Jacobs in *Albany*, *supra* note 2, para. 267-270.

⁷³⁶ See above at pp. 87-89.

supplementary insurance schemes in collective agreements,⁷³⁷ an especially important task nowadays due to the shift from the first to the second pillar. Thus both the fundamental right to collective bargaining and the fundamental right/principle of access to social security can justify restrictions of competition in this case. Art. 86 (2) EC's test of proportionality cannot lead to a result different from the test of proportionality in the collision between competition law and fundamental rights: the restrictive agreements are protected by the fundamental rights to collective bargaining and social security, because they pursue the aim of providing social insurance through collective agreements, they are necessary for the financial equilibrium of the schemes and the importance of providing supplementary social insurance outweighs the occurring restrictions of competition.⁷³⁸

The final kind of agreements between employers that is to be analyzed here are agreements leading to so-called *hot cargo* clauses, which deal with outsourcing and rationalization. These clauses forbid the employer from maintaining business relations with certain undertakings, in order to prevent the use of certain inputs in the productive process.⁷³⁹ Certain anti-rationalization clauses forbid the introduction of new technologies and machinery.⁷⁴⁰ Other clauses forbid the outsourcing of tasks to sub-contractors. The test of whether these agreements can be prohibited by competition law focuses on the test of proportionality in the narrow sense.

The clauses in question have very negative effects on competition. In addition to restricting the freedom of the employers to compete on different methods of production, they also restrict the freedom of suppliers of technology and of subcontractors to offer their goods and services. In the case of sectoral or national bargaining, these clauses may even lead to the destruction of highly specialized upstream markets for technologies and other inputs⁷⁴¹ and they might cause strong impediments to cross-border trade, thus being detrimental to market integration.⁷⁴²

⁷³⁷ As for example occupational pension schemes in the Netherlands, see *Albany*, *supra* note 2.

⁷³⁸ Contra KORDEL, *supra* note 182, at p. 196-199, who considers the monopolization disproportionate and proposes as a less anticompetitive measure obliging the employers to pay part of the contributions and the setting of minimum requirements, no matter what insurance company is chosen by the employee. Kordel does not take into consideration the special features of the market of social insurance and the threat of the downward spiral.

⁷³⁹ KORDEL, *supra* note 182, at p. 209.

⁷⁴⁰ See KORDEL, *supra* note 182, at p. 89.

⁷⁴¹ See KORDEL, *supra* note 182, at pp. 204 seq. and 211.

⁷⁴² Compare KORDEL, *supra* note 182, at p. 204; VON WALLWITZ, *supra* note 51, at pp. 136-139 with regard to clauses, which forbid outsourcing.

Furthermore, the aspect of competition as a learning process, directly connected to innovation, is strongly impeded by anti-rationalization agreements.⁷⁴³

On the other hand, the effect of these clauses on working conditions and the welfare of workers is only indirect. They contribute to securing jobs by forbidding the substitution of dependent human work with capital or independent services. Employees have a legitimate interest in securing their workplace as the very basis of their wages and working conditions. Yet the clauses in question can also destroy jobs on the upstream markets. The aim of job security can be reached by other, more proportionate means. Thus a job guarantee (at least for a certain period of time) can achieve the same aim. It is also positive from an economic point of view, because it provides an incentive to invest in plant-specific know-how and skills and avoids opportunistic behavior on the part of both employees and employers.⁷⁴⁴ A negative effect is, on the other hand, the lesser flexibility of the employer to react to negative shocks in demand with lay-offs.⁷⁴⁵ This can eventually lead to a market exit, which would also destroy jobs. Therefore job guarantees must include hardship clauses. Job guarantees can also hinder the introduction of new technology and outsourcing, because it would not be cost-effective.⁷⁴⁶ But if a new technology strongly improves productive efficiency, job guarantees will not hinder its introduction in the long run, given that such guarantees are restricted in duration. The same is true where subcontractors are much more efficient than the employer's own production lines. Thus job guarantees which are limited in duration are much more proportionate means of serving the same end as *hot cargo* clauses – securing jobs.⁷⁴⁷ Unlimited job guarantees, on the other hand, might have the same negative effects as *hot cargo* clauses. With regard to the negative effects on competition, innovation and employment (on upstream markets), both would be disproportionate with regard to the aim to create only indirect job safety for employees. The respective agreements between employers are thus forbidden under Art. 81 EC, if they do not fulfill the requirements of Art. 81(3) EC.

⁷⁴³ See VON WALLWITZ, *supra* note 51, at p. 139.

⁷⁴⁴ See above at p. 113.

⁷⁴⁵ KORDEL, *supra* note 182, at p. 206.

⁷⁴⁶ See KORDEL, *supra* note 182, at p. 206.

