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COLCOM Report

Collective Agreements on the Competitive Common Market. A Study of Competition Rules and Their Impact on Collective Labour Agreements

Niklas Bruun

Professor

Centre of International Economic Law

Hanken School of Economics

Jari Hellsten

Researcher

Centre of International Economic Law

Hanken School of Economics

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Preface

This study was mainly financed by the European Commission. We note this with gratitude and would like to affirm that while the views expressed in the report are entirely those of the authors, it is certainly justified to claim that this study focuses on issues that are important for the proper functioning of the internal market issues on which attention has lately been drawn as a consequence of a series of important cases submitted to the European Court of Justice for preliminary rulings.

The study was initiated in September 1999 by the Central Organisation of Finnish Trade Unions (SAK), which was willing to guarantee the necessary preparations for a coordinated European study, including the initiative for necessary co-financing. Besides SAK, the following organisations have participated in the co-financing: ÖGB (Austria), DGB (Germany), CSC and FGTB (Belgium), FNV (the Netherlands), LO-Denmark, LO, TCO and SACO (Sweden), LO-Norway, AF-Norway, STTK and AKAVA (Finland). The European Trade Union Institute has also given its assistance, as have many members of its European network of lawyers and researchers.

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Professor Niklas Bruun of the Hanken School of Economics led the project. Researcher Jari Hellsten was also able to work for several months on the project on a full-time basis. The members of the steering group were: Professor Brian Bercusson (University of Manchester), Professor Thomas Blanke (University of Oldenburg), Professor Antoine Jacobs (University of Tilburg), Professor Antonio Ojeda Aviles (University of Seville), Professor Bruno Veneziani (University of Bari), Assistant Professor Christophe Vigneau (University of Lyon II) and Research Officer Stefan Clauwaert (European Trade Union Institute).

For the sake of clarity we would finally like to stress that the undersigned authors take full responsibility for any errors and misunderstandings remaining in the general report. For the national reports each rapporteur bears full responsibility; we have made some linguistic or technical changes.

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Niklas Bruun
Professor

Jari Hellsten
Researcher

Centre of International Economic Law (CIEL)
Hanken School of Economics, Helsinki, Finland

Introduction

This study was described in the project plan as seeking to look into the following questions:

- What is the legal status of collective agreements in EC law, including case law, in relation to competition law?
- How is the problem of the relationship between labour law and competition law resolved in the Member States? This question includes the following: to what extent are collective agreements sheltered from competition law?;
- What is the relevant EC competence in this field?

At national level, legal studies were carried out in the following Member States: Austria, Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Spain, Sweden and the United Kingdom. In the listed Member States national researchers were directly involved. Their Reports are published as separate parts of the full COLCOM-report. The general background and an attempt to give a description of the state-of-art in EC law and a summary of the national profiles are contained in this single general report.

The project thus deals with elementary aspects of collective bargaining and social dialogue, seeking to promote them within the meaning of Articles 139(1) and 140 of the EC Treaty.

The subject matter, the relationship between collective labour agreements and competition rules, presumably falls in toto neither under either social law nor under competition law, but reflects their dynamic interaction. In fact, the title presupposes that neither of these areas of law as such is able to explain the relationship between collective agreements and competition law. However, in this report details from both areas are presented to the extent necessary for describing and explaining their mutual relationship. First we try to describe the status quo before the judgements *Albany International*, *Brentjens and Drijvende Bokken* (hereinafter referred to as *Albany*) issued on 21st September 1999.¹ The provisions of the ECSC Treaty are not discussed at all. A condensed presentation follows of the EC law on collective agreements, as part of the analysis of the *Albany* judgements. Subsequently, conclusions on the basis of the *Albany* judgement are discussed. All this forms part one of the report. Part two comprises an analysis of the national rules concerned. A table on the material scope of collective agreements and their anti-trust immunity is set out in Annex I. Annex II contains the questionnaire that formed the basis for the national reports.

¹ Cases C-67/96, *Albany v. Stichting Bedrijfspensioenfonds Textielindustrie*; joined cases C-115-117/97, *Brentjens' Handelonderneming v. Stichting Bedrijfspensioenfonds voor de handel in bouwmaterialen*; and case C-219/97, *Drijvende Bokken v. Stichting Pensioensfonds voor de vervoer- en havenbedrijven*.

Part One: The EC Law Perspective

1. EC Competition Rules

1.1. Basis of EC Competition Rules

1. Article 2 EC (as amended by the Treaty of Amsterdam) states that the Community shall have as its general task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community
 - a harmonious, balanced and sustainable development of economic activities,
 - a high level of employment and of social protection,
 - equality between men and women,
 - sustainable and non-inflationary growth,
 - a high degree of competitiveness and convergence of economic performance,
 - a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and
 - economic and social cohesion and solidarity among Member States.
2. These are – in terms of the Treaty of Amsterdam - functions which are meant to be fulfilled by means of the activities set out in Article 3 EC. They include first and foremost the creation of an internal market characterised by the four freedoms: free movement of goods, persons, services and capital, and by “*a system ensuring that competition in the internal market is not distorted*” (subparagraph (1)(g)). However, Article 3 EC equally includes “*a policy in the social sphere...*” (subparagraph (1)(i)).
3. How the position of competition rules in the EC legal order is seen from the point of view of competition law is graphically illustrated by the introduction of the Braakman and Schröter report.² The objectives in Article 2 EC are first counted, after which comes the following explanation of Article 3 EC (paragraph 2 of the publication):

“To permit achievement of these general objectives, a large number of activities have been assigned to the Community in Article 3. These are dominated by the creation of an internal market, which is characterised by the free movement of goods, persons, services and capital (Subparagraphs (a) and (c)) and by undistorted competition (Subparagraph (g)). This has been the

² The Application of Articles 85 & 86 of the EC Treaty by National Courts in the Member States, written by Mr. August J. Braakman, a competition solicitor, and Helmut R.B.Schröter, Head of Unit of DGIV of the Commission. Published by DGIV, July 1997. The essentials of this work are also available via <http://europa.eu.int/comm/dg04/lawenten/natintro/en/maintoc.htm>. The report does not cover the new Member States, i.e. Austria, Finland and Sweden. As to EC competition law, this report relies extensively on the Braakman & Schröter report (Braakman and Schröter).

Community's most important task by far, and therefore the main focus of its activities, for three decades. Other key Community activities from the very start included the implementation of common policies in the spheres of foreign trade, agriculture and fisheries and transport (Subparagraphs (b), (e) and (f)), the approximation of laws to the extent required for the functioning of the Common Market (Subparagraph (h)) and the association of the overseas countries and territories (Subparagraph (r)). Other activities were not inserted in the list contained in Article 3 until the Treaty on European Union was concluded. The Community is now expressly required, for example, to supplement the policies of Member States with its own policies. This task applies to the social sphere, the sphere of the environment and the sphere of development cooperation (Subparagraphs (i), (k) and (q)), the strengthening of economic and social cohesion (Subparagraph (j)), the strengthening of the competitiveness of Community industry (Subparagraph (l)), the promotion of research and technological development (Subparagraph (m)) and encouragement for the establishment and development of trans-European networks (Subparagraph (n)).³

1.2. Substantive Competition Rules in EC Law

4. Besides the basis in Articles 2 and 3 EC, Article 81 (ex 85) EC prescribes that

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

³ Braakman and Schröter, paragraph 2.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”

5. This basic norm is followed by a prohibition of the abuse of a dominant position in Article 82 (ex 86) EC⁴, a competence norm in Article 83 (ex 87) EC for the application of Articles 81 and 82 EC, and by Article 86 (ex 90) EC on (public) undertakings with exclusive rights.
6. While establishing the European Economic Community, only two of the six Member States had competition laws. No specialised competition authority existed. The EC competition 'regime' nevertheless developed rather rapidly, especially if compared, for example, to social law. The Commission became a real and centralised authority. Regulation 17/62 defined its powers in implementing Articles 81 (ex 85) and 82 (ex 86) EC, as well as in granting individual exemptions (and negative clearances) from competition rules. A voluminous case law appeared throughout the said normative pattern. In sum, an apparatus for implementation and a legal culture of its own has developed within EC competition law during the past four decades.

⁴ Article 82 EC:

“Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

7. The EC competition law system relies upon guaranteeing a certain level of competition where the term “certain” means neither ‘minimal’ nor purely economically maximal but something applicable as such. The prohibition principle in Article 81 EC is complemented by certain powers of the Commission to use a right to grant exemptions. The prohibition principle is manifest in Article 81(2) EC, according to which agreements or arrangements infringing Article 81(1) EC are automatically void with the exception of bagatelle cases with no appreciable effect on competition. Articles 82 (ex 86) and 86 (ex 90) EC are, on the other hand, built upon the abuse principle. Public undertakings with exclusive rights are allowed if justified by special circumstances.⁵ Based on Article 81(3) (ex 85(3)) EC, block exemptions have been adopted via regulations in the fields of vertical agreements, licensing agreements for the transfer of technology, specialisation and research and development agreements, franchising agreements and the insurance sector. At the Treaty level, agriculture is in a special position: according to Article 36 (ex 42) EC, competition rules apply to agriculture if the Council of Ministers so decides. Special rules exist within the transport and telecommunication sectors, and in the coal and steel industry. An important precondition for the applicability of EC competition rules is the effect of an agreement, arrangement or practice on trade between the Member States. The notion of enterprise further qualifies the application of Article 81 (ex 85) EC et seq.

8. In any EC law doctrine there is consensus on the fact that competition rules form part of the core of the Common Market. This was most recently confirmed in judgement *Eco Swiss China Time Ltd v. Benetton*⁶, in which the ECJ held that:

”36. ...according to [Article 3(1)(g)] of the EC Treaty, Article 81 constitutes a *fundamental* provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market...” (our italics).

9. The ECJ went on to state that Article 81 should be regarded as falling within the meaning of *public policy (ordre public)* for the purposes of the application of the New York Convention on the Recognition and Enforcement of Arbitral Awards (paragraph 37 of the judgement). The case before the ECJ dealt with procedural

⁵ Article 86 (ex 90) EC:

“1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.”

⁶ Case C-126/97, judgement 1.6.1999, nyr. For a brief analysis, see Furse and D’Arcy, ECLRRev. [1999], issue 7, p. 392-394. Komninos presents a thorough case annotation in CMLRev. 37: 459-478, 2000.

aspects in the annulment of an arbitral award. According to *Furse* and *D'Arcy*, it remains to be seen whether the national courts also have to apply the EC competition rules ex officio in substantive cases. Their answer is that “this case seems to suggest that [national] courts should be aware of this”, following the characterisation in the cited paragraph 36 of the judgement as: “a fundamental provision...”⁷

10. In the following discussion the basic elements of EC competition rules are further explored to the extent necessary to outline the relationship between collective agreements and competition rules in EC law.

1.3. Inter-State Trade Effect

11. The EC competition rules are applicable where the agreement, arrangement, practice or concentration concerned has a so-called inter-state trade effect. This concept is given a broad interpretation in case law. It includes not only the movement of goods, but also the movement of persons⁸, services⁹ and capital¹⁰ between the Member States. A 'likelihood of impairment' of such trade as specified in Articles 81 (ex 85) and 82 (ex 86) EC is deemed to exist if a set of objective circumstances make it appear sufficiently probable that the arrangement restricting competition of abusive behaviour will actually or could directly or indirectly affect trade between the Member States in a way which will make it more difficult to achieve the objectives of the Treaty.¹¹ The latest account of the previous case law was made in the case *Kesko v. Commission*¹², in which the CFI stated that

”103. It has been consistently held by the Court of Justice and the Court of First Instance with regard to the application of Articles [81] and [82] of the Treaty that, in order for an agreement between undertakings or, indeed, an abuse of a dominant position to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability and on the basis of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realisation of the aim of a single market in all the Member States¹³ ... Accordingly, it is not necessary that the conduct in question should in fact have substantially affected trade between Member

⁷ *Furse* and *D'Arcy*, op. cit. p. 394.

⁸ *Pronuptia*, case 161/84, ECR [1985], 353, 384.

⁹ *Van Ameyde*, case 90/76, ECR [1977], 1091; *Verband der Sachversicherer*, case 45/85, ECR [1987], 405.

¹⁰ *Züchner v. Bayerische Vereinsbank*, case 172/80, ECR [1981], 2021, 2032.

¹¹ *Braakman and Schröter*, paragraph 38.

¹² Case T-22/97, judgement 14.12.1999, paragraphs 103 to 108.

¹³ Case C-250/92 *DLG* [1994] ECR I-5641, paragraph 54, and Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge Transports and Others v Commission* [1996] ECR II-1201, paragraph 201, were referred to by the CFI.

States. It is sufficient to establish that the conduct in question is *capable* of having such an effect” (our italics).¹⁴

12. The CFI also confirmed that when applying Article 82 (ex 86) EC, it makes no difference whether the infringement is confined to a single Member State as long as it is capable of affecting patterns of trade and competition within the common market.¹⁵ Accordingly, the ECJ has gone as far as stating that inter-state trade was affected even though the product concerned was only traded in one region, Cognac, in France.¹⁶
13. EC law currently provides no clear-cut answer to the question of when a *collective agreement* (or its provisions) fulfils the *inter-state trade effect* criterion. A cross-border or European agreement obviously does so a priori. As to trade in goods, one could well argue that wage-related provisions normally do so, although this is subject to discretion where the share of wages in the final production costs varies, as does the effect of productivity. As regards the competition effect in provision of services, the same rules should apply. Hence, provisions in a national collective agreement able to affect inter-state provision of services are in principle subject to the EC competition law concept. Anyway, answering that question in casu is vitally important in assessing whether a collective agreement is subject to national or EC competition rules. This issue will be further discussed in connection with the Albany cases.

1.4. Notion of Undertaking

14. The term ‘*undertaking*’ in the sense of Articles 81 (ex 85) et seq. EC is not defined in the Treaty. The ECJ has ruled that the notion means any entity carrying on an *economic* activity regardless of its legal status, manner of financing or nature as a profit-making or non-profit-making body. Thus, it even covers public

¹⁴ The CFI referred to the following cases: as regards Article 82 (ex 86) of the Treaty, Joined Cases C-241/91P and C-242/91P RTE and ITP v Commission [1995] ECR I-743, paragraph 69, and, as regards Article 81 (ex 85), Case T-29/92 SPO and Others v Commission [1995] ECR II-289, paragraph 235).

¹⁵ Paragraph 105 of the judgement. The CFI referred to Case 322/81, Michelin v Commission [1983] ECR 3461, paragraph 103, and to Case T-65/89 BPB Industries and British Gypsum v Commission [1993] ECR II-389, paragraphs 134 and 135.

¹⁶ Cases 123/83, Bureau National Interprofessionnel du Cognac v. Clair [1985] ECR 391, p. 425, paragraph 29, and 136/86, Bureau National Interprofessionnel du Cognac v. Aubert [1987] ECR 4789, p. 4814, paragraph 18. In Clair the Court stated that: “any agreement whose object is to restrict competition by fixing minimum prices for an *intermediate* product is capable of affecting intra-Community trade, even if there is no trade in that intermediate product between the Member States, where the product constitutes the raw material for another product marketed elsewhere in the Community. The fact that the finished product is protected by a registered designation of origin is irrelevant.” (our italics)

institutions.¹⁷ The activity concerned must have a certain regularity and duration.¹⁸ The Commission has noted that

“the term ‘undertaking’ must be viewed in the broadest sense covering any entity engaged in economic or commercial activities such as production, distribution or the supply of services and ranging from small shops run by one individual to large industrial companies.”¹⁹

15. Public undertakings are subject to special treatment as Article 86 (ex 90) EC shows. Public monopolies are allowed if justified by overriding reasons of e.g. public service (e.g. in water supply) or by social reasons.²⁰ The Court has also held that the concept of undertaking did not encompass organisations charged with the management of certain compulsory social security schemes, based on the principle of solidarity.²¹ On the other hand, the ECJ has judged that a non-profit-making organisation which managed a pension scheme intended to supplement a basic compulsory scheme, established by law as an optional scheme and operating according to the principle of capitalisation, was an undertaking within the meaning of Article 85 et seq. of the Treaty. Optional affiliation, application of the principle of capitalisation and the fact that benefits depended solely on the size of the contributions paid by the beneficiaries and on the financial results of the investments made by the managing organisation implied that that the organisation carried on an economic activity in competition with life assurance companies. Neither the social objective pursued, nor the fact that it was non-profit-making, nor the requirements of solidarity, nor the other rules concerning, in particular, the restrictions to which the managing organisation was subject in making investments altered the fact that the managing organisation was carrying on an economic activity.²²

16. Under this broad interpretation of the concept ‘undertaking’ artisans, tradesmen, farmers, self-employed persons, performing artists, theatres, sports clubs and professional sportswomen and sportsmen are also undertakings in the sense of EC competition rules, as confirmed by the ECJ.²³ So are trade associations of separate undertakings.²⁴ Dependant employees have not been regarded as undertakings.²⁵

¹⁷ *Höfner and Elser v. Macrotron*, [1991] ECR I-1979, paragraph 21, at I-2016, and *C-244/94, Fédération Française des Sociétés d'Assurance and Others v Ministère de l'Agriculture et de la Pêche* [1995] ECR I-4013, paragraph 21 (FFSA).

¹⁸ *IGAV v. ENCC*, case 94/74, [1975] ECR p. 699, at 713.

¹⁹ *EEC Competition Rules – Guide for Small and Medium-Sized Enterprises*, (1983) European Documentation, at p. 17. Referred to by Van Bael and Bellis, *Competition Law of the European Community*, 3rd edition, CCH Europe, Oxfordshire 1996, p. 27.

²⁰ *Case Läärrä et al. v. Finnish State*, C-124/97, judgement 21.9.1999, whereby a public monopoly was accepted in operating slot machines, due both to their gambling nature and prominent social purposes in spending the revenue.

²¹ *Joined Cases C-159/91 and C-160/91 Poucet and Pistre* [1993] ECR I-637, paragraph 17.

²² *Case C-244/94 Fédération Française des Sociétés d'Assurance and Others v Ministère de l'Agriculture et de la Pêche* [1995] ECR I-4013, paragraphs 17 to 21.

²³ See the numerous judgements and Commission decisions referred to by Braakman and Schröter, paragraph 34, footnotes 103 to 109.

²⁴ See e.g. the cement cartel case, T-25 to 65/95 whereby the producers' European association (Cembureau) and some national associations were also ordered to pay penalties because they had been involved in arranging the infringement.

17. The limits of the notion of undertaking were further elaborated by the ECJ in case *Becu*.²⁶

The case dealt with work in the port area of Gent, Belgium. National law and a Decree rendered any work within the defined port area, i.e. in addition to loading and unloading vessels any ancillary operations such as work in silos and maintenance, as work to be performed exclusively by ‘recognised dockers’. A special collective agreement, rendered binding erga omnes by Decree, defined their minimum wages. One company used non-recognised dockers for ancillary work. These workers were sent by a temporary employment agency and were paid about half of the rate stipulated in the collective agreement concerned. The Public Prosecutor’s Department brought proceedings because of the use of non-recognised dockers. The Court of appeal asked the ECJ whether this national legislation was compatible with Article 90(1) (now 86(1)) EC, read in conjunction with Articles 6 (12), 85 (81) and 86 (82) EC.

18. The ECJ noted that the conditions related to work and pay were governed by a collective agreement rendered universally binding (erga omnes) and that the workers were engaged under fixed-term contracts of employment. Hence, they were workers in the sense of Article 48 (now 39) EC, incorporated into the undertakings concerned and they formed an economic unit with them – without themselves constituting ‘undertakings’ within the meaning of Community competition law (paragraph 26). It was especially added that, even when viewed collectively, the recognised workers in a port could not be regarded as constituting an undertaking. In contrast to the *Merci* judgement,²⁷ in this case the dockers did not constitute any organisation that could support the view that they operated on the dock work market as an entity or as workers of such an entity (paragraph 29). *Merci* concerned a cooperative undertaking of dockworkers with exclusive rights to load and unload vessels in the port of Genoa.

19. Even though the wording of Article 81 (ex 85) EC refers only to undertakings, consistent case law indicates that it has to be read together with Article 10 (ex 5) EC, which establishes a loyalty principle for the Member States. Thus, they are not allowed to order, facilitate or otherwise favour agreements contravening Article 81 (ex 85) EC.²⁸ Similarly, the Member States may not permit undertakings (public or private) in a dominant position to infringe Article 82 (ex 86) EC, as read in conjunction with Articles 3(1)(g) (ex 3(g)) EC.²⁹ Finally, in addition to the loyalty principle (Article 10 EC), the principle of equal treatment (Article 12 EC) by the Member States – both between public and private, and

²⁵ *Suiker-Unie et al. v. Commission*, cases 40 etc./73, [1975] ECR, p. 1663, at 2024.

²⁶ Case C-22/98.

²⁷ Case C-170/90, [1991] ECR I-5889.

²⁸ See e.g. cases *van Eycke*, 267/86, [1988] ECR 4769, at 4791; *Meng*, C-2/91, [1993] I-5751, at 5797; *Reigg*, C-185/91, [1993] ECR I-5801, at 5847; *Delta Schiffarts-u. Speditionsgesellschaft*, C-153/93, [1994] I-2517, at 2530.

²⁹ See cases *GB-Inno-BM v. ATAB*, 13/77, [1977] ECR 2115, at 2145 f; *Centro Servizi Spediporto*, C-96/94, [1995] ECR 1995 I-2883, at 2909, 2911 f.

between domestic and foreign undertakings – also applies under Article 86 (ex 90) EC.

1.5. De Minimis Rule

20. For the purposes of Article 81 (ex 85) EC, cartels are only prohibited if they have, as their object or effect, a substantial restriction or distortion of competition, and if they are also likely to impair trade between Member States *in a perceptible manner*.³⁰ In other words, there is an implied condition that the restriction of competition should be noticeable. According to this unwritten *de minimis rule*, measures completely devoid of economic significance are not caught by Article 81 EC et seq. In case law it is assumed that a joint market share below 1 per cent meets this criterion, whereas a share larger than 5 per cent shows the opposite.³¹ On the other hand, the rule does not exempt large companies even if their market shares of a given product are minor.³² In defining the relevant market, a cross-border assessment is becoming more relevant. Accordingly, the ECJ has ruled that even a market share of slightly more than 3 per cent was enough to affect the structure of inter-state trade and thereby the goals of the common market. These percentages can also be set aside on the basis of a cumulative effect of parallel networks or of similar agreements.³³ The Commission has published a Notice on Minor Agreements,³⁴ operating with the rules above but reserving the right to scrutinise minor arrangements if they include inherently serious infringements. Under these conditions it nevertheless remains conceivable that collective agreements could be exempted from EC competition rules on the basis of this *de minimis rule*.

1.6. Exemptions

21. The Commission grants exemptions from EC competition rules. Consistent case law demonstrates that the substantive conditions for (group) exemptions set out in Article 81(3) EC must be satisfied simultaneously in order to justify the exemption concerned.³⁵ According to Van Bael and Bellis:

”A review of the Commission’s decisions under Article 85(3) [81(3)] reveals that the nature of the agreement and the position of the parties on the market tend to be the two most important factors in determining whether an agreement qualifies for an exemption or not.

Thus, it is clear that certain kinds of agreement will hardly ever receive the benefit of an exemption – e.g. price-fixing and market sharing agreements,

³⁰ Braakman and Schröter, paragraph 99. Case Béguelin, 22/70, [1971] ECR, 949, 960, is referred to there.

³¹ Ibid. paragraph 100.

³² Case Distillers Company v. Commission, 30/78, [1979] ECR 2229, paragraph 28.

³³ Ibid., paragraph 101.

³⁴ OJ C372 on 9/12/1997: Notice on agreements of minor importance, which do not fall under Article 85(1) of the Treaty establishing the European Community. This is in fact an amendment of earlier notices. The first was published as long ago as 1970.

³⁵ Braakman and Schröter, paragraph 144.

export bans – while other types of agreements have been held more often than not to be eligible for an exemption – e.g. licensing, distribution, specialisation and joint venture agreements.

By the same token, it is fair to say that it is relatively easier for small or medium-sized firms to qualify for an exemption than for large companies.”³⁶

22. The Commission has a certain discretion in assessing the application of an exemption, or of the so-called negative clearance indicating the Commission’s withdrawal from measures on the basis of the information obtained – without this being binding on the courts. While the decisions are subject to review by the CFI and the ECJ, the latter has made it clear that it would like to avoid interfering in the policy-making of the Commission. The ECJ stated in *Consten and Grundig*:³⁷

”The exercise of the Commission’s powers necessarily implies complex evaluations of economic matters. A judicial review of these evaluations must take account of their nature by confining itself to an examination of the relevance of the facts and of the legal consequences, which the Commission deduced therefrom. This review must in the first place be carried out in respect of the reasons given for the decisions, which must set out the facts and considerations on which the said evaluations are based.”

23. Article 81(3) (ex 85(3)) EC does not even refer to social policy purposes as a justification for an exemption, let alone mentioning collective agreements. However, in the Commission’s practice and in case law such purposes have been accepted as a justification.³⁸ Moreover, in some cases linked to Article 86(2) (ex 90(2)) EC, regional, environmental, energy, transport or cultural policy have also gained the same status.³⁹ The use of social policy justifications, especially preserving jobs, has been relatively common within the field of State subsidies but also exist also in so-called crisis cartels associated with difficult economic times and declining or stagnant industries. These ‘extreme’ exemptions (crisis cartels) can be applied only on the initiative of the Community authorities.⁴⁰ In this connection we also want to point to the fact that the ECJ has broadly given social aspects importance within the field of *state aid*, which is natural under Article 87

³⁶ Van Bael and Bellis, p. 63.

³⁷ Case *Consten and Grundig v. Commission*, 56/64, [1966] ECR 299, at p. 347.

³⁸ Case *Metro v. Commission (I)*, 26/70, [1970] ECR 1915, paragraph 43; *van Landewijk et al. v. Commission*, 209-215 and 218/78, [1989] ECR 3278, paragraph 182; *Remia v. Commission*, 42/87, [1985] ECR 2545, 2577, paragraph 42; *Metro v. Commission (II)*, 75/84, [1986] ECR, 3021, 3090 paragraph 65; Commission decisions on synthetic fibres, OJ1984 L207 p. 17, 23 paragraph 37; *Ford/Volkswagen*, OJ 1993 L20 p. 14, 19 paragraph 36; *Stichting Baksteen*, OJ 1994 L131 p. 15, 20 paragraph 27.

³⁹ *Braakman and Schröter*, paragraph 148.

⁴⁰ Case *Montedipe v. EC Commission*, T-14/89, judgement of 10 March 1992, not reported, para. 271. The case is referred to by Van Bael and Bellis, p.560, footnote 152. The CFI rejected the argument of undertakings’ self-discipline being allowed, based upon the lack of a counterpart in the EC Treaty for Article 58 of the ECSC Treaty, which provides measures, by the High Authority.

(ex 92) EC. While judgements *Albany*, *Brentjens and Drijvende Bokken* may have repercussions even there, we have to set state aid aspects aside in this report.⁴¹

1.7. Block Exemptions

24. In order to avoid the problem of legal insecurities in many special kinds of agreements, the Commission has adopted regulations granting *block or group exemptions* for certain categories of agreements. Block exemptions are granted by detailed Commission regulations. Group exemption regulations concern licensing agreements for the transfer of technology, specialisation and research and development agreements, the insurance sector and franchising, as well as other vertical agreements. A separate exemption covers agreements on motor vehicle distribution.⁴² The other vertical agreements were covered by one single exemption regulation issued in December 1999 and simplifying the old rules.⁴³ Why are group exemptions of particular interest to this study? In simple terms, they deal with agreements of a certain *type* that inherently include or imply restrictions of competition but also with the boundary of the scope of application of competition rules. Block exemptions are, however, not usually drafted as issues of the public policy being pursued, but more as specific types of agreements. Behind the block exemption rules we can, however, also trace some policy considerations concerning, for instance, the position of consumers. The block exemptions for vertical agreements also include a whole variety of conditions that above all prohibit the fixing of resale prices but also protect retail dealers and allow their exclusive territorial rights. This protection for the weaker party shows some similarity to the policy pursued under labour law. A clear example of the fact that this kind of thinking is not unknown in competition law can be found in the motor vehicle regulation. Its preamble explains Article 6(1)(5) as follows:

24) In order to protect dealers' investments and prevent any circumvention by suppliers of the rules governing the termination of agreements, it should be confirmed that the exemption does not apply where the supplier reserves the right to amend unilaterally during the period covered by the contract the terms of the exclusive territorial dealership granted to the dealer (Article 6 (1) (5)).⁴⁴

1.8. Abuse of Dominant Position⁴⁵

25. An undertaking under Article 81 (ex 85) may abuse its dominant position in the sense of Article 82 (ex 86) EC. The difference is that, unlike the situation in Article 81 (ex 85), no exemptions are allowed under Article 82 (ex 86). They are also applied concurrently: an exemption is not possible under Article 81(3) if it would mean an outcome contravening Article 82 (= abuse).

⁴¹ As to some notable recent cases, see e.g. Stephen Vousden, ILJ Vol. 29, June 2000, 189 pp.

⁴² The *acquis* concerned is reachable e.g. via

http://www.europa.eu.int/comm/dg04/lawenten/en/entente3.htm#iii_1

⁴³ Commission Regulation (EC) 2790/99.

⁴⁴ Commission Regulation (EC) 1475/95.

⁴⁵ See Braakman and Schröter, paragraphs 229 to 246.

26. According to the case law, a dominant position means first and foremost an economic power, meaning the ability to behave to an appreciable extent independently of competitors, customers and ultimately from consumers.⁴⁶ A market share of less than 20 per cent normally precludes the dominant position and one of more than 50 per cent establishes it. The number of relevant competitors is an additional key factor. As to the relevant geographical market, in the case law any of the large and medium-sized Member States is regarded as meeting the criterion (substantial part of the Common Market). The size of the territory does not define everything, however. 8 per cent shares of production and 5 per cent of shares of consumption are sufficient for a territory to be defined as a 'substantial part' of the Community. A dominant position may also be created by a group of companies or by the members of a cartel.
27. Abuse is assessed in objective terms, in the light of the general Treaty objectives, while accusations of immoral, indecent or even criminal behaviour are excluded. On the other hand, e.g. social policy purposes are *not* mentioned in Article 82 (ex 86). The definition given by the ECJ shows that a market dominator is entitled to pursue its commercial interests vis-à-vis competitors, suppliers and customers as long as it observes the principle of competition in *efficiency*.⁴⁷ Substantively, Article 82 (ex 86) EC seeks to prohibit the imposition of unfair prices or trading conditions, limiting production, markets or technical development to the prejudice of clients and consumers, and to prohibit discrimination, tie-in transactions and abusive concentrations of undertakings.
28. The thresholds and conditions above are obviously of importance when assessing the potentially dominant position of bodies established by a collective agreement.

1.9. Exclusive Rights for Undertakings, Article 86 (ex 90) EC⁴⁸

Special or Exclusive Rights

29. Article 86 (ex 90) EC regulates the behaviour of the Member States in granting special or exclusive rights to undertakings. This is of interest in this study – given the variety of bodies established by collective agreement and running various schemes based on them. If compliance with such a scheme is made universally binding (*erga omnes*), the question arises of whether such an arrangement is compatible with Article 86 (ex 90) of the EC Treaty.
30. In practice, Article 86 is often applied in conjunction with Article 82, and even with Article 10 (ex 5) EC. The undertakings concerned can be both private and public. Essential is the borderline between (the abuse of) dominant position (Article 82), on the one hand, and special and exclusive rights (monopoly) on the other. Accordingly, under Article 86 (90) it is enough to be a body engaged in economic activity. For instance a national broadcasting monopoly is of this nature

⁴⁶ Case *United Brands v. Commission*, 22/76, [1978] ECR p. 207.

⁴⁷ *Braakman and Schröter*, paragraph 241. Case *Hoffman – La Roche v. Commission*, 85/76, [1979] ECR, p. 461.

⁴⁸ We rely on *Van Bael and Bellis*, p. 892 to 910.

when selling advertisement time. No separate legal personality is needed to qualify as a public undertaking.⁴⁹

31. The distinction between granting special or exclusive rights and the exercise of such rights is, according to Van Bael and Bellis, no longer as clear as it was often deemed in earlier years. In *France v. Commission*⁵⁰, the ECJ found that the compatibility of the rights granted under Article 86 (ex 90) EC with other Treaty provisions depended on Articles 12 (ex 6) EC and 81 to 89 (ex 85 to 94) EC, referred to in Article 86 (ex 90) EC. The same issue was dealt with in *Höfner and Elser*, which concerned the monopoly of the public employment agency. The ECJ confirmed that the exclusive right of recruitment was in breach of Article 86(1) (ex 90(1)) EC because the agency was “manifestly incapable of satisfying the demand prevailing on the market for such activities.”⁵¹ It was confirmed that merely creating a dominant position by granting exclusive rights under Article 86 (ex 90) EC is not itself incompatible with Article 82 (ex 86) EC. A Member State infringes the Treaty if the rights are liable to create a situation in which the undertaking is led to commit abuse. The same was confirmed in *Merci Convenzionali Porto di Genova*.⁵² In this case, however, the ECJ set aside any social justifications for these rights and found that the cooperative was induced to abuse its dominant position.⁵³
32. The *Becu* judgement further elaborated the relationship between social law and competition rules on undertakings in Article 86 (ex 90) EC. Namely, the ECJ first found that the status given to the dockers in the port of Gent meant exclusive or special rights in the sense of Article 86(1) (90(1)) (paragraph 23). The Court then noted, however, that these rules apply only to ‘undertakings’. Whereas the reasoning in *Becu* led to the result that there was no ‘undertaking’ formed by the dockers and operating on the market (as there was in *Merci*), the national legislation concerned⁵⁴ was compatible with Article 90(1) (now 86(1)), read in conjunction with Articles 6 (now 12), 85 (now 81) and 86 (now 86) EC. Governing the conditions of work and remuneration by collective labour agreement and performing the work using workers under fixed-term contracts were especially mentioned in the reasoning (paragraphs 25 and 26) as grounds supporting the non-applicability of Article 86(1) (ex 90(1)).
33. It is worth noting that the question submitted by the national court in *Becu* implied that the national legislation would be too strictly in favour of the workers concerned.⁵⁵ The ECJ did not concern itself at all with this but in fact called attention to the difference in the costs concerned: BEF 667 per hour to a worker

⁴⁹ See EC Commission v. Italy [1987] ECR 2599, at p. 2623 (para. 13), concerning the Italian tobacco monopoly.

⁵⁰ Case C-202/88, [1991] ECR I-1223.

⁵¹ Case C-41/90, [1991] ECR I-1979, paragraph 34.

⁵² Case C-179/90, [1991] ECR I-5889, paragraphs 16 and 17.

⁵³ Bypassing the social aspect in this judgement has been criticised by Lyon-Caen and Lyon-Caen, *Droit social international et Européen*, Paris 1993, p.212.

⁵⁴ See paragraphs 17 and 18, above.

⁵⁵ See paragraph 19 of the judgement: “...’recognised dockers’...where binding rates must be applied, even though the work can be performed by ordinary (that is to say non-recognised) workers”.

sent by the interim agency, BEF 1355 minimum to a recognised docker (paragraph 17).⁵⁶ In its final answer the ECJ declared as compatible with the Treaty the obligation to pay to recognised dockers “remuneration far in excess of the wages of their own employees or the wages which they pay to other workers.”

Services of “General Economic Interest”

34. Article 86(2) (ex 90(2)) EC forms an exception to general EC competition rules for undertakings entrusted with the operation of services of ‘general economic interest’ or having the character of a revenue-producing monopoly. The latter are no longer of any interest. The former are allowed – according to Article 86(2) EC – if the other Treaty rules would obstruct the performance, in law or in fact, of the particular tasks assigned to them. Thus, so as to qualify under Article 86(2) (ex 90(2)) EC, it is sufficient that compliance with other treaty rules would make the performance of the tasks more difficult.⁵⁷ On the other hand, the development of trade must not be affected to such an extent as would be contrary to the interests of the Community. The case law until Albany etc. does not really clarify its limits as to tasks or bodies (‘undertakings’) established by a collective agreement.

1.10. Social Aspects in Merger Control

35. Merger control forms an elementary part of EC competition rules. In the cases *Perrier*⁵⁸ and *Vittel*⁵⁹ the CFI has considered the relationship between the merger control regulation 4064/89 and the social objectives in Article 2 EC. The thirteenth recital of the regulation refers to them, including the provisions on economic and social cohesion, referred to in Article 130c (now 160) EC. In these cases the trade unions and representative bodies of employees were granted locus standi to contest a concentration decision of the Commission only as far as concerned their prerogatives to be heard. Otherwise exceptional circumstances would be required. The overall reasoning is, however, more important for the purposes of this study. Namely, the CFI reasoned on the relationship as follows:

“38 For that purpose it must be noted to begin with that in the scheme of Regulation No 4064/89, the *primacy given to the establishment of a system of free competition* may in certain cases be reconciled, in the context of the assessment of whether a concentration is compatible with the common market, with the taking into consideration of the social effects of that operation if they are liable to affect adversely the social objectives referred to in Article 2 of the Treaty.” (our italics)

36. Primacy is, in this judgement, thus clearly given to competition rules vis-à-vis the social objectives. On the other hand, the CFI hardly had other options, given the wording in the preamble to the regulation. Both cases also included a collective agreement while the judgements do not reveal the extent to which the plaintiffs’

⁵⁶ The District Court held this difference to be unfair under Article 82 (ex 86), point (a) of the second paragraph. The figures mentioned are not just wages as the Court noted but total costs of the employer.

⁵⁷ Case C-320/91 Corbeau, [1993] ECR I-2533, paras 14 to 16.

⁵⁸ T-96/92 *CCE Perrier* [1995] ECR II-1213.

⁵⁹ T-12/93, *CCE Vittel v. Commission*, Rec. [1995] II-1247, paragraph 36

claims were perhaps defensible by the agreements. Anyway, the CFI found that the workers and their representatives were not directly affected by the merger in the sense of Article 173 (now 230) EC and that they were protected by the Transfer of Undertakings Directive and other EC law by which the Member States and national courts had to abide.

1.11. Allocation of Powers Between Community Competition Authorities and Member States

37. The question of how to regard the division of powers between the EC and its Member States raises complex issues that are considered here only in brief. The well-known background is that any national competition law throughout the Community is subject to a more or less slow but stable integration process while it still today includes a set of national features. National law increasingly adheres to the principles of Articles 81 and 82 EC.⁶⁰ Accordingly, in the event of a collision, the supremacy of EC law prevails. This is derived from Article 83(2)(e) (ex 87(2)(e) EC, which refers to EC acts determining the relationship between national and EC law.⁶¹
38. The crucial question is whether an agreement or arrangement compatible with Articles 81 and 82 (ex 85 and 86) EC could still be prohibited by national competition law and hence, whether the idea of 'single barrier' or 'double barrier' prevails. The opposite question is not relevant, given the supremacy of EC competition law. Besides this, EC rules may be inapplicable because of *de minimis* or *interstate trade* rules.
39. One basic principle is clear: only the Commission is entitled to grant an individual exemption under Article 81(3) (ex 85(3)) EC. This is also evident from Article 9 of Regulation 17/62, although the Commission proposes the decentralisation of this power. In most cases it is the Commission which determines the block exemptions established at Community level.⁶² At the national level a distinction between the administrative authorities and courts has to be made. However, there is a difference even between the separate administrations of the Member States. Out of the 15 Member States, nine administrative authorities can (either now or in future) directly apply articles 81 and 82 (ex 85 and 86) EC on the basis of their national law, whereas six cannot. This 'applying directly' means – of course – that the issue does not fall under the exclusive powers of the Commission. The nine authorities, which can apply EC law are those of Belgium, France, Germany, Greece, Italy, the Netherlands, Portugal, Spain and the United Kingdom. The six which cannot do so are Austria, Denmark, Finland, Ireland, Luxembourg and Sweden. A further complication comes from the fact that parallel investigations

⁶⁰ See e.g. Goyder, *EC Competition Law*, Oxford 1993, p. 344.

⁶¹ See case *Walt Wilhelm*, 14/68, [1969] ECR 1, paragraph 5.

⁶² Article 7 of Council Regulation 19/65, as amended by Council Regulation (EC) No 1215/1999, entitles the national competition authorities to withdraw the benefit of a vertical block exemption if a particular agreement, having regard to its effect within its territory, no longer fulfils the conditions of Article 81 (3) EC. This was further elaborated in Commission Regulation 2790/1999, which will be discussed later.

may take place.⁶³ Secondary legislation and case law provide further guidance on cooperation between the Commission and national authorities.⁶⁴

40. The whole system of implementation of Articles 81 (ex 85) and 82 (ex 86) EC is under revision. The Commission has submitted a White Paper seeking to simplify the regime, to decentralise it and to resort to much more ex post control. The Commission's monopoly in granting exemptions under Article 81(3) (ex 85(3) EC) would be terminated and it would become directly applicable in the Member States. All of this would enable the Commission to concentrate on significant cases at Community level.⁶⁵ While the reform is obviously inevitable in order to maintain the necessary efficiency, it would create further pressure towards more fundamental uniformity between EC and national competition rules.

1.11.1. National Courts

41. The task of national courts differs from that of national competition authorities. The latter (both the Commission and the national competition authorities) are obliged to conduct competition policy and thus to act in the public interest. The national courts have been entrusted with the duty of protecting the individual rights of private persons and companies by virtue of Articles 81 to 89 (ex 85 to 94) EC. On the other hand, national courts are not allowed to intervene in 'competition policy-making' (neither in the policy-making of the Commission, nor in that of the national competition authorities), but they are obliged to ensure that decisions taken within the framework of this policy-making are based upon relevant facts, that correct procedures are applied and that the decision does not constitute a manifest misuse of powers. Braakman and Schröter conclude:⁶⁶

“Community law therefore permits the courts of Member States to predict a negative outcome of the Commission's deliberations regarding the future granting of exemptions from the prohibition.”

42. The competence of national courts to apply EC rules stems from the direct effect of Articles 81(1) and (2), and 82 EC. This effect between private individuals has been consistently confirmed in the case law of the ECJ.⁶⁷ According to Braakman and Schröter, the group exemption regulations adopted by the Commission are

⁶³ See e.g. case *Walt Wilhelm*, 14/68, [1969] ECR 1, paragraph 3.

⁶⁴ Regulation 17/62 stated that the public authorities of Member States have jurisdiction and competence to apply Articles 85(1) and 86 so long as the Commission has not initiated any proceedings. In the case *BRT v. SABAM I*, 127/73, [1974] ECR 51, this was elaborated to include competition authorities and competition courts.

⁶⁵ White Paper on modernisation of rules implementing Articles 85 and 86 of the EC Treaty; Commission programme 99/027, published 28.4.1999. See http://www.europa.eu.int/comm/dg04/entente/en/wb_modernisation.pdf.

⁶⁶ Braakman and Schröter, p. 117, paragraph 315, where – besides *Delimitis v. Henninger Bräu*, *ibid.*, I-993, paragraph 50 – *Brasserie de Haecht v. Wilkin and Janssen*, case 48/72, [1973] ECR, p. 77, at 87, is referred to.

⁶⁷ Case *BRT v. SABAM I*, p. 54, at 62; *Delimitis v. Henninger Bräu*, C-234/89, [1991] ECR I-935, at 991, paragraph 44.

also directly effective (see, however, the discussion under the next heading).⁶⁸ So are naturally any other Commission *decisions* under the exclusive powers of the Commission, such as individual exemptions under Article 81(3) (ex 85(3)) EC. On the other hand, mere comfort letters of the Commission are not directly binding, but have to be included in the evidential facts of the case before the court. Finally, according to Braakman and Schröter, the national courts have to determine – where the conditions for application of the prohibition on cartels are satisfied – “whether an arrangement belongs to one of the groups of cartels that could be considered for *legal exemption*.”⁶⁹ If this is the case, the court has to apply such an exemption. While Braakman and Schröter arrive at ‘legal exemption’ via special rules applicable within agriculture, the question arises as to the extent to which collective agreements fall within the scope of such exemption under EC and national law.

43. Due to the possibility of parallel investigations (by the Commission) and (national) court cases, the ECJ and the Commission have developed detailed rules on cooperation between the national courts and the Commission.⁷⁰

1.11.2. Double Barrier – Single Barrier

44. Within the competition law doctrine but also between the Commission and national authorities the debate about ‘double barrier’ and ‘single barrier’ theory has continued since the establishment of the Community.⁷¹ Double barrier means that an arrangement, agreement etc. has to overcome both the Community barrier (competition rules and policy) and the national barrier (competition rules and policy) so as to be lawful. It further means that if both EC and national competition law apply, the latter can be stricter, i.e. granting less immunity e.g. to collective agreements. Single barrier means that if the substantive matter passes the EC law test, then national authorities or courts may not prohibit it on the basis of a stricter national law. This is clearly e.g. the position of Braakman and Schröter above, and the Commission is of the same opinion.⁷² The issue is partially addressed by Regulation 17/62 but this fails especially to fix the status of individual exemptions granted. Article 9 of the Regulation confirms that the Commission has the exclusive right to grant exemptions under Article 81(3) EC but this fails to answer the question of whether the same agreement or arrangement could still be prohibited on the basis of (stricter) national law.

⁶⁸ This was stated in *Delimits v. Henninger Bräu*, *ibid.*, at 992, paragraph 46: “The same is true of the provisions of the exemption regulation (judgement in Case 63/75, *Fonderies Roubaix* [1976] ECR 111). The direct applicability of those provisions may not, however, lead the national courts to modify the scope of the exemption regulations by extending their sphere of application to agreements not covered by them. Any such extension, whatever its scope, would affect the manner in which the Commission exercises its legislative competence.”

⁶⁹ Braakman and Schröter, p. 119, paragraph 321.

⁷⁰ See Braakman and Schröter, p. 121 to 124, paragraphs 328 to 338.

⁷¹ See e.g. Goyder, p. 343-356, and the opinion of AG Tesouro in case C-266/93, [1995] ECR I-3479, at 3500, paragraph 45.

⁷² Fourth Annual Report on Competition, paragraph 45.

45. The basis for the debate was the case *Walt Wilhelm* where, besides affirming the supremacy of EC law but recognising the parallel proceedings, the ECJ referred to Article 2 EC, finding that this provision:

“also permits the Community authorities to carry out certain positive, albeit indirect, action in order to promote a harmonious development of economic activities throughout the Community in accordance with Article 2 of the Treaty”.⁷³

46. One might argue that on this ground any exemption granted under Article 81(3) (ex 85(3)) would also bind the Member States. Despite this, e.g. Joanna Goyder notes that in general the double barrier theory prevails but that “this may not be so where the Commission has granted an exemption.”⁷⁴ Van Bael and Bellis refer to the possibility of drawing a distinction between an exemption granted as a measure of Community [competition] policy and an exemption whereby an agreement or practice is merely declared to be consistent with the common market.⁷⁵

1.11.3. Tesouro’s reasoning

47. In the application of *block (group) exemptions* by the national courts (but obviously also by competition authorities) the legal landscape is different from that relating to the application of Article 81(3) (ex 85(3)) EC. Anyway, the position of Braakman and Schröter that block exemptions are directly effective and bind the national courts (at least as to a ‘legal exemption’) can be supported by several reasons. Firstly, block exemptions are set up by Regulations. Even though they are enacted by the Commission, they are still Regulations in the meaning of Article 249 (ex 189) EC. The European institutions, and ultimately the ECJ, must have the final say in their application. Any other solution would be intolerable from the point of view of the primacy of EC law, as AG put it in *VW*.⁷⁶ This case as such concerned car distribution, which is subject to a separate block exemption in Regulation No 123/85, and the application of that regulation formed the basic issue of the case. Finally, as to case law, one must refer to the case *Delimitis v. Henninger Bräu*, in which the ECJ noted the binding effect of block exemptions and stressed that the national court had to stay within the scope of the exemption.

48. Moreover, in the *VW* case the Advocate General firmly proposed a negative answer to the possibility of prohibiting under national law an agreement or arrangement exempted under European law. Hence, his position was not limited to

⁷³ Case 14/68, [1969] ECR 1, paragraph 5.

⁷⁴ Goyder, p.346. Her reasoning (of 1993) in fact means that individual exemptions issued by the Commission should definitely be sheltered at national level, and group exemptions are, on stronger grounds, rather in the same than in the opposite position. *Ibid.* pp. 348 – 352.

⁷⁵ Van Bael and Bellis, p. 876. They further refer to Markert, “Some Legal Administrative Problems of the Coexistence of Community and National Competition Law in the EEC”, (1974) CMLRev 92, p. 97.

⁷⁶ Case Volkswagen (VW), C-266/93, [1995] ECR 3479, at 3504, paragraph 55 of the opinion. A sister case to VW was BMW, C-70/93, [1995] ECR I-3439.

block exemptions, but concerned individual exemptions as well. This becomes clear in the following:

“...the national court asks whether a decision of the national authority prohibiting conduct such as that in point can be reconciled with a different result which may have been dictated, at the Community level, with respect to the same conduct, in the light of Article 85(1) alone or of Regulation No 123/85.”⁷⁷

49. The ECJ avoided answering both with respect to a possibility limited to block exemptions and to an overall possibility associated with Article 81(3) (ex 85(3)), because a previous question, being the basic subject matter in the case, already fell under Article 81(1) (ex 85(1)). But Advocate General Tesauro’s conclusion was:

“As a consequence of the principle of the primacy of Community law, an agreement qualifying for the protection of an exempting regulation or declared compatible with Article 85(1) of the Treaty inasmuch as it does not adversely affect competition may not be prohibited by the national authorities on the basis of more restrictive national provisions”.⁷⁸

50. In the context of this study the reasoning of AG Tesauro in *VW* is, however, worth quoting further:

“56... There can be no doubt that national law is applicable where the agreement in point, inasmuch as it is held not to be liable to have an adverse effect on trade between Member States, does not even fall within the field of application of Community competition law...

57. In contrast, some doubts may properly be entertained in a case where the Commission’s assessment is *positive*, the Commission considering, for example, that *the agreement in point, whilst in principle restrictive of competition, does not constitute a restriction falling within Article 85(1), since it also contributes towards the attainment of the objectives of the Treaty*. Situations of this kind do indeed frequently arise in the context of negative clearances and it is specifically with respect to such a situation that some writers argue that the favourable view taken by the Commission cannot be called into question through the application of more rigorous provisions of national law...”⁷⁹ (our italics).

⁷⁷ Paragraph 44 of the opinion.

⁷⁸ Tesauro’s paramount argument was judgement *Walt Wilhelm*, case 14/68, [1969] ECR 1, para. 5 (see footnote 61 above). Its value was emphasised by the differing conclusion of AG Roemer, who held that an exemption granted under Article 85(3) simply reflected a waiver on the part of the Community authorities which, as such, permitted the Member States to apply – in the event, stricter – national provisions without threatening the objectives of the Treaty (opinion of AG, [1969] ECR 17, in particular at 23). Tesauro contested *expressis verbis* the position of Markert, referred to in footnote 75 above; see Tesauro’s opinion in *VW*, paragraph 50. Tesauro also referred to *Delimitis v. Henninger Bräu*, see footnotes 66 and 68 above.

⁷⁹ Paragraphs 56 to 60 of the opinion are in [1995] ECR I-3504 et seq. As to the writers concerned, Mr. Tesauro refers to Rideau, ‘Droit communautaire de la concurrence et droits nationaux de la concurrence’, in *Revue des Affaires Européennes*, 1991, p. 5, in particular p.

51. At this stage it is enough to note that the reasoning of Tesauro quoted above could very well be applied to collective agreements. This is the case in spite of the fact that no aspect of the *VW* case had anything to do especially with collective labour agreements. The ‘objectives’ to which Tesauro refers clearly mean those set out in Article 3 EC, besides the competition regime. However, Tesauro went on to note the need for uniformity throughout the Community as a basis for his paragraph 57, but also the fact that non-binding decisions of the Commission (comfort letters) do not bind national courts (end of paragraph 58). He then notes the *prima facie* nature of his conclusion in this respect (paragraph 58) but anyway continues as follows:

“59... In the result, whenever a particular case does not fall within Article 85(1) because there is no *adverse effect on trade between Member States*, the competent national authorities may well hold the agreement in point to be anti-competitive in view of the harmful effect it has on the domestic market. Conversely, a *binding* finding of the Commission or, *a fortiori*, a judgement of the Court, to the effect that the agreement does not adversely affect competition precludes, in my view, its being penalised at the national level. In such a case, in my opinion, the requirements for asserting the primacy of Community law are satisfied.” (our italics)

52. Advocate General Tesauro draws a distinction between the repercussions of the inter-state trade effect and the *overall* effect on competition.⁸⁰ In the latter case EC law should prevail. Further on, a combined reading of his paragraphs 57 and 59 above seems to imply some support for the outcome that collective labour agreements, if assessed as a matter of principle in relation to competition rules, should get the same treatment by the national courts as that given by the ECJ in *Albany* and *Brentjens*. Finally, it is worth noting that in his opinion Tesauro deals with national authorities in a way which, in this context, covers both the competition authorities proper and the courts.

1.11.4. Block Exemption for Vertical Agreements

53. Commission Regulation No 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices contains some elements concerning the relationship between national and EC competition law. In

15 et seq.; and to Sarras, *L’application du droit communautaire de la concurrence par les juridictions nationales*, *Revue de la concurrence et de la consommation*, 1990, p. 19, in particular p. 24 et seq.

⁸⁰The distinction is much easier to see in the Italian and French versions of paragraph 59 of AG. They are free from being mixed by ‘adverse effect on trade between Member States’ (first sentence) and ‘adversely affect competition’ (second sentence). In French the corresponding notions are ‘*le préjudice pour les échanges intracommunautaires*’ (first sentence) and ‘*atteinte au jeu de la concurrence*’ (second sentence); in the original Italian version they are “*pregiudizio per gli scambi intracomunitari*” (first sentence) and “*un’alterazione della concorrenza*” (second sentence). Goyder makes the same distinction, *op. cit.*, p. 348.

the draft of 24 September 1999 the relationship between EC and national law was described in the following way (Preamble, consideration 18):

”Whereas, in accordance with the principle of primacy of Community law, this regulation prevails over any decision taken in the application of national laws on competition; whereas this Regulation does not however preclude Member States from applying national laws on competition to vertical agreements to which Article 81(1) is not applicable;”⁸¹

54. The final version of Regulation 2790/1999 declares in its preamble as follows:

“(17) In accordance with the principle of the primacy of Community law, no measure taken pursuant to *national* laws on competition should prejudice the uniform application throughout the common market of the Community competition rules or the *full effect* of any measures adopted in implementation of those rules, including this Regulation.” (our italics).

This statement stems directly from the case law, *Walt Wilhelm* and *Guerlain*.⁸² Nevertheless, the statement implies, for instance, that block exemptions ‘should’ be binding at national level and prevail over national law. It has to be underlined that the new capacity, under the same regulation, for national competition authorities to withdraw the benefit of the same group exemption in a particular case is ‘by definition’ a different issue. It represents the exercise of Community powers especially conferred by the Regulation and an application of EC, and not national law.

55. The final wording of the Regulation thus shows the deletion of the second “whereas” as a whole, replacing “this regulation prevails” by “no measure should be taken pursuant to national laws” and inserting the protection of the “full effect” (“*effet utile*”) of the regulation. It seems to be a kind of compromise reached in the process of reshaping the control and enforcement of EC competition rules. Whatever reasons there may be for the changes made in the text, it suffices for the purposes of this study to conclude that according to the principle of primacy of EC law, *block exemptions have a strong binding effect at national level*.

⁸¹ The quasi-binding nature of block exemptions is also illustrated by the Green Paper of 1996 on Vertical Agreements, which noted that “national competition authorities may apply Article 85(1) and (2) and 86 as long as the Commission has not opened its own procedures in respect of the same agreements.... Unless the Commission has granted an Article 85(3) exemption or the agreements are covered by a block exemption, Member States can apply their own national law to an agreement.” Commission Communication COM(96) 721, paragraph 19. A statement on the equally strict line is presented in the same document, under legal certainty, paragraph 190. Otherwise the Commission published on 24 May 2000 the Guidelines on Vertical Restraints. See <http://europa.eu.int/comm/dg04/entente/other.htm>.

⁸² In *Walt Wilhelm* paragraph 6 reasoned and concluded by stating the principle of primacy of EC law. The judgement in *Guerlain* noted – referring to *Walt Wilhelm* - that “in the above-mentioned judgement the Court stressed that parallel application of national competition law can only be permitted in so far as it does not prejudice the uniform application, throughout the common market, of the Community rules on cartels or the full effect of the measures adopted in implementation of those rules.” Joined cases 253/78 and 1/79 to 3/79 *Giry and Guerlain* [1980] ECR 2327, paragraph 16.

2. European Social Law; Collective Agreements in EC Law

2.1. General

56. Introductory remarks are presented under this heading, while the aim is to deal with the relevant Treaty provisions in the context of the judgements *Albany*, *Brentjens* and *Drijvende Bokken*.
57. European social law did not originally include any Community policy on collective agreements, while encouraging collective bargaining among the Member States was the duty of the Commission (Article 118 EEC). The Community was founded and first developed as a primarily economic community, the EEC. The first debate on European collective agreements, held in the 1970's⁸³, led nowhere – except in paving the way for the first wave of EC labour legislation from the mid-seventies onwards. In the Single European Act of 1986 “social policy” was enshrined in the Community’s objectives in Article 3(i) (now 3(1)(j)) EC and the possibility of European agreements was established by introducing Article 118B EC. At the same time Article 2 EC was amended by inserting not only “balanced” to qualify further the “harmonious” economic activities sought, but also a “high level of employment and social protection” as a declared task. In the Maastricht Agreement on Social Policy (ASP) of 1992 the position of collective agreements and the competence of management and labour to conclude European agreements was strengthened further. Since then three interprofessional and one real sectoral European agreement have been concluded.
58. However, these legislative developments have never led to a European definition of a collective agreement. Hence, from this point of view it is not so surprising that the impact of EC competition rules on collective agreements has not been at stake before the judgements *Albany*, *Brentjens* and *Drijvende Bokken*. Another factor to be taken into account is the wide acceptance of collective agreements as a tool for regulating the labour market in the Member States. Given the wide use of collective agreements in the Member States, irrespective of the differences between national legal orders in the overall legal nature, binding effect, normative competence of parties or personal scope of application (*erga omnes*), the issue is of the utmost importance. In a broad sense, the overall importance of collective agreements in regulating working life is one of the main pillars of the so-called European Social Model. Therefore the judgements in question did not emerge from a complete vacuum, but reflect wide acceptance of the principle of freedom of association and the right to collective bargaining that is part of the constitutional traditions of most Member States.⁸⁴

2.2. Collective Agreements in Relation to EC Competition Law before Albany

59. The EC Treaty provisions containing the competition rules also show that originally no attention was paid to collective labour agreements in this context.

⁸³ See the conclusions of the Paris Summit in 1972.

⁸⁴ See Part two, *infra*, the answers to the first question in the national reports and paragraph 4 of conclusions on the national reports.

Before the judgements *Albany*, *Brentjens* and *Drijvende Bokken*⁸⁵ no explicit case law of the ECJ and CFI existed on the applicability of competition rules to collective agreements. In the practice of the Commission we have found only one decision on this subject: the one issued on the *Irish Banks' Standing Committee* dating from the mid-1980s.⁸⁶ This unofficial association of Irish banks applied for so-called negative clearance of an agreement on opening hours that it had concluded with a trade union representing the banks' employees. Hence, the aim was to secure confirmation that the agreement was not in conflict with competition rules, notably with Article 81 (ex 85) EC. The Commission held that as such the agreements concerned *may be* taken to constitute agreements between undertakings for the purpose of Article 81 (ex 85) EC. Despite this, the Commission took the view that “any prevention, restriction or distortion of competition which results from this agreement is not appreciable” and granted the negative clearance. It is noteworthy that the case also dealt with agreements on clearing rules between the banks and on a Direct Debiting Scheme. This single Commission decision does not change the overall picture.

60. One minor but still indicative incident occurred in a written question posed in the European Parliament. Namely, in 1989 proceedings were instituted under Italian national law against the management of FIAT regarding health and safety at work (industrial accidents). The question included a reference to inequality between the workers of other countries and the Italian workers who suffered from bad working conditions. This encouraged MEP Amendola to submit that the treatment of the FIAT workers in Italy violated EC competition rules, which thus also necessitated action by the Commission against the company. The essential point in the brief answer received from the Commissioner for social affairs, Mrs. Papandreu, - terminating the case at European level - was as follows:⁸⁷

“However, it seems very doubtful that FIAT’s treatment of its workers could give rise to an infringement of either *Article 85 or 86 of the Treaty, which are not in principle concerned with matters of labour law.*” (our italics)

61. Finally, regarding collective agreements during the pre-Albany era, Braakman and Schröter note:⁸⁸

“The individual or *collective regulation of working conditions*, the collection of contributions and the rendering of services by statutory social security

⁸⁵ Cases listed in footnote 1. Note that judgement *Becu* of 16.9.1999 implied a collective agreement. See paragraphs 17 and 18, *supra*.

⁸⁶ OJ 1986 L295, p. 28. The opening hours of the Associated Banks had, since 1965, been the subject of formal agreements between the parties and also with the Trade Union of Bank Employees. The normal opening hours were as follows: 10.00 a.m. – 12.30 p.m., 1.30 p.m. – 3.00 p.m. Monday to Friday, and until 5.00 p.m. on one day a week Monday to Thursday inclusive. Certain additional banking services were available up to eighteen or twenty-four hours a day from Automated Teller Machines (ATMs) operated by each of the parties. The Commission’s decision does not reveal whether these hours were different from those applied in other banks. Presumably not.

⁸⁷ Written question No 777/89, see OJ C328/3, 31.12.1990.

⁸⁸ Braakman and Schröter, paragraph 34. It is understandable that in case law they can only refer to Poucet and Pistre, footnote 21 above.

institutions are not activities which entail classification as an undertaking.”
(our italics).

62. Although Braakman and Schröter do not define what they mean by collective regulation of working conditions, it is beyond doubt that collective (labour) agreements do fall within that concept in any conventional legal terminology. Hence, for Braakman and Schröter, collective agreements were not, or at least not a priori, subject to EC competition rules. We recall that the Braakman and Schröter report was published in 1997, with a prologue by Commissioner van Miert. That the Commission (or the legal service of the Commission) did not fully adopt that view later on becomes clear in the cases *Albany* etc. and *van der Woude*.⁸⁹

3. The Judgements *Albany*, *Brentjens* and *Drijvende Bokken*

*Facts and Questions for Preliminary Ruling*⁹⁰

63. All three cases dealt with a single sectoral pension fund – each running a supplementary occupational pension scheme established by a sectoral collective agreement that had been declared binding *erga omnes*. This meant that every worker in the three sectors concerned had to be affiliated to the sector’s fund unless the fund itself granted an exemption. The companies concerned wanted to dispense with the compulsory affiliation by arranging similar or better pension benefits for a lower price outside the fund. They invoked the EC competition rules.

64. This position led to proceedings under Article 234 (ex 177) EC with four questions in essence asking the following:

- does Article 81 (ex 85) EC preclude the parties to sectoral collective bargaining from establishing by collective agreement a single sectoral fund and from asking the authorities to declare it binding *erga omnes*?
- do Articles 3(1)(g) (ex 3(g)), 10 (ex 5) and 81 (ex 85) EC preclude the authorities from declaring such an agreement binding *erga omnes*?
- is the pension fund concerned an undertaking in the sense of Article 81 EC et seq.?

⁸⁹ Pending case C-222/98. In that case, as in *Albany*, the Commission found it possible to think that, in the sense of competition law, there is an agreement between the employers. However, the Commission noted how this would lead to prohibiting practically all sectoral collective agreements which, moreover, could hardly enjoy any exemption under Article 81(3) (ex 85(3)) EC. For the Commission, all this would be in conflict with international legal instruments and the European Social Model.

⁹⁰ For more details, see the Dutch report in part II of this study. On the Internet, the judgements are available at the website www.curia.eu.int/.

- do Articles 82 (ex 86) and 86 (ex 90) EC preclude the exclusive rights of the fund as a serious infringement of the freedom to conclude an insurance agreement?⁹¹

Judgements In General

65. As to the reasoning, the judgements are in every essential respect quite identical. In the following discussion the structure of the Brentjens judgement is used, as its questions were ultimately those answered exactly and in the order of submission. The three national courts, one of them the Supreme Court of the Netherlands, posed no explicit question about the overall relationship between collective agreements and competition rules. The European Court of Justice found it necessary to include this within the first question as a pre-question in order to answer the first and second questions (above) of the national courts. Such a procedure is relatively rare in the Court's practice.⁹² However, Advocate General Jacobs in fact did the same in constructing his proposal the structure of which was followed.
66. The judgements were issued after the entry into force of the Amsterdam Treaty. As the events concerned date from previous years, the Court did not apply the Amsterdam Treaty.

*The Opinion of the Advocate General*⁹³

67. The joint opinion of Advocate General Jacobs for all three cases is rather voluminous. It is explained here only to the extent necessary to interpret the judgements. While they include no reference at all to the opinion, the latter is anyway a useful mirror that makes it easier to draw conclusions on the nature of the judgements.
68. The Advocate General began his reasoning on EC law with the following pre-question: Is there a general *exception* for the social field from the competition rules?⁹⁴ In answering this he relied on:
- the expressed special position of agriculture and military equipment, and the related case law,

⁹¹ Whereas the first question was not formally put in the Albany case, that judgement includes only three formal answers. Note also that the ECJ set aside some minor differences between the cases in the formulation of the fourth question above.

⁹² See Ole Due, the former president of the ECJ, *Understanding the reasoning of the Court of Justice, Mélanges en hommage à Fernand Schockweiler, Nomos, Baden-Baden, 1999, p. 83.*

⁹³ A critical analysis of the opinion of the Advocate General is provided by Brian Bercusson, Annex 2 to "Freedom of Association and Fundamental Trade Union Rights, A Legal Framework for European Industrial Relations", ETUI, Brussels 1999, pp. 29-38. Luc Gyselen holds the opinion to be a "gold-mine of references and ideas". CMLR 37: 425-448, April 2000. He seems to concur broadly in the analysis of the Advocate General. A rather critical view is presented in the *Industrial Law Journal*, June 2000, pp. 181-191; case annotation on Albany by Stephen Vousden.

⁹⁴ Paragraphs 120 to 130 of the opinion.

- case law on transport, energy, banking and insurance, and
- case law on certain social policy matters such as employment service monopolies,⁹⁵ pension funds⁹⁶ and a body engaged in non-profit making health-care activities;⁹⁷ these cases reflect the principle that EC competition rules have an impact on social policy matters, while the cases referred to by the Advocate General do not imply any collective agreement.

From these elements he concluded that there is no generalised exception sheltering the *social field* as a whole from the competition rules.⁹⁸ The judgements do not discuss this more general question but directly address the status of collective agreements.

69. However, AG Jacobs recognised the legitimate purpose of collective agreements, their benefit for business, the widespread use of the *erga omnes* effect and the desirability of promoting and encouraging social dialogue. Finally he tried to strike a balance between competition rules and collective agreements in the following way:

“194. Accordingly, my conclusion on antitrust immunity for collective agreements is that collective agreements between management and labour concluded in good faith on core subjects of collective bargaining such as wages and working conditions which do not directly affect third markets and third parties are not caught by Article 85(1) [now 81(1)] of the Treaty.”

70. While all three conditions (good faith, core subjects and no direct effect on third markets and parties) are open to various interpretations, they are not discussed further here because the Court did not adopt this proposal. The proposal was constructed by relying essentially more on an “anglo-saxon” influenced classical competition law analysis than on the analysis adopted by the Court.

3.1. The Basic Immunity of Collective Agreements

The Status of Social Partner Organisations in relation to Competition Rules

71. The companies contended that the requirement making affiliation to the pension fund compulsory constituted an agreement between undertakings in the sense of competition rules (*agreement argument*; paragraph 46 of Brentjens) and was contrary to Article 81(1) (ex 85(1)) EC while it restricting competition in two ways: by preventing the companies from making the pension insurance deal with an insurance company and by excluding these companies from a substantial part

⁹⁵ Cases C-41/90 Höfner and Elser [1991] ECR I-1979, and C-55/96 Job Centre [1997] ECR I-7119.

⁹⁶ Joined cases C-159/91 and C-160/91 Poucet and Pistre [1993] ECR I-637 and case C-244/94 Fédération Française des Sociétés d’Assurances [1995] ECR I-4013.

⁹⁷ Case C-70/95 Sodemare and Others v Regione Lombardia [1997] ECR I-3395. This concerned an old people’s home that was deemed to be an undertaking under Article 81 (ex 85) EC.

⁹⁸ Paragraph 130 of the opinion.

of the insurance market (paragraphs 47 to 49 of Brentjens). This corresponds in fact to the conclusion of the Advocate General. According to him, while employees and their organisations do not fall under competition rules,⁹⁹ employers' organisations do. This indicates an assessment of the status of the parties separately. The Court made no such assessment, instead drawing (in paragraph 56 of Brentjens) a comprehensive conclusion *opposite* to that of the Advocate General:

“It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if *management and labour* were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.” (our italics).

72. It is self-evident that paragraph 56 keeps the *negotiating* social partners outside of competition rules. One aspect of this is that the (negotiating) social partners do not depend on an individual exception granted by the Commission on the basis of Article 81(3) (ex 85(3)) EC. Accordingly, the *negotiating* social partners are *not* subject to competition scrutiny affording the Commission extensive powers to interfere in the action concerned and even to prohibit it. Finally, paragraph 56 relies on a weighing of social values when it refers to a serious undermining of social policy objectives if the social partners were to be subject to Article 81(1) (ex 85(1)) EC.
73. Further on, the negotiating social partners are excluded from competition rules irrespective of ‘gravity’ (or *de minimis*), duration, territorial scope or any other competition yardstick. It should be noted, however, that the effect of the exclusion at national level may be different. The grounds for the exclusion are clearly also valid for non-sectoral social partners. It seems natural to presume that both interprofessional and enterprise-level social partners would enjoy the same status but this need not guarantee the same material immunity. This concerns especially enterprise-level agreements. On the other hand, it is self-evident that the European social partners enjoy the same exclusion as that set up in Albany and Brentjens. They equally enjoy the same material immunity.
74. The exclusion of (negotiating) social partners is a *material* exclusion. If the social partners – directly or via their separate organs; parties together or not – are involved in business as undertakings to an extent unconnected to their specific role as (negotiating) social partners, then they are subject to competition rules. The same applies if the social partners’ organisations act as investors.

Grounds for Excluding Social Partners

⁹⁹ Paragraphs 209 to 227 of the opinion.

75. The Court's reasoning prior to excluding the (negotiating) social partners was rather unorthodox. As it also directly served to set up the basic immunity of collective agreements, it deserves to be presented as a whole. The Court reasoned as follows:

“50. It must be noted, first, that Article 85(1) of the Treaty prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. The importance of that rule prompted the authors of the Treaty to provide expressly in Article 85(2) of the Treaty that any agreements or decisions prohibited pursuant to that article are to be automatically void.”

76. Here one may note that the ECJ does not describe Article 81 (85) as a “*fundamental* provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market” (our emphasis) as was done in the judgement *Eco Swiss*.¹⁰⁰ Here the ECJ simply repeated the wording of the Treaty and continued as follows:

“51. Next, it is important to bear in mind that, under Article 3(g) and (i) of the EC Treaty (now, after amendment, Article 3(1)(g) and (j) EC), the activities of the Community are to include not only a '*system ensuring that competition in the internal market is not distorted*' but also '*a policy in the social sphere*'. Article 2 of the EC Treaty (now, after amendment, Article 2 EC) provides that a particular task of the Community is '*to promote throughout the Community a harmonious and balanced development of economic activities*' and '*a high level of employment and of social protection*'.”

77. The inclusion of Article 2 in the reasoning is structurally in line – beginning from the *Walt Wilhelm*¹⁰¹ case - with the judgement *Europemballage and Continental Can*, in which the Court stated how “the *restraints* on competition which the Treaty allows under certain conditions because of *the need to harmonise the various objectives of the Treaty*, are limited by the requirements of Articles 2 and 3. Going beyond this limit involves the risk that the weakening of competition would conflict with the aims of the common market” (our italics).¹⁰² This clearly shows the level on which the balancing has to be made. It is worth noting that the national courts did not anchor their questions in Article 2 EC. However, the Court continued:

¹⁰⁰ See footnote 6, above.

¹⁰¹ See footnote 61, above.

¹⁰² Case 6/72, [1973] ECR 73, paragraph 24. This case clearly proves that even Article 2 EC influences the competition rules and affects their application, and that the starting point of any analysis should be an overall balance between competition rules and the other Community policy objectives, on this occasion social policy, collective agreements included. The judgement equally shows that Article 2 EC also includes requirements, and thus not merely soft or vague objectives without legal repercussions.

“52. In that connection, Article 118 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) provides that the Commission is to promote close cooperation between Member States in the social field, particularly in matters relating to the right of association and collective bargaining between employers and workers.¹⁰³

53. Article 118b of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) adds that the Commission is to endeavour to develop the dialogue between management and labour at European level which could, if the two sides consider it desirable, lead to relations based on agreement.

54. Moreover, Article 1 of the Agreement on social policy (OJ 1992 C 191, p. 91) states that the objectives to be pursued by the Community and the Member States include 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.¹⁰⁴

55. Under Article 4(1) and (2) of the Agreement, the dialogue between management and labour at Community level may lead, if they so desire, to contractual relations, including agreements, which will be implemented either in accordance with the procedures and practices specific to management and labour and the Member States, or, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.¹⁰⁵

56. It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.”

¹⁰³ Dissenting from this, the Advocate General called attention to the subsidiary nature of Article 118 (‘Without prejudice to the other provisions of the Treaty’), paragraph 188 of the opinion.

¹⁰⁴ *Ibid.*, the AG referred to the preamble of the Protocol for the Maastricht Agreement on Social Policy. The preamble noted the secondary nature of the Agreement in relation to the Treaty.

¹⁰⁵ The Advocate General noted, conversely, how the (then) eleven Member States were not willing to confer - in the Agreement on social policy - legal effect on the rights to which they had given their political support in the 1989 Community Charter on Fundamental Rights. Paragraph 137 of the opinion.

3.2. The Scope of Basic Immunity of Collective Agreements

78. The reasoning of the Court culminated in setting up the basic anti-trust immunity of collective agreements in paragraph 57 of Brentjens as follows:

“It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty.”

79. This basic conclusion given with respect to collective agreements and the balance between them and competition rules is *in principle* exactly the opposite to that suggested (Brentjens, paragraph 46) by the Advocate General (*agreement argument*). We recall how he concluded that – in the sense of competition rules – “every collective agreement between management and labour contains an *implied agreement* between undertakings on the employers’ side”.¹⁰⁶ Logically, such an agreement is subject to competition scrutiny. From the labour law angle it is clear that the essential aspect of a collective agreement is the ‘accord’ between the parties, and not the possible informal or additional agreements within each party. The Court applied this labour law concept and assessed the *joint* position of the social partners in respect of competition rules.

80. Thus, paragraph 57 of the judgement de facto sets up a basic immunity of collective agreements in relation to competition rules. Its interpretation covers several aspects. Firstly, paragraphs 56 and 57 need to be read together. Secondly, they need to be read in conjunction with, or, as the culmination of the whole chain of reasoning that follows the *agreement argument* in paragraph 46 of the judgement and the restrictions of competition referred to by the companies in paragraphs 47 to 49. Thirdly, they need to be read together with the practical test in paragraphs 58 to 61.¹⁰⁷

¹⁰⁶ Paragraph 244 of the opinion. Gyselen, *op. cit.*, p. 441 to 443, shares the view of Advocate General with mainly “semantic reservations”. On the other hand, Gyselen holds how the Court – unlike the Advocate General – did not distinguish between the applicability of *rationae materiae* and *rationae personae* within the scope of Article 81(1). *Op. cit.* 441 et seq. As is clear from paragraphs 56 of Brentjens and 59 of Albany, however, the Court first defined the position of the negotiating social partners as being outside competition rules (*rationae personae*). The *rationae materiae* of Article 81(1) (ex 85(1)) then comes in the following paragraph et seq. (57 to 60 in Brentjens, 60 to 63 in Albany).

¹⁰⁷ Fourthly, they need to be read in conjunction with the opinion of the Advocate General. His *normative* concept was – besides the *agreement argument* – that the negotiating social partners were in the position of ‘any other economic actors’ whose agreement deserved *a priori* sheltering from competition rules to the extent that the general protection of agreements allows. See paragraph 162 of the opinion. Another aspect is that the Advocate General also relied upon the social and economic benefits of collective agreements in justifying his proposal for the immunity of collective agreements. Later, in his opinion in *Pavlov et. al.*, C-180/98 to 184/98, opinion delivered 23.3.2000, he no longer calls this basic immunity of collective agreements into question (see paragraphs 97 and 98 of the opinion). In contrast, again in *Pavlov*, while reasoning on the exclusive rights of the pension fund in question in granting exceptions from the compulsory affiliation (but only at that point), he qualifies the

81. Paragraph 57 of *Brentjens* also describes the interpretation of the Treaty in paragraphs 50 to 57: ‘*interpretation of the provisions of the Treaty as a whole which is both effective and consistent*’. It is not necessary to find out here whether this kind of interpretation and/or its promulgation is a unique feature. Rather it suffices to note that it is certainly rare. But so also was the task of the Court: to fill a four-decade gap on the level of the EC Treaty itself by defining the relationship between collective agreements, an elementary part of [EC] social policy, and EC competition rules. Moreover, this had to be done by first answering the question of the basic immunity of collective agreements, *put by the Court itself*. Dissenting from the opinion of the Advocate General, the Court balanced the two sets of rules and thus defined the basic immunity of collective agreements directly on the basis of the Treaty – without first resorting to any survey of national laws¹⁰⁸, other international legal instruments¹⁰⁹ or the past application of Articles 81 to 86 (ex 85 to 90) EC¹¹⁰.
82. In addition, whereas the competition rules have been regarded as *fundamental*, it is also appropriate to qualify the Treaty provisions on social policy - collective agreements included - in relation to competition rules as *fundamental*.¹¹¹ Furthermore, and given the reasoning in paragraphs 45 to 57 of *Brentjens* with the special qualification in paragraph 57 (‘the effective and consistent interpretation of the Treaty as a whole’) together with the scope of the judgement, it is justified to qualify the establishment of basic immunity within EC law as a decision of the utmost importance of principle. The debate about collective agreements as (a result of the use of) fundamental rights needs to continue in other forums.

corresponding outcome of the Court in *Albany* and *Brentjens* by asking rhetorically: “if that case law is to stand,”. See paragraph 200 of the opinion in *Pavlov*.

¹⁰⁸ Having noted the basic positions of the parties, the Advocate General carries out a comparative overview of solutions as to the line between competition rules and collective agreements in several Member States (Denmark, Finland, France, Germany and the United Kingdom) and in the USA (paragraphs 80 to 112 of the opinion). As to the comments, see the corresponding national reports in part II and the conclusions thereof, *supra*.

¹⁰⁹ The Advocate General carried on a long discourse on whether there is a fundamental right to bargain collectively that would underpin a perhaps untouchable immunity for collective agreements vis-à-vis competition rules. The Netherlands and French governments and the Commission held that such a right would follow from ILO Conventions nos. 87 and 98, and from the European Social Charter, the International Covenant on Civil and Political rights and the International Covenant on Economic, Social and Cultural rights as well as from the European Convention on Human Rights and Fundamental Freedoms. The Advocate General briefly discussed these instruments, especially the use of the case *Gustafsson v. Sweden* at the ECHR, 25 April 1996, R.J.D., 1996-II, No 9, but drew the conclusion that the national laws and the international legal instruments concerned did not offer sufficient convergence on the recognition of a specific fundamental right to bargain collectively (paragraph 160 of the opinion). Consequently, he granted collective agreements immunity only as far as the general protection of agreements allows.

¹¹⁰ See paragraph 68 above.

¹¹¹ Compare to the position of the Advocate General. He stated that even if the fundamental nature of the right to collective bargaining were to be recognised, collective agreements would still not be sheltered from competition rules (paragraph 163). A paramount justification used by AG Jacobs in bridging this (in paragraph 162) was the case *C-44/94 R. v. Ministry of Agriculture, Fisheries and Food, ex parte Fishermen’s Organisations and Others*, [1995] ECR I-3115, paragraph 55 of the judgement.

83. In the operational sense, basic immunity has important consequences. One of the repercussions has to be that there is no obligation to notify collective agreements to the Commission. In ‘normal’ competition cases notifications are still needed in order to secure negative clearance or a binding individual exemption. Only cases falling under block exemptions are discharged from the obligation to notify. In the case of collective agreements, however, the immunity is now a presumed starting point – also imposing the burden of proof on the party maintaining that an infringement has occurred. On the other hand the Commission and the national authorities must also somehow be able to fasten on possible abuses of the basic immunity of collective agreements, albeit in exceptional situations.

3.3. Competition Test; Limits of Basic Immunity;

84. The practical test, the application of a competition assessment, conducted by the Court (in paragraphs 58 to 61 of Brentjens) shows the ultimately relative nature of the immunity.¹¹² It can simply be seen as intended to prevent any abuse by ‘covering’ an intentional distortion of competition by a collective agreement. Such behaviour is clearly rather exceptional. Anyway, the solution means that the Court also rejected the arguments of the Dutch, French and Swedish governments and the Commission that collective agreements would be coherently, thus also in the material sense, excluded from competition rules. Functionally the solution of the Court can be compared to block exemptions that usually include special terms under which the Commission may withdraw the benefit of the exemption in individual cases.¹¹³

85. The test means assessing the nature and purpose of the provision concerned, and thus, in theory, of any provision in the agreement. The checking of “nature” means verifying whether the provision (or, agreement) satisfies the formal criteria for a

¹¹² “58. The next question is therefore whether the nature and purpose of the agreement at issue in the main proceedings justify its exclusion from the scope of Article 85(1) of the Treaty.

59. First, like the category of agreements referred to above which derive from social dialogue, the agreement at issue in the main proceedings was concluded in the form of a collective agreement and is the outcome of collective negotiations between organisations representing employers and workers.

60. Second, as far as its purpose is concerned, that agreement establishes, in a given sector, a supplementary pension scheme managed by a pension fund to which affiliation may be made compulsory. Such a scheme seeks generally to guarantee a certain level of pension for all workers in that sector and therefore contributes directly to improving one of their working conditions, namely their remuneration.

61. Consequently, the agreement at issue in the main proceedings does not, by reason of its nature and purpose, fall within the scope of Article 85(1) of the Treaty.”

Note that there is clearly a translation error into English in paragraph 59 of Brentjens. The French text speaks about the representative organisations (“les organisations représentatives”), not the organisations representing.

¹¹³ Note also the new powers for national competition authorities to withdraw the benefit of a block exemption in a particular case. See footnote 42 above.

collective agreement and derives from collective bargaining.¹¹⁴ A matter not falling under the scope of the immunity clearly is a unilateral measure, action or practice of either side unless it falls e.g. under lawful industrial action. An additional part of this formal element of the test was the Court's statement regarding the agreement arising from the negotiations of representative organisations (paragraph 59). In this case it was obviously taken more or less for granted, based on the *erga omnes* declaration made at national level. No additional European criteria for representativeness were established. An essential fact concerning this immunity test is that the principle of *proportionality* was not mentioned in this connection but, only the (nature and) purpose of the provision. According to this, it seems that the immunity test involves no a priori proportionality test in any sense other than that some factors of proportionality might be relevant within the framework of the test of nature and purpose of the provisions.

86. In this case the purpose of the provisions concerned was to improve the supplementary pensions, thus an aspect of remuneration that is one of the working conditions (paragraph 60, in fine). This is self-evidently even one of the 'core subjects' of collective bargaining. In view of this, the Court avoided an exhaustive discussion of the material limits of the immunity. It is nevertheless important to note that the Court did not limit the immunity by good faith or to 'core subjects, such as wages and working conditions' and to those which 'do not directly affect third parties or markets' as the Advocate General did. This means the strong rule that at least genuine provisions under "conditions of work and employment" (Brentjens, paragraph 56) are sheltered from competition rules. One consequence is that, for example, provisions on manning or engagement are sheltered even when they affect third parties. On the other hand, the outcome leaves room for future disputes where the courts have to weigh between the basic immunity and the practical restrictions of competition, which are more or less inherent in the collective agreement concerned.
87. While the application of basic immunity by the practical test of nature and purpose leads to the conclusion that the Dutch agreement concerned did not fall within the scope of Article 81(1) (ex 85(1)) EC, the first question for the preliminary ruling was answered negatively. A single sectoral pension fund can be set up by a collective agreement and the parties may request the public authorities to make the affiliation compulsory for all workers in that sector without violating EC competition rules.

¹¹⁴ Another question is whether the use of 'nature' means applying the 'rule of reason' thinking in the American anti-trust law (Vousden, p. 188). No, according to the Court that declared its source: the EC Treaty, finally as a whole, which meant also excluding any a priori proportionality test (see paragraph 85, supra). If yes, Vousden sees its source in the Opinion of Advocate General (his paragraph 252). That this 'yes' limps is evident. While Advocate General – at this point - ended up in *pro-competitive cooperation between undertakings* as Vousden notes on page 185, the Court linked the immunity either to social policy objectives or conditions of work and employment – without referring to any such cooperation. Besides, Advocate General *discussed* at this point the possible restrictive effects of the collective agreements concerned. The Court took such restrictions as granted (paragraph 59 of Albany, 56 of Brentjens). In sum, attempts to explain the basic immunity of collective agreement by 'rule of reason' do not convince. We refer to our opinion according to which competition law categories are not enough to explain Albany.

3.4. Two Interpretations of the Limits of Immunity

88. There is also another way to interpret the material scope of the immunity. Namely, the question concerns the ultimate denotation of the expression “in pursuit of “*such objectives*” (italic here) in paragraph 57 of Brentjens. Both ‘the social policy objectives’ of collective agreements and ‘conditions of work and employment’ are present in paragraph 56. On the one hand, it is evident that paragraph 56 draws a clear distinction between objectives and measures, and paragraph 57 uses ‘objectives’, not measures. Also ‘employment’ in paragraph 56 seems to justify a wide interpretation for use in relation to ‘objectives’. On the other hand, one might argue that inserting in paragraph 57 the word ‘such’ – instead of writing e.g. ‘these objectives’ – seeks to refer to ‘conditions of work and employment’. Along the same lines, one might argue that the wording of paragraph 60 of Brentjens indicates the same (“...one of their working conditions”). Further on, one might maintain that the social partners are excluded from competition rules “when seeking jointly to adopt measures to improve conditions of work and employment” and that the limits of the immunity have to follow this exclusion. However, both interpretations, relying on ‘social policy objectives’ or ‘conditions of work and employment’, are possible – and remain so on the basis of the French version that is the authentic text. The difference between the interpretations is clear. If the wording of paragraph 57 is deemed to refer to the social policy objectives in paragraph 56, then the scope of the immunity is finally defined by Article 136 et seq. EC, and is therefore wider than ‘conditions of work and employment’.¹¹⁵

¹¹⁵ Blanke has presented the wider interpretation. See Blanke, *Tarifvertrag für Wettbewerbsrecht, Arbeit und Recht*, 1/2000, p. 31, paragraph 3. At the hearing of the case van der Woude on 23 March 2000 at least the Dutch and Swedish governments plus the Commission presented the narrower interpretation. In case van der Woude, Advocate General Fennelly did not mean to propose any revision of Albany (paragraph 19 of the Opinion). Anyway, he came up with an immunity “strictly limited to regulating working conditions” in his first final answer. The Opinion was delivered 11 May 2000. Vousden, *op.cit.*, p.189, refers to an even narrower interpretation, i.e. covering just remuneration, which seems strange in the light of the social policy premises he otherwise endorses. Namely, he finds that the “Court’s use of the word ‘direct’ [in paragraph 63 of Albany and 60 of Brentjens] suggests that it could still draw a distinction between issues of remuneration and non-remuneration”. Further on, Vousden finds it possible that provisions relating to care, family life and training could fall “outside the scope of a direct contribution to working conditions”. This opinion is too straightforward. First, in our view, paragraphs 63 of Albany and 60 of Brentjens are not the appropriate starting point for the assessment of the both general limits of the immunity. These paragraphs belong already to a reasoning where the Court applies the general rule in a concrete situation. Second, remuneration is in the judgements clearly mentioned as *one* of the working conditions, which renders distinction between remuneration and non-remuneration irrelevant in this context. Third, the word “directly” doesn’t justify any conclusions *e contrario* as Vousden suggests with “direct contribution to working conditions” as a leading criterion of immunity (*op.cit.*, p. 191). ‘Direct’ rather seems to reflect the unproblematic nature of this particular test done by the Court.

3.5. Erga Omnes

89. The second question concerned the problem of whether EC competition rules deprived the Member States of the right to render the collective agreement, the fund affiliation included, compulsory. This was answered negatively, again without conditioning it by proportionality. EC competition rules (now Articles 3(1)(g), 10 and 81 EC) do not prohibit a public authority from taking a decision to make a sectoral agreement universally binding (*erga omnes*). The companies maintained that such a decision would fall under the category of State measures affecting competition contrary to Article 81, as established in case law.¹¹⁶ The Court overruled this by referring to the fact that the agreement concerned did not violate competition rules, and, moreover, that the *erga omnes* effect is part of a regime ‘established in a number of national laws’. The third reason mentioned was Article 4(2) ASP (now Article 139(2) EC), which provides that the European social partners may apply jointly to the Council for the implementation of social agreements.

90. The outcome means consolidates the *erga omnes* practice.¹¹⁷ This practice is applied in Austria, Belgium, Finland, France, Germany, Greece, Ireland, Luxembourg, the Netherlands, Portugal, Spain and Norway. In Austria and Finland it works directly on the basis of statute, thus with no separate declaration by a public authority. In the Austrian system this assumes that the agreement is concluded within the Chamber (*Kammer*) system.

91. In relation to the *erga omnes* effect one may ask whether the Court would have reached a different conclusion if the compulsory affiliation to the pension funds had been stipulated directly by law. There is no reason to suppose this. On the contrary, at least the answer to the fourth question concerning the *de facto* monopoly status of the funds justifies predicting the same outcome.¹¹⁸ Moreover, labour legislation also affects competition and is often enacted for that reason. This is manifested, for example, in the preamble to the Posting Directive (96/71/EC) that as follows:

“(5) Whereas any such promotion of the transnational provision of services requires a climate of *fair competition* and measures guaranteeing respect for the rights of workers”.

92. Also the possibility of implementing European Directives via the social partners (Article 137(4) EC) indicates that a direct State measure (a law) to establish the compulsory affiliation would have been accepted.

3.6. The Notion of Undertaking

93. The third question was whether the Dutch pension funds concerned were undertakings within the meaning of Article 81 (ex 85) EC et seq. The funds and

¹¹⁶ Paragraphs 65 to 70 of Brentjens.

¹¹⁷ See also paragraph 66 of Brentjens

¹¹⁸ See also Blanke, *Arbeit und Recht*, 1/2000 p. 31 and 32.

the Dutch, French, Swedish and German governments answered negatively by referring to

- the funds' status in pursuing an essential social function in the Netherlands because of the extremely limited statutory pension,
- the non-profit-making nature of the funds,
- the solidarity elements in the schemes: all workers accepted without prior medical test, incapacity is no impediment to accrual of benefits, employers' insolvency covered by the scheme, no equivalence (for individuals) between contributions and pension rights (which are determined by an average salary); these solidarity elements also made compulsory affiliation essential.

94. On these grounds the funds and governments held the Dutch funds to be comparable to the social security schemes in the joined cases *Poucet* and *Pistre*, in which the two French funds concerned were not deemed to be undertakings,¹¹⁹ and not to the *FFSA* case in which such an outcome was reached¹²⁰.

95. The Court held the Dutch funds to be undertakings under competition rules. It took as its starting point the capitalisation principle applied by the Dutch schemes, which tends to argue in favour of a status as undertakings (Brentjens, paragraph 81). In contrast with *Poucet* and *Pistre*, the Court now found that the Dutch benefits depended on investment performance, supervised by the Insurance Board as in insurance companies (paragraph 82). The Court further relied upon the ability of the funds to grant exemptions from compulsory affiliation (paragraph 83), it deemed the funds to be engaged in economic activity in competition with insurance companies (paragraph 84), and it concluded that non-profit-making and the manifestations of solidarity were insufficient to negate the status of the sectoral funds as undertakings within the meaning of the competition rules (paragraph 85). A new aspect in Brentjens is that, instead of the *purpose* of a scheme, the *manner of organising its functions* seems to have more importance in the assessment.¹²¹ This seems to differ from the test that was adhered to in the basic immunity created in paragraphs 56 and 57 of Brentjens. On the other hand it illustrates the difference between the immunity of 'self-executive' corpus

¹¹⁹ Footnote 21 above.

¹²⁰ Footnote 22 above.

¹²¹ Similarly Xavier Prétot, *La Cour de justice des Communautés Européennes et les fonds de pension néerlandais*, *Droit social* 1/2000, p. 109. Cf. Gyselen who writes (op. cit. p. 439) that the Court was not clear here. He thinks that the degree of solidarity was inappropriately used as an argument here while it should be used only under Article 86(2) (ex 90(2)) EC. Further on, according to Gyselen, the Court failed to distinguish between jurisdiction and justification. In his "alternative" view even a fund of *Poucet* and *Pistre* type (of law-based social security) would fall under the ambit of Article 81 (ex 85) and 82 (ex 86). Anyway, he recognises that such a fund could be accepted under Article 86(2) (ex 90(2)), while the high degree of solidarity required excludes any market. As is clear from paragraphs 79, last phrase, 85 (...nor the requirements of solidarity, nor the other rules...) and 86 of the judgements, the degree of solidarity was not used as a central concept of justification by the Court. Another aspect is that the Court had such an option (even a justifiable one). It is anyway appropriate to note that the solidarity aspect is involved more widely than in mere contributions and benefits.

provisions in an agreement and ancillary, more or less independent bodies with their own legal personality.

96. The judgement deserves some remarks. Firstly, the Court took expressed distance (paragraph 82 of Brentjens) from the Poucet and Pistre cases. In those cases, above all the solidarity principle and the compulsory nature of the funds justified the exclusion of the two French pension funds from the concept of an undertaking. Now, in Albany, Brentjens and Drijvende Bokken, no difference is noted in relation to FFSA. Conversely, the Court carefully lists the points of reasoning in FFSA (Brentjens, paragraph 79): neither the social objective pursued, nor the non-profit-making character, nor the requirements of solidarity, nor the rules restricting investments by the fund altered the fact that the organisation carries on an economic activity. Despite this, there remains the essential difference that in FFSA the pension scheme was genuinely optional but the Dutch funds are fundamentally *compulsory* – even to the extent that this forms the key issue in the questions subject to the preliminary ruling. Similarly, the Court had recourse to the exceptions from compulsory affiliation, required but also merely possible exceptions, in defining this kind of key notion. As such, the cases Höfner and Sodemare already showed the breadth of content that ‘undertaking’ has occupied in the established case law. Hence, the outcome, aligning to the FFSA case was not entirely unexpected. However, a test of the status of corresponding statutory pensions can also be performed under this answer. That would mean one factor tending more towards Poucet and Pistre.
97. Anyway, the principle of solidarity is also used somewhat differently on this answer and on the last answer concerning the exclusive rights of the funds.¹²² There it was enough to justify a de facto monopoly for the performance of a particular social task of general interest via a qualitatively new interpretation of the Treaty, relying strongly on the “high level of solidarity” (paragraph 109 of Brentjens¹²³). On this third answer the solidarity aspect was assigned less weight.
98. There is no reference in the judgements to any need to keep these kinds of body, established by a collective agreement, in principle or definitely under competition scrutiny, administrative jurisdiction included, as a kind of safety valve against any abuse of the antitrust immunity of the collective agreement itself (see paragraph 79 above).

3.7. The Special and Exclusive Rights of Funds

99. Already within its reasoning on the notion of undertaking the Court referred to the possibility that the pursuit of a social objective and other constraints in running the fund may render it less competitive than insurance companies, which may anyway justify the exclusive right of such a body to manage a supplementary pension scheme (Brentjens, paragraph 86). This was the essential point in the fourth question referred to the Court.

¹²² Prétot, loc. cit.

¹²³ In paragraph 109 the high level of solidarity displayed was seen to result, ‘in particular’, from the fact that contributions do not reflect the risk. But this is, again, a genuine reason for the capitalisation, investments etc. typical to insurance companies.

100. The Dutch government contended that the compulsory affiliation neither meant conferring exclusive rights on the fund in the meaning of Article 86 (ex 90) EC, nor a dominant position under Article 82 (ex 86) EC. The Court rejected both submissions and concluded that the fund may be regarded as having a dominant position (paragraphs 89 to 92 of Brentjens). However, the Court noted that exclusive rights under Article 86(1) (ex 90(1)) EC do not automatically signify the abuse of a dominant position. Anyway, the reasoning under Article 86(1) (ex 90(1)) EC led to a note that there was a restriction of competition deriving directly from the exclusive right of the fund (Brentjens, paragraph 97). At this point the Court made no specific determination regarding whether this also signified abuse of a dominant position.¹²⁴

101. In any event, the Court saw necessary to discuss the possible legitimisation of the exclusive rights of the funds under Article 86(2) (90(2)) EC, which is, moreover, an exceptional provision. The point was whether this justifies the exclusive right, necessary to perform a particular *social task of general interest* (Brentjens, paragraph 98). It means that the necessary proportionality test must also be performed and understood from this starting point and with respect for the autonomy of the Member States in the field of social policy.¹²⁵

102. The social task of general interest is a novelty in relation to the wording of Article 86(2) (ex 90(2)) EC, which refers only to services of general economic interest and revenue-producing monopolies and, besides, expresses an exceptional provision that is normally subject to a literal interpretation. Also the case law referred to in paragraph 103 of Brentjens is limited to economic and fiscal¹²⁶ matters, while also including a reference to the right of Member States to take into account objectives pertaining to their national policy when determining what services of general economic interest are to be entrusted to certain undertakings (Brentjens, paragraph 104). The essential social function of the funds within the Netherlands pensions system is, indeed, then referred to, as well as the low level of the statutory pension, which is calculated on the basis of the statutory minimum wage (Brentjens, paragraph 105). Furthermore, the role of the social factor, the solidarity aspects, are included and highlighted in many ways, as are the dangerous consequences for the funds – even jeopardising their financial equilibrium – if the exclusive rights were to be removed (Brentjens, paragraphs 108 to 111).¹²⁷

¹²⁴ This is also the understanding of Advocate General Jacobs in the Pavlov case, C-180 to 184/98, opinion given 23.3.2000. See paragraph 193 of the opinion.

¹²⁵ Gyselen criticises the Court for its “most deferential attitude on the proportionality issue.” Gyselen, op. cit. p. 447.

¹²⁶ There is a mistake in the provisional English version of Albany, Brentjens and Drijvende Bokken at paragraph 103. The French version of each judgement uses ‘economic and *social*’ aspects justifying certain State measures instead of ‘economic and *fiscal*’ as the provisional English version does.

¹²⁷ Note that the Court, on the other hand, explained how the application threshold of Article 86(2) (ex 90(2)) EC does not require that it be totally impossible to perform the tasks concerned if the exclusive right were to be removed. It would be enough to harbour ‘economically unacceptable conditions’ (Brentjens, paragraph 107).

103. The Court furthermore dismissed the submission of the companies that the dual role of the funds, managing the scheme and granting exceptions, constitutes the abuse of an exclusive right. The Court relied essentially on the contents of the exception system, the margin of appreciation in assessing highly complex data and the ability of the national courts to ensure that the exceptions were not refused in an arbitrary manner, and that non-discrimination and other conditions for legality were respected (paragraph 121). These conditions were met.

104. Finally the Court encountered and rejected the companies' practical argument that an adequate pension level could be assured by simple minimum requirements to be met by insurance companies. The Court relied on the margin of consideration allowed to the Member States in organising their social security systems (paragraph 122).¹²⁸ ¹²⁹ The conclusion was thus that, *following the application of Article 86(2) (ex 90(2)) EC, the exclusive rights of the funds did not violate Articles 82 (ex 86) and 86 (ex 90) of the Treaty*. Given the exceptional scope of Article 86(2) (ex 90(2)) EC, normally subject to a narrow (literal) interpretation, and the departure from its wording by presenting the concept of a *particular social task of general interest*, the inevitable conclusion is that under

¹²⁸ Gyselen criticises this outcome strongly. Op. cit., p. 447-448. For him it is the "Court's most sweeping (and probably most disappointing) observation" *if assessed in the light of proportionality*. According to Gyselen the Court relied only on the judgement in *Duphar*, Case 238/82. Gyselen then emphasises that *Duphar* did not discharge the measures concerned from the proportionality test. He continues by stating how *Duphar* could only be a useful starting point but that it can "hardly provide an 'alpha and omega' for the assessment of State measures in the area of social protection under Article 86(2)". The Court also referred however to *Poucet and Pistre*, as well as to *Sodemare*. As is the idea of paragraph 16 in *Duphar* (that, too, referred to in paragraph 122 of *Albany and Brentjens*), *Poucet and Pistre*, as well as *Sodemare*, state how "Community law does not detract from the powers of the Member States to organise their social security systems" (*Poucet and Pistre*, C-159/91 and C-160/91, [1993] ECR I-666, paragraph 6; *Sodemare*, [1997] ECR I-3395, paragraph 27). This is something essentially different from the proportionality test that in *Duphar* was performed under Article 28 (ex 30) EC. Now the issue concerns Article 86(2) (ex 90(2)) EC and is directly linked to the powers conferred to the Community. *As a general principle of Community law, proportionality as such does not penetrate the ways in which a Member State might organise national social security schemes*.

¹²⁹ Gyselen finally maintains that at this point the Court skipped the *Corbeau* (C-234/89, [1991] ECR I-935) question on regulating, as opposed to eliminating, competition. Moreover, Gyselen notes that there is no reference in *Albany and Brentjens* to *Corbeau*, op. cit. p. 445. In fact there is a reference to *Corbeau* at paragraph 107, concerning the consequences of cancelling the exclusive rights concerned. *Corbeau* considered the possibility of dissociating from the Belgian postal monopoly certain additional services not offered by the traditional postal service. The Court did not answer this in the affirmative - unconditionally. The final answer was left for the national court, while the European Court of Justice did place conditions on the possible dissociation. This dissociation was regarded as necessary insofar as those additional services did not compromise the economic stability of the service of general economic interest performed by the holder of the exclusive right. Moreover, in *Albany and Brentjens* the Court discussed the consequences of cancelling the exclusive rights concerned. Thus, there is no reason to maintain that the Court in *Albany* – unlike in *Corbeau* - skipped examining the idea that it might be possible to "*regulate... rather than eliminate altogether, competition*" (Gyselen p. 448). Besides, in contrast to the view which Gyselen maintains, the exception procedure described in paragraphs 116 to 121 of *Albany* shows that competition is not 'eliminated altogether in *Albany*-cases.

this answer the *social* dimension was afforded real appreciation, in fact equal to that of the *economic*.¹³⁰ On the other hand, one could have expected a reference under this answer to the new antitrust immunity of collective agreements in paragraphs 45 to 57 of Brentjens, as was made under the second answer. The lack of any such reference can be explained simply, however, by the fact that here the focus is on the exclusive right of the *fund*, which is also deemed to be an undertaking under competition rules in the third answer. The *collective agreement* itself is no longer in focus at this point.

3.8. Summary of Albany, Brentjens and Drijvende Bokken

Basic Immunity of Collective Agreements

105. The judgements Albany, Brentjens and Drijvende Bokken set up, in their grounds, a basic antitrust immunity for the social partners and their sectoral collective agreements in EC law. This directly means that:

- the negotiating social partners are not subject to competition rules, and
- sectoral collective agreements are a priori excluded from competition rules.

106. This solution is a '*collective agreements exclusion*' of principle for provisions that are 'self-executing' between management and labour, thus, operative without any additional fund or other body that could be regarded as an independent market actor. This special exclusion is not subject to any margin of appreciation or application by the European Commission, as is inherent in individual or block exemptions under Article 81(3) (ex 85(3) EC. The *collective agreements exclusion* takes effect directly in relation Article 81(1) (ex 85(1)) EC.

107. More elaborately, either genuine provisions in order to improve 'conditions of work and employment' or even those falling under the 'social policy objectives' pursued by sectoral collective agreements enjoy this immunity. In the latter interpretation Article 136 et seq. EC show the limits of the immunity. In any case, the immunity is relative (or material). The test with the nature and purpose of the provision concerned has to justify its exclusion from EC competition rules. This will, however, only exceptionally lead to the nullification of a provision, in practice only where a distortion of competition has been masked by a collective agreement.

¹³⁰ It also worth noting how the Advocate General concluded that the exclusive rights of the funds violated Articles 82 (ex 86) and 86 (ex 90) whereas (i) the funds were 'manifestly not in a position to satisfy demand' and whereas (ii) they were induced to abuse of a dominant position in their dual role as both running the monopoly scheme and granting the exception, subject only to a limited judicial control (fourth answer of the Advocate General). This is linked to the difference between the Court and Advocate General in the equilibration of collective agreements (the social aspect) and competition rules.

108. While the basic immunity of collective agreements is:

- established by balancing the Treaty provisions on social policy and collective agreements with an EC competition regime qualified as *fundamental*,
- expressly anchored in the basic objectives of the Community, such as harmonious and balanced development of economic activities and a high level of employment and social protection (Article 2 EC),
- based on an interpretation of the provisions of the Treaty as a whole which is both effective and consistent,
- a bridge over a gap of 40 years in the Treaty itself, and
- a permit in this framework for the Member States to have recourse to the erga omnes effect of collective agreements enjoying basic immunity,

it is appropriate to call it a fundamental decision on the interpretation of the Treaty.

Immunity of Bodies Based on Collective Agreements

109. For bodies based upon collective agreements the judgements further elaborate – albeit in a manner open to criticism as to consistency – the line of previous case law. With respect to the notion of undertaking the manner of operating has now gained in weight at the expense of the purpose of a scheme. However, the outcome means that bodies based on collective agreements may always be subject to competition rules, provided that they carry on independent economic activities.

Spill-Over onto Agreements of Other Type

110. A specific problem remains: how firm are the conclusions which may be drawn as to agreements other than sectoral, i.e. interprofessional, enterprise or even rival sectoral agreements? The exclusion of negotiating social partners as organisations naturally also covers other than sectoral social partners, i.e. the interprofessional organisations. Equally self-evidently and possibly applicable to European social partners – both sectoral and interprofessional - are cross-border agreements e.g. on the posting of workers. The exclusion also seems to apply with no difficulty to agreements to which two or more employers are parties. In all of the above cases the principal exemption of the agreement is obviously also applicable. At the level of a single enterprise the exclusion of the social partners as organisations seems clearly applicable but the test with the nature of the agreement is inoperable as such when there is no organisation on the employer's side but rather a single employer.¹³¹ Conversely, the social aspect as included in the *reasoning* of these judgements usually also applies to single enterprise level agreements. A clear difference exists for the threshold of regarding a concrete provision or agreement as infringing competition rules. Namely, at enterprise level the competitors in the sector are not present to safeguard their interests. Neither is the employees'

¹³¹ See paragraph 59 of Brentjens: "...the agreement at issue...is the outcome of collective negotiations between *organisations* representing employers and workers." (our italics)

sectoral organisation's presence guaranteed, ensuring that fair competition is upheld between employees. Furthermore, rival sectoral agreements may present case-related features that do not fit especially well into the framework of Albany and Brentjens.

3.9. Impact of the Judgements Albany, Brentjens and Drijvende Bokken on National Courts and Authorities

Competition law assessment

111. The question remains concerning the repercussions of the Albany, Brentjens and Drijvende Bokken judgements for the application of EC and national law by national courts and authorities outside of these three concrete cases. It is not possible within this report to take on a detailed reasoning on the overall status of the binding effect of preliminary rulings. It is sufficient to note that in practice their effect as precedents in EC-law is strong - albeit that in the very formal sense preliminary rulings are of case law.
112. As seen above (paragraphs 35 to 44) and further in the national reports, in many countries the national law is, in structure and wording, quite similar to the EC rules, or at least operates on the prohibition/exemptions principle as does EC law. These countries are Austria, Belgium, Greece, Ireland, Italy, Luxembourg, Portugal, Spain, Sweden and the United Kingdom; in the near future this group will also include the Netherlands. In these countries the problems of divergent national legislation do not arise, at least under normal circumstances. The antitrust immunity of Albany/Brentjens obviously should also be applied at national level.
113. In the other countries the present situation is not clear, albeit that the planned decentralisation of EC powers and entrusting national competition authorities with the application of EC competition rules might further increase the pressure towards an overall harmonisation and uniformity of the scope of competition rules. Nevertheless, especially in the Member States that have not yet completely harmonised their national laws with EC rules, the question arises of whether the three judgements could have a legal impact on the national legislature, competition authorities and judiciary. This means, in practice, whether it is possible to have under a national law stricter or looser immunity for collective agreements than is established in these judgements. One pre-question is that of when a collective agreement concluded in a Member State satisfies the trade effect criterion or, in other words, when it exerts an impact on a 'substantial part of the common market'. As shown in paragraphs 11 to 13 above, the requirements for that criterion set up in the previous case law are almost always regarded as satisfied. Even merely regional trade may satisfy them. One illustration of the territorial effect can be seen in the cases Albany, Brentjens and Drijvende Bokken themselves. No party contested the applicability of EC competition rules to the nation-wide sectoral Dutch agreements.
114. Even so, as shown above (paragraph 13) there is no explicit statement of the Court concerning the problem of which kind of collective agreement may satisfy

the trade effect criterion and bring the agreement under EC law. E.g. at harbours and airports it happens already 'by definition'. On the other hand, it is essential to see that in order to satisfy this criterion it is not necessary to have exports or imports of an intermediate product, but merely of the finished product. Equally, whereas infringing EC competition rules merely by hampering the free movement of services (such as hiring out of manpower) suffices to fulfil the criterion,¹³² the margin for collective agreements not falling under EC competition rules is not too broad. Besides, one may also rely on the qualification in paragraph 92 of Brentjens. According to this, managing a pension scheme '*in an industrial sector in a Member State*' satisfies the criterion of affecting 'a substantial part of the common market' as required in Article 82 (ex 86) EC for a dominant position. This means, *a fortiori*, that nation-wide sectoral and interprofessional collective agreements enjoy the antitrust immunity established by the ECJ and taking effect under Article 81(1) (85(1)) EC. Otherwise it is predictable under the trade effect that further line-drawing will take place as to agreements on a level less than Member State-wide, such as at state-level in a federation (e.g. the German Länder), or at regional, local and even site-level, finally down to single enterprise agreements.

115. The crucial question regarding the applicability of EC or national rules to collective agreements still remains:

- can the national authorities and courts apply to collective agreements stricter national law when the agreement falls under EC law, i.e. satisfies the inter-state trade criterion?

116. A question closely related to this one was put in the *Volkswagen* case (see paragraphs 44 to 50 above). The Court did not need to answer this because answering became unnecessary due to a previous question in the same case. Advocate General Tesouro discussed the question with due regard to the (possible) opposite outcome in that previous question. The case dealt with a block exemption, hence related to agreements that have a competition-restrictive impact but that nevertheless are exempted from competition rules. In that sense they have significant resemblance to collective agreements; see how paragraph 56 of Brentjens denotes certain restrictions of competition inherent in collective agreements.

117. AG Tesouro left a clear margin of discretion for the national authorities and courts if the matter remained only under national law due to the absence of an inter-state trade effect. Decisions of the Commission and, '*a fortiori*', of the Court under EC law, he considered as their opposites. On this basis, and referring to the need for uniformity in EC law, he deduced from the primacy of Community law that *what does not fall under Article 81(1) EC or is declared compatible with it cannot be prohibited by virtue of stricter national competition law*.¹³³ The importance and effect of block exemptions is also demonstrated by the new Commission Regulation 2970/1999 on vertical agreements.¹³⁴

¹³² See footnote 9 above.

¹³³ See paragraphs 47 to 52 above.

¹³⁴ See paragraph 56 above.

118.If the principle regarding the binding effect of block exemptions, which also has support in the literature, is to apply to the “collective agreements-exclusion”, then all the collective agreements falling under EC competition rules enjoy the same immunity as that set up in the Albany/Brentjens judgements. Accordingly, while the EC competition rules seek to establish a minimum level of competition, it is not possible to exempt under national law a collective agreement deemed to infringe the EC competition rules. The same applies e.g. to a pension or other fund established by collective agreement. What is deemed to be an undertaking under EC competition law cannot be exempted under national law. Finally in accordance with this way of thinking it is also logical to reason that the decisions under Articles 82 (ex 86) and 86 (ex 90) EC concerning collective agreements bind national authorities and courts. If it is established under the EC Treaty and secondary competition legislation that a body (such as a pension fund) set up by collective agreement is not abusing its dominant position (or is not in such a position) when exercising its exclusive or specific rights granted under Article 86 (ex 90), then the national courts and competition authorities must comply with this finding. Conversely, any infringements established under EC law are also binding at national level.

119.In sum, one could argue that whereas sectoral and interprofessional collective agreements are quite similar to block exemptions, they should be granted a corresponding immunity at national level as they are deemed to possess at EC-level. According to this, if they are allowed under EC law, they should not be regarded as anti-competitive under stricter national law.

120.The counter argument here is that block exemptions are more clearly defined than the “collective agreements-exclusion” and based on an explicit competence rule. Furthermore it can be argued that the system of collective bargaining should enjoy an extensive national autonomy. This implies that there should be a broad national competence to decide on the nature and restrictions of the national collective bargaining system, a fact that also cannot be questioned from the tendency towards a more decentralised system of competition law.

121.The effect of Albany, Brentjens and Drijvende Bokken at national level can anyway not be assessed only from the point of view of competition law. We must also assess the fact that the *values* involved have a fundamental rights *aspect* in several Member States and within the EU, a fact stressed by Advocate General Jacobs but little discussed by the ECJ. The court did not, however, have to consider this fact in order to reach the outcome in the said three cases.

122.On an international level it is clear that freedom of association and the right to collective bargaining, including the right/freedom to collective action, are regarded as fundamental rights respected in various international treaties. What is undeniable in our view is that most of the Member States explicitly adhere to these rights, as is also shown in the national reports on which this study is based. In several cases they are protected by national constitutions, and in other cases by international conventions. All Member States have adhered to ILO-conventions

nos. 87 and 98.¹³⁵ The Amsterdam Treaty explicitly stipulates that the Union shall respect fundamental rights as they result from the constitutional traditions common to the Member States.¹³⁶ An amendment in the Treaty of Amsterdam was also the insertion in Article 136 EC of the references to the European Social Charter of 1961 and to the Community Charter of Fundamental Rights of Workers of 1989. At least the latter, in its paragraph 12, recognises the fundamental right to collective bargaining and agreements – albeit ‘under the conditions laid down by national legislation and practice.’ There is good reason to argue that a radical interpretation of competition law giving no immunity to collective agreements would be in conflict with constitutional EC law and therefore null and void. On the other hand we would like to emphasise that here we are discussing issues that have not been decided in case law.

123. Furthermore, some case-related elements are significant from the EC-legal point of view when discussing the effect of these judgements. When defining the relationship between collective agreements and competition rules the Court relied on a number of provisions in the Treaty itself, starting from the basic objectives of the Community in Article 2 EC. The Court ended up with the “interpretation of the provisions of the Treaty as a whole which is both effective and consistent”. It is evident that the Member States are committed to and bound by the same objectives, as well as by the other Treaty provisions listed by the Court. The “Treaty as a whole” likewise binds them.¹³⁷ Against this background, and taking into account the constitutional aspects referred to above, it is possible to argue that national Parliaments, public authorities and courts cannot end up with a definition of the relationship between collective agreements and competition law which is essentially different from that adopted in Albany, Brentjens and Drijvende Bokken.

124. One further aspect specific to the judgements Albany, Brentjens and Drijvende Bokken seems, however, to support this view. Namely, the exclusion of the negotiating social partners from competition rules (paragraph 56 of Brentjens) was justified by the assessment that:

“the social policy objectives pursued by such [collective] agreements would be seriously undermined if management and labour were subject to Article 85(1) [now 81(1)] of the Treaty...” (our underlining)

125. The qualification “*seriously*”, firstly clearly implies that there was no doubt about the undermining effect and the need to protect the social policy objectives. Secondly, a reading of this paragraph together with the opinion of the Advocate General - who found that the employers’ side would anyway fall under competition rules - shows that the qualification is not there by accident but is a carefully considered assessment.¹³⁸ Thirdly, given the tie between the justification

¹³⁵ See Bruun, Fackliga och grundläggande rättigheter i EU, Stockholm 1999, and the literature referred to therein.

¹³⁶ This has been confirmed in case law, see e.g. the *Nold* case, C-4/73, [1974] ECR 491.

¹³⁷ “Treaty as a whole” adds to the provisions ‘present’ in Albany also Article 1 EC according to which “the High CONTRACTING PARTIES establish among themselves a European *Community*” (our italics).

¹³⁸ Ole Due stresses that ‘each point in the judgement has its importance’. Op. cit., p. 79.

in paragraph 56 and the conclusion in paragraph 57 of Brentjens, this logically means that a narrower immunity for collective agreements – ultimately in the eyes of the Court – would undermine the social policy objectives even *more than seriously!* Undermining would reach an extent endangering or even destroying the social policy objectives. This would not be compatible with Articles 2 and 3 EC.

126. We conclude with the statement that there are good arguments for answering the question posed in paragraph 115, *supra*, in the negative, although there is no clear-cut answer at the present stage of development of EC-law.

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4. General Analysis and Conclusions Based on the National Reports

Starting point

1. The national reports are structured by the questionnaire that was sent to the rapporteurs in advance. These reports are reproduced as such. No substantial editing has been done, which explains the slightly different approach taken in each individual report.
2. The Member States covered by this study were chosen on the presumption that the essential differences both in the position or status of collective agreements vis-à-vis national competition rules, including different methods applied in the legal definitions of that relationship, could be covered by a group of eleven Member States. This takes no stand on the state-of-the-art in the Member States not covered, i.e. Greece, Ireland, Luxembourg and Portugal. The main reason for not covering these States was the tight schedule and limited scope of this study.

Analysing National Reports

General remarks

3. The essential overall remark to make is that there is no uniform way of regulating the relationship between collective agreements and national competition rules. Even so, the overall picture is that in every Member State it is so far rather unusual to find collective agreements appearing in competition law practice and jurisprudence. A common tendency exists, however, although this may even differ radically in each country as to the steps taken: a growing application of competition rules to collective agreements itself or to bodies established by them. At the same time it must be emphasised that in two countries covered by this study, *Austria* and *Italy*, the national reports present no relevant national case law.¹ In *Belgium*, *Denmark*, *France*, *Spain* and the *United Kingdom* only one or two relevant cases are brought to light. The *Netherlands* had no case law on collective agreements before the cases *Albany*, *Brentjens* and *Drijvende Bokken*. *Norway* is in a similar situation but, on the other hand, the case regarding the compatibility of the single pension fund for the municipal sector with competition rules is of vital importance both in economic and legal terms. However, the case is in many respects very similar to *Albany*.² Finally, there is more administrative practice and case law in *Germany*, *Sweden* and *Finland*. Especially in *Sweden* and *Finland* the competition authorities seem to have been relatively active in

¹ This is said with the reservation that the *Merci* case from the port of Genoa, C-179/90, [1991] ECR I-5889, and the subsequent Italian case law are of importance especially in defining the notion of undertaking on the European level. They also show the relationship between the social dimension and competition rules in general. However, the question about the relationship between collective agreements and competition rules was not the focus of *Merci*.

² Case KPL, Arbeidsrett (National Labour Court) Nr. 7/1999. While writing this, the case has been referred to the EFTA-Court. In fact, the case is comparable to *van der Woude*, C-222/98 whereas the scheme does not imply compulsory affiliation (*erga omnes*).

scrutinising collective agreements during 1990s.³ Nowhere, however, are the social partners obliged *ipso jure* to notify their agreements to competition authorities in order to request an exemption.⁴

Ways to Define the Relationship

4. It is appropriate to note – even if merely in summarising – that firstly the Member States investigated are countries in which the *right to collective bargaining* enjoys an express or derived constitutional guarantee or at least an anchoring via an expressed right to strike: *Austria* (derived anchoring), *Belgium* (expressed guarantee), *France* (expressed guarantee), *Germany* (Tarifautonomie), *Italy*,⁵ *Spain* (constitutional guarantee of ‘normal’ rank) and *Sweden* (expressed anchoring). In addition to this, it is known that relevant constitutional provisions also exist in *Greece* and *Portugal*.⁶ In these States the antitrust immunity of collective agreements might be guaranteed by, anchored in or at least derived from the national constitution without the need to resort to international legal instruments. Nevertheless, only in *Germany* is the constitution-based case law wide enough to show the practical effect of the constitutional guarantee in defining the immunity. Even this case law, however, is often linked to the erga omnes declaration of an agreement. At the same time, the national reports show that free competition is constitutionally protected only as a derived right, if at all (*Germany*) and, accordingly, is stipulated by ordinary law. In any event, while the constitutional aspect is a pivotal one, legislation and practice on this subject matter varies to a large extent among the States mentioned above.
5. This means that the Member States covered by our study can be divided roughly into two groups: (i) Member States in which the law does not expressly regulate the relationship between competition and labour law; (ii) Member States in which the competition law defines the position of the social partners and/or collective agreements by an expressed provision.

³ Practice may also be based also merely upon complaints. On the other hand, all cases are not necessarily published. The authorities have discretion in conducting competition policy.

⁴ In the cases *Albany*, *Brentjens* and *Drijvende Bokken* the proposal of the Advocate General was intended to establish such an obligation by foreseeing competition scrutiny for agreements with potentially harmful effects, with the possibility of granting individual exemptions under Article 81(3) EC. Paragraph 193 of the opinion.

⁵ Article 39 in the Italian constitution is programmatic. See the Italian report, paragraph 1 in part two, *infra*.

⁶ Due to the scope of this study, we now set aside the question of to what extent such a guarantee flows from or can be derived from international legal instruments binding the rest of the States relevant in the EC/EEA context: Denmark, Finland, Iceland, Ireland, Liechtenstein, Luxembourg, the Netherlands, Norway and the United Kingdom.

The prevailing picture: Lack of Exemption in Competition Law

6. (i) The first group covers *Austria, Belgium, France, Germany, Italy, the Netherlands, Spain* and the *United Kingdom*.⁷ In these States neither competition nor labour law expressly excludes collective agreements from the scope of competition law.⁸ As noted in the *French* report, a fair measure of uncertainty prevails about the applicability of competition rules to collective agreements while the labour law doctrine supports immunity on the basis that a trade union is not an undertaking. In *Germany* the immunity of collective agreements is supported by a majority doctrine and by the travaux préparatoires of the previous competition law. A notable case law also seems to support this view in *Germany*.
7. One essential point is that the lack of statutory law has not prevented competition authorities and courts in many cases from assessing the immunity of collective agreements or their ancillary bodies from a material point of view in these countries (there is no case law in Italy and Austria).
8. The *Spanish* system deserves an additional remark. The national report shows the possibility – although rarely used – of calling into question the validity of provisions in a collective agreement in a suit filed by a third party whose rights or real and important interests are violated by a collective agreement when assessed objectively (against the ill will – *animus nocendi* - of a party to the agreement).⁹ Such a ‘third party’ may also be within the sector concerned. While this legal construction is not formally based on the terms of competition law, it may in practice have such an effect. This is also highlighted by the cases from the regional Supreme Courts in Spain, which on several occasions in the late 1990s relied on the harmful effect of collective agreements on the competitiveness of temporary employment agencies. Specifically, the sectoral collective agreements often prescribed the benefits of the main sector in a mandatory manner. As a consequence, an obligation of intermediary manpower agencies to comply with the wages binding the client enterprise was imposed by law in 1999.¹⁰
9. The *United Kingdom* and the *Netherlands* differ in some respects from the other States that have been studied. In the *United Kingdom* the statutes of 1973 and 1976 excluded collective agreements from competition law. This exclusion resembled the formulation in paragraph 56 of Brentjens. On the other hand, the 1973 law empowered the authorities to bring an agreement under competition scrutiny for a recommendation. In any event, a new law repealed the laws of 1973 and 1976 in the United Kingdom, and this new law simply applies to any agreement. The conclusion seems to be that, at least a priori, collective agreements

⁷ It is especially the new legislation that was not yet in force at the beginning of the year 2000 that makes a difference.

⁸ Also in Greece, Ireland and Luxembourg competition law includes no reference to collective agreements. In Portugal the Competition Act states that it does not apply to restrictions of competition due to another law.

⁹ See the medication case, Supreme Court decisions 15.3.1993, A.R. 1859 and 11.3.1997, A.R. 2309, at the end of section 2 of the Spanish report. The possibility of quashing provisions in collective agreements under Dutch law is a dead letter. See heading 2b) of the Dutch report.

¹⁰ Spanish report, end of section 2.

are now subject to competition rules. The new Act in the United Kingdom follows as closely as possible the structure, letter and even application of EC competition rules.¹¹ In the *Netherlands* a future law will transform in a similar way the national law into the model of EC law, bypassing the old de facto immunity of collective agreements. Since the judgements *Albany*, *Brentjens* and *Drijvende Bokken*, the impact of the coming rules is still the subject of debate between the social partners and the government.

10. An important question especially in the *Netherlands* and the *United Kingdom* concerns the impact of earlier immunity. Did this disappear completely in the UK and will it also do so in the Netherlands? There is good reasons to answer in the negative, because the express connection between national competition law and the principles of EC law merely highlights the fact that the principles established by the cases *Albany*, *Brentjens* and *Drijvende Bokken* must have at least some effects at national level.

The Nordic Model: Exclusion Defined in Law

11. The *Nordic* countries form a separate group with respect to the manner of regulating the relationship between competition law and labour law (ii). These States have an active interaction between one another when creating this kind of legislation, and so there are many similarities in the structure of Nordic competition law, although each State has its own specialities. The current national competition legislation of the Nordic countries is quite recent. The Nordic Acts are based on the idea that competition law does not apply to agreements concerning the labour market (*Finland*), agreements between employers and employees relating to wages and other conditions of employment (*Sweden*), or to wages and labour relations (*Denmark*). The exclusion of collective agreements from the scope of application of competition law in Nordic legislation (*Norway* included) means a certain *material* immunity. This does not, however, indicate that all collective agreements *pro forma* are excluded as soon as they are called “collective agreements”. In these countries the possibility exists to resort to competition law scrutiny as to the contents and effect of collective agreements, albeit that such scrutiny is exceptional both in practice and in accordance with the applicable regulatory regime.
12. However, the expressed exclusions *ipso jure* have not always offered the clarity and certainty needed to avoid conflicts, as is illustrated in *Sweden* at least by the newspaper distribution case and in *Finland* by the paper mills case.¹² In both cases competition law has been applied to a collective agreement in a new and escalating manner. In the newspaper case the purpose of the provision concerned - to prevent self-employment on payment lower than the benefits in the collective agreement - was not regarded as a reason for seeing the clause as one relating to wages or other conditions of employment. One could ask whether the Labour Court might have taken another view in the newspaper case if the agreement had expressly forbidden the use of self-employed manpower except under such

¹¹ See the report on the United Kingdom, heading 8: UK competition law and EC competition law.

¹² See the Swedish report, heading 3.2.2, at footnotes 38 and 40, and the Finnish report, paragraphs 13 to 34, *infra*.

conditions? In any event, it seems clear that the social partners in both of these cases, when initially inserting the provision concerned, could not have imagined that it would later be declared null and void under competition scrutiny.

Summing up

13. In sum, the ways of determining (or failing to determine) the relationship between collective agreements and competition law vary remarkably. As such, this can primarily be seen as a difference of legal technique. It is nevertheless important to observe that the technicalities may, in the wider context, affect the contents.
14. On a general level we might draw a distinction between three different legal techniques in determining the relationship between collective agreements and competition law:
 - a. *The Nordic Model* uses the express exemption rules in Acts on competition.
 - b. *The Continental Model* uses no express exemption rules, but rests on the constitutional dignity of the collective bargaining system as a legitimisation for affording immunity to collective agreements in relation to competition law. The scope of this immunity is rather unclear. On the other hand, the lack of case law in this field may also show that the practical problems are limited.
 - c. *The Anglo-Saxon Model* does not, at national level, recognise any kind of clear immunity. In principle competition law is applicable to collective agreements if they cause the required effects on competition. Furthermore, the future situation in the Netherlands will resemble the situation in the United Kingdom.
15. While in most of the Member States the relevant actors (competition authorities, social partners, courts) may be accustomed to a purely national situation in defining the relationship between collective agreements and competition rules, it is in any event predictable that this state of affairs may change. The relationship between national and EC competition law is undergoing changes. We recall the current process of reallocating powers between the Commission and national authorities in applying EC competition rules.¹³ This process will also introduce EC law into the daily work of national competition authorities. They will then need to have a clear understanding, not only of national law, but also of the interaction between EC and national law in this field.

¹³ See, for example, the new Commission Regulation on vertical agreements, paragraphs 54 to 56, EC law report.

Material Scope of Immunity

Results of the Survey in Relation to the Opinion of AG Jacobs

16. In the cases *Albany*, *Brentjens* and *Drijvende Bokken* the Advocate General of the European Court of Justice AG Jacobs based his proposal for solution on a survey of the legal situation in a number of Member States and the USA. It is therefore of some interest to note that no Member State has adopted as such the definition of immunity proposed by Advocate General Jacobs. He proposed a restricted immunity for cases operating with ‘core subjects, such as wages and working conditions’ and the effect on ‘third parties and markets’.¹⁴ The court rejected his proposal.
17. Some specific remarks concerning some Member States supplement the picture painted by AG Jacobs. In *Germany* the previous competition law – in its travaux préparatoires - excluded collective agreements. Despite of the fact that this is no longer the case, German case law shows that in defining the material scope of the immunity of collective agreements it is necessary to bear in mind the position of the Constitutional Court and Federal Labour Court. The German report sums up the reasoning of this Labour Court as follows:
- “The prohibition of cartels would apply only in the case of abusive collusion by employers and trade unions that intentionally used the framework of collective agreements to cover an anti-competitive cartel on the markets for goods and commercial services.”¹⁵
18. The statement concerning Germany quoted above in fact corresponds to the solution of the European Court of Justice in *Albany*, *Brentjens* and *Drijvende Bokken* in defining the basic immunity. Furthermore, it is also appropriate to note at this point that according to the German Constitutional Court a declaration of erga omnes effect did not infringe the negative freedom of association and, consequently, competition rules. One of these cases particularly dealt with a sectoral pension fund (in the construction sector). That is also true for one case from the Federal Labour Court (in printing industry).¹⁶
19. The case concerning *France* referred to by Advocate General Jacobs is also subject to controversies.¹⁷ It was presented in the opinion but isolated from its background. The essential criticism in the French report highlights how the judgement concerned was strongly criticised by the doctrine, and how the special characteristics of the sector (artists dubbing films) and the case do not justify any generalisation concerning collective agreements in traditional sectors. A final remark in relation to the survey presented in the opinion of Advocate General Jacobs is the paper mills case from *Finland*. An old manning provision (also stipulated against lower benefits) was declared null and void by an extensive

¹⁴ Paragraph 70, EC law report, supra. Its nearest ‘relative’ perhaps is the paper mills case in Finland.

¹⁵ Paragraph 2.4 of the German report, part two, infra.

¹⁶ Paragraph 2.9 of the German report. See also the direct criticism vis-à-vis the survey in the opinion of Advocate General Jacobs, paragraph 2.0 of the German report.

¹⁷ The French report, paragraphs 1 and 2.

application of competition legislation by the Supreme Administrative Court, which thereby set aside the traditional concept of the normative competence of the social partners under labour law, and covering manning provisions. The survey in the opinion of Advocate General in the case *Albany*, *Brentjens* and *Drijvende Bokken* gives an adequate description of the legislative situation in Finland. The presentation of the case does not, however, give the full picture. The judgement is based on the assumption that the clause in the collective agreement that was held to be invalid had no impact whatsoever on the employment terms and conditions of the employees covered by the collective agreement. The description given in the opinion does not at all reveal this feature of the paper mills case.¹⁸

20. In sum, these aspects from three countries already show that that the comparative overview of national law given in the opinion of Advocate General Jacobs did not give the full picture. It is therefore retrospectively not very surprising to see that in these final judgements from the court his opinion was not adhered to at some important aspects.

Limits of the Immunity

21. The material scope of the national antitrust immunity of collective agreements gets its final content via case law and administrative practice. Even so, a common presumption is that it should correspond to the normative competence of the social partners under labour law, thus their competence to agree upon conditions that are effective in the relationship between an (organised) employer and his employees. This is, in some countries, defined by the national laws on collective agreements. The opinion of Advocate General Jacobs proposed a more narrow mode of thinking by operating with “core subjects, such as wages and working conditions” (paragraph 194 of the opinion). We recall that the Court also declined to use the concept of the normative competence of the social partners, but introduced a test based on the *nature* of the provision concerned (paragraph 60 of *Brentjens*). This does not conflict with the use of the normative competence of social partners but has a natural background in the fact that there is no EC legal definition of a collective agreement, as this is still absent even in two Member States (Italy and Denmark; although the Danish practice is based on the so-called basic agreement between the central labour market confederations).
22. A further conclusion is justified by the national reports. If the law, or case law, establishes the immunity case law, then this means a material immunity, i.e. the possibility of resorting to an exceptional application of competition rules if an intentional distortion of competition is masked by a collective agreement. This also corresponds to the judgements *Albany*, *Brentjens* and *Drijvende Bokken*.
23. Otherwise, the national reports show in general terms that all “conditions of work and employment” (paragraph 56 of *Brentjens*) can be covered by collective agreements and form a valid scope for them under labour law. There is no doubt about wages - in the broad sense, working time and other working conditions belong there. However, there are national variations in defining the ultimate

¹⁸ See paragraphs 80 and 81 of the opinion.

limits. An interesting case in the *Spanish* report shows how a provision on the employer guaranteeing the cheapest medication was quashed as anti-competitive. The *French* case shows the borderline in relationship to a right that was regarded (rightly or wrongly) merely as a copyright based upon work done. The *Danish* report shows that manning provisions belong to recognised working conditions in case law. In *Finland* strong doctrine and long lasting practice indicate the same, but the paper mills case marks an exception in this respect.¹⁹ Besides this, the normative competence of the social partners at least in *Germany, Sweden, Spain* and *Finland* is even broader than “conditions of work and employment”. Moreover, the Belgian and *Austrian* solution regarding the scope of collective agreements is remarkably wide.²⁰ In *Germany* “conditions of work and *economy*” form the legal scope of a collective agreement. Accordingly, this scope may even include agreements regulating specific kinds of product quality. On the other hand, the German report notes that the German notion of “conditions of work and *economy*” does match “conditions of work and employment”. The *Italian* practice shows that *investment* obligations have been found to be binding (in civil law) in the collective agreement binding FIAT. Furthermore, as in the *German* law, the *Swedish* and *Finnish* laws on collective agreements and/or worker participation also make it possible to conclude agreements either on codetermination/employee participation itself or to conclude via that structure agreements that have the legal effect of a collective agreement and affect the business management of the employer, including his contracts with clients, suppliers, customers and other third parties. The *Finnish* exclusion of collective agreements from the scope of competition law (“agreements concerning the labour market”) is, in its wording, ultimately wider than the normative competence of organisations under labour law (“employment terms and conditions”).

24. The limits of immunity in the national case law also need to be assessed in the light of the (basic) immunity established by the ECJ in the cases *Albany, Brentjens and Drijvende Bokken*. Some cases reported are worthy of attention. The *Spanish* medication case seems to present a narrower immunity, at least if the ECJ immunity is interpreted with “social policy objectives” setting up the limits of the immunity.²¹ However, even if the narrower interpretation of ECJ immunity is applied, with “conditions of work and employment” defining the limits, the *Swedish* newspaper case and the *Finnish* paper mills case show a rather narrow national immunity. On the other hand, the *Danish* recruitment case shows how *manning* provisions have been approved in the national case law.²²

Extension (Erga Omnes)

25. With the exception of the *United Kingdom, Italy, Denmark* and *Sweden*, the extension procedure or an ipso jure extension (*Austria* and *Finland*) of collective agreements is applied in the Member States studied. As to the extension itself, this

¹⁹ The government bill for Act no. 202/98 shows that the purpose of the law was to confirm the restrictive line of the paper mills case as the interpretation of the previous competition law.

²⁰ Belgian report, heading 3.

²¹ Paragraph 88 of the EC law report. *supra*.

²² See the case referred to in the Danish report at footnotes 6 and 7.

does not seem especially problematic in relation to national competition law. In *Germany* extension has been, in some cases, the ‘channel’ establishing the dispute between a collective agreement and competition rules. In any event, the Constitutional Court has held that competition rules were not violated by the erga omnes declaration. In *France*, the Competition authority has accepted the extension procedure in a recommendation of 1992.²³ In the *Finnish* employees’ group life-insurance case the automatic erga omnes effect rather worked as one justification supporting the acceptance of an exemption of ten years for the life-insurance pool of the insurance companies. Furthermore, the *Spanish* case law includes a link to erga omnes through the lawsuits of ‘third parties’ against collective agreements. Essentially, however, the national extension practice was used as a justification and was de facto consolidated by *Albany*, *Brentjens* and *Drijvende Bokken* in relation to competition rules.

The Notion of Undertaking

26. The national reports confirm the prevailing view of the notion of undertaking. Nowhere are the social partners regarded as undertakings insofar as they act in this specific role. The *French* report refers to the status quo that the organisations on both sides of the social partnership cannot take on commercial activities but they must limit themselves to the “study and the defence of rights and material and moral interests of their members”.²⁴ Hence, the French social partners are not likely targets of competition scrutiny, as they need to engage in commercial publishing via separate bodies. Those bodies can, of course, be treated as market actors. Otherwise the debate on the position of the funds which run the French supplementary social security schemes continues. As to the position of other separate bodies, the *Finnish* employees’ group life-insurance case is in line with *Albany*, *Brentjens* and *Drijvende Bokken*, while the pool of the insurance companies running the scheme was found to constitute an undertaking by the Competition Board (Court).²⁵
27. On the trade union side one additional example can be mentioned. The *Swedish* case shows how a collective household insurance scheme, also including property and liability insurance, established by agreement between the LO of Sweden and the insurance company, was not deemed to be anti-competitive. Not only the solidarity principle and non-commercial nature of the scheme, but also the status of the union as a non-undertaking were taken into account as grounds.²⁶
28. On the employers’ side the unilateral actions of an association or of several employers are in a different position. The German report shows how the *Bosman* judgement changed the doctrine that now recognises the employers’ association as an undertaking.²⁷ Besides, such an association may at the same time serve as a trade association with product or production process-linked interests. It can be difficult to distinguish between these and the employer role. Merely anchoring

²³ French report, paragraph 6.

²⁴ French report, paragraph 4.

²⁵ Finnish report, paragraph 36.

²⁶ Swedish Report, footnote 58.

²⁷ German report, footnote 8.

some action in the collective agreement may, perhaps, not suffice to deprive the association of its commercial or economic role. Further case law seems inevitable.

Locus Standi

29. In general, the locus standi (i.e. the right to be heard and to act) of the social partners does not seem problematic. Where national competition law would exceptionally be applicable to a collective agreement, the social partners have locus standi. The *Swedish* newspaper case seems to be a clear and single exception. The trade union, a party to the collective agreement concerned, did not have locus standi when appealing against a decision of the competition authority that prohibiting the application of a provision in the said collective agreement. This agreement concerned subcontracting to self-employed subcontractors of newspaper distribution performed on foot, by bicycle or by automobile. Such subcontracting was banned by the agreement. The union has referred the case to the European Court of Human Rights on fair trial grounds.²⁸

Conclusion on National Reports

30. Some remarks necessary on the basis of the national reports are presented here; while the interaction between the national and EC level antitrust immunity of collective agreements is discussed in the Executive Summary. The national reports show - in addition to all of their technical and historical differences - essential disparities in material contents between the Member States in defining the relationship between collective agreements and competition rules, and in the (possible) national antitrust immunity of collective agreements. The table in **Annex I** seeks to highlight these in a summary manner. Investigations devoted to company level agreements would shed further light on them. Nevertheless, the prevalence and effect of collective agreements justifies the reference to a European model.

²⁸ Swedish report, footnote 38.

Executive Summary of Entire Study

1. There has been a certain at least potential tension between collective agreements and competition rules for decades both on the Community and national levels. The studies carried out within this project seek to clarify the interplay between these fields of law also taking into account the relationship between national and EC law.

The EC Level

2. The Treaty of Rome of 1957 set up EC competition rules as core elements of a common market that was meant to promote harmonious development of economic activities within the Community. However, these rules were not drafted with their applicability to collective agreements in mind. Before the judgements of the Court of Justice in the cases *Albany*, *Brentjens* and *Drijvende Bokken* of 21.9.1999 this matter was rarely considered.
3. Social policy was enshrined as a task of the Community by the Single European Act, which also recognised European level social dialogue. The Maastricht Agreement on Social Policy further fostered the status of collective agreements and has now also led to four European agreements transformed into European Directives by the Council. Social dialogue has been promoted by the European Commission and recommended by the Council. At the same time, national collective agreements are still very essential in regulating working life.
4. In *Albany*, *Brentjens* and *Drijvende Bokken* the Court expressly set up the basic antitrust immunity of sectoral collective agreements without any clear guidance in the EC Treaty. The Court held that the negotiating (sectoral) social partners do not fall under competition rules when seeking jointly to adopt measures to improve conditions of work and employment (*Brentjens*, paragraph 56). The ultimate reason was that falling under those rules would seriously undermine the social policy objectives of collective agreements.
5. By an “interpretation of the Treaty as a whole that is both effective and consistent” the Court concluded that collective agreements also fall *a priori* outside competition rules (*Brentjens*, paragraph 57). Hence, collective agreements were granted a basic immunity and a sphere of application in relation to competition rules. Nevertheless, any provision of a collective agreement can be tested under competition rules. The nature and purpose of a provision need to justify its exclusion from competition rules in order to avoid any distortion of competition by masking it as a collective agreement. The limits of this immunity are shown either by “conditions of work and employment” or by “social policy objectives”. Both can be backed up by good reasons. In any case, at least “conditions of work and employment” are thus *a priori* sheltered from competition rules. The Court thereby also excluded an overall application of the proportionality principle while assessing the “collective agreements” exclusion.

6. This basic antitrust immunity certainly also applies to interprofessional and European agreements, and basically also to company level agreements – albeit further elaboration is needed on the latter.
7. The judgements *Albany*, *Brentjens* and *Drijvende Bokken* consolidated the use of the erga omnes extension of collective agreements enjoying antitrust immunity. It does not violate competition rules.
8. The position of joint bodies established by a collective agreement in relation to competition rules was further elaborated by these judgements. Such bodies are widely held as undertakings subject to competition rules if operating on a market. Their exclusive rights or monopoly position granted by the authorities under Article 86 (ex 90) EC can now also be directly justified by a special *social* function of general public interest.

National rules

9. In this project national laws have been analysed in Austria, Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Spain, Sweden and the United Kingdom. In many of these countries collective agreements have an internal constitutional anchorage.
10. Disputes involving competition rules and collective agreements are relatively rare but generally a growing tendency towards conflicts can be discerned in several Member States. For the purposes of this project three groups of countries can be distinguished, especially in respect of their manner of regulating the relationship between competition law and collective agreements:
11. *Firstly* in the *Nordic group of countries* we find law-based immunity for collective agreements explicitly confirmed in national competition law. *Secondly* in the *Continental European group* of countries national law defines no antitrust immunity for collective agreements. Such immunity can, however, usually be derived from constitutional rights or freedoms pertaining to collective bargaining. *Thirdly* we have the *Anglo-Saxon* tradition where competition law in principle applies to the entire sphere of labour law and explicit exceptions have been rather weak. Furthermore, the assessment of collective agreements in terms of fundamental or constitutional rights has not gained ground.
12. In the Nordic group the relationship between collective agreements is defined in competition law. The definition does not correspond exactly to the normative competence of the social partners under labour law. On the other hand, the existence of the definitions has not prevented the authorities and courts from expanding applications of competition rules. The immunity applied in some of these court cases is narrower than that set up by the European Court of Justice in the cases *Albany*, *Brentjens* and *Drijvende Bokken*. A special feature in Sweden is the lack of locus standi of the trade union party to the collective agreement under scrutiny.
13. If we compare the judgements and the opinion of Advocate General Jacobs in these three cases we can say that the Court actually adopted a “Nordic solution”: It

created a case law-based immunity for collective agreements. The Court clearly drew a borderline for competition law and therefore also excluded collective agreements from its scope of application. Advocate General Jacobs, on the other hand, was clearly influenced by the Anglo-Saxon way of thinking and combined this with ideas regarding the constitutional European model. He introduced several elements of a constitutional and human rights discourse in his analysis.

14. The (future) Dutch and the new British laws provide the last example of states with national competition rules remodelled according to EC rules, implying the possibility of resorting to competition scrutiny of collective agreements. In both cases the old immunity disappears while the principles of EC law are applied instead.

EC Rules – National Rules

15. The national disparities at sectoral and interprofessional level in defining the 'peaceful coexistence' of collective agreements and competition law are somewhat alleviated by the effect of the judgements *Albany*, *Brentjens* and *Drijvende Bokken*. In particular, an analysis of EC competition rules demonstrates that collective agreements falling only under national law are not too common. Nationwide agreements normally fall under EC law (as in *Albany*, *Brentjens* and *Drijvende Bokken*) but even merely regional agreements can qualify. On the other hand, the issue is complicated where there is a contradiction between the EC law immunity and national immunity of collective agreements.
16. This means solving the problem of overlapping rules through a primacy of EC law that also guarantees a certain level of competition. The position of this principle was most recently expressed in the preamble to Commission Regulation 2790/1999 on group exemption from competition rules for vertical agreements. The status of this principle is strong within the sphere of competition. Outside competition law other principles apply. While the judgements *Albany*, *Brentjens* and *Drijvende Bokken* represent the common constitutional traditions of the Member States, they must be regarded as being fundamental and having the effect of setting a kind of general minimum standard in the Member States.
17. The crucial question with respect to the applicability of EC or national rules to collective agreements is: can national authorities and courts apply stricter national law to collective agreements when the agreement falls under EC law, i.e. fulfils the inter-State trade criterion?
18. We conclude by maintaining that there are good arguments for offering a negative answer to the question posed in paragraph 17, although there is no clear-cut answer at the present stage of development of EC-law.
19. It would therefore in our opinion be appropriate to enshrine *Albany*, *Brentjens* and *Drijvende Bokken* in the text of the Treaty by a "collective agreements exclusion", followed by a more detailed Council regulation on the relationship between collective agreements and competition rules.

Part Two: Collective Agreements in Relation to National Competition Law

National Reports

The Austrian COLCOM Report

1. **Preliminary Remark.** Due to the specific Austrian political constellation, Social Partners are comparatively strong in our country; they are even institutionalized by law, in the so-called “chamber system”.¹ Thanks to this system, Austria’s labour situation is (still) characterized of great stability. Within the OECD, we are the strike-poorest country.² Another point is that due to the institutionalization, the competence of the social partners is clearly defined and does not create legal problems. These circumstances help to explain why we have not had COLCOM conflicts yet. There is no case law in the sense of the study. Nevertheless, the Austrian case does not enjoy immunity against EC competition law and against future internal developments³, thus erosion of collective agreements can at least be thought.

Defining the relationship between competition law and collective agreements

2. The Austrian Restrictive Trade Practices Act (hereinafter RTPA) has its roots in 1870, when freedom of association was still explicitly prohibited. The actual RTPA⁴ excepts a couple of business actors: banking houses, building societies and private insurance companies, if they are submit to ministerial supervision; government monopolies; transport enterprises and collectives, in some aspects; and price-fixing for books and like products of the cultural sector.⁵ Cartels from the labour market such as collective agreements are not mentioned in this act.

¹ This phenomenon only exists in Austria: compulsory membership for all employees and employers in the statutory representative associations (Chamber of Labour and Economic Chamber). There are similar systems in two federal states of Germany, but they are not completely comparable to the Austrian system.

² Switzerland, due to its “peace rule”, is not comparable to other OECD members.

³ When finishing this study, the government change (from a social democratic-conservative coalition [SPÖ-ÖVP] to a conservative-“liberal” coalition [ÖVP-FPÖ]) could in the long run bring a revolutionary change to the Austrian collective agreement system. There is information that the trade-wide system, which covers all undertakings of a trade, would be substituted by only company-related agreements, which sensibly would weaken the actual system. See final outlook.

⁴ Law 600/1988.

⁵ This price setting is at variance with EC competition law, as long as it is cross-border (Austria - Germany). Scrutiny by the EC competition supervision will probably have the effect that the cross-border price setting will be reduced to national cartels, an Austrian an a German one. National cartels will continue to be allowed, among others, because there is one in France, too.

3. This is “not surprising” (Prof. Löschnigg), because it is not necessary. Firstly, because a collective agreement aims at the reconciliation of interests between employer and employee organisations, and not at business competitors. There might emerge a competition aspect, if there were a rivalry between different representative associations, but in this case, the RTPA would not apply. The collective agreement is not an agreement between “undertakings” in the sense of competition law and the doctrine-consensus holds (as a matter of fact) that cartels from the labour market do not fall under competition law.
4. Secondly, because the collective agreement has the force of a statute, although it is a contract under private law. As it has the effect of a statute, it cannot be filled with contents that violate other statutes. See specific Austrian characteristics of collective agreements (see paragraphs 12 to 15).
5. Summarising, although collective agreements are not excepted *expressis verbis* from the RTPA, they do not fall under this act in Austria.
6. Besides, there is another “immunity aspect” of collective agreements against competition law. The Collective Employment Regulatory Act⁶ (hereinafter CERA), which is the legal basis for collective agreements, is a “special statute”, whereas the RTPA is only a “normal statute”, which has a minor legal status.

Links to the Constitution

7. There is no direct constitutional anchorage neither for the CERA nor for the RTPA.
8. The right of association is – as being a fundamental right – guaranteed in Art 12 of the Basic Law of 1867, that has been taken over completely into the Austrian Constitution. This Article is the basis of the CERA, which strengthens collective agreements through indirect constitutional protection. Whereas, *as an institution*, the Austrian collective agreements with its specific legally binding effect is not protected by the Constitution, according to the mainstream-doctrine. Hence, it is neither guaranteed in this form by the European Convention for the Protection of Human Rights and Fundamental Freedoms, which only guarantees the freedom of association, like the Austrian Constitution.
9. The collective agreement is anyway more related to private law, which regulates relations between private parties. Constitutional law regulates mainly the security of the citizens towards the state (Prof. Löschnigg).
10. Constitutional Law contains, among others, freedom of ownership. The question is, whether collective agreements have restricting effects in this point and to what extent. Would it be possible that a collective agreement restricts the property of the employer in an extent that it is void? Theoretically, yes

⁶ Law 22/1974.

(Prof. Löschnigg). But in practice, there are no cases. The scheme present in Albany, for instance, would not be an anti-constitutional construction in Austria.

11. There is a certain link between competition law and the Constitution through the right of ownership.

Specific Austrian characteristics of collective agreements

12. The collective agreement is a contract under private law, but it has the same force as a statute.⁷ It is legally binding for all persons subject to it, and it has to be treated like a statute by courts. This phenomenon only exists in Austria.
13. **After-effect.**⁸ When a collective agreement ends, it continues valid for the contracts of services until a new agreement is concluded.
14. **Erga omnes extension.**⁹ Collective agreements are valid not only for Austrian and foreign citizens in the same way, but also for those employees who are not members of the concluding employee organisation.¹⁰ This is also possible in Germany, if the Federal Office of Labour declares a collective agreement “generally applicable”. The erga omnes extension is the logical consequence of the collective agreements’ status of an act (which has general validity).
15. Austrian collective agreements are trade-wide, not company-related. They are concluded with employer organisations. The situation is the same e. g. in Germany, whereas in Holland, for instance, firm-related collective agreements prevail. There are a few exceptions for big (public) enterprises like Austrian Airlines, ORF, Post, but also societies of great economic importance like the Red Cross.¹¹

⁷ Section 11, CERA.

⁸ Section 13, CERA.

⁹ Section 12, CERA.

¹⁰ There is one exception: When the legal employer representative organisation, the Chamber of Labour, concludes a collective agreement – what is unusual – and the „private“ organisation – the ÖGB (which usually concludes collective agreements) – concludes an additional collective agreement with better conditions, the latter does not have the outsider-effect. The erga omnes extension has another consequence: It hinders affiliation. If the collective agreement is valid also for non-members, there is no need to become one. Nevertheless, affiliation runs up to 50 per cent in Austria.

¹¹ Big enterprises do not generally conclude own collective agreements, but they execute a strong influence on collective bargaining within their trade. Multinational corporations recently tend to conclude international collective agreements, on an EC-level or globally, like for instance the Allianz Insurance Company. This might but must not cause deterioration compared to national collective agreements.

Material Scope of Collective Agreements = Scope of the Immunity

16. The scope of contents agreed in collective agreements is clearly defined by law, namely in Section 2 of the CERA. Professor Runggaldier holds that the Constitution does not refer to the contents of collective agreements and thus does not restrict its scope either. (There only can arise conflicts between different fundamental rights like the right of association and the right of property, as described before.)¹² As the material scope is well defined, it is also clearly limited ipso jure: “No form of employee participation can validly be agreed between employers and employees if not allowed for in the CERA.”¹³ If a collective agreement regulates an issue that falls out of its legally defined scope, it is automatically void.¹⁴
17. The regulatory competence of collective agreements is mainly, but not exclusively defined by the CERA, other legal sources have at least to be taken into account (Prof. Löschnigg).
18. Section 2, subparagraph 2 of the CERA defines the core scope of collective agreements with “duties and rights arising from the employer-employee relationship”. Generally, in collective agreements there are regulated different norms, like concluding norms, enterprise norms, institutional norms or norms according to the scope. In the latter enter wage determination, working hours, piece work, additional pays, entitlement to holiday, reimbursement of expenses, period of notice, and the like.¹⁵
19. The Austrian translation of „working and employment conditions“ corresponds approximately to “duties and rights arising from the employment relation” which can even specify these conditions. There are no contents in collective agreements that escape from this scope and thus could be vulnerable to competition law.
20. **Closed shops.** This collective agreement clause, which is typical for the United States, means that an employer is only allowed to employ members of a certain trade union. Such a clause would be unlawful in Austria (Prof.

¹² RUNGGALDIER, Ulrich: *Kollektivvertragliche Mitbestimmung bei Arbeitsorganisationen und Rationalisierung*, page 106 – 109, Alfred Metzner Verlag, Frankfurt 1983.

¹³ STRASSER, Rudolf: *Labour Law and Industrial Relations in Austria*, p. 32, Kluwer Law and Taxation Publishers/Manzsche Verlags- und Universitätsbuchhandlung, Deventer/Boston/Vienna 1992.

¹⁴ Prof. Runggaldier, whose habilitation (see footnote 12) compares the collective agreement systems of Austria, Italy and Germany, indicates that in Italy, where the material scope of collective agreements is much wider than in Austria, COLCOM collisions can be imagined more easily.

¹⁵ SCHWARZ, Walter / LÖSCHNIGG, Günther: *Arbeitsrecht*, p. 94, ÖGB-Verlag, 5th edition, Vienna 1995.

Löschnigg), amongst other reasons, because it would constitute the fact of negative freedom of association.

21. **Pension funds.** In Austria, the public pension system is the main pillar of the pension system. Company pensions, which are regarded as the second pillar, are regulated in works agreement, even obligatorily. Since 1997, collective agreements can prescribe the membership in a trade-wide pension fund.¹⁶ A (rare) example is the fund of banking houses and building societies. Before 1997, collective agreements only regulated direct pensions, which were paid by the undertakings to the retired employees. Curiously, Prof. Runggaldier holds that a compulsory membership in a sector-wide pension fund is only admissible, if the “general interest” prevails (which is not the case, see paragraph 42). Even then, the excessiveness rule would have to be taken into account: “Competition should not be more restricted than necessary.” Nevertheless, both Prof. Löschnigg and Prof. Runggaldier assume that there will not arise COLCOM problems with trade-wide pension funds. If they arose, the conflict would be between EC competition law and the Austrian CERA.

22. COLCOM problems are more likely with another body regulated (possibly) by collective agreements: The introduction of **dismissal indemnity funds** is imminent in Austria.¹⁷ This means that, when employees leave their company, the dismissal pay goes into a fund, which is added to the pension. If the employer dismisses them, the dismissal indemnity can remain in the fund or be paid out. If they leave the company voluntarily, the indemnity has to remain in the fund. The organisation of the fund(s) is still open, especially the question, if there will be a single national fund or if each trade will have its own fund (what is more likely). Even company-related funds are possible. COLCOM problems could arise if a collective agreement is to determine the trade-wide fund, in which employers have to put the money. The point is that the conversion of the dismissal indemnity in a part of the pension does not fall under the regulatory competence of the social partners, as they cannot determine the use of wages.¹⁸ Probably, this operation will be regulated by an act. If this act contradicts to EC competition law, it will not be applicable. Usually, new acts are scrutinised according to their compatibility with EC law.

23. **Limits.** The collective agreement would meet its limits, if it intervened excessively in the business competence of the employer, what it – anyway – is not allowed for (due to the clearly defined scope by Section 2, CERA). In this theoretical case, it would be void ipso jure. In Austria, there is no practice and thus no case law.

¹⁶ Amendment to section 3 of the Company Pension Act (“Betriebspensionsgesetz”).

¹⁷ The idea comes from the former government. The new one will implement it. Latest information says that the employers will have to pay a 2,33 per cent of the gross wages in the dismissal indemnity fund, for a maximum period of 25 years.

¹⁸ SCHWARZ, Walter / LÖSCHNIGG, Günther: *Arbeitsrecht*, p. 94, ÖGB-Verlag, 5th edition, Vienna 1995.

Works Agreements

24. Works agreements have a lower legal status than collective agreements, but they have the force of a statute, too, although they are - as well as collective agreements - contracts under private law. They only can contain better or more specific regulations than collective agreements. Their material scope is legally defined in the Sections 96 and 97 of the CERA. The contents of Section 96 can be forced by the works council, the provisions of Section 97 have to be negotiated. Typical contents of works agreements are: reimbursements of expenses, company pensions, periods of notice, reasons for the premature termination of the employment relationship.¹⁹
25. These regulations take influence on the business competence of the employer, but as they are regulated by the CERA, they cannot be attacked by other statutes. They are immune to competition law; there is no case law. Sometimes, works agreements indeed regulate issues they are not allowed for. But these subjects use to be “peanuts” that are not relevant for competition law.²⁰

Personal Scope of the Immunity

26. The scope of works agreements is narrower than in collective agreements, although they can contain subjects than are not to be regulated by collective agreements.²¹ The immunity is the same, as works agreements also have the force of a statute.

Basic Status of Organisations

27. Social partners and trade unions are not esteemed as undertakings or associations of undertakings in the sense of competition law.
28. To avoid an undertaking character of employee representatives who conclude the collective agreement, in Austria it is forbidden that trade union representatives form part of the supervisory board in stock companies.

Procedure

¹⁹ SCHWARZ, Walter / LÖSCHNIGG, Günther: *Arbeitsrecht*, page 121, ÖGB-Verlag, 5th edition, Vienna 1995.

²⁰ Such an example would be that a company has a collective car pool instead of an official car for every individual employee who needs it. The latter creates more costs for the company due to a different fiscal treatment.

²¹ Like for example showers for the whole enterprise staff.

29. In case of containing an unlawful arrangement, a collective agreement would be automatically void. Theoretically, a 50 per cent of the Austrian collective agreements is not lawful, but only due to “peanuts” like unclear formulations; hence there are no problems.
30. What would happen if an inadmissible content of a collective agreement (in the light of Section 2, CERA) violated competition law?
- a) If it is esteemed as a contract under private law, and the doctrine unanimously does, it is automatically void like any other contract under private law (that does not enjoy the force of a statute).
 - b) There also might be a statutory scrutiny by the Constitutional Court. But this is denied by Austrian labour law doctrine in its majority, because there is no legal basis for it. Prof. Löschnigg holds that, theoretically, collective agreements could be attacked under the concept of violation of bonos mores.²²
31. If a lawful content of a collective agreement (by section 2 of CERA) or of a works agreement (by sections 96 and 97 of CERA) entered in conflict with EC competition law, the national law would have to be adapted because EC law prevails.

Extension

32. In Austria, the concluding party on the employer side is usually the statutory employer association: the Economic Chamber. As membership is compulsory there, the collective agreement is automatically valid for all traders of the sector. In a few cases, the collective agreement is not concluded by the Economic Chamber, but by a voluntary employer association. In this case, the trade union (or the employer association) can require the “Satzung” (charter) of the collective agreement, which makes it valid also for non-members of the voluntary association. The “Satzung” (regulated in sections 18 – 21 of the CERA) is legally binding, too and has the same validity for all traders included.

Questions Based on EC Law

33. **Question 8a.** The Austrian RTPA has a similar structure as EC law, it is based upon three pillars: cartels, abuse of a dominant position, merger control. According to cartels, the relationship is defined by the interstate clause that says that national cartels are to be answered by national competition law and

²² According to section 8/79 ABGB.

international ones by EC law. Literature uses the concepts of “parallelism” and “completion”.²³

34. Generally, EC law has priority to national law. This priority fundamentally cancels the national immunity of collective agreements towards (national) competition law.²⁴
35. Austrian experts hold that collective agreements are well saved on an EC level by Art 137 (ex Art 118) of the EC Treaty (see also Albany 55 and 60), by the European Social Charter and the European Convention for the Protection of Human Rights and Fundamental Freedoms, Art 11, paragraph 1²⁵.
36. The permanent debate within the EC about the role of the „social dialogue“ seems to strengthen collective agreements step by step. The Maastricht Treaty transferred through Art 118 (new 137) the right to conclude collective agreements on the national level.²⁶ National experts are optimistic that Austria can conserve the contents of both, collective agreements and works agreements. Germany and the majority of the other EC members support this position. Amendments to Art 137 are expected.
37. At present, there is no criticism of the ECJ concerning the Austrian CERA. The only section theoretically incompatible with EC law is 110 that regulates the participation of members of the works council in joint-stock companies. Future adaptations to EC law might occur.

Notes on Albany

38. Since the amendment of the Company Pension Act²⁷ in 1997, collective agreements are allowed to prescribe compulsory membership to a trade-wide

²³ BARFUSS, Walter / WOLLMANN, Hanno / TAHENDL, Rainer: *Österreichisches Kartellrecht*, p. 158, Manz, Vienna 1996.

²⁴ An example in competition law, although not COLCOM, would be the present problem that Austria has with the price setting for books and like cultural products.

²⁵ One source indicates a different point of view: „It is controversial, to which extent the right of concluding collective agreements is immanent in the freedom of association, protected by Art 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.“ The author says that the European Commission of Human Rights is pronouncing for the protection, but the Court, in *Gustafsson*, made a different ruling (judgement 25. 4. 1996). ÖHLINGER, Theo: *Verfassungsrecht*, WUV, 4th edition, Vienna 1999, quoting *Österreichische Juristen Zeitung* 1996, page 869.

²⁶ Other experts (Prof. Winkler, from the Economic Chamber) do not recognize Art 118 as a guarantee of collective agreements. He also holds that the association law is generally excepted from EC law.

²⁷ Law 282/1990.

pension fund. A (rare) Austrian example would be the pension fund for banking houses and building societies. Exemptions from this compulsory membership are not possible.

39. These pension funds are without any doubt undertakings in the sense of competition law, because they determine contributions and benefits themselves (according to the Company Pension Act), they work with capitalization and they compete with other insurance companies on the market.
40. In difference to Albany, they do not pursue social policy objectives. In this point, they clearly differ from the public pension system that provides the “main pension“. Firm-pensions are only additional pensions („the butter on the bread“).
41. In the judgement Albany (91 and 92) it is argued that the pension fund concerned had a dominant market position, but it did not abuse it, because it was fulfilling with a function of general interest (Albany 104 to 106). The fact of fulfilling a function of general interest was arguable in Holland, because the public pension is just a basic pension and not the “main pillar” of the whole system. In Austria, the situation is different. The main pension is provided by the public system (which also pursues social policy objectives), whereas the company pension is just additional pay. This means: A comparable Austrian pension fund could be esteemed as **abusing its dominant position**. Nevertheless, both, Prof. Runggaldier and Prof. Löschnigg doubt it.
42. **Question 8b.** Hence, the national scope for collective agreements seems to be wider than allowed by EC competition law, because the compulsory membership in a sector-wide pension fund can also be prescribed by a collective agreement, if this fund does not pursue social policy objectives.
43. As already described before, a COLCOM risk may be higher according to the imminent introduction of dismissal indemnity funds, which will be pendants to the pension funds: Whereas company pension funds can be installed by works or collective agreements, the case is not so easy with dismissal indemnity funds, because collective agreements cannot prescribe the use of benefits, but they would if they forced the dismissal pays to remain in the fund. Fundamentally, the regulatory competence of social partners does not go so far. The question is whether an employer may choose a fund or not. Prof. Löschnigg is not sure, whether a monopoly with compulsory membership (nation-wide or trade-wide) would be justifiable.
44. **Question 8c.** A debate on Albany has not taken place in the mass media. One article was noticed in a technical journal (“Soziale Sicherheit”). Prof. Löschnigg argues that the judgement is quite recent.

Outlook with regard to the new government

45. The new Austrian government (between the conservative Popular Party [ÖVP] and the right-wing Liberal Party [FPÖ]) foresees a reorganisation of the social

partners. Undoubtedly, they shall be weakened. The Austrian chamber system is discredited; there are attempts to weaken it.

46. The first concrete measure is a short paragraph in the governmental program: The bargaining about working hours can be transferred to the company level in cases where no collective agreements exist. This provision does not sound very revolutionary, but experts suppose that greater changes could hide behind this small, little phrase. The worst case scenario, after having “opened the door for the transfer from a trade-wide to the company level” is the de facto abolishment of trade-wide collective agreements by transferring negotiations about working time, employee protection and wages on a company level. Collective agreements would lose their cartel effect within the trade. The Austrian system would die. Some experts foresee already the “end of the social market economy”.
47. The least change would be that bargaining about working time is transferred on a company level where no collective agreement exists²⁸, as foreseen in the governmental program: Trade unions would complain, but they would agree. But, there is no doubt that, if wages are touched or hours of work generally, we would have strike, even in Austria.
48. Another, very recent point is that the government itself attacks with a labour market policy measure, that is disguised as a “social policy measure” collective agreements: unemployed of long duration and persons who get social emergency benefits will be forced to work in the “social and environmental sector”, earning only a plus of 20 per cent, which means that in many cases their incomes will be under the minimum wage fixed by collective agreements. The problem: They could enter in competition with other workers who are already employed regularly.
49. And a last point that just has been known: The ministerial competence of Labour and Labour Law, which traditionally is incumbent to the Ministry of Social Affairs, goes to the Ministry of Economy, which also is a clear sign.

Summary

50. Relationship between competition law and collective agreements. Law does not define the impact of competition law on collective labour law. The RTPA does not mention the CERA; there is no doctrinal doubt that cartels from the labour market are excepted from competition law.
51. Links to the Constitution. There are no explicit links to the Constitution. The CERA is protected to a certain extent by the (fundamental) right of

²⁸ As a single-issue amendment to section 96 or 97 CERA.

association, whereas the protection of the RTPA through the right of ownership is less direct.

52. Specific Austrian characteristics of collective agreements. Same force as a statute. After-effect and erga omnes extension. Trade-wide.
53. Material scope of the immunity. The scope is defined in section 2 CERA with “rights and duties arising from the employment relationship”, what corresponds approximately to “conditions of work and employment” (Albany, paragraph 59).
54. Personal scope of immunity. Works agreements, which regulate better or more specific issues than collective agreements, have a narrower material scope. As they also have the force of a statute, the “immunity” is the same. There is no practice.
55. Basic status of organisations. The social partners are not deemed as undertakings in the sense of the competition law.
56. Procedure. If a collective agreement is unlawful, it is automatically void ipso jure.
57. Extension. As membership to the employer association that usually concludes a collective agreement is compulsory, there are no problems with competition law.
58. EC law / national law. (Question 8a) Austrian and EC competition law is similarly structured. The interstate clause defines the relationship according to cartels.
59. National law in relation to Albany. (Question 8b) The CERA guarantees collective agreements a wider immunity than that in Albany, as compulsory membership can be provided by a collective agreement even if no social policy objectives are pursued.
60. If the CERA violated EC law, it would have to be adapted.
61. Debate on Albany. (Question 8c) A debate on the case did not take place in Austrian newspapers. One article was noticed in a technical journal.
62. Outlook. The new government obviously intends to weaken the social partnership. If collective bargaining is reduced to a company level, strikes will reappear.

COLCOM PROJECT

Collective Labour Agreements and Competition Law

NATIONAL REPORT : BELGIUM

Patrick Humblet
Ghent University (RUG) & University of Antwerp (U.I.A.)

Marc Rigaux
University of Antwerp (U.I.A.) & University of Brussels (V.U.B.)

Introduction

Before providing a general answer to the questions, we would like to give – by way of background information – a brief picture of Belgian competition law, the cartel bans that dominated labour law in the past and the recent tensions between competition law and collective labour law.

a. Belgian competition law in the strict sense

The first Belgian competition legislation in the real sense of the term was the Act of 27 May 1960 on protection against abuse of a dominant position. On 1 April 1993, the first full-fledged national cartel legislation – the Act of 5 August 1991 on the protection of economic competition¹ – came into force. This legislation was inspired by EC cartel law. It has been recently amended and re-co-ordinated.²

b. The cartel ban in Belgian collective labour law³

The Le Chapelier Act of 17 June 1791 banned professional coalitions. This act and a number of similar laws formed the basis for Articles 414, 415 and 416 of the Penal Code. They were taken over by Belgium's lawmakers after independence was achieved in 1830.⁴

Conspiracy by employees to go on strike was punishable with imprisonment of two to five years. A similar, albeit less severe, ban applied to employers too.⁵ A cartel of employers with the intention to lower – wrongfully and unfairly – the wages of the employees was punishable by imprisonment of six days to a month and a fine of BEF 200 to 500.

A coalition of employees was thus always punishable. Employers, on the other hand, were punished only if they had endeavoured to lower wages wrongfully and unfairly. In the period from 1830 to 1867, this led to about 1,500 employees being convicted. There is not one single known instance of an employers' cartel being punished.⁶

¹ *Belgisch Staatsblad* [Official Gazette], 11 October 1991.

² Royal Decree of 1 July 1999, *Belgisch Staatsblad*, 1 September 1999.

³ For a historical summary, see F. Stevens, "Het coalitieverbod in België (1795-1866)," in *Liber amicorum prof. Dr. Roger Blanpain*, Bruges, die keure, 1998, 395-413. More generally, see M. Gotzen, *Vrijheid van beroep en bedrijf en onrechtmatige mededinging*, Brussels, Larcier, 1963, 723 pp.; R. Blanpain, *Handboek van het Belgisch Arbeidsrecht*, I, *Collectief Arbeidsrecht*, Ghent, Story-Scientia, 1968, 75 ff.; J. Neuville, *La condition ouvrière au XIXe siècle*, II, *L'ouvrier suspect*, Brussels, Ed. Vie Ouvrière, 1977, 170 ff.; M. Rigaux, *Staking en bezetting naar Belgisch recht*, Antwerp, Kluwer, 1979, 74 ff.

⁴ Article 20 of the Civil Code (present Article 27 of that code) did guarantee freedom of association, but no one associated this with freedom to form trade unions (see R. Blanpain, *Handboek van het Belgisch Arbeidsrecht*, I, *Collectief Arbeidsrecht*, 81).

⁵ Note that employers could create cartels for trading purposes.

⁶ B.S. Chlepnier, *Cent ans d'histoire sociale en Belgique*, Brussels, Ed. de l'ULB, 1956, 22.

With the Act of 31 May 1866, Articles 414 ff. of the Penal Code were rescinded. Both employers and employees could unionise and conclude agreements concerning pay and working conditions and even take collective measures to that end, such as strikes and lockouts.⁷ This act implied *de facto*⁸ only that employers were no longer punishable for concluding cartels geared against the employees. For their part, employees could unionise, but every efficient means of pressure such as a blockade of a factory gate was prohibited on pain of imprisonment and fines.

Freedom of association was guaranteed by the Act of 24 May 1921. This act is general, to be sure, but it leaves no doubt whatsoever that the legislator wanted to recognise first and foremost the freedom (of employees and employers) to unionise. From that moment on, employees could unite without any interference from the authorities, if necessary to exact certain pay and working conditions.

c. No tensions until recently

There have been no tensions between competition law and collective labour law until a few years ago when proceedings before the Ghent Criminal Court (known as the Becu-case) nearly caused a disruption.

** the legal framework*

Article 1 of the Law of 8 June 1972 organising dock work⁹ states "no one shall cause dock work in port areas to be performed by anyone other than recognised dockers".

The working conditions of the dockers are imposed by means of collective labour agreements concluded at sectoral level in joint committees¹⁰. These committees are composed of an equal number of representatives of employers' and workers' organisations. The collective agreements can also apply to persons who do not belong to organisations that have signed the collective labour agreement.

** the facts*

NV Smeg used in defiance of the 1972 Law temporary workers instead of recognised dockers. The Public Prosecutor's Department brought proceedings before the Criminal Court against the company, its director Mr. Becu and against the temporary employment agency. This Court acquitted the defendants. In its view the 1972 Law and the Royal Decrees implementing the law were incompatible with Article 90(1) in conjunction with Article 86 of the EC Treaty. This judgement could have jeopardised our collective bargaining economy. However, the European Court of Justice declared

⁷ R. Blanpain, *Handboek van het Belgisch Arbeidsrecht*, I, *Collectief Arbeidsrecht*, 84.

⁸ This act applied to both employees and employers, but the courts usually did not apply it to the latter (see *Pandectes belges*, v^o *syndicat*, 606, no. 137).

⁹ *Belgisch Staatsblad* 10 August 1972

¹⁰ Before 1945, collective labour agreements for pay and working conditions were concluded by and between employers and employees, but there was no legal framework for that purpose.

By the Decree-Order in Council of 9 June 1945, the individual normative provisions could be given binding force *erga omnes* by means of a royal decree at the request of a joint committee or representative organisation.

The Act of 5 December 1968 – which is known as the Collective Labour Agreement Act – created a legal framework which offered employers and employees the possibility to conclude agreements at national, sectoral and company level.

the Belgian law not to be incompatible with EC law (C-22/98 *Becu* 1999-09-16), decreasing as such the tensions between competition law and collective labour law.

Recapitulation

In sum, we can state that cartels were banned by labour law under certain conditions only before 1921. A competition law and a law on concluding collective labour agreements have developed in Belgium since the 1960s. There have been no serious tensions between the two legislations to date. 414 ff. of the Penal Code were rescinded. Both employers and employees could unionise and conclude agreements concerning pay and working conditions and even take collective measures to that end, such as strikes and lockouts.¹¹ This act implied *de facto*¹² only that employers were no longer pun

1. Defining the relationship between competition law and collective agreements

Is the impact of competition law on collective labour law defined by legislation, case law and/or administrative procedure, or by legal doctrine? Does constitutional law have any impact in this field?

No statutory legislation regulates the relationship between competition law and collective labour agreements. Neither in case law nor in legal doctrine the discrepancy between competition law and collective labour agreements is raised.

In the (new) Article 23 of the Constitution¹³, the constitutional legislator guarantees a right to collective bargaining, and in so doing recognises the individual character of our labour relations system.¹⁴ The Constitution, however, does not contain a reference to competition. The freedom of commerce and trade is guaranteed by article 7 of the Decree d'Allarde of 1-17 March 1791. This decree still remains in force¹⁵.

2. National practice

If there is national practice, which criteria of competition law (such as abuse of dominant or monopoly position or prohibition of cartels) are used in assessing the validity of collective agreements, and which subject matters of collective agreement are dealt with (e.g. manning provisions, pension or other agreement-based funds, status as worker in relation to entrepreneurship)?

¹¹ R. Blanpain, *Handboek van het Belgisch Arbeidsrecht*, I, *Collectief Arbeidsrecht*, 84.

¹² This act applied to both employees and employers, but the courts usually did not apply it to the latter (see *Pandectes belges*, v° *syndicat*, 606, no. 137).

¹³ Co-ordinated Constitution of 17 February 1994, *Belgisch Staatsblad*, 17 February 1994.

¹⁴ M. Stroobant, "De sociale grondrechten naar Belgisch recht. Een analyse van de parlementaire werkzaamheden bij art. 23 G.W.," in M. Stroobant (ed.), *Sociale grondrechten*, Antwerp, Maklu, 1995, 87.

¹⁵ W. Van Gerven, *Handels- en economisch recht*, I, *Ondernemingsrecht*, A, Brussel, Story-Scientia, 1989, nr. 21

No published case law where provisions from collective agreements are contested because they conflict with competition law are known to date in national practice.

If this eventuality should occur, it is settled with Article 9 and Article 51 of the Collective Labour Agreement Act, which formulate a hierarchy of labour law standards. This law occupies first place in the ranking. This implies that if the provisions of a collective labour agreement should conflict with the provisions of the national competition legislation, the law will have priority. The relevant conflicting provisions of the collective labour agreement are null and void.

Community law is of course not included in the list in Article 51 of the Collective Labour Agreement Act, but takes precedence nonetheless. Since the *Franco Suisse Le Ski* decision of the Court of Cassation of 27 may 1971, it is for that matter assumed that provisions with a direct effect of the EC Treaty enjoy priority over national law. Furthermore, Article 9 of the Collective Labour Agreement Act stipulates that the provisions of a collective labour agreement will be null and void if they conflict with international treaties and regulations that are binding in Belgium.

If, in other words, a provision from a collective labour agreement does not violate national law, but is not compliant with EC law, the latter takes priority. In such a case too, the court will declare the relevant provision null and void.

Taking account of the fact that the right to collective bargaining is included in international treaties, EU law could conflict with provisions in international treaties signed by Belgium. There is scarcely any case law on the matter, so that we cannot provide any answers as to how a court would react in such a case.

We must point out, in this connection, that Belgium for many years applied a ban on night work by women – which was contrary to Directive 76/207/EEC – because the country was bound by the ILO Treaty no. 89.

3. Material scope of the immunity

What could be regarded as the national interpretation of “conditions of work and employment” (Albany, Paragraph 59)? Does it correspond to the national definition of the normative competence of the social partners, normally done in law or by practice? Are there practical examples of terms and conditions in agreements that fall outside the category of “conditions of work and employment”?

What is the possible meaning of “social policy objectives” and “the measures to improve conditions of work and employment” in this context?

A. *Conditions of work and employment*

Article 5 of the Collective Labour Agreement Act runs as follows: “The collective labour agreement is an agreement concluded by and between one or more employee organisations and one or more employer organisations, whereby individual and collective relations between employers and employees in companies or in a branch

of industry are fixed and the rights of obligations of the contracting parties are regulated.”

Consequently, *individual and collective* relations can be regulated in a collective labour agreement.

Individual relations are synonymous with “working conditions” in the widest sense¹⁶, e.g.

- fixing wages;
- pegging wages to the index;
- fixing various bonuses and benefits;
- job classification;
- duration of working time and holidays;
- additional social security;
- rights of the applicant;
- regulation of recruitment and selection;
- organisation of labour.

etc.

Collective relations concern the organisation of social matters in the company, e.g. the

- establishment of a trade union representation;
- procedure on mediation in a labour dispute (conciliation proceedings);
- procedure applicable in the event of a strike;
- provisions concerning health and safety;
- powers of the works council;

etc.

One of the most important competencies in collective relations pertains to what are known as “Social Security Funds.”¹⁷ These funds are set up at sectoral level by collective labour agreements. They channel the supplementary social security.

The collective labour agreements can govern all sorts of matters – including economic ones – and are thus not limited to defining working conditions.¹⁸

There is only one issue that is explicitly withdrawn from regulation by the social partners. Article 9 of the Collective Labour Agreement Act stipulates that an agreement on the settlement of individual disputes which are entrusted to arbitrators is null and void.

¹⁶ A. Mazy, “Commentaar op de wet van 5 december 1968 betreffende de collectieve arbeidsovereenkomst en de paritaire comités,” *Arbbl.* 1969, 229.

¹⁷ See, inter alia, J. Van Steenberge and I. Briers (eds.), *Fondsen voor bestaanszekerheid en aanvullende sociale verzekeringen*, Bruges, die keure, s.d. 197 pp.

¹⁸ See *Parl. St. Senaat* 1966-67, no. 148, 102.

The legislator may in exceptions temporarily prohibit parties from contracting on certain matters. For instance, there is a wage freeze at the moment in Belgium which obliges the social partners to negotiate wages within a margin fixed by the legislator beforehand. The social partners may, in other words, still conclude agreements, but their freedom of negotiation is limited. Employers bound by the collective labour agreement are not obliged to comply with arrangements that exceed the margins.

Naturally, the object and motive of the collective labour agreement may not conflict with public order or common decency, or with a source of law higher in the hierarchy. For instance, no arrangements can be made in a collective labour agreement provision which conflict with the principle of equal treatment of men and women, the right to privacy, etc.

B. *Social policy objectives*

The character of the collective labour agreements fits into a free-market concept.

The social partners are given the widest possible freedom to negotiate.¹⁹ This can be gauged from the fact that the government does exercise a formal control over collective labour agreements, but no expediency control. The contents of the collective labour agreements do not concern the government.

Naturally, the court can always declare certain provisions null and void afterwards (see question 2, *supra*).

If, owing to Community law, the collective labour agreement can no longer be used effectively, then the government will (have to) play a bigger role.

C. *Measures to improve conditions of work and employment*

Collective labour agreements enable arrangements to be made in a flexible way on ways of improving conditions of work and employment.

4. Personal scope of immunity

Does the possible exemption of collective agreements from competition rules cover also other agreements than sectoral ones (e.g. enterprise/works council agreements if affecting the status of workers as consumers, or inter-professional agreements)? If so, how exactly?

Belgian competition law is formulated in general terms and comprises no exemptions concerning collective labour agreements.

¹⁹ Or *not to* negotiate. The employer is actually not obliged to negotiate.

As was explained in the answers to the previous questions, we attach a great deal of importance to the possibility of negotiating collectively so that no-one has up to now raised the question of collective labour agreements conflicting with competition legislation.

5. Basic status of organisations

Does the national law on competition (legislation / case law / administrative procedure) apply to the social partners as organisations? If so, how exactly?

In spite of the fact that the employee and employer organisations are not explicitly excluded from the scope of application of competition legislation, it is highly unlikely that it can be applied to them, for two reasons:

Firstly, the legislation is geared to “undertakings,” i.e. “natural persons or bodies corporate that endeavour towards an economic goal in a sustained manner.” It would be difficult, however, to qualify employee and employer organisations as such. For they are not after an economic goal in the strict sense, but look after the material *and* – in every respect as regards employee organisations – the moral concerns of their members.²⁰ Furthermore, they run no economic risk, which after all is the essence of an undertaking.²¹

There are no indications of an opposing view to be found in national case law and legal doctrine.

That such lines of thought are not followed can also be explained by the fact that representative employee and employer organisations are considered by the government as part of the state apparatus. For instance, employee organisations are involved in the payment of unemployment benefits. So it is obvious that they are not classed as undertakings.

There is moreover a problem of a procedural nature. Even if the organisations did fall within the scope of application of the aforementioned legislation, it would be quite difficult to bring them to court. No employee organisation has legal personality. This implies that only individual members can be summonsed before the court.

Some sectoral employer organisations do however have legal personality because they are organised either as a trade association or as a non-profit association.

It is not impossible for employee and employer organisations to organise a number of parallel activities for their members through legal persons. For instance, most employee organisations have holiday homes. These assets belong to non-profit associations. Under this assumption, they naturally fall under the competition legislation and the (non-profit) association can be brought to court if necessary.

²⁰ See B. Edelman, “A bas le droit du travail, vive la concurrence! (à propos de l’arrêt de la Cour de Paris du 6 mars 1991)”, D., Critique, I, 4.

²¹ Ibid.

Similarly, Social Security Funds (see *supra*) can perhaps be qualified as undertakings.

6. Procedure

Are the social partners involved in anti-trust scrutiny? If so, how exactly? Is the distinction between automatically void and contestable procedures relevant? How is the nullity of a provision established? Who has the burden of proof in showing that collective agreements violate national competition law?

The social partners have been left alone up to now as regards the violation of competition law. If this should occur however, there are two possibilities.

Either the plaintiff takes action on the basis of national competition law and lodges an anti-trust complaint. As trade unions lack legal personality, this is not a likely scenario.

It is perhaps possible that an employer on whom a collective labour agreement places a certain obligation (e.g. to contribute to a Social Security Fund) does not comply, arguing before the court that the collective labour agreement provision violates competition law. In such a case, the employer has the burden of proof. The employee organisations can take legal action and intervene in the suit by virtue of Article 4 of the Collective Labour Agreement Act.

7. Extension

Does the extension (the *erga omnes* effect) of collective agreements create specific problems in relation to competition rules?

a. National collective labour agreements concluded at the level of the National Labour Council

These collective labour agreements can be declared generally binding by the King.²² This implies that not only the undersigned organisations, but also non-signatories who fall under the scope of application of the Collective Labour Agreement Act must comply with the normative provisions. There are no published pronouncements of national law courts where complaints have been lodged regarding conflict of agreements concluded at this level with national competition law.

b. Sectoral collective labour agreements concluded at the level of the joint (sub)committee.

²² Article 28, Collective Labour Agreement Act.

i. Collective labour agreements declared generally binding. Sectoral collective agreements can also be declared generally binding. The same considerations as in paragraph a) supra apply here as well as regards the generally binding declaration. Although there are no disputes at this time, it is not impossible that such disputes will occur in future. The *Albany* case will perhaps have an inspiring effect. Especially in sectors where concluded collective agreements impose additional social security entitlements (e.g. the construction sector), there is a real chance of this occurring, because of the greater economic interests that come into play.

ii. Collective labour agreements declared not generally binding.

When the collective agreement is declared as not generally binding, *all* employers from the (sub) sector (thus also those who are not members of a signatory organisation), must nonetheless comply with the individual normative provisions (e.g. provisions concerning pay and working time).²³ In this case too, there are no published pronouncements of national law courts known where complaints have been lodged regarding conflict with competition law. A number of explanations are possible here.

First of all, the individual freedom to contract remains a priority. The employer is not bound by the individual normative provisions if a clause that runs counter to the agreement is included in writing in the individual contract of employment.²⁴ In addition, agreements declared not generally binding are often concluded in sectors where the emphasis of the negotiations is at company level and the pay and working conditions agreed at sectoral level are usually minimal (so that every one can/wants to comply with them).

8 a)

Is the national competition law, in relation to collective agreements, ipso jure, in light of travaux préparatoires or by case law, anchored in EC law?

National competition law devotes no specific provisions to collective labour agreements.

National competition law is strongly inspired by EC cartel provisions. In interpreting concepts not clearly described, a link is sought with the decisions of the European Commission and the case law of the Court of Justice.²⁵

²³ This is the supplementary binding by virtue of Article 26 of the Collective Labour Agreement Act.

²⁴ Article 26, Collective Labour Agreement Act.

²⁵ See, inter alia, R. Van Den Bergh, E. Dirix and H. Vanhees, *Handels- en economisch recht in hoofdlijnen*, Antwerp, Intersentia, 1997, 269, and J. Stuyck, "De doorwerking van de beschikkingen van de Europese commissie en de jurisprudentie van het Hof van Justitie op de toepassing van de wet van 5 augustus 1991 tot bescherming van de economische mededinging. Doorwerking van het Europees kartelrecht in het Belgisch kartelrecht," *R.W.* 1995-96, 1107-1116.

8 b)

Are there indications that the national immunity from competition law of collective agreements is narrower/broader than affirmed in Albany?

Assess the legal consequences if national competition law would be more stringent than EC law in attacking “anti-competitive” practices, and more stringent national competition law would affect collective agreements? i.e.

i. *does EC-competition law pre-empt national law, or only set a minimum standard?*

ii. *does EC anti-trust immunity for collective agreements pre-empt national law which provides less (or more?) immunity?*

As already described above, in Belgium the link between collective labour agreements and competition law has never been made. We shall therefore limit ourselves to a general answer.²⁶

National competition law implements the European legal provisions on the matter. If a discrepancy should occur between national and Community law, the latter takes priority (see *supra*).

8 c)

How is Albany described in the national debate? Are there already reactions of authorities, social partners, legal doctrine etc?

The reaction to the decision has to date been limited to announcements in specialised reviews and newsletters. No articles have yet appeared in the Belgian specialised periodicals, probably because it is a little too early for that yet. Such periodicals often have a production time of more than six months.

There is some concern among the social partners that the Community rules will change the existing industrial relations. If it should ever be decided that certain national and sectoral collective labour agreements conflict with the competition law, this could have rather extensive consequences which would in the long run lead to social destabilisation. The shifting of negotiations to company level may lead to a splintering of the trade unions, which are quite strong in Belgium. We assume that employers too want to avoid this. They are now concluding agreements with organisations that are capable of keeping their supporters under control. In a more splintered social landscape, there is a great possibility that the influence of the trade union movement will be reduced or even disappear. That can lead to radicalisation and greater social unrest.

The government too wants stability in labour relations. The possibility of employers attacking sectoral or national collective agreements before the law courts is not desirable. The legislator therefore amended Article 26 of the Collective Labour

²⁶ See in greater detail, J. Steenlant, “Verhouding Europees-Belgisch mededingingsrecht,” in *Wet tot bescherming van de economische mededinging. Haar werking*, TBH-dossier no. 1 – 1994, Brussels, Story-Scientia, 1994, 86-89.

Agreement Act to prevent an employer from having a collective agreement concluded in a joint body nullified by the Council of State.

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COLCOM-Project

National Report. Denmark

By Ruth Nielsen

Generally Danish law has only addressed the interplay between competition law and collective agreements on few occasions. Apart from section 3 of the Competition Act there is no legislation and there is very little case law on the matter. In legal writing the problem is seldom dealt with.

. Defining the relationship between competition law and collective agreements.

Is the impact of competition law on collective labour law defined by legislation, case law and/or in administrative procedure, or by legal doctrine? Does constitutional law have any impact in this field?

In Denmark there is legislation, case law from the ordinary courts and from administrative bodies, particularly the competition bodies, as well as discussions in legal doctrine.

The enforcement of the Competition Act come under the jurisdiction of a politically independent body, the Competition Council. The Competition Authority is the secretariat of the Competition Council and attends to the current enforcement of the Competition Act (section 14(2)). According to section 19(1), some of the Competition Council's decisions - or the decisions, which the Competition Authority has made on behalf of the Competition Council - may be brought before the Competition Appeals Tribunal. As a principal rule, appeal does not have delaying effect.

The purpose of the competition Act is to promote efficient production and resource allocation by means of workable competition.

Article 2(1) of the Competition Act provides that it is applicable to any kind of business activity. According to the travaux préparatoires the notion of 'business activity' has to receive a wide interpretation and includes all kinds of economic activities on markets for goods and services. Neither a profit-making purpose nor a certain legal form are required for the law to be applicable.

The main provision of the Competition Act is section 6 which provides:

- 6.-(1) Any conclusion of agreements between undertakings etc. which have as their object or effect the restriction of competition shall be prohibited.
- (2) Agreements under subsection (1) may, for instance, be such agreements which

- 1) fix purchase or selling prices or any other trading conditions,
 - 2) limit or control production, markets, technical development, or investment,
 - 3) share markets or sources of supply,
 - 4) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, or
 - 5) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
- (3) Subsection (1) shall apply correspondingly to decisions made by an association of undertakings and to concerted practices between undertakings.
- (4) The Competition Council may issue orders for the termination of infringements of subsection (1).
- (5) Any agreements and decisions prohibited under subsections (1)-(3) shall be void, unless exception is made under section 7, exemption is granted under section 8 or section 10, or a negative clearance is given under section 9.

Article 3 provides that the Act is not applicable to wages and labour relations. According to the travaux préparatoires that exception is limited to the relationship between employers and employees. Article 3 reads:¹

3. This Act shall not apply to wages and labour relations. In carrying out its duties, the Competition Council may, however, request information from organisations and undertakings concerning wages and labour relations.

It follows from the travaux préparatoires that the exception contained in the Competition Act must be interpreted in conformity with the interpretation of the former laws on monopolies.

. National practice.

If there is national practice, which criteria of competition law (such as abuse of dominant or monopoly position² or prohibition of cartels) are used in assessing the validity of collective agreements, and which subject matters of collective agreements are dealt with (e.g. manning provisions, pension or other agreement-based funds, status as worker in relations to entrepreneurship)?

A judgement of the Supreme Court of 1965³ is still of importance. The court had to decide on rules in a collective agreement between an employer's organisation and a worker's union in the clothing industry which provided that uniforms for the state or municipalities had to be paid as skilled tailor-made work and not as factory-tailored.⁴

¹ In the unofficial translation by the Competition Authority (only the Danish text is authentic) see <http://www.ks.dk/organisation/index.loveng97.html>

² Cfr. Case *Merci*, C-179/90, [1991] ECR I-5889.

³ UfR 1965.634 H.

⁴ U 1965,634 H. The contested provision read in Danish: *Leverancearbejde til stat og kommune, private baner, telefonselskaber, banker, brobetjening og havnevæsenet betales efter priskurant for leverancearbejde i skrædderfaget. Alt andet*

This resulted in excluding certain groups of consumers (notably the state) from the supply of clothes produced in a less expensive way than the one prescribed in the collective agreement. The Competition Authority had ordered both the employers' organisation and the workers' union to abstain from interfering in prices in this way. The workers' union brought this order before the ordinary courts claiming that the collective agreement was excluded from the scope of the Competition Act. The supreme Court held that the exception in the Competition Act was not applicable since the agreement went further than regulating wages and working conditions. The collective agreement at issue in that case did not solve a conflict between employers and workers but tried to further their joint interest in selling as expensive uniforms as possible by precluding the public sector from buying cheap factory-tailored uniforms. Furthermore the supreme court held, that the Competition Act was applicable *ratione personae* to the 'social partners' in so far as they were dealing with 'such economic interests'. Thus, the Danish prohibition of cartels is applicable to rules in collective agreements which are 'related to an economic activity' and which 'do not concern wages or working conditions'.

The Competition Appeals Tribunal decided a case August 3, 1999⁵ on a collective agreement provision restricting the employer's freedom of recruitment by prescribing that recruitment should take place through the local employment exchange.

The employers' organisation contested the validity of that provision and brought the case before the Competition Council which found in favour of the employers' organisation.⁶

The workers' union complained to the Competition Appeals Tribunal which found in favour of the workers' union. The Competition Appeals Tribunal argued that the purpose of the contested provision was to ensure that members of the relevant workers' union got the vacant jobs and that they were paid in accordance with the collective agreement. It therefore concluded that the contested provision came within the scope of section 3 of the Competition Act.⁷ Consequently the Competition Act

leverancearbejde og beklædning - af hvad art nævnes kan - betales efter den i fabrikantforeningens priskuranter fastsatte time- eller akkordløn."

⁵ May be found in Danish on <http://www.ks.dk/konkuromr/ka-kdl/19990803a.htm>

⁶ The decision by the Competition Council read in Danish: "Konkurrencerådet har på mødet i dag vedtaget, at . . . bestemmelserne i overenskomstens § 46, stk. 2, 1. pkt., og § 49, stk. 2, 2-3. pkt., hvorefter anvisning af tjener-løsarbejdere foregår gennem det stedlige offentlige arbejdsformidlingskontor, er omfattet af forbudet i konkurrencelovens § 6 og ikke kan fritages efter § 8, stk. 1. Overenskomstparterne påbydes i medfør af konkurrencelovens § 6, stk. 4, jf. § 16, stk. 1, nr. 1, senest den 1. januar 1999 at opheve de nævnte bestemmelser."

⁷ In Danish the conclusion read: Ankenævnet finder, at en sådan kollektiv aftaleregulering af HORESTAs medlemsvirksomheders adgang til arbejdskraftsøgning m.v. ikke indebærer varetagelse af sådanne erhvervsinteresser,

did not apply to the contested provision and the competition bodies could not assess its validity.⁸

. Material scope of the immunity.

What could be regarded as the national interpretation of “condition of work and employment” (Albany, paragraph 59)? Does it correspond to the national definition of the normative competence of the social partners, normally done in law or by practice? Are there practical examples of terms and conditions in agreements that might fall outside the category of ‘conditions of work and employment’? What is the possible meaning of “social policy objectives” and the “measures to improve conditions of work and employments” in this context?

In the paragraph in Albany referred to above, the ECJ stated:

59. It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.

60. It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty.

The above-mentioned case on the price for uniforms is an example of a collective agreement provision which falls outside the concept of “conditions of work and employment”. The case concerning a recruitment provision is an example of a condition of work and employment.

. Personal scope of immunity.

Does the possible exemption of collective agreements from competition rules cover also other agreements than sectoral ones (e.g. enterprise/works council agreements if affecting the status of workers as consumers, or interprofessional agreements)? If so, how exactly?

som konkurrenceloven angår, men må anses for at angå løn- og arbejdsforhold omfattet af konkurrencelovens § 3, 1. pkt. Den påklagede afgørelse savner herefter hjemmel og vil derfor være at ophæve som påstået af klager.

⁸ It might be argued that employment through a local employment exchange violates some of the free movement provisions in the EC Treaty. It would be for the competent court - which in matters of collective agreements is the Labour Court - to rule on that issue, and not for the Competition authorities, which are only competent in matters concerning the Competition Act.

There have been no cases on this problem. In my view, the level of the collective agreement is irrelevant, what is relevant is whether it deals with a conflict between workers and employers.

. Basic status of organisations.

Does the national law on competition (legislation/case law/administrative procedure) apply to the social partners as organisations? If so, how exactly?

In principle yes. As an example the above case on a collective agreement concluded between an employers' organisation and a workers' union fixing the price for uniforms may be mentioned. If and when the social partners control the price of certain goods by collective they are covered by the Competition Act on the same footing as any other undertaking.

. Procedure.

Are the social partners involved in the anti-trust scrutiny? If so, how exactly? Is the distinction between automatically void and contestable provisions relevant? How is the nullity of a provision established? Who has the burden of proof in showing that collective agreements violate national competition law.

The above case on the price of uniforms was a case before the ordinary courts with the workers' union (Dansk Beklædningsarbejderforbund) as the one party and the Competition Authority as the other party. In such a situation the workers' (or employers') organisation has the same position as any other party before the ordinary courts. The general rule in Denmark is that the plaintiff claiming that an agreement is void must show that it is so.

If the case is dealt with by administrative bodies like the Competition Authority it will have to show that a contested collective agreement violates competition law.

As far as I know there has never been cases in Denmark involving collective agreements which have been decided without the active participation of at least one of the social partners. In the above case on the price of uniforms where both the employers' organisation and the workers' union had received an order from the Competition Authority, only the workers' union took the case to court and the employers' organisation was not represented in the court case.

. Extension.

Does the extension (the erga omnes effects) of collective agreements create specific problems in relations competition rules?

Danish collective agreements do not have *erga omnes* effect.

. The EC case law necessitates some further questions to be answered also by the national COLCOM reports.

8a) *Is the national competition law, in relation to collective agreements ipso jure, in light of travaux préparatoires or by case law, anchored in EC law?*

The present Competition Act is generally based on the same principles as EC competition law. The specific provision on collective agreements in section 3 of the Act is an old Danish provision dating back to long before Denmark's membership of EC (as at 1 January 1973).

8b) *Are there indications that the national immunity from competition law of collective agreements is narrower/broader than that affirmed in Albany? Assess the legal consequences if national competition law would be more stringent than EC-law in attacking "anti-competitive" practices, and this more stringent national competition law would affect collective agreements? I.e.*
i. does EC competition law pre-empt national law, or only set a minimum standard?
ii. does EC anti-trust immunity for collective agreements pre-empt national law which provides less (or more?) immunity?

I don't think there is any reason to believe that Danish collective agreements' immunity from competition law is narrower or broader than that affirmed in Albany. But it is not clear precisely what relationship between collective agreements and competition law Albany established. One may raise the question whether paragraph 60 has to be taken to mean that the social policy objectives (Articles 136 et seq. EC) define the limits of the basic immunity of collective agreements or whether the expression "conditions of work and employment" in para 59 would show the limits. Danish sources of law do not offer any contribution to clarifying this point.

8c) *How is Albany described in the national debate? Are there already reactions of authorities, social partners, legal doctrine etc?*

There is only scarce Danish literature on Albany. As one example one can mention "EU-konkurrenceretten og kollektive overenskomster" by Jens Fejø, in Julebog 1999 from Juridisk Institut, Copenhagen, Juristforbundets forlag 1999 p 219.

Jari Hellsten
Researcher
Centre of International Economic Law
of the Hanken School of Economics
Helsinki, Finland

The Finnish Report /COLCOM Project

Defining the relationship between competition law and collective agreements

1. The relationship between competition law and collective labour agreements has been settled in the Act on Competition Restrictions of 1992 (later “ACR”).¹ The law (Section 2, paragraph 1) states that “*This law shall not be applied to agreements or arrangements which concern the labour market.*” The same rule has been in the precedent laws since 1957. Remarkable case law exists.
2. There is no explicit constitutional anchorage for competition law, neither for collective agreements. Anyway, in the doctrine it is said that freedom of association, enshrined in the constitution, means that also the right to strike and to collective bargaining enjoy a semi-constitutional protection. It can be derived especially from the international legal instruments.² One case exists on the level of the Court of appeal whereby the fundamental-type nature of the right to a boycott (for a collective agreement) has been referred to.³ A part of competition law (mainly free access to a trade) can be based upon the freedom of trade, enshrined in the constitution.

National Competition Practice At Collective Agreements

3. The ACR attacks competition restrictions by using both the concept of direct nullity (*ipso jure*) and that of prohibitions based on discretion. The former covers price-setting, production and purchase limitations, market sharing and abuse of dominant position. They are prohibited while an individual exemption can be granted at market sharing and production limitations if it promotes both production and clients and customers. Discretionary prohibitions operate with the “harmful effect”, existing or likely, of an agreement on the effectiveness of the economy, as enshrined in ACR. That criterion is mainly used in the practice of the Finnish Competition Authority (later on: “the Office”).⁴ It means the

¹ Law 480/92

² See e.g. Antti Suviranta, *Työtaisteluoikeuden rajoittamisesta* (“On Restricting the Right to Industrial Action”) in *Työtuomioistuim 50 vuotta* (“Labour Court 50 years”), Helsinki 1997, p. 225.

³ *Estonia Shipping Company Ltd v. Transport Workers’ Union (Finland) and The Finnish Seamen’s Union*. The Helsinki Court of Appeal, Case S 99/275, 20.7.1999.

⁴ Section 9 (as amended by law 303/98):

“A competition restriction which is not forbidden under Sections 4-7 shall be deemed to have harmful effects if it, in a manner inappropriate for sound and effective competition, decreases or is likely to decrease efficiency within the economy, or prevents or hinders the conducting of business by another.” (The English translation by DGIV of the Commission) Section 16 allows a prohibition

possibility for the Office (and for the Competition Council, the court of first instance in these cases) to prohibit the application of the provision concerned. Thus, based on this concept mainly manning provisions (outside labour) have been scrutinised, in several sectors, such as dock work, metal industry, paper mills, municipal sector (cleaning in hospitals) and on a TV-Company. In metal industry the Office imposed to skip restrictions on outside labour in its letter to the social partners. In the case of the employees' group life-insurance pool, based upon collective agreement, however, the ACR provisions on direct nullity were applied (see paragraph 37). The plumbing work provisions have been scrutinised in 90's (the same provisions as in paragraphs 10 to 13 below). Some earlier cases are explained briefly only under this heading.

4. **Dock work.** The Office received complaints late 80's and early 90's by companies trying to start with dock work which is covered by the ILO's Dock Work Convention 1973, No. 137, targeting to stable employment contracts for dock workers. The Convention has traditionally been deemed to be implemented by the branch-wise national collective agreement. It foresees the use of the permanent manpower covered by the agreement and employed by an organised dock work company. In its decision of 1991⁵ the Office noted (in its grounds) that if the employers' organisation hinders the entry into that business or hampers its driving, this can be deemed as falling under the Restrictive Practice Act. This way the Office indirectly recommended the employers' organisation to accept new traders as its members.
5. **Hospital cleaning.** At the municipal sector the Office scrutinized the separate collective agreement concluded by the Municipal Sector's Trade Union and the multinational cleaning company ISS on cleaning in hospitals, thus when carried out by the company instead of the permanent staff of the hospital. It enumerated 12 hospitals and stipulated that the company would not conclude a delivery agreement for the others unless separately agreed upon with the union. The Office stated that the restrictive provision did not violate competition rules as the company was itself party in the agreement.⁶

Material Scope of the Immunity

6. The travaux préparatoires of 1987 gave the following grounds for the material scope of the anti-trust immunity of collective agreements:

“After having considered the material scope of the Act on Competition Restrictions... the committee has come to the opinion that leaving also in the future the labour markets outside the Act is founded. The terms and conditions of employment are defined in the income policy procedure that is clearly developed as its own branch of economic- and social policy where the importance and nature of economic competition are different from those in relationships between traders. Also administratively labour market relations

against such a practice or arrangement. Section 17 of the law makes it possible to use a conditional fine against practices meant by Section 9.

⁵ Competition Office, decision 23/221/88, 11.3.1991.

⁶ Competition Office, decision 30/61/92, 13.1.1994.

are at least during this century understood as a field of problems separate from the overall trade policy. Internationally the price-setting for manpower is everywhere distinguished from the overall competition policy as a separate phenomenon whereon – because of social, economic but also of moral reasons – principles different from those in product price-setting are to be applied.

The exclusion of the labour market from the scope of the rules on restrictive practices does naturally not mean that by such arrangements clearly restrictive practices between traders could be excluded from the competition law. The exclusion of labour market from the scope of the competition law means defining the material scope. If the collective agreements include provisions that substantially do not deal with terms and conditions of employment but e.g. restrict the employer's relations with his clients, it means a phenomenon falling under the competition law. In practice, there have been e.g. provisions restricting competition in canteen keeping on (building) sites. This kind of agreements are according to the committee of restrictive practice outside the 'labour law competence' of the labour market organisations and have to be assessed on the basis of the overall competition law.”⁷

7. The governmental bill and the Parliament kept both the wording of the Section concerned and the quoted grounds proposed by the committee. The basic solution was clearly adopted also by the labour law doctrine.⁸ Professors Tiitinen and Bruun have held that there seem to be three crucial aspects in the above reasoning:
 - anti-trust immunity of collective agreements foresees acceptable social or labour market policy reasons,
 - provisions not dealing with terms and conditions of employment may fall under competition rules, and
 - the committee held that matters outside the 'labour law competence' of the social partners might fall under competition rules; this notion doesn't correspond entirely to the doctrinally stable notion of 'normative competence' of the social partners although it is rather near.

8. The regulatory competence of the social partners in the present Collective Agreements Act of 1946, Section 1(1), in line with the previous law, states that a collective agreement is one concerning *employment terms and conditions*, concluded by one or more employer or employer associations on the one side, and by one or more employee associations on the other. These 'terms and conditions' can be divided into terms giving individual benefits (pay, wages etc.) or common benefits to workers (canteens, safety and health measures etc.). This division is, however, not relevant now because the employer is equally bound – *ipso jure* - to implement both types of benefits. Furthermore, the Employee Participation Act of 1978⁹ gives for the social partners the power to conclude company-level agreements on the matters covered by that law. One of them is

⁷ State Committee 1987:4, p. 61-62.

⁸ See e.g. a joint statement of Professors Bruun and Tiitinen of 1993. This report widely relies on their statement.

⁹ Law 725/78.

the use of outside labour. These agreements have the legal effect established by the Collective Agreements Act.

Relevant Case Law Defining the Normative Competence of Social Partners

9. The first relevant case in the present context was of **plumbing works**.¹⁰ The sector-wide collective agreement includes since early 60's a provision stating that works in new buildings are to be carried out by piece-work if there is no special hinder for that. The piecework entity is defined so that, notwithstanding some minor works, all the plumbing works at a site form an indivisible entity. It means that every plumber belongs to the single piecework team and a joint hourly earning is calculated. The system first and foremost guarantees equal earnings while the price setting per piece and unstable circumstances would not guarantee it.¹¹ Essential now is that the system affects the relations between the plumbing trader and his clients, hence what kind of offers he can accept.
10. In the Labour Court the Construction (Labour) Union submitted that the employer has to see to it that he can offer the work to the plumbers as provided in the collective agreement and that this was to be taken into account when concluding delivery contracts with the clients. The employer association maintained that the collective agreement could legally not cover agreements to be done with third parties. The Labour Court¹² unanimously held that
 11. "Taking into account of the provisions in Section 1 of the Collective Agreement Act it is not possible to prescribe by a collective agreement the limits within which the agreement-bound [plumbing] employer may enter into agreements with the principal contractor. However, the Labour Court holds that the collective agreement can validly stipulate the volume [and scope] of the piece-work to be given to the piecework team - -, even if this in practice effects the kind of contracts the [plumbing] employer may conclude with the principal contractor."¹³
12. Bruun and Tiitinen denote how this judgement reflects a certain balanced comparison of different interests on both sides. An indirect effect of a collective agreement to business conducting was accepted because the provision concerned meant to protect a very concrete interest of the worker, namely the basis for the amount of his salary. Traditionally the limits of the law-based normative competence of the social partners have been assessed as rather clear up to 90's in the case-law as to the effect of a collective agreement vis-à-vis third parties or markets. E.g. manning provisions or provisions on outside labour were subject to several Labour Court judgements without any submissions of such provisions

¹⁰ Labour Court 32/73 and 47/73.

¹¹ If several plumbing companies are present at the same site, they can do it as a joint venture but even then the plumbers of different companies are to be treated as one team.

¹² A tripartite court. Case 32/73.

¹³ Judgement in case 47/73 was given by votes 8 to 1. These two judgements are also those meant by Antti Suviranta in *International Encyclopaedia for Labour Law and Industrial Relations, Finland*. Kluwer, the Hague (1997), p. 182. See, however, Suviranta's comment in footnote 27.

falling outside the normative competence of the social partners. The symbiosis meant that – according to its letter – Act on Competition restrictions was not applied to agreements or arrangements that concerned the labour markets.

Case Law on Competition Rules

13. The **paper mills** case of 1995 in the Supreme Administrative Court (SAC) then meant a clear change in emphasizing the status of competition law.¹⁴ It was the first case whereby a court has made an in depth reasoning on the borderline between competition law and collective agreements – having besides a direct impact on the national practice. Therefore, and whereas the case is referred to also by Advocate General F.G. Jacobs in the case Albany etc. – as the only one from Finland,¹⁵ it deserves a more detailed explanation.
14. The Office of Free Competition received in 1992 a request from ISS Servisystems, a multinational service conglomerate, to investigate whether the provisions and restrictions on the use of outside labour in paper mills could be deemed as restrictive practice that hinders and limits competition under the Act on Competition Restrictions. Own permanent staff had traditionally carried out cleaning work in paper mills while ISS wanted to enter that market. The national collective agreement on paper and pulp mills contained the following provisions:
 1. “Outside labour” refers to all labour not under an employment contract with the employer in question in the sector.
 2. The employer shall not employ outside labour on a continuous basis to perform normal production and maintenance jobs inside a mill.
 3. Temporary use of outside labour is possible in order to level out work peaks or in assignments that are otherwise clearly restricted in terms or quality.

¹⁴ Supreme Administrative Court, File Copy No 1586, 11.4.1995. A detailed description of the case is published in International Labour Law Reports, Kluwer, [1995] Volume 15, pp. 310-327 (rapporteur Bruun).

¹⁵ See Opinion of A.G. Jacobs in case C-67/96, paragraphs 83-84. He wrote: “83. In Finland Law 480/1992 on competition (Laki kilpailunrajoituksista) excludes by its Article 2(1) agreements concerning the labour market from its scope of application. According to the travaux préparatoires collective agreements on working conditions are therefore sheltered from the competition rules. However, it is said, competition rules are applicable to collective agreements which are not concerned with working conditions but for example with the commercial relations between the employer and his clients.” This was followed by a reference to the proposal of the State committee, quoted in paragraph 6, supra. But Advocate General continued: “84. The Supreme Administrative Court decided on the scope of that exception in a case concerning a collective agreement in the paper industry which restricted the possibility for employers to subcontract to independent service providers certain tasks (e.g. cleaning) which were traditionally fulfilled by employees. The court held that only clauses directly affecting working conditions, such as for example wages, working time, and protection against dismissal, were excluded from the scope of the prohibition of cartels. The restrictions in question were therefore not covered by the exception. Employees were sufficiently protected by a legal provision prohibiting dismissal in case of subcontracting.”

The above notwithstanding, outside labour shall not be used to fill job vacancies in mill production processes.

4. Before utilising outside labour in the cases mentioned above in point 3., the employer shall ensure that his or her own labour which would be suitable for performing such a task is not under-employed. Use of outside labour is not to result in dismissal of the mill's own labour force.
15. Further on, the agreement enumerated several maintenance, repair, wood processing and internal transport works where the use of (mainly temporary or seasonal etc.) outside labour was possible. For maintenance and repair a general exception existed if locally agreed upon. The collective agreement also required that the subcontractors comply with the collective agreement of their branch or with that covering the paper mill.
16. The Finnish Forestry **Industry Federation** stated that the collective agreement applied to some 30.000 employees in 62 mills. As a consequence of the collective agreement, also own staff delivered security and cleaning services, as well as mechanical and electrical maintenance. An exception existed, meaning a mill where various service companies were responsible for mechanical and electrical maintenance. The Federation found that the collective agreement stiffened the structures and prevented assessing cost effectiveness since no alternatives existed. The possibility to engage outside labour on the basis of a local agreement was a dead letter.
17. The **Paperworkers' Union** held that the Office had no statutory competence to deal with the case in question, at least on the issue of whether or not the provisions governing the use of outside labour fell within the right under labour law to establish regulations (normative competence of the social partners). The Union referred also to several judgements of the Labour Court whereby it had been affirmed that the provisions concerned fell under the normative competence of the social partners. The latest was given by the affirmative action raised by the Union after the decision of the Office in this case.¹⁶
18. The **Office** held that the provisions concerned were to be deemed a collective boycott imposed by entrepreneurs in their capacity as employers and directed aimed, inter alia, to cleaning and security companies, which was a prohibited restrictive practice. At least, the arrangement constituted an harmful restriction of competition that reduced or was likely to reduce efficiency in industrial life, and which prevented and hampered traders in cleaning, security and similar businesses from offering subcontractor services to companies in the paper industry. Since the collective agreement was kept as such despite of the decision of the Office, it brought the case before the **Competition Council**, the national First Instance in this kind of cases. The Council upheld the decision of the Office at the "harmful effect" insofar as the provisions concerned prevented the companies from using outside labour, and there was no reasonable justification

¹⁶ The latest judgement was 95/93, 8.10.1993.

for this. The clauses in the agreement had only a limited relevance to the protection of workers. Finally, the practice agreed upon also differed to a significant extent from collective agreements in other branches. Hence, the Council ordered that the provisions 2 and 3.2, quoted above were not to be applied. The Council granted the Union the position as a party in the case.

19. The Supreme Administrative Court upheld in its judgement ¹⁷ the essential in the decision of the Competition Council: the provisions 2 and 3.2 were deemed as harmful restrictions of competition under section 9 of the Act on Competition Restrictions and their application was prohibited. The grounds of the decision are worth a closer scrutiny since the judgement is the first one with in depth considerations on the borderline between collective agreements and competition law.
20. The judgement includes several separate issues:
 - the right of the union to appeal,
 - applicability of the Act to labour market,
 - the importance of the judgement of the Labour Court in the case,
 - “immediate” consequences on the employment relationships,
 - effect on the job security,
 - use of outside labour and transfer of undertaking,
 - direct nullity / contestable provisions.

These aspects are first described as the SAC reasoned.

21. The Office had contested the Union’s right to appeal against the decision of the Competition Council. The Supreme Administrative Court (SAC) granted this right because the matter dealt with a collective agreement whereto the union was a party.
22. As to the applicability of the ACR to agreements concerning the labour market, the SAC noted as a starting point a reference to the employer’s relations to his customers, mentioned in the legislative draft. ¹⁸ Restricting them by a collective agreement was deemed to fall under the ACR. The SAC then reasoned that the actual consequences of the provisions in the collective agreement corresponded to restrictions on customer relations.
23. The judgement of the SAC dealt with the judgement of the Labour Court whereby it was affirmed that the provisions concerned fell under the normative competence of the social partners. ¹⁹ The SAC first denoted the simultaneous applicability of the Collective Agreement Act and the ACR. It further stated the Labour Court’s position on the provisions concerned under the normative competence of the social partners. According to the SAC, this fact was, however, not enough to conclude that the provisions “in full, and with all their legal consequences, should apply to the labour market in the manner referred to in

¹⁷ See footnote 14. With a similar approach the Office required to modify provisions on outside labour in the metal industry. The case was not treated by courts.

¹⁸ Quoted in paragraph 6 above.

¹⁹ Judgement 95/93.

Section 2, paragraph 1 of the Restrictive Practices Act, and that they would consequently fall outside the scope of the Act.”

24. The SAC introduced the concept of immediate consequences for employment relationships as defining the material scope of the ACR. Wages and working hours were certainly of such a nature and fell outside the competition rules. Termination of employment relationship (job security) was to be assessed by studying what changes might occur if the provisions concerned were not to be applied. In that sense the SAC held that the provision No 4 would remain in force and expands job security compared to the level generally guaranteed by section 37 a of the Employment Contract Act. Therefore, according to the SAC, the provisions No 2 and 3.2 did not concern “labour market” as provided for by the ACR.
25. Of its own motion the SAC discussed the use of outside labour as a transfer of an undertaking and its impact on job security. It would mean in theory, as in *Christel Schmidt*,²⁰ subcontracting cleaning activities which is then assessed as a transfer of undertaking. The Court held that the provision No 4 would follow the workers to the service undertaking, protecting them from redundancy. The conclusion of the SAC was that the restrictions on outside labour did not have any immediate effect on the terms of job security in the case that subcontracting cleaning activities would be deemed as transfer of undertaking. Thus, provisions No 2 and 3.2 had no immediate effect to labour market in the sense of Article 2 ACR but the whole ACR was applicable to them.
26. The conclusion of the SAC was that the provisions concerned were deemed to have harmful effects to competition as described in section 9 of the ACR. Prior to that, the SAC dismissed the claim of the Office to apply the ACR sections on the direct nullity. Namely, the SAC held that a trade union is not an undertaking in the sense of ACR. Applying section 9 of ACR means that the provisions are not null and void but contestable and subject to the scrutiny and discretion of the competition authorities.²¹ The essential outcome²² then was that the SAC confirmed the decision of the Competition Council by which the application of the provisions 2 and 3(2) in the application directive on outside labour in paper

²⁰ C-392/92.

²¹ The essential grounds of the SAC read, as follows: “As a result of the restrictions under discussion, companies that are party to the collective agreement in the paper industry have not had an opportunity to utilize in their own industry the expertise of companies that have specialized in their own line of the service sector, an expertise that is based on the most recent developments. They have not been able to benefit from the cost savings that arise from improved technology and working methods in the sectors in which the service companies operate, since it is not rational for modern production plants to expend their resources in a similar way to develop operations. When one further notes that the collective agreement provisions in question are not in use in other countries or in other industrial sectors in Finland, they constitute an exceptionally severe restriction on business operations.”

²² A by-street was that the SAC accepted the claim of the Office to widen the prohibition to apply throughout the collective agreement that covered also several sub-branches next to paper mills, i.e. cardboard and pulp mills, groundwood mills paper and cardboard processing factories, stores, maintenance units etc.

mills was prohibited by virtue of ACR. The grounds of the Competition Council were also confirmed.

27. The SAC judgement was then followed by a new affirmative action in the Labour Court, raised by the Paper Workers' Union.²³ It sought again to get affirmed that the provisions on outside labour fell under the normative competence of the social partners and were still applicable. With votes 4 to 2 the Court held that this was longer the case, due to the decisions of the Competition Council and Supreme Administrative Court. The minority held that the national legislation had not settled the normative contradiction between ACR and Collective Agreements Act, and proposed to upkeep the earlier judgement 93/95 of the Labour Court.
28. Examining the same provisions followed the judgement of the Labour Court by a board of arbitration, based upon the new collective agreement. The board dismissed the provisions concerned. However, the employers' association gave a unilateral recommendation that the employers refrain from contracting with outside labour. Without any formal decision the Office informed the public of such a recommendation as not being at variance with the ACR.
29. **Assessment of the SAC decision.** Both parties in the labour market regarded this conflict as important in principle. For the labour movement, the major issue was the principle that everyone in a branch belongs to the same union (Paper Workers' Union) and is affected by the same collective agreement (that for the paper mills). For the employers, what was at issue was the possibility of being able to use one's labour force in a more effective manner, of being able to lower salary costs, and of deciding independently on how one should organise the work. As to the salary costs, the dossier indicates that cleaning costs would be even 40 % lower by outside labour, the union estimates that the difference in salaries is about 20 %. The judgement doesn't really discuss this aspect.
30. Three other elements are worth specific remarks: (i) "direct effect" to employment relationships as a precondition for the antitrust immunity of provision in a collective agreement, (ii) the argumentation with the transfer of undertaking and (iii) the position of the ACR as *lex generalis* or *lex specialis*. (i) A historical analysis of the normative competence of the social partners leads to conclude that provisions on outside labour fall therein while they mean to prevent situations where redundancy of permanent own would occur. In practice the travaux préparatoires meant to leave such provisions outside the material scope of the ACR.²⁴ At least in this sense the decision of the SAC established a

²³ Judgement 40/1995, 30.6.1995.

²⁴ See paragraph 6, *supra*. See also the statement of professors Tiitinen and Bruun, pp. 10 and 12-13. Cf. the statement of Professor Kairinen who held that the provisions concerned fell under the ACR. The position of provisions on outside labour was subject to some debate in 1970's on the basis of the doctorate dissertation of Pirkko K. Koskinen. She presented arguments for and against as to their position within the normative competence of the social partners. Professor Antti Suviranta, the opponent – as the acting President without being able to take a final stock – noted in his statement that "...one may find on the other hand that the interest of the own staff to get protection against outside and perhaps unfair competition is so high that restricting the employer's contractual freedom on the way of the said

new criterion for the immunity with the “immediate (or “direct”) effect” to terms and conditions of employment. The novelty is clear in relation to Section 2 of the ACR that refers to “agreements concerning the labour market” in general terms, not qualifying them at all. “Immediate effect” leads also to an overlapping application of the ACR and Collective Agreement Act where a part of the provisions in a collective agreement could be conditionally valid but subject to an anti-trust scrutiny. Another consequence of “immediate effect” is deciding the collision of the laws in favour of the competition law.²⁵

31. (ii) Transfer of undertaking in the reasoning of the SAC is – of course – limited to the grounds and doesn’t have any *res judicata* effect. Anyway, applying the provision 4 in the collective agreement means to oblige the mill as *transferor*, to protect the *own workers* against dismissals and to complement the general job security in the law. In the reasoning of the SAC the provision was transferred to the service company and would thus oblige the service company as *transferee* and would complement the general protection of the Employment Contract Act against dismissals in connection to a transfer. In this context, it is difficult to see who would be of outside labour.²⁶
32. (iii) The outcome has been described also as proving the ACR as *lex specialis* while the legislative draft and events in the Parliament seem to show that the law was meant to be *lex generalis*. Anyway, the argument is not the strongest one because also the Collective Agreements Act can be seen – depending on the view point – as *lex generalis*.²⁷ The SAC held that the ACR applies to any economic activity.
33. On the ministry level the SAC decision was received neutrally.²⁸ At the Office level it clearly generated a stronger approach *vis-à-vis* collective agreements as e.g. the TV-company case shows (see paragraph 35). One consequence was to amend the wording Section 9 of ACR.²⁹ The change was in fact a semantic one in the context relevant now but in that connection it was said in the grounds of the governmental bill³⁰ that the purpose was not to change the existing line in the application practice. The paper mills case was not mentioned. Anyway, it was clearly covered by this statement and, hence, shows the ultimate material

[interprofessional] agreement [on outside labour] may belong to the terms and conditions of the own staff.” See also Jorma Saloheimo, *Kilpailunrajoituslain soveltaminen työmarkkinoilla*, (“Application of Act on Competition Restrictions in the Labour Market”), *Defensor Legis* 1995, pp. 602-615, *passim*.

²⁵ Saloheimo, p. 614. He notes how this meant redefining the scope of the ACR and asks where does it come from.

²⁶ Saloheimo, p. 610. He finds that the SAC decision on the material scope of the immunity is heavily bound to this – to his mind wrong – interpretation of the restriction of dismissal.

²⁷ Saloheimo p. 614. Antti Suviranta, the former chief justice of the Labour Court and the SAC, has referred to the fact that the Competition Law has been enacted more recently than the Collective Agreements Act and the Employee Participation Act. Referring to the SAC decision he has noted that even the provisions such a those subject to the Labour Court judgements 32/73 and 47/73 (see paragraph , *supra*) might be invalidated by the ACR.

Op.cit. p. 182.

²⁸ See e.g. Inga Pöntynen, *Defensor Legis* 1/97, p. 94-95.

²⁹ Law 303/98.

³⁰ Bill 243/97.

contents of the national law. At the same time, the legislator did not define what is the relationship between Collective Agreements Act and Restrictive Practices Act. The former was not amended but the Act of 1946 is in force. Anyway, the legislator gave the Office and the Competition Council the right to prohibit the application of such provisions in collective agreements that do not directly constitute or modify the terms of the employment relationship. One may accordingly conclude that the normative competence of the social partners has been reduced accordingly, or at least put under competition scrutiny to that extent. The developments reflect of the reasoning mentioned by the decision of the Competition Council in the paper mills case: “With the changes in the legislation the attitudes towards restrictive practices have become essentially stricter. This causes the need to reconsider even such arrangements that earlier have not been touched by the competition authorities.”

34. If one considers the paper mills case in the light of the Opinion of Advocate General in the case Albany etc.,³¹ only one conclusion is possible. The short description in the Opinion in fact shows how the SAC decision deviates from the letter of the ACR in establishing the concept of “direct effect” to terms and conditions of employment. However, the Opinion does not explain in full the evolutionary nature of the SAC decision and the consequent de facto redefinition of the normative competence of the social partners.

35. At the MTV-Company’s collective agreement the deletion of a provision³² on outside labour was noted in a decision of the Office, with the following culminating grounds:

“A trader has to have the right to decide by himself whether his works are carried out by his own manpower or by subcontractors. This right cannot be restricted by a collective agreement.”³³

Following to the deletion the Office held that the matter didn’t warrant further measures from its part and closed the file. One crucial ground for the Office was the agreement’s specific provision on job security when works were given to outside traders who used their own personnel. It declared that this was not an acceptable reason for redundancy if the works concerned were of stable own

³¹ See footnote 15, supra.

³² The provision read as follows: “Works in the MTV are preferably on the responsibility of the own personnel. External manpower can be used mainly on the occasions where the use of permanent staff is not possible due to the quantity or high intensiveness of the work, or if the programme target foresees special knowledge or equipment.”

³³ Decision 23.11.1995, Dno 614/61/94. The Paper Mills case was largely referred to in this case. In the MTV case the grounds of the Office (preceding the culminating conclusion above) also explained ratio legis, as follows: (referring to the travaux préparatoires of the law) “...it cannot be seen as appropriate that the society should wait for a real reduction of effectiveness before its reacts to a restriction of competition. The reduction of effectiveness means longstanding developments of the production and marketing processes, and from the competition policy point of view it is not right to let the damage be realized before its reasons can be attacked, if it is with sufficient likelihood foreseeable that the arrangement leads to reducing effectiveness in the economy.” The conclusion of the Office was that the provision quoted in the previous footnote reduced effectiveness and also hampered trading possibilities of outside traders. Therefore, it was to be prohibited.

production or of new production suitable for the permanent staff. That provision was deemed as not falling under competition law but as improving job security vis-à-vis the general Labour Contract Act that includes the compulsory and inter-professional rules on redundancy.

36. A specific case is on the employees' **group life-assurance pool**.³⁴ It is based upon a few identical inter-professional collective agreements that are then inserted into practically each sector- or profession-wise collective agreement in the private industries and business sectors. The system was created 1976.³⁵ It functions so that employer's contributions are collected as a percentage of the contribution for the law-based compulsory accident insurance. This guarantees a priori a rather outstanding coverage. The life-insurance benefits depend only on the age and family circumstances but set aside e.g. the sector and gender. In practice it means that an ordinary wage earner family has a basic life-assurance coverage that favours families with children and sectors with higher mortality. The scheme thus includes a solidarity aspect. Anyway, the basic prohibition of restrictions in section 6 of the Act on Competition Restrictions was deemed by the Competition Council to apply³⁶ to the pool that covers in practice every insurance company in the country and is open to any other from the EEA-area. Hence, the Competition Council held that the arrangement included prohibited price cooperation in fixing the running costs by the pool and market sharing between the insurance companies. Following to the Council decision the internal rules of the pool were amended accordingly and fixing the running costs now belongs to every pool member. Still, an overall exemption from the ACR was granted for the pool for ten years because the scheme is a part of the complementary social security and because of its obvious advantageousness. In practice, no separate insurance company or even some of them together could offer the coverage and the overall cost effectiveness guaranteed by the pool. The latter aspect is in the interests of the employers who finally finance the scheme. The pool itself in 1993 raised the case when it asked for an exemption by the Office. Following to the entry into force of the European Economic Area (EEA) Agreement in 1994 the pool asked for an exemption also by the EEA Surveillance Agency. After Finland's entry into EC the European Commission took it over. When writing this, the case is still pending there.

37. Technical building equipment.³⁷ The nation-wide collective agreement concerning installation works in the building equipment sector (covering mainly electrical, water, heating and air conditioning installations) provides the organised employers with the possibility to deviate in electrical installations from the detailed price setting in remuneration of piece work. It meant in

³⁴ Competition Council, decision 8.3.1996, No 27. The pool had submitted that the pool agreement in fact concerned the labour market and that it would therefore not be subject to ACR.

³⁵ In fact, it replaced a corresponding leisure time insurance-scheme that was applicable since late 60's.

³⁶ The Council referred to the decision of the SAC in the paper mills case. Thus, the Council found that the provisions in the collective agreement establishing the group life-insurance scheme did not amount to affect directly the terms and conditions of employment.

³⁷ Competition Office, decision 40/61/98, 17.2.1998

practice the possibility to apply a simplified system without lowering the overall level of remuneration. A rival employers' federation complained by virtue of competition rules that the arrangement discriminated the employers not members in the organisation concluding the collective agreement since they had no right to apply the simplified system. The Office held that the question fell entirely outside competition rules as it dealt with remuneration.

38. The immunity of collective agreements vis-à-vis collective agreements is subject to a test in one case pending in the Supreme Court, namely Estonia Shipping Company Ltd (later on "ESCO") v. Finnish Seamen's Union ("FSU") and Transport Workers' Union (Finland) ("TWU").³⁸ Two cargo ships of ESCO, a company own 70 % by foreign capital but flying the Estonian flag, were in line traffic in the triangle Estonia-Finland-Denmark (main traffic between Finland and Denmark), with Estonian staff on board – with Estonian wages that are one third or just one fifth of the level of the Finnish collective agreement. The FSU union declared a boycott in order to conclude a separate collective agreement for the staff on board with a wage level nearing the Finnish agreement. As a ground it referred to serious distortion of competition inside EC that had to be prevented. The Estonian staff concerned didn't demand anything. The TWU decided to support the action of the FSU, which meant that the ships couldn't any longer unload or load on Finnish ports. The Danish organisations joined the boycott. The result was that the ships were transferred to other lines.
39. ESCO sued the Finnish unions in Finland and sought as an interim measure a prohibition of the boycott by the District Court of Helsinki. ESCO claimed also a conditional fine of appr. EUR 300.000. It invoked also the competition rules enshrined in the association agreement between Estonia and EC.³⁹ In general terms, they repeat the rules of the EC Treaty. The district court held that the invoked competition rules didn't apply because it was not established that the purpose of the boycott was to touch the freedom of trade or to deliberately damage ESCO economically. The court further dismissed the whole suit by reasoning mainly based on the one hand upon the summary procedure at interim measures and upon the fundamental-type nature of the right to boycott. The Court of Appeal confirmed the outcome – with its main grounds -. The Supreme Court has granted ESCO the permit to appeal.

Personal Scope of the Immunity

40. The letter of the ACR exempts from competition rules the "agreements or arrangements which concern the labour market". Thus, no distinction has been made between different types of agreements. The scope for enterprise/works council agreements is in Employee Participation Act of 1978 in fact wider than in Collective Agreements Act but the binding effect is the same. The former act denotes e.g. outside labour as one example of items possible to consultation and agreement. In other words, also agreements on the traditional business competence of the employer are legally valid within that law. In the MTV-case

³⁸ See footnote 3, supra.

³⁹ OJL 068, 09/03/1998 pp. 3 – 198, amended by 298D0724(01) (OJ L 208 24.07.98 p.53) and by 299A0203(01) (OJ L 029 03.02.99 p.11), implemented by 299D0609(01) (OJ L 144 09.06.99 p.16). http://europa.eu.int/eur-lex/en/lif/dat/1999/en_299D0609_01.html

(see paragraph 35 above) the agreement concerned was a company level collective agreement but neither that aspect nor the possible effect of the Employee Participation Act was reflected by the Office decision. On the other hand, in the hospital case (see paragraph 5 above) the Office especially referred to the fact that the company itself had concluded the restrictive agreement subject to scrutiny.

Basic Status of Organisations

41. The ACR doesn't mention the social partners. Anyway, in the SAC decision the Court held that the nullity rules did not apply because the workers' union did not fall under the concepts of undertaking or association of undertakings. The discretionary competition rules apply also to collective agreements operating by the notion of 'harmful effect' to economy. If the organisations act outside the framework of collective bargaining, they can be regarded as falling under competition rules. However, this is not the case at normal direct service by the trade union to the members (e.g. legal assistance by lawyers in-house, reduced prices negotiated by the organisation).

Procedure

42. The social partners have no special procedural status. Hence, the Office hears them and they have locus standi in the Competition Council when their agreements are subject to competition scrutiny or judgement. This was especially confirmed in the SAC case. The distinction between automatically null and contestable provisions is relevant because the employees' organisations do not fall under competition rules.⁴⁰ A provision can be de facto prohibited if the Office requires to amend the agreement which then happens,⁴¹ by an administrative Office decision or by the Courts (Competition Council and Supreme Administrative Court). No specific rules exist on the burden of proof in the ACR or in the administrative laws defining the status of the Office and Competition Council. The basic rule is that the authorities have to take care of safeguarding the interests of any party involved. Since collective agreements are under discretionary competition scrutiny (instead of direct nullity) it seems reasonable to conclude that in practice the Office has to prove that something is at variance with the ACR.

Extension

43. The Finnish erga omnes extension of collective agreements is based directly upon the criteria established by the Employment Contract Act. The problems in that structure are not especially linked to competition rules. As the **building equipment** case (see paragraph 37 supra) shows, an employer organisation representing the employers bound only by the extension claimed that certain provisions on pay de facto favouring the organised employers (bound directly in

⁴⁰ Affirmed by the SAC in the paper mills case.

⁴¹ See the TV-Channel case (paragraph 35 above)

that position) were at variance with competition rules. The Office held that they affect directly the working conditions as discussed in the SAC decision and dismissed the complaint.

Questions Based on EC Law

44. (Question 8a) The letter of the national competition law doesn't mention EC law. The travaux préparatoires of 90's do refer to it both in general terms⁴² and at separate issues but there is no specific reference to collective agreements.
45. (Question 8b) The SAC decision and the subsequent amendment of ACR show that the national immunity is somewhat narrower than "employment and working conditions" used in paragraph 60 of Albany. The national additional precondition for the immunity is the 'direct effect' to employment and working conditions. On the other hand, the national law includes the rank of contestable agreements and arrangements (with 'harmful effect' to economy) in addition to the absolute nullity. In that sense it seems clear that – in theory – the national law would be less stringent than EC law that operates only with the absolute nullity and exemptions. (i) The national competition law doesn't define its relation to EC law. The Office obviously holds that nationally more stringent rules are possible while the EC competition law is seen only as a minimum standard. (ii) The question with less national immunity for collective agreements than that granted in Albany has no answer for the moment being. The situation is open.
46. (Question 8c) A debate in newspapers has taken place with divided opinions on the effect of Albany on the national level. Public authorities are still preparing their positions. See also the Estonia Shipping case (paragraph 39 above) where the argumentation with the opinion of AG F.G. Jacobs is relied.

Summary

1. Defining the relationship between competition law and collective agreements. Law – without direct constitutional implications defines the impact of competition law on collective labour law.
2. National practice. The most relevant national practice is mainly based upon 'harmful effect' to economy. Manning provisions (outside labour) are the most important subject matter dealt with. One case based upon a cartel exists (on the employees' group life-insurance scheme).
3. Material scope of the immunity. The national definition of the normative competence of social partners corresponds to "conditions of work and employment" (Albany, paragraph 59). In 80's a separate provision on canteen keeping at a building site clearly fell outside that concept. "Social policy objectives" and the "measures to improve conditions of work and employment"

⁴² Governmental bill 162/91, pp. 3, 7 and 12.

do not seem to have any specific impact in this connection. A ‘traditional’ interpretation was for decades that all genuine agreements and arrangements dealing with the labour market would be exempted from competition rules. This can be backed up also by the travaux préparatoires of the ACR. Essential is the redefinition of the relationship between competition law and collective agreements, made by the SAC in the paper mills case of 1995 and followed by the corresponding repositioning of the Labour Court. The interpretation line of the SAC was then adopted also by the legislator (in the governmental bill) in 1998 when amending Section 9 ACR. However, Section 2(1) ACR and the Collective Agreements Act (CAA) (let alone the Employee Participation Act) have not been amended and tension between ACR and CAA seems to prevail. Anyway, the outcome is that a provision in a collective agreement falls under the Act on Competition Restrictions if it doesn’t have a ‘direct effect’ to employment and working conditions and if it has an ‘harmful effect’ to the efficiency of the economy. This is based upon discretion of the competition authorities and courts instead of direct nullity.

4. Personal scope of immunity. Works council agreements have a wider scope than collective agreements under Collective Agreements Act. They could have a wider immunity on that basis. Practice hardly exists in that sense.
5. Basic status of organisations. The national law applies to social partners but the employees’ organisations are not deemed as undertakings in the sense of the competition law. It follows that collective agreements do not fall under the clauses based upon direct nullity but under clauses operating in administrative discretion. For that purpose the social partners’ organisations are subject to the competition scrutiny.
6. Procedure. The social partners have the standard judicial protection inherent in cases subject to discretion of competition authorities. The distinction between automatically void and contestable provisions is thus relevant. The nullity can be established by the Office or the courts (Competition Council and Supreme Administrative Court). If the Office wants to set a fine, it has to bring the matter to the Competition Council that decides it. The burden of proof lies de facto on the party that maintains that an agreement is at variance with the ACR.
7. Extension. The extension procedure doesn’t create especial problems. One case exists where a rival employer organisation challenged the wage provisions in a collective agreement rendered erga omnes by invoking the competition law. As it dealt with wages, the Office dismissed the submission. The organisation didn’t appeal.
8. EC law / national law. (Question 8a) The travaux préparatoires of the national law indicate that the EC law has been generally taken into account by the national law.
9. National law in relation to Albany. (Question 8b) The national case law and administrative competition practice grant collective agreements a narrower immunity than that in Albany. On the other hand, the national law doesn’t operate with direct nullity (ex tunc) at the provisions of a collective agreement

but with discretion of the authorities. As in Albany, the pool of insurance companies running employees' group life-insurance scheme has been deemed as a cartel but exempted by social reasons and because of its efficiency.

10. EC competition law sets only a minimum standard in cases where 'trade effect' exists (i). Whether EC anti-trust immunity for collective agreements pre-empts a national law with less immunity depends on all aspects of the EC and national law. While writing this the answer to (ii) remains thus open. I refer to the EC law report.
11. Debate on Albany. (Question 8c) Exchange of differing opinions has taken place mainly in newspapers.

The French Report/COLCOM Project

Questionnaire 8th December 1999

1). Defining the relationship between competition law and collective agreements.

Under French law, no statutory legislation regulates the relationship between competition law and collective agreements. According to the French Constitution, any person may defend his rights and interests through unions activities and join the trade union he wants. Furthermore, the Constitution establishes the right for any worker to participate, through his representatives, to the collective determination of his working conditions. These provisions provide with no doubt a constitutional anchorage for collective bargaining in the French legal system. On the contrary, the Constitution does not contain any reference to competition. Competition rules have been settled in an act of the 1st of October 1986¹ that does not deal with the situation of collective agreements. Therefore, the solution to this problem has to be found in the doctrine or the case law. Unfortunately, due to the lack of any decisive jurisprudence on the matter, there is still in France a great uncertainty over the complex debate of the link between collective agreements and competition rules.

It is widely admitted amongst French authors that collective agreements do not constitute cartels². As a consequence, collective agreements should not fall under the scope of Article 7 of the 1986 Act, which prohibits “cartels, agreements, express or tacit concerted practices or coalition”. Furthermore, trade unions are not considered as undertakings mainly because they do not pursue any economic objectives. According to the doctrine, the social aims of trade unions provide legitimate grounds for excluding the application of competition rules to collective agreements. Nevertheless, unlike Article 81 of the Treaty (former Article 85), Article 7 of the 1986 French regulation does not use the concept undertaking. This could imply that the French regulation has a broader scope than the European.

The opinion of the doctrine, which clearly exempts collective agreements from the scope of competition rules, had been significantly challenged firstly by a decision of the Competition Authority³ and, secondly,

¹ Official Journal, 09/12/1986.

² Lyon-Caen A., Droit social et droit de la concurrence – Observations sur une rencontre, in *Les orientations sociales du droit contemporain – Ecrits en l’honneur du Pr Jean Savatier*, Dalloz, 1992, p.331. Edelman B., *A bas le droit du travail, vive la concurrence !*, D., 1992, Chronique I, p.1.

³ Decision of the 26th of June 1990, *Syndicats d’artistes-interprètes*, Rec. Lamy, n.400, note M.-A. Rotschild-Souriac.

on an appeal of this decision, by the judgement given by the Court of Appeal of Paris on the 6th of march 1991⁴. The position adopted by the Competition Authority and the Court of Appeal in the “Syndicat des artistes-interprètes” case was strongly criticised amongst the French doctrine⁵ and interpreted as the harbinger of the infiltration of Labour law by competition rules⁶. The facts rather complexes regarded the television and radio sector and can be summarised as follows: due to the refusal of some trade associations of producers and TV channels to pay a complementary bonus in order to compensate for the repeats, artistes and performers decided to launch a strike and, at the same time, concluded a separate agreement with other TV channels. In this separate agreement attached to the collective agreement, the TV channels accepted, while the strike was going on, to refuse any co-production with those who did not allocate the complementary remuneration. Even if the agreement was lapsed by the subsequent acceptance of this complementary remuneration by all TV channels, the ones who had before refused, along with non-signatory producers, considered that competition rules had been breached and, therefore, brought an action before the Competition Authority. In its decision of the 26th of June 1990, the Competition Authority firstly did not decline jurisdiction and accepted to examine the validity of a collective agreement with regard to competition rules. This decision contradicted the traditional view that collective agreements are not only of a contractual but also of a legislative nature. Although in a much more cautious approach, the Court of Appeal of Paris upheld the decision of the Competition Authority. The Court did not assess the validity of the collective agreement but only of the separate agreement, which is interpreted as an unlawful cartel.

Until recently, the “Syndicat des artistes-interprètes” case could be interpreted as the leading case under French law on the issue of the relationships between trade unions activities and competition law. So was the opinion of the Advocate General Jacobs in its conclusion on the Albany case. However, in a more recent decision, the Court of Appeal of Paris⁷ takes a rather different view than in the “Syndicat des artistes-interprètes” case and adopts a solution much more in line with the opinion of the legal doctrine. Even though the case does not deal with collective agreements, it clarifies the situation of trade unions with respect to competition law. The case was related to the print industry and regarded different types of collective actions taken by a co-ordination of various trade unions called "Comité intersyndical du livre parisien" against a newspaper publisher and a printing house. French printing houses are divided into two categories : "the "Imprimeries de presse" which print daily newspapers and the "Imprimeries de laur" dealing with magazines and specialised daily newspapers. For the first category of printing houses, the "Comité intersyndical du livre parisien" has a monopoly for the placement of workers. This monopoly does not exist for the "Imprimeries de laur" which are covered by a specific collective

⁴ Contrats, concurrence, consommation, 1991, n.108, note L.Vogel.

⁵ Edelman B., A bas le droit du travail, vive la concurrence !, D., 1992, Chronique I, p.1; Vogel L., Définition et preuve de l'entente en droit français de la concurrence, JCP, eds Ent., 1991,n°48, p.491.

⁶ Lyon-Caen G., L'infiltration du droit du travail par le droit de la concurrence, D.O., 1992, p.313.

⁷ Cour d'Appel of Paris, 29/02/2000, unpublished.

agreement. In 1992, a newspaper publisher decides to stop the printing of his newspapers in an "imprimerie de presse" and move to an "imprimerie de laeur". The "Comité intersyndical du livre parisien" reacts by organising different types of actions against the newspapers publisher and the printing house. Occupation of the workplace, pressures over the publisher and neutralisation of the rotary presses in the printing houses ("imprimerie de laeur") chosen by the publisher were amongst the actions carried out by this co-ordination of trade unions. These conducts, which were not related to any industrial action within the printing house, were aimed at deterring the publisher from editing some newspapers in this printing house.

Even though there was a clear restriction to competition, the problem was to decide whether competition rules applied to trade unions as such. Two legal arguments were raised before the Competition authority: firstly, the newspaper publisher claimed that the monopoly of placement created an abuse of dominant position and, secondly, that the actions carried out against the publisher and the printing house constituted an unlawful concerted practice. Concerning the monopoly for placement of workers in the printing house, the Competition Authority considers that no abuse of dominant position exists since the "Comité intersyndical du livre parisien" is not an undertaking. The free of charge character of the activity of placement excludes the "Comité intersyndical du livre parisien" from the scope of Article 8 of the 1986 which refers expressly to undertakings. On the contrary, the Competition Authority found that since the Article 7 of the 1986 Act does not mention the term "undertaking", trade unions should fall under its scope and, therefore, that the actions carried out by the organisation of trade unions constituted unlawful concerted actions⁸. The decisive ground upon which the Competition Authority bases its judgement is that Article 8 of the 1986 Act expressly refers to undertakings whereas Article 7 does not. The different solutions given by the Competition Authority rested essentially upon the wording of each article. It followed that Article 7 had a wider scope than Article 8 and covers not only undertakings. On an appeal to the Competitive Authority's decision, the Court of Appeal of Paris had to decide whether this interpretation was right. The Court of Appeal reversed the decision and considers that even if Article 7 does not refer to undertaking, it requires that one of the parties to the cartel carries out economic activity. In this case, the Court held that the sporadic actions carried out by the "Comité intersyndical du livre parisien" could not confer to this body the status of economic actor. This new case is obviously of a great importance in order to decide whether collective agreements fall under competition law. Indeed, the same reasoning is applicable whatever the basis of the restrictive practice is. It might be a collective agreement or a collective action. Both are immune from the scope of Article 7 of the 1986 Act as long as trade unions are not considered as economic actors.

2). National practice.

⁸ Decision 99-D41, 22/06/1999, Comité intersyndical du livre parisien.

In the “Syndicat des artistes-interprètes” case, the Court held that the clause of the agreement infringed the legislation on cartels. Notwithstanding, if collective agreements would fall under the 1986 regulation, any breach of this regulation whatever the criterion (cartel, abuse of dominant position) is unlawful. In any case, in order to apply such criteria, the Court has to admit that trade unions are acting as undertakings. Even though there is neither statutory rule nor decisive case from the supreme court of the judicial order (i.e. the *Cour de cassation*), this is not so far the case under French law and the recent decision of the Court of Appeal of Paris confirms this state of law.

3). Material scope of the immunity.

The very peculiar facts that gave rise to the “Syndicat des artistes-interprètes” case made difficult to draw any conclusion and to identify any decisive criterion for the assessment the validity of collective agreements. Indeed, only the separate agreement had been scrutinised by the Court, leaving aside the collective agreement. Moreover, this separate agreement was meant precisely to exclude some producers in order to put some pressure on them to accept the claims of the artists. The specificity of the sector and the characteristics of the agreement under scrutiny prevented from making any generalisation. Therefore, it seemed very hazardous, as Advocate General Jacobs did in the Albany case, to conclude from the “Syndicat des artistes-interprètes” case that collective agreements fall under French Law within the scope of competition rules. In an attempt to reconcile this case with the view of the doctrine, an author had put forward the substantive criterion as the only one that could draw the line between lawful and unlawful clauses of a collective agreement with respect to competition rules⁹. Collective agreements would be unlawful insofar that they contain clauses that do not form part of the purposes of collective bargaining. From this point of view, the material scope of the immunity is limited to traditional issues dealt with collective bargaining (such as remuneration, working conditions, social benefits).

Art L.131-1 of the French Labour Code confirms this point of view. It restricts the scope of collective agreements to working and employment conditions on the one hand, and to social guarantees of the workers on the other. The first aspect relates mostly to Labour Law while the second regards social security aspects of the employment relationship. Working conditions refers to all provisions related to remuneration, working time, holidays, health and safety. Employment conditions relate to matters such as training, access to social services, transport, mobility and non-competition clause. All these issues constitute the core areas of collective bargaining that is not subject to competition rules. For French courts, working conditions and

⁹ Vogel L., Définition et preuve de l’entente en droit français de la concurrence, préc., p.493.

employment have a very broad meaning and cover any matter that is directly or indirectly linked to the job.

Since 1971, social partners are entitled to conclude agreements related to social guarantees of workers. On this legal basis, collective bargaining can deal with all matters related to complementary social security and may, in particular, create or designate a specific body to run the fund. With respect to complementary social security, the competition authority ruled that the designation of a unique body to administrate the fund was not contrary to competition rules¹⁰. The Cour De Cassation later confirmed this solution . The Court held that in designating a single administrator for the fund, the collective agreement infringed competition rules¹¹. Since 1994, Art. L.912-12 of the Social Security Code admits this designation. Nevertheless, in this respect, the French legal situation is subject to EU law.

4). Personal scope of immunity.

As far as the immunity of collective agreements from competition rules is concerned, there is no difference between agreements concluded at sectoral or company level. Enterprise agreements are also immune from competition rules as long as they do not go beyond their traditional matters. In this respect, sectoral and company agreements have the same potential material scope.

Basic status of organisations.

Under French law, until the “Syndicat des artistes-interprètes” case, competition law had never been applied to trade unions. On the contrary, in various occasions, the Competition authority had banned distortions of competition by agreements between organisations of employers¹². These cases mainly regard agreements or decisions of professional organisations that have a restrictive effect on competition. These decisions might cause some confusion mainly it could give the impression that different bodies (trade unions and trade associations) having the same legal status (“Syndicat”) are treated differently with respect to competition rules. Indeed, this disparity of treatment contradicts the idea explaining the immunity of collective agreements by the non-commercial activity of trade unions.

¹⁰ Avis n°92-A-01, Syndicat français des assureurs conseils, Bulletin Officiel de la Concurrence, de la Consommation et de la Répression des Fraudes, 21/03/1992, p.113.

¹¹ Leonnet J., Protection sociale et concurrence – A propos de l’arrêt Bayer France c./IRPVRP, Droit social, 1994, p.600.

¹² Conseil de la Concurrence, 3^e rapport (1989), p.28. Cour d’Appel Paris, 03/05/1990, BOCCRF 1990, p.195.

According to the French doctrine, the non-commercial activity of trade unions explains their immunity from competition rules. This is the position recently adopted by the Court of Appeal of Paris in the "Comité intersyndical du livre parisien". In fact, commercial activities are forbidden to all "syndicats", either of employees or employers. Under Art.L.411-1 of the labour code, the legal purposes of the "syndicats" must be restricted to the "study and the defense of rights and material and moral interests of their members". While trade unions and employer organisations fall under the same legal status defined by art. L.411-1 of the Labour Code, their regime with respect to competition rules might appear completely different. However this disparity of treatment only reflects the fact that courts are much more reluctant to admit for trade unions than for trade associations a status of economic actors that would have as a consequence the application of competition law. But for both type of organisation, the status of economic actor on the market is the decisive criteria of application of competition rules.

In conclusion, coherence might be existing between the "Comité intersyndical du livre parisien" and the "Syndicat des artistes-interprètes". One could argue that both cases exclude trade unions from the scope of competition law insofar that they do not exceed their traditional activity. In the "Comité intersyndical du livre parisien" case, the Court implies that a trade union could fall under the scope of competition rules for all its activities that have an economic character. Similarly, the "Syndicat des artistes-interprètes" case may be interpreted as admitting such exclusion for collective agreements for all matters traditionally related to collective bargaining. Therefore, in each case, the decisive factor is to determine whether the trade union acts as an economic actor or not. However, it remains to be seen in which situations a trade union could become an economic actor and fall as a consequence under the scope of competition law. The recent case concerning the "Comité intersyndical du livre parisien" shows how reluctant are the courts to admit that a trade union operates as an economic actor. Nevertheless, the reasoning followed by the Court of Appeal in this case inclines to think that competition rules could be applied to a trade union for any systematic intervention of an economic character on a market. But if a trade union does so, then it goes out from its statutory missions. Therefore, in carrying out such economic activities, trade unions would lose their immunity coming from their status and lead to the application of competition rules.

Procedure.

The social partners do not have any role in the anti-trust scrutiny. If a complaint were lodged before the Competition Council against a collective agreement social partners would be asked to present their position as any other party or defendant. The distinction between automatically void and contestable provisions is not relevant due to the absence of any legal basis for the assessment of collective agreements with respect to competition law. In the case of an action against a collective agreement, the burden of proof

belongs to the plaintiff who would have to prove that the collective agreement or some clauses lie outside the scope of collective bargaining.

Extension.

The very usual procedure of extending collective agreements does not create specific problems in relation to competition rules. On the contrary, it reinforces the immunity of collective agreements with respect to competition rules. Indeed, the extension of a collective agreement increases its regulatory dimension with respect to its contractual one. It stresses the regulatory anchorage of collective agreements that are not only contract between free individuals but cover persons and companies who were not part of the agreement. Here, the interest of the all sector or, more generally, the community of workers, takes precedence over the freedom of contract of each worker, each company or each trade union.

Furthermore, the extension procedure requires an administrative scrutiny of the agreement and, in particular, its conformity to statutory and regulatory acts. As a consequence, in extending a collective agreement, the government endorses its content. The Competition Authority considered in a 1992 recommendation that firstly the extension of a collective agreement was a legal procedure that could not be challenged under competition rules and, secondly, it produces equal competition amongst companies within the sector and increases social and economic progress¹³.

8 a) Is the national competition law, in relation to collective agreements, ipso jure, in light of travaux préparatoires or by case law, anchored in EC law?

French law is definitely anchored in EC Law concerning collective agreements related to complementary social security. The French jurisprudence, more in line with the Poucet and Pistre case¹⁴ than with the Coreva case¹⁵, appeared more reluctant than the Court of Justice in relation with the application of competition rules to collective agreements that designate a single body to deal with a complementary

¹³ Avis n°92-A-01, Syndicat français des assureurs conseils, Bulletin Officiel de la Concurrence, de la Consommation et de la Répression des Fraudes, 21/03/1992, p.115.

¹⁴ Case C-159/91 and C-160/91 Poucet and Pistre [1993], ECR, I, p.637.

¹⁵ Case C-244/94 Fédération française des sociétés d'assurances [1995], ECR, I, p.4013.

pension fund¹⁶. In any case, French courts will have to comply with the solution of the Court of justice.

- 8 b) Are there indications that the national immunity from competition law for collective agreements is narrower/broader than that affirmed in Albany? Assess the legal consequences if national competition law would be more stringent than EC-law in attacking “anti-competitive” practices, and this more stringent national competition law would affect collective agreements? I.e.**
- i. does EC competition law pre-empt national law, or only set a minimum standard?**
 - ii. does EC anti-trust immunity for collective agreements pre-empt national law which provides less (or more?) immunity?**

Despite the uncertainties raised by the "Syndicat des artistes-interprètes" case and partially removed by the recent "Comité intersyndical du livre" case, the scope under French law of the exclusion of collective agreements from competition rules appears at least equal to the one established in the Albany Case. Firstly, the immunity of trade unions provides a different conception of the relationships between collective agreements and competition rules. Secondly, the provisions of art.L.131-1 of the Labour Code and even the approach taken in the "Syndicat des artistes-interprètes" give room for an immunity of collective agreements except from the clauses that are outside the scope of collective bargaining. These solution follow the one found in Albany whereby the immunity of collective agreements depends on their "nature and their object". Here, one difference may exist between the solution of the Court of Justice and of the French system. Whereas the French solution looks at the

¹⁶ Cass.crim. 17/03/1992, Tramier, Revue de jurisprudence sociale, 11/1992, n°1287; Com., 06/04/1993, Droit social, 1993, p.494. See, Laigre P., L'intrusion du droit de la concurrence dans le champ de la protection sociale, Droit social, 1996, p.82; Serizay B., Droit du travail et protection sociale complémentaire, Droit social, 1998, p.1023; Leonnet J., Protection sociale et concurrence – A propos de l'arrêt Bayer France c./IRPVRP, Droit social, 1994, p.600.

conformity of the collective agreement with the scope of collective bargaining, the Court of Justice takes as a criterion, the objective of European social policy. That could lead to some discrepancies between the national and European solution provided that it is admitted under French Law that collective agreements do fall under the scope of competition rules which is far from granted.

8 c) How is Albany described in the national debate? Are there already reactions of authorities, social partners, legal doctrine etc?

So far, the only significant reaction comes from Mr. Prétot who published a comment of the Albany case in *Droit social* (pp.106-110). This very brief article does not address the general problem of the relations between competition rules and collective bargaining. Even if he welcomes the solution given to the problem, no comparison is made with the national situation and no analyze is given of the impact of the case on French law. Mr. Prétot's article focuses more on the social security aspect of the case. In particular, he intends to show the lack of coherence of the Court of Justice with respect of complementary social security seen as "legal impressionism". Without given his point of view on the issue, he criticizes the decision delivered by the Court, based according to him only on "political dissertations" and "statements of principles".

Thomas Blanke

Colcom Project: The relationship between collective labour law agreements and competition rules under the German law

1. Defining the relationship between competition law and collective agreements. Is the impact of competition law on collective labour law defined by legislation, case law and/or in administrative procedure, or by legal doctrine? Does constitutional law have any impact in this field?

1.1. The impact of competition law on collective labour law in Germany is not defined by legislation itself. Firstly one has to remember that the German Constitution (Grundgesetz, German Basic Law, 'GG') protect as a human right the right to form and join coalitions, to bargain collectively and to conclude collective agreements which are legally binding (Art. 9 Abs.3 GG), whereas the freedom of competition is not mentioned at constitutional level.

1.2. The mainstream in legal doctrine and case law deny therefore, that the freedom of competition is a fundamental right with constitutional rank or a constitutionally recognised basic institution of the society and its economic order. It is a standing argument in the jurisdiction of the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG)¹ that the German Basic Law don't foresee a specific economic order and that there is no constitutional guarantee of capitalism and market society.

1.3. Only a minor position in legal doctrine² and case law³ recognises the freedom of competition as a right deriving as a so called institutional "annex-guarantee" from the personnel freedom and the recognition of individual property and the implicit guarantee of a free market sphere in Art. 2, 12 and 14 of the German Basic Law.

1.4. More specific the German *Federal Law against Restraints of Competition* (Gesetz gegen Wettbewerbsbeschränkungen, 'GWB') excludes certain fields of the economy and agreements from its material scope of application (§§ 98ff. GWB). However this law does not provide an explicit exemption for the labour market or collective agreements. But the historical legislator mentioned in the official considerations ('travaux préparatoires') for the *Law against Restraints of Competition*, that "agreements concerning the conclusion and the content of labour contracts"⁴ fell outside the competition rules. The reason therefore is that private autonomy in the field of labour market exists only via collective bargaining and collective agreements and not individually.⁵ The exemption is the consequence of the constitutional prescription in Art. 9 Abs.3 GG.⁶

¹ BVerfG v. 20.7.1954, E 4, 7ff., 17; BVerfG v. 1.3.1979, E 50, 290ff., 369.

² For example Immenga/Mestmäcker, GWB, 1981, § 1, Rn.336ff.; Immenga, Grenzen des kartellrechtlichen Ausnahmebereichs Arbeitsmarkt, 1989; Wiedermann, Unternehmensautonomie und Tarifvertrag, RdA 1986, 231ff.; .

³ Kammergericht Berlin, Urteil v. 27.6.1989, WuW 1989, 347.

⁴ Official considerations zum GWB, BT-Drs.2/1158, S.30.

⁵ BVerfGE 81, 242, 254f.; BVerfG v. 27.1.1998, E 97, 169, 176f.; ständige Rspr.; aus der Literatur vgl. Rütters, WuW 1980, 392ff.; Säcker, ZHR 137 (1974), 455, 463ff.; Fleischer, WuW 1996, 472ff., 485.

⁶ Löwisch, Münchener Handbuch zum Arbeitsrecht, Bd.3, 1993, § 240 Rn.5; Säcker, ZHR 137 (1974), 455, 463ff.; Richardi, Kollektivgewalt und Individualwille bei der Gestaltung des

1.5. Therefore is still clear that the rules of this law are directed only against limitations of the free movement of goods and commercial services. § 1 GWB (German *Federal Law against Restraints of Competition*) provide, that "*agreements between competing undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition shall be prohibited*". Services of dependent workers are not considered as *commercial* services in the sense of § 1 GWB.⁷ In consequence the mainstream in the German legal doctrine held before the Bosman decision of the ECJ⁸ that even regulations of working conditions stated only between employers were sheltered from the application of the competition rules. It is clear also, that the employees and trade unions are not "*competing undertakings*" nor "*associations of undertakings*" in the sense of the competition law (§ 1 GWB) and those collective agreements therefore are not covered by the rules of this law. That means in general immunity of collective agreements from the rules of competition law. This opinion is predominantly shared also by case law and legal doctrine. But almost in legal doctrine there are still remaining relevant differences in how far this immunity reaches.

2. National practice. If there is national practice, which criteria of competition law (such as abuse of dominant or monopoly position or prohibition of cartels) are used in assessing the validity of collective agreements, and which subject matters of collective agreements are dealt with (e.g. manning provisions, pension or other agreement-based funds, status as worker in relation to entrepreneurship)?

2.0. Preliminary remark: The survey presented by Advocate General Jacobs in the joined cases Albany, Breentjens und Bocken⁹ drew a distorted picture of the German legal situation in this field. Although the positions referred to in this survey are mainly correct in detail it leads to a false description in giving the Federal Labour Court, the Federal Cartel Office and the Higher Regional Court, Berlin (Kammergericht) the same legal relevance. Firstly, one has to consider that the undisputedly dominant position in defining what is the given legal situation in Germany belongs to the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) and to the Federal Labour Court (Bundesarbeitsgericht, BAG). Secondly, the legal opinion of the Federal Cartel Office is due to its administrative function of less importance because it is only a official statement in a litigation procedure. It underlies a jurisdictional control. In the first case mentioned by Advocate General Jacobs (paragraph 92) the opinion of the Federal Cartel Office, expressed in a letter addressed on the employers confederation,¹⁰ did explicitly not concern

Arbeitsverhältnisses, 1968, S.179ff.; Däubler, Das Grundrecht auf Mitbestimmung und seine Realisierung durch tarifvertragliche Begründung von Beteiligungsrechten, 1973, S. 310ff.

⁷ Fleischer, WuW 1996, 472ff., 484 mit zahlr. Hinweisen.

⁸ EuGH Urteil v. 15.12.1995 – C-415/93, Slg. I-4921.

⁹ Gemeinsame Schlussanträge v. 28.1.1999 in den Rechtssachen *Albany, Breentjens und Bocken*, RS C 67/96, C 115-117/97 und C 219/97, VI A - Comparative overview.

¹⁰ Letter from 31.1.1961 - Z 2 - 121 100 - 465/60 -, partly published in: WuW/E BKartA 1961, 339f.

a collective agreement rather than an agreement only between undertakings. In the second case (paragraphs 93 and 94, opening hours in retailing) the opinion of the Office¹¹ was not shared by the courts involved in that case but expressly refused. Both courts, the Regional Court (Landgericht Berlin)¹² and the Higher Regional Court (Kammergericht Berlin)¹³ belong to the civil - and not to the labour - court's system. The Regional Court came to the result, that there is no legal competence of the civil courts for a legal control of collective agreements under the criteria of § 1 GWB (Act against Restraints of Competition). Following that position the jurisdiction about the legality of collective agreements lies by the labour courts and the relevant criteria are given in § 1 Abs.1 TVG (Tarifvertragsgesetz, Law on Collective Agreements) which define the core subjects of collective agreements. On appeal by the retail company the Higher Regional Court stated in conformity with the opinion of the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) and of the Federal Labour Court (Bundesarbeitsgericht, BAG), that in so far as the collective agreement concerns regulations of working, employment and economic conditions in the sense of Art. 9 Abs.3 GG and § 1 Abs.1 TVG the regulating autonomy of the social partners is not restricted - nor by law nor by judicial control. The opinion of the Civil Courts is therefore only insofar relevant for the analysis of the relationship between competition law and collective agreements as they don't claim on competence for the proof of the legality of collective agreements as far as they act in their constitutionally guaranteed legal framework.

2.1. The relationship between collective labour law and collective agreements in the German national practice is the following: At first we have to consider that there is some national practice dealing with the relationship between competition law and collective agreements. The courts and the Federal Cartel Office (Bundeskartellamt) have on several - but in confrontation with other legal problems not very often - occasions had to consider this problem. Therefore we have some highly important decisions from the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) and from the Federal Labour Court (Bundesarbeitsgericht, BAG) in this field.

2.2. All of the relevant court decisions came to the result, that in the concrete cases at stake there was no restriction of the right on collective agreement via competition law.

2.3. The *main criteria* in the decisions of the *Federal Labour Court*¹⁴ regarding the relationship between collective agreements and competition law are the following: *Firstly* it is said, that the trade unions and the coalitions in general are fulfilling highly important and constitutionally (in Art. 9 Abs.3 GG) guaranteed public social functions by concluding collective agreements. The labour market needs special regulations in view of its social

¹¹ V. 3. 4. 1989 - P - 178/88 -, summery in WuW 1989, 563ff.

¹² LG Berlin, Urteil v. 4.4. 1989, WuW 11/1989 LG/AG 643ff.

¹³ KG Berlin, Urteil v. 21.2.1990, WuW/E OLG 1990, 5431ff.

¹⁴ BAG, Urteil v. 27.6.1989, E 62, 171ff.; BAG, Urteil v. 28.3.1990, AP Nr.25 zu § 5 TVG; BAG, Urteil v. 10.11.1993, AP Nr. 169 zu § 1 TVG Tarifverträge: Bau.

function. *Secondly* it stated, that the mere fact that these agreements influence market conditions do not justify doubts in respect of the legality of these agreements. Namely are not given the preconditions of the *Federal Law against Restraints of Competition*: Nor the trade unions nor the workers could be classified as undertakings for the purpose of this law, since they were not acting on the markets for goods or commercial services. Thus, collective agreements were not agreements between undertakings, even if they may have some influence in restricting the competition between companies. Furthermore the parties of collective agreements would not pursue a common interest in the sense of this law by concluding a collective agreement, since trade unions and undertakings are not acting as competitors on the relevant markets.

2.4. The result of the argumentation of the Federal Labour Court is the following: Collective agreements are generally not covered by the principles and the rules of the national and the EC competition law. The prohibition of cartels would apply only in the case of abusive collusion by employers and trade unions that intentionally used the framework of collective agreements to cover an anticompetitive cartel on the markets for goods and commercial services.

2.5. The relevant judicial problem in the decisions of the Federal Constitutional Court¹⁵ was the question, whether or not the administrative act to give collective agreements an *erga-omnes effect* (Allgemeinverbindlicherklärung) is an unlawful violation of the principles of competition law.

2.6. In the German legal doctrine it is seen as problem of denying the right of the individual subject *not to join* a trade union or an employers association and *not to take part* on their activities. In legal terms it's called the "*negative freedom of coalition*" (negative Koalitionsfreiheit). One can say that this individual, negative right functions within the system of legal thinking in Germany as a placeholder for the personnel freedom and the freedom of competition in the area protected by the human right to form and join coalitions which include the rights to bargain collectively, to take collective action by the trade union and which forms by that a whole legal system of collective agreements. The Federal Constitutional Court stated, that the erga-omnes effect did not violate this "*negative freedom of coalition*".

2.7. Surely, the Federal Constitutional Court admitted that from this administrative procedure to extend the validity of collective agreements to those workers and employers who are not members of the associations as partners of the agreements would derive some pressure to request membership in the coalitions. The reason therefore is, that only in that way they can influence the outcome of collective bargaining. But in the meaning of the Federal Constitutional Court this pressure is not strong enough to be considered as unlawful.

¹⁵ BVerfGE 20, 312, 321f.; BVerfG v. 24.5.1977, E 44, 322; BVerfG v. 15.7.1980, E 55, 7, 22.

2.8. This follows on the one hand from the above-mentioned constitutional guarantee of the bargaining activities of the social partners, which have the right and “the public obligation to regulate autonomous and within their own responsibility the working and economic conditions”¹⁶ (Art. 9 Abs.3 GG). And on the other hand it flows from the fact that the extension of collective agreements on outsiders of the coalitions could only be made under cooperation of the state authorities.

2.9. The main subject matters of collective agreements between the management and labour who raised in the German legal debate the question whether they are sheltered from the prohibition of cartels were in the last 20 years the following:

- a) Decisions giving erga-omnes effect on agreement-based pension funds in the print¹⁷ and construction¹⁸ sector of industry.
- b) Agreements in the construction sector of industry making compulsory the wage level at working place even for posted workers.¹⁹
- c) Agreements affecting shop opening and generally trading hours in the sector of wholesale distribution through direct or indirect regulation of working time schedules.²⁰

2.10. In the earlier debate other subject matters were for example:²¹

- a) Collective agreements regulating security-problems at the workplace by forbidding dangerous materials.
- b) Agreements to protect workers against dismissals in case of rationalization measures caused by specific tools or machines.
- c) Agreements regulating specific kinds of product-quality.
- d) Agreements making compulsory to engage a certain percentage of the workforce in the status of apprentices.

3) Material scope of the immunity. What could be regarded as the national interpretation of „conditions of work and employment“ (Albany, paragraph 59)? Does it correspond to the national definition of the normative competence of the social partners, normally done in law or by practice? Are there practical examples of terms and conditions in agreements that might fall outside the category of ‘conditions of work and employment’? What is the possible meaning of „social policy objectives“ and the „measures to improve conditions of work and employment“ in this context?

3.1. The correspondent German terms for the ECJ’s “conditions of work and employment” in par. 59 of the Albany-Case are “conditions of work and economy”. Art. 9 Abs.3 German Basic Law protects as a fundamental right

¹⁶ BVerfGE 55, 7, 22.

¹⁷ BAG, Urteil v. 28.3.1990, AP Nr.25 zu § 5 TVG.

¹⁸ BVerfG v.15.7.1980, E 55, 7ff.

¹⁹ BAG v. 10.11.1993, AP Nr. 169 zu § 1 TVG Tarifverträge: Bau.

²⁰ LG Berlin, Urteil v. 4.4. 1989, WuW 11/1989 LG/AG 643ff.; KG Berlin, Urteil v. 21.2.1990, WuW/E OLG 1990, 5431ff.; BAG, Urteil v. 27.6.1989, E 62, 171ff.

²¹ Vgl. Schmidt-Eriksen, AuR 1991, 137ff.

the primacy of the social partners in regulating the sphere of “conditions of work and economy” (Arbeits- und Wirtschaftsbedingungen).

3.2. The meaning of “conditions of work and economy” is at least as wide as “conditions of work and employment”. Even if it is not very clear how far reaching the denotation “conditions of economy” as a matter of collective agreements should be interpreted,²² it is clear that the German term of “conditions of work” include also the whole spectrum of “conditions of work and employment”. The German Law on Collective Agreements (Tarifvertragsgesetz, ‘TVG’) describes for example as a matter of collective agreements also the regulation of codetermination rights of the works councils. This could be seen as a result of their competence to regulate also “Conditions of economy”.

3.3. There are in Germany *no practical examples* of terms and conditions in agreements falling outside the category of ‘conditions of work and employment’. In the legal debate and in some few decisions of minor level courts one can find the argument that in the above (question 2, Par. 2.9 and 2.10) mentioned matters of collective agreements affects in a serious way the markets for goods and commercial services so that they were not a priori excluded from the scope of application of the German cartel law. Following this opinion it depends on the *balancing of the interests involved* in the concrete agreement under scrutiny which rules has to prevail.²³ The main position in case law and legal doctrine instead contradicts with the consideration that this would lead towards a constitutionally forbidden judicial control of the content of collective agreements.²⁴ Collective agreements are seen in Germany as having via collective bargaining and the right to take collective action a internal guarantee of being just and fair.

3.4. The possible meaning of „social policy objectives“ and the „measures to improve conditions of work and employment“ in this context is as wide as the competence of the social partners to regulate “conditions of work and economy” (Art.9 Abs.3 GG) reaches.

4. Personal scope of immunity. Does the possible exemption of collective agreements from competition rules cover also other agreements than sectoral ones (e.g. enterprise/works council agreements if affecting the status of workers as consumers, or interprofessional agreements)? If so, how exactly?

4.1. This is a very interesting question, but as far as I can see we have no discussion on that in Germany. Collective agreements between trade unions and employers (or employer associations) exist in Germany at sectoral level

²² Vgl.Löwisch in: Münchener Handbuch zum Arbeitsrecht, Bd.3, 1993, § 240 Rn.6; Kittner in: AK-GG, Bd.1, 1989, Art. 9 Abs.3, Rn.30ff.

²³ Vgl. Kulka, RdA 1988, 336ff., 343 mit zahlr. Nachweisen; Salje, ZfA 1991, 653ff., 667 Fn.62; this is also the opinion of the German Federal Cartel Office v. 3. 4. 1989, summary in WuW 1989, 563ff, given in the proceedings before the LG Berlin mentioned by Avocate General Jacobs in para 83 (see above Fn.12) but rejected also from the LG Berlin as in second instance from the KG Berlin.

²⁴ Vgl.Löwisch in: Münchener Handbuch zum Arbeitsrecht, Bd.3, 1993, § 240 Rn.15; para. 83 (see above Fn.AG v. 27.6.1989, AP nr. 113 zu Art. 9 GG Arbeitskampf unter II 4.

and at company level. Both are excluded from the application of the German *Federal Law against Restraints of Competition*. Even if collective agreements between employers and *works councils* in Germany are not included in the guarantee of the human right granted in Art. 9 Abs.3 GG rather than only by the legislation one has to argue that they are not covered by competition rules.

4.2. There should be valid the same limits as for collective agreements concluded by trade unions.

5. Basic status of organisations. Does the national law on competition (legislation/case law / administrative procedure) apply to the social partners as organisations? If so, how exactly?

5.1. The German *Federal Law against Restraints of Competition* does not apply to the trade unions because they are not regarded as undertakings or associations of undertakings in the sense of the competition rules.

5.2. The law applies to the employers as far as they act as participants in market competition. But not insofar as they are playing the role of social partners.

6. Procedure. Are the social partners involved in the anti-trust scrutiny? If so, how exactly? Is the distinction between automatically void and contestable provisions relevant? How is the nullity of a provision established? Who has the burden of proof in showing that collective agreements violate national competition law?

6.1. The social partners as such are not officially involved in the anti-trust scrutiny under German law. The social partners have no special procedural status. But they have - as any other person - the right to indict presumptive violations of the *Federal Law against Restraints of Competition* by indicating the agreements to the Federal Cartel Office (Bundeskartellamt). They must be heard by the Office when their agreements are subject under scrutiny or judgement and have locus standi in that procedure.

6.2. The distinction between automatically void and contestable provisions is not especially relevant for the here-interesting problem of the validity of collective agreements in view of competition law.²⁵ The *Federal Law against Restraints of Competition* do not prescribe the nullity of agreements falling under the prohibition of cartels stated in par.1 of the *Act against Restraints of Competition*. The reason therefore is that those agreements can in principle be legalised under the procedures and conditions in §§ 2 ff. *Act against Restraints of Competition*.

²⁵ Löwisch in: Münchener Handbuch zum Arbeitsrecht, Bd.3, 1993, § 240 Rn.10.

6.3. The nullity of a provision is established via declaration of the Federal Cartel Office. This declaration is an administrative act which lies under judicial control of the German civil courts. There exist many highly specific rules on the burden of proof in the different facts and procedures of the *Act against Restraints of Competition* but not in regard to eventually violating the competition rules by collective agreements. The basic rule is that the authorities have to prove unlawful acts and agreements. The burden of proof obliges therefore the Federal Cartel Office.

7. Extension. Does the extension (the erga omnes effect) of collective agreements create specific problems in relation to competition rules?

7.1. It creates the above-mentioned (question 2, par. 2.5 - 2.8) constitutional problems in relation to the fundamental right of coalition and the competition rules.

8. The EC case law necessitates some further questions to be answered also by the national COLCOM reports.

8. a) Is the national competition law, in relation to collective agreements, ipso jure, in light of travaux préparatoires or by case law, anchored in EC law?

8.a.1. The relation between German competition law and collective agreements is seen as to be anchored in EC law by case law.

8.a.2. But there are no special considerations regarding the competition law in respect to other fields of law. As far as the EC law does not infringe obviously the fundamental rights granted by the German Basic Law the EC law has in general a primacy on national law.

8 b) Are there indications that the national immunity from competition law of collective agreements is narrower/broader than that affirmed in Albany? Assess the legal consequences if national competition law would be more stringent than EC-law in attacking „anti-competitive“ practices, and this more stringent national competition law would affect collective agreements?

I.e.

i. does EC competition law pre-empt national law, or only set a minimum standard?

ii. does EC anti-trust immunity for collective agreements pre-empt national law which provides less (or more?) immunity?

8.b.1. There are – however weak - indications that the national immunity from competition law of collective agreements is broader than that affirmed in Albany (see above question 1, par.1. 2; question 2, par.2.3 and 2.4; question 3, par.3.2).

8.b.2. EC anti-trust immunity for collective agreements do not pre-empt German national law which provides more immunity.

8 c) How is Albany described in the national debate? Are there already reactions of authorities, social partners, legal doctrine etc?

8.c.1. Until now there are only few reactions on the Albany case in the German debate. There is one published commentary to the Court's decision written by me²⁶ and one from Klaus Lörcher²⁷ (see in the annex). Both give mainly approval to the Court's decision.

²⁶ Blanke, Anm. zu EuGH, Urteil v. 21.9.1999 - Rs. C-67/96 - AuR 2000, 26ff., 28ff..

²⁷ This short commentary v. 8.11.1999 is not yet published.

COLCOM PROJECT: the Italian Report

Bruno Veneziani - Gabriella Leone

Introduction

1.- In the Italian Constitutional Charter there is no explicit reference to freedom of competition. There is, though, a norm which guarantees freedom of 'private economic initiative' which, according to the same article, shall not, however, be developed so as to conflict with the good of society or in a manner detrimental to safety, liberty or human dignity. The law – continues the same article – prescribes appropriate plans and controls in order that public and private enterprise may be directed and co-ordinated towards social ends (art. 41).

On the other hand, art. 39 of the Italian Constitution¹ refers to a collective agreement as an agreement that has erga omnes effect. This norm is considered to be programmatic and hence not directly enforceable: in the absence of any statute law regulating collective agreements, the latter are thus acts under private law which are only binding on the parties stipulating such agreements. In any case, there is no explicit relationship in the Italian Constitution between the two norms. Both freedom of trade union organisation (i.e. the freedom to be or not to be a union member, to cease being part of a trade union, or to act in the name of a union) as well as the freedom and right to strike are referred to in different articles of the Constitution; they are also rights that cannot be limited by statute law.

¹ Art. 39 states that *The organisation of trade unions shall be unrestricted. No obligation shall be imposed upon trade unions other than that of registration at a local or central office in accordance with the provisions of the law. It shall be a condition of registration that the rules of a union provide for a democratic internal structure. Registered trade unions shall have legal personality. They shall have power each being represented in proportion to its membership to conclude collective employment agreements with binding force on all persons belonging to the categories to which the agreement relates.*

Defining the relationship between competition law and collective agreements.

2.- The Italian law protecting competition (no. 287 of 10 October 1990) does not contain any explicit provision about the possible relations of this law with collective bargaining.

However, in a similar way to what has happened at the Community level, the absence of an explicit law does not exclude a priori that collective agreements may be evaluated in the light of the law in question, since art. 2 of the above law forbids restrictive agreements in the field of competition, including agreements and/or practices agreed upon by undertakings. It is therefore a question of verifying whether the collective agreements stipulated by the trade union organisations representing the workers and those representing the employers – or by the trade unions and an employer – may be considered as agreements, and thus whether the organisations themselves can be considered as enterprises in accordance with the Italian law on competition. As regards the former aspect, it should be pointed out that the concept of an “understanding” as defined by case law and by the Italian Competition Authority may refer to any type of behaviour which aims to alter the freedom of competition, irrespective of the means used or of the choice of form². This could therefore cover any type of understanding deriving from a wide range of manifestations of will by the parties.

Clearly, then, collective agreements could also theoretically be considered as “agreements” in the sense described above, since they are in any case agreements stipulated by two parties. It is also clear that, in actual fact, it all hinges on whether the social parties may be defined in terms of an “enterprise”. But we shall return to this issue later by examining the requisites that have been laid down.

Material scope of immunity

3.- In Italy there is no law defining the duties, enforceability rules and parties in relation to collective bargaining, hence any definition used in this field is based either on case law or legal theory. The only exception to this statement is to be

² TAR Lazio sez. I 2.11.1993, *FI*, 1994, III, 150; AG 8.06.1994 (*Assicurazioni rischi di massa*).

found in law no. 741 of 14 July 1959 which, in art. 1, delegated to the government the task of emanating legislative decrees guaranteeing 'minimum economic and normative treatment' to all those belonging to the same branch of work. This objective was achieved by taking into consideration the content of the collective agreements in the wording of the decrees.

On the basis of this provision – but above all on the basis of the case law of the Constitutional Court arising out of the legislative decrees passed by the government – it is customary to refer to the traditional function of a collective agreement as the so-called normative function³, i.e. one which contains all the clauses relating to minimum economic and normative treatment to be included in individual contracts of employment which are either ongoing or to be stipulated.

- 4.- A careful analysis of the content of collective agreements, however, shows that such agreements may contain other clauses that do not automatically come within the normative function, but within what we might call an obligatory function. In fact, these clauses set up relationships of a compulsory nature that bind not just the parties stipulating the individual contract of employment but those stipulating the collective agreement itself or their smaller territorial branches

Legal theorists have also added clauses that do not come within the two functions outlined above and which must therefore be defined differently. Among these – and here we may refer to the Albany case itself – we find the so-called institutional clauses which set up particular bodies or institutions, such as pension funds, which arise out of the will of the collective bargaining parties and which must carry out specific tasks.

Lastly, in order to complete our analysis of the functional transformation of the collective agreement, we should remember that, since the 1970s, the collective agreement – especially at plant level – has lost its exclusively distributive and acquisitive nature. Seen from this perspective, i.e. in terms of the restructuring of undertakings in crisis and thus in terms of the promotion of employment, the

³ C. Cost. 9.06.1965, n.43, *GC*, 1965, III, 153; C. Cost. 27.12.1965, n. 100, *FI*, 1966, I, 164; C. Cost. 10.02.1969, n. 12, *GI*, 1969, I, 577; C. Cost. 9.07.1970, n. 127, *GI*, 1970,

collective agreement has assumed a so-called procedural function: in other words, the employer's power to manage the crisis of the undertaking is channeled through a specific procedure.

- 5.- On the basis of what we have said so far, it is clear that one must be particularly careful about analyzing the expression "conditions of work and employment" contained in the Albany case. In fact, it can be understood from the case itself that the "work conditions" are those regulating the exchange between work and remuneration according to the contract of individual employment (point 63). In other words, they seem to coincide with the so-called normative clauses of collective agreements, i.e. with those containing minimum economic and normative treatment.

We therefore need to clarify the expression "employment conditions" which would seem to coincide with the Community's idea concerning social policy to which the procedural clauses refer. Seen from this perspective, we may include not only those 'management clauses' whose aim, all things considered, is that of maintaining employment levels, but also all those provisions – usually contained in interconfederal agreements – aimed at promoting employment itself.

Some doubts may arise, therefore, as regards institutional clauses that, as we have seen, have a completely different objective. In fact, it might be thought that the clause setting up a body (such as a pension fund) does not come within the ECJ's definition of a collective agreement that may be exempted from the norms on competition. Nevertheless, there would appear to be no need to resort to some other definition for these clauses with respect to those used up to now (the social parties are not enterprises). But above all we cannot rule out the presence of a normative effect in the sense that, while the parties to the contract of individual employment are not its ultimate recipients, they produce rules that affect employment relationships more or less directly (e. g. social security benefits provided by certain bodies or of the contributive relationship that may be set up with them).

I, 1745; C. Cost. 17.02.1971, n. 18, *FI*, 1971, I, 804; C. Cost. 29.03.1972, n. 59, *GI*, 1972, I, 1137.

Personal scope of immunity

6.- As has already been mentioned briefly, law no. 287 of 1990 contains no reference to the social parties who are therefore not expressly taken into consideration by the legislation on competition.

Nevertheless, the concept of an “enterprise” according to Italian antitrust law is a much wider concept which includes any person or body undertaking an activity of an economic nature capable of reducing, even potentially, the degree of competition, as long as the goods or services produced are offered on the market. By applying to this definition the considerations arising from case law and legal theory over the concept of an entrepreneur as laid down in the civil code (art. 2082⁴), we might conclude that, as regards legislation on competition, we can speak of an “enterprise” when the activity carried out is aimed at producing wealth, which may mean not only the pursuance of profit but also simply when outgoing costs are equal to income.

7.- If we analyze the decisions of the Competition Authority we can see that it considers enterprises also as including category-based associations if, and insofar as, the associate members carry out entrepreneurial activities⁵.

In this regard, however, it should be pointed out that the Authority’s decisions refer to Trade Associations, i.e. to associations that are concerned only with commercial relations, and not to Employers’ Associations, which, on the contrary, are concerned with collective bargaining. If, therefore, these doubts exist as regards employers’ associations – in the sense that they are set up for purposes of collective bargaining – there is all the more reason for such doubts existing in relation to trade unions.

As we have said, the collective bargaining system in Italy is not regulated by legislation, but only by a recent three-way agreement of 23 July 1993, which also the government signed. This, moreover, may be considered as a political agreement and an indication that national agreements may contain issues and

⁴ Art. 2082 of the civil code (*Enterpriser*) states that *An entrepreneur is a person who engages professionally in an economic activity organised for the purpose of production or exchange of property or services.*

⁵ AG 26.08.1991 (*Assirevi*); AG 2.07.1993 (*Ania*); AG 9.03.1994 (*Latte Associazione esercenti*).

clauses that the parties are completely free to choose, the only restriction being that plant-level agreements cannot deal with issues that are similar to or the same as the economic ones belonging to national agreements. As regards the issues to be dealt with, this is the only difference with reference to the various bargaining levels.

Basic status of organisations

8.- Trade union organisations are considered as "not recognized associations" in accordance with art. 36 of the civil code⁶ and therefore the pursuance of an economic activity is not considered as one of their main activities. In other words, legal theory admits that trade union organisations may also carry out some form of economic activity as a subsidiary activity (such as setting up and managing a publishing house), and in this limited sense it considers them as enterprises in accordance with art. 2082 of the civil code, but it does not allow that the protection of workers' interests may be in any way evaluated in economic terms, precisely because such protection is carried out for purposes of solidarity.

It therefore follows that the social parties cannot be considered as "enterprises" in terms of the national legislation on competition.

Procedure

9.- The social parties are in no way involved in antitrust control, either in terms of a possible restriction over their bargaining activities in accordance with the law on competition, or in terms of some relationship with the Competition

⁶ Art. 36 of the civil code (*Organisation and management of non-recognized associations*) states that *The internal organisation and management of associations which are not recognized as legal persons are regulated by agreements among the members. Such associations can be parties in judicial proceedings, being represented by those upon whom the presidency or management is conferred under such agreements.*

Art. 37 of the civil code (*Common assets*) states that *Contributions of members and property acquired with these contributions constitute the common assets of the association. As long as the association lasts, individual members cannot request partition of the common assets nor claim share in case of withdrawal.*

Art. 38 of the civil code (*Obligations*) states that *Third persons can enforce their rights against the common assets of the association for obligations undertaken by the person representing it. Persons who have acted in the name and for the account of the association are also personally liable in solido for such obligations.*

Authority which has been set up to deal with the administrative side of competition law.

10.- Under the Italian legal system, any form of legal bargaining, which therefore includes agreements, may be rendered invalid through voiding or voidability.

The former is based on the need to protect the general interests of the legal system: a contract declared void thus has no effect either on the parties directly concerned or on third parties. Voidability, on the other hand, derives from norms protecting a particular interest of one of the parties who therefore has the power to choose whether or not to terminate bargaining: in fact, where a judgement for voidability in due time is not initiated, the terms of an agreement must be respected.

Following EC competition law, law no. 287/90 considers any forbidden agreement as radically null and void (art. 2 para. 3), and entrusts the courts (the Court of Appeal that is competent for a given area) with exclusive competence in deciding on the actions for ascertaining voidness and compensation for damages (art. 33, para. 2).

11.- It should be pointed out straight away that the civil court judge is absolutely independent with respect to the rulings of the Competition Authority. The Court of Appeal is therefore not influenced by the latter's decisions and may even decide not to apply an authorization granted by the Authority in order to legitimize agreements that would otherwise be null and void.

The burden of proof in a judgement lies with the party that denounces the voidness of an agreement and therefore on the firm's competitors, or else on its suppliers or users or final consumers. Should the legislation on competition be applied also to collective agreements, the burden of proof – by analogy – would lie with those organisations of workers and/or of employers that did not sign the agreement that is claimed to be void, and probably also with individual employers and/or workers belonging to such organisations.

Extension

12.- As has already been said, a collective agreement in Italy is an act of private autonomy which – since art. 39, para. 2 and ff., of the Constitution is not

applied – binds, from a strictly legal viewpoint, only those employers and workers belonging to the organisation that stipulated the agreement. It therefore has no erga omnes effect, and at the present moment there is no connection with the legislation on competition which, as we have seen, makes no explicit reference to collective bargaining.

8a question.

13.- The close connection between Italian legislation and EU legislation on competition clearly emerges in articles 1-4 of law 287/90 which obliges us to interpret the norms contained in Title I of the law itself – and therefore the norms relating to agreements, the abuse of a dominant position and concentrations – on the basis of the “principles” of the EU’s legal system. Legal theory in particular has clarified that such “principles” include not only the norms of the Treaty or other similar forms of regulation, but also, and above all, the orientations of the Court of Justice and of the Commission on the subject.

Moreover, this declaration of principle corresponds exactly with the way in which it has been applied by the Competition Authority, which has based its rulings on the solutions provided at EU level when dealing with problems arising from the real world. In particular, as regards the issue that concerns us here, this process of ‘substantial transposition’ has been carried out in relation to the concept of the enterprise, the definition of dominant position and the concrete evaluation of the behaviour of enterprises in a dominant position. The explanation for such an explicit choice on the part of the legislator is evidently to be found in the desire to create a “grounding in case law” which was non-existent at the time law 287/90 came into being, and to ensure that the decisions taken at a national level substantially coincided with those taken at a Community level

8b question.

14.- In the Italian legislation on competition, there is no provision that allows us to arrive at a similar or different solution from the one offered by the Court of Justice in the Albany case, neither has Italian case law provided solutions or definitions similar or different from those proposed by the Court itself.

As regards the relations between EU legislation and national legislation, law 287/90 explicitly reserves a merely residual scope of application for the latter with respect to the former. The scope is in fact limited only to cases of agreements or of abuses of a dominant position or of concentrations that do not come within the scope of the ECSC Treaty or the EU Treaty or other binding Community norms (art. 1, para. 1). The choice here is clearly different from that of the Court of Justice which, on the contrary, has affirmed that EU law overrules national laws, and thus anti-competitive practices that affect trade between Member States and which may also have an effect within single States are also subject to the application of national legislation and to the jurisdiction of the individual countries concerned.

In order to make the primacy of EU law effective, law 287/90 actually refers to procedural coordination between the national Competition Authority and the EU Commission on the basis of which:

- a) if the Authority deems that a particular case does not come within the scope of law 287/90, it informs the Commission by providing the information that it possesses (art. 1, para. 2);
- b) if, on the other hand, an EU procedure has already been started on the same case in question, the Authority must suspend its inquiry except for those aspects that are of exclusively national relevance (art. 1, para. 3).

8c question.

15.- The Albany case raises a few questions that require further consideration. On the one hand, it poses the problem of the delicate relationship between Community rules on competition (art. 81 of the Treaty) and trade union activities. On the other hand, and more specifically, it takes up a consolidated orientation in the case law of the Court of Justice concerning the relationships between the Community's rules on competition and its institutions for social protection.

As regards the former point, while, as we have seen, national legislation would not seem to allow at present for a national solution to the problems raised by the Albany case, as far as the latter point is concerned, it has aroused the curiosity of legal theorists for two distinct reasons.

In fact, on the one hand, as part of the current debate on the reform of the Welfare State and on the role to be played by supplementary forms of welfare, the Albany case provides the occasion for analyzing in greater depth the role of pension funds within the national pensions scheme and, above all, the possibility of their being considered as enterprises and, as such, as coming under the laws on competition. In this regard, however, it should be pointed out that in Italy adhering to a pensions fund is a voluntary act, thus the obligation of contribution for employers only arises if workers have decided to adhere.

On the other hand, the case brings to our attention the question already raised in the report that the Competition Authority itself had made on 4 February 1999 as regards INAIL (The National Institute for Insurance Against Industrial Accidents). In fact, in Italy this form of compulsory insurance is currently run as a legal monopoly by the above-mentioned body owned by the State. But according to the Authority, since insurance is an activity of an economic nature, it could – indeed, should – be entrusted to the market and thus be run also by private firms, since it does not possess those characteristics identified by the case law of the Court of Justice as justifying the existence of a legal monopoly. In other words only a social function is performed on the basis of solidarity principle, i.e. without a close relationship between contributions and benefits. Moreover, this issue was recently examined by the Constitutional Court to see whether there were the necessary requisites for a referendum abrogating the law that allows for such a monopoly: but the Court declared the requisites to be inadmissible, so the law will remain unchanged for the time being.

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THE RELATIONSHIP BETWEEN COMPETITION LAW AND

COLLECTIVE LABOUR LAW

Colcom Project

THE CASE OF THE NETHERLANDS

definitive text

28.3.2000

by Mr. E. Franssen
Prof. dr. A.T.J.M. Jacobs

Introduction

Until very recently Dutch law used to deal with competition law and collective labour law as two completely separated matters. Therefore the relationship between competition law and collective labour law was only rarely mentioned in the legal doctrine on Dutch competition law as well as on Dutch labour law.¹ It was taken for granted that collective labour law was not subject to any scrutiny from the aspects of competition law.

This self-evidence has disappeared in recent years. Since a few years certain connections between both areas have been established. First of all this was done by the legislator when the new Competition Act was enacted in 1997. Secondly the relationship between both areas was raised in cases pending before Dutch courts, which have all been referred to the Court of Justice of the EC. And it is quite probably that the relationship between these two legal areas will attract more attention in the near future.

In this report well we will explore the relationship between competition law and labour law following the questionnaire of the COLCOM-project.

1. Is the impact of competition law on collective labour law defined by legislation, case law and/or administrative procedure, or by legal doctrine. Does constitutional law have any impact in this field?

2. If there is national practice, which criteria of competition law (such as abuse of dominant or monopoly position or prohibition of cartels) are used in assessing the validity of collective agreements, and which subject matters of collective agreements are dealt with (e.g. manning provisions, pension or other agreement-based funds, status as worker in relation to entrepreneurship).

3. What could be regarded as the national interpretation of "conditions of work and employment" (Albany, paragraph 59)? Does it correspond to the national definition of the normative competence of the social partners, normally done in law or by practice. Are there practical examples of terms and conditions that might fall outside the category of 'conditions of employment'? What is the possible meaning of "social policy objectives" and the "measures to improve conditions of work and employment" in this context?

7. Does the extension (the erga omnes effect) of collective agreements create specific problems in relation to competition rules?

8a. Is the national competition law, in relation to collective agreements, ipso jure, in lights of travaux préparatoires or by case law, anchored in EC law?

A) Collective Labour Law

In The Netherlands three Acts of Parliament regulate the process of collective bargaining

- the Collective Agreements Act of 1927;
- the Act on the Binding and Non-Binding Declaration of Collective Agreements of 1937, hereafter called Extension Act;
- the Wages Act of 1970.

The last-mentioned Act does not have any relationship with competition law.

1. The Act on collective agreements 1927

The first act is important for our subject as it provides the legal definition of the collective agreement.

Article 1 of the Dutch Act on Collective Agreements states that

a collective agreement is an agreement concluded between one or more employers or one or more incorporated associations of employers on the one hand and one or more incorporated organisations of employees on the other hand, the main or exclusive object of which is to regulate conditions of employment which must be taken into consideration in individual contracts of employment.

In legal doctrine traditionally a broad interpretation has been given on the term 'conditions of work'. According to many authors this even includes agreements with regard to industrial investments, the structure of the enterprise, the price of the production, the establishment of funds.

In practice, the limits of the subjects to be dealt with in collective agreements are being determined by the possibility for a negotiating party to impose its will on the other. In fact in 98% of the clauses, collective agreements tend to limit themselves to working conditions, labour relations, additional social security, employment policies and vocational training.

The first time the definition of the subject matter of collective agreements came to court was on a case in which the agreement was only about two subjects, which do not belong to the core of conditions of work. This question arose in 1987. A collective agreement in the pipefitter-branch only regulated the establishment of a vocational training fund and described detailed rules on that fund. On the basis of these rules, employers were obliged to pay 0,6% of the yearly earnings to the fund. The Supreme Court stated in its judgement of 30-1-1987 that such an agreement can be regarded as a collective agreement in the sense of Article 1 of the Act on Collective Agreements. The Supreme Court based this judgement on the fact that in practice often subjects are regulated by collective agreement which do not belong to the core of conditions of work.

Another item in which the definition of 'collective agreement' was at stake in court was on the issue of the so-called 'social plan'. Social plans are often agreed between an employer and the trade unions in case of wholesale reductions of the workforce. In such a case the trade unions and the employer involved are used to conclude a 'social plan', in which a solution is outlined for the social consequences for the workers

concerned. For example by trying to place them in another company or by giving them a redundancy payment.

The question was raised whether such a social plan can be considered a collective agreement. According to Dutch case-law, it is a collective agreement if it fulfills the conditions of Article 1 of the Act on Collective Agreements and in fact that is the case most of the times.

The Act on Collective Agreements prohibits only one specific type of clauses as subject matter of collective agreements, viz.

clauses by which an employer binds himself not to employ persons who belong to a particular race or religious denomination or political party or are members of a particular association, or to employ such persons exclusively.

Those clauses are null and void (Art. 1 (3)).

So these matters can not legally be a subject matter of collective agreements.

This point can even be stretched somewhat further: all discriminatory provisions in collective agreements must be considered as null and void on the basis of the General Dutch Law on Equal Treatment as well as on the basis of international rules.

Apart from defining the notion of 'collective agreement' and the parties which may conclude collective agreements, the 1927 Act establishes the binding force of collective agreements on individual employment contracts.

Formally, this binding force is a relatively weak one - only those employers, who are (members of) signatory parties, are legally bound to apply collective agreements. Every employer is in theory free either not to enter or to leave the signatory parties.

However, in practice it may sometimes be difficult to back out of the obligations laid down in such a collective agreement.

But it is legally possible, safe if the provisions of the collective agreement have been made 'generally binding' as ascribed in the next subsection.

2. The Extension Act of 1938 and the Occupational Pension Funds Act of 1948

a) the power to extend a collective agreement/pension fund 'erga omnes'

The Extension Act of 1937 gives the formal mechanism to the extension of a collective agreement over an entire sector of industry. Art. 2 states

Our Minister shall have power to declare certain provisions of a collective agreement which apply throughout the whole country or in a part of the country to a majority (in the opinion of the Minister a large majority) of the persons employed in an industry to be generally binding throughout the whole country or in the said part of the country.

The effect is, that in that case no employer working in the relevant sector of the industry can escape the binding force of the collective agreement (save if he has been excepted by the signatory parties or by the Minister).

The purpose of the Extension Act is to avoid competition on the point of labour conditions by undercutting by outsider employers. This will enhance industrial peace in the sector concerned (See Van der Heijden, Jacobs, Zalm, etc.)

The Act obliges the Minister to exempt certain types of clauses from his extension order. Article 2(5) of the Extension Act states that

a declaration of provisions as binding shall not apply to any provisions of a collective agreement which contain stipulations made for the following purposes:

- a. to prevent the reference of disputes to the law courts for decision*
- b. to compel employers or employees to become members of an industrial association of employers or employees;*
- c) to provide for different treatment for employees belonging to an industrial association and those not belonging to such an association;*
- d) to give the employees a direct interest in the application of regulations relating to the prices to be charged by the employer to third parties for goods or services or to the conditions subject to which the employer undertakes to deliver goods to third parties.*

This provision does not mean, that the matters concerned cannot be subject matter of collective agreements. They can - provided they are not contrary to the general prohibition of unequal treatment - but they cannot be subject to a Ministerial declaration to make them generally binding.

The power to extend collective agreements *erga omnes* is certainly not a dead letter in The Netherlands. It is widely used. A large number of all workers covered by collective agreements is covered thanks to the fact that the Minister exercises this power.

Quite comparable with the system of the 1937 Act is the Dutch legislation on pension schemes. Trade unions and employers tend to set up pension funds to provide for additional pensions for the workers on top of the statutory Old Age Pension Scheme. In the Occupational Pension Funds Act of 1948 (BPW) it is provided:

Article 3:

Our Minister may, at the request of a sectoral trade organisation which he regards as sufficiently representative of the business structure of a sector or activity, after consulting the head of the appropriate general administrative department whose area of responsibility includes the activities of the sector concerned, the SER (Social and Economic Council) and the Verzekeringskamer (Insurance Board), make affiliation to the sectoral pension fund compulsory for all workers or for certain categories of workers in the sector of activity concerned.

Also this power is widely used in the Netherlands and was in fact the quintessence of the Albany case.

For many decades the power of the Minister under the Extension Act to give binding force *erga omnes* was in principle rarely debated in The Netherlands. It was seen as beneficial and self-evident by all the political and social-economic forces. The only question really debated was the question: what provisions exactly can be declared generally binding?

In the early 90s important Dutch economists like Zalm (Zalm, oratie, 1990), Bomhoff, Van der Ploeg and others, attacked more fundamentally the Ministerial powers to declare collective agreements generally binding. In their opinion this instrument underpinned the fixation of wages by negotiations within monopolistic relations, because employers and workers who are not organised, are no longer free to fix labour conditions on a lower level than laid down in the collective agreement concluded by the organised workers and employers. As this monopolistic way of negotiating wages in fact restricts competition, the government should abolish the instrument of declaring collective agreements generally binding.

This attack on the instrument of declaring collective agreements generally binding was not only rejected by the trade unions but also by the employers associations. Therefore successive cabinets explicitly maintained this power in the Statute Book and it is still widely practiced in the Netherlands.

The only amendment made was the publication of policy rules with regard to the extension of collective agreements. (All the time between 1937 and 1998 the Minister of Social Affairs never published the lines of his policy to concede or to refuse a declaration to make collective agreements binding *erga omnes*).

In the new rules, published on 2 December 1998 (see Dutch Official Gazette, 1998, nr. 240, p. 14), the Minister of Social Affairs gave as paramount criterion, that the collective agreement has to be 'related to labour' (see 4.3.6. of the Policy rules). This will presumably mean that provisions relating to employment policy, the labour market, labour relations, labour conditions, additional social security and vocational training can all be declared generally binding. On the other hand, stipulations with regard to the development of new techniques, matters pertaining to business economics, the quality of the products produced or the promotion of a sector do not relate to labour, according to the Minister, and can thus not be declared generally binding. If those stipulations contain elements which are sufficiently 'related to labour', these elements can be declared generally binding if they are separately formulated (point 4.3.6 of the Policy rules). Moreover the Minister will refuse to declare clauses of collective agreements generally binding which exclude or disproportionately limit the access to the relevant market for bona fide enterprises, without proper means of dispensation. This could for instance concern the exclusiveness of one or more insurance companies, occupational health and safety services, vocational training or temporary