⁷⁴⁷ See also KORDEL, *supra* note 182, at pp. 212 seq.; VON WALLWITZ, *supra* note 51, at p. 139 points out that these agreements even belong to the essence of the fundamental right to collective bargaining.

e) Summary

While the application of Art. 81(3) EC to the collision between competition law and collective bargaining only leads in certain cases to an exemption of collective agreements from competition law, the test of an infringement of the fundamental right to collective bargaining by competition law provides a more appropriate and general tool to resolve the conflict. The fundamental right is subject to limitations which obey the principle of proportionality. Similarly to the application of Art. 86(2) EC in the field of social insurance, the test of proportionality facilitates a balanced trade-off between the colliding fields of law and makes it possible to meet the interests of both competition law and collective bargaining in a particular case.

Furthermore the application of the fundamental right of collective bargaining is in accordance with the Constitutional Treaty, which contains this right as directly applicable law in Art. II-88.

3. A general solution for the clash of competition law with other fields of law

The solutions found for the relationship between EC competition law and national social insurance law on the one hand, and EC competition law and national collective labor law on the other hand, might serve as a general example of how the relationship between competition law and other fields of law can be dealt with. The starting point of this approach is the application of competition law to every situation that can be subsumed under Art. 81 seq. EC. As in the case of social insurance, the application of competition law can itself provide a solution that meets the objectives of both fields of law and takes into consideration the specificities of the markets for social insurance. This goal is achieved by the test of proportionality conducted in the framework of Art. 86(2) EC.

In the case of collective bargaining, it was shown that competition law is not applicable to the collective agreements themselves, thus immunizing trade unions and employees from the wrath of competition law. Only the underlying agreement between the employers (or concerted practice or decision of an employers' association) can come within the ambit of competition law. Some of these agreements are exempted under Art. 81(3) EC. Yet certain cases exist in which competition law and collective bargaining collide. In these cases the different fields of law, having the same legal rank, must be reconciled. The fundamental right of collective bargaining embodies a fundamental decision of order for the labor market. Yet it might interfere with other markets, which are governed by the order of freedom and competition. Here a trade-off must be found in every single case. This can be attained by the fundamental legal principle of proportionality (see Art. 5 EC and Art. I-11(4) of the Constitutional Treaty) in the framework of the fundamental right to collective bargaining, which ensures the optimal consideration of each colliding interest.

In summary, the method involves three steps:

1. Application of competition law.
2. If there is a collision, the legal rank of the different fields of law in the hierarchy of norms must be assessed. In particular Art. 2 EC can serve as a tool for this assessment. The higher norm will prevail.
3. If both fields of law are on the same constitutional level, a trade-off in the single case, subject to the principle of proportionality, must be conducted.

IV. Conclusion

The method of applying EC competition law to every possible case and of solving an unavoidable conflict with other fields of law, which have the same legal rank and importance as competition law, by a comprehensive test of proportionality allows a balanced trade-off between the colliding fields of law. The test of proportionality facilitates the consideration of the objectives of both fields of law, in which each field will be given its optimal possible effect.

It was evident that in the relation between EC competition law and the –mainly national – law of social insurance a real conflict does not exist. The application of competition law itself allows the consideration of the special features of social insurance because of the test of proportionality in Art. 86(2) EC. Hence social insurance schemes are not endangered by the application of competition law and only anti-competitive behavior and measures which are unnecessary to maintain the financial equilibrium of the respective insurance scheme can be prohibited by competition law.

The relationship between EC competition law and the – mainly national – law of collective bargaining is more complicated. Here an application of competition law would in many cases lead to a prohibition of the decisions of employers to join collective agreements and render the objective of collective bargaining – the deliberate restriction of competition on the labor market to protect employees – impossible. However the recognition of a fundamental right of collective bargaining at EC level makes it possible to establish the right balance between competition law and collective bargaining in an individual case. This is achieved by the test of proportionality which every limitation of the fundamental right to collective bargaining by competition law is subject to.

In summary it can be concluded that neither the national systems of social insurance nor the national collective bargaining rights are endangered by the primacy of EC competition law. On the contrary, EC competition law contributes to social welfare by protecting the free market, which is the basis for material prosperity in Europe. Hence the fears of an unbound, globalized *laissez-faire* capitalism, which is allegedly supported by the European common market with free competition, are unfounded. The same is true for the rejection of the Constitution because of social reasons. It could clearly be shown that the Constitution would

not weaken, but would in fact strengthen the role of social rights in the European Union by introducing of a negative fundamental right/fundamental principle of access to social security and social protection and by providing definite legal confirmation of the fundamental right to collective bargaining.

Competition law protects economic freedom, the free and competitive market, economic integration and innovation. It is indispensable for the generation of wealth and the protection of a free society. Social insurance covers large parts of the population with insurance against social risks by a system based on solidarity and redistribution of wealth. It is indispensable to generate social peace and justice. It also provides for the necessary material background and security to make use of (economic) freedom. Collective bargaining empowers the employee against the superiority of employers, it prevents exploitation and makes a dignified life for workers possible. Hence it also generates social peace and justice. Collective bargaining creates material freedom for the employee towards the employer, because as an individual he would lack the necessary economic power to exercise his formal freedom against the employer.

Only the consideration of both competition law and social insurance and collective bargaining in the different cases can contribute to the ultimate goal: freedom and wealth for all Europeans.

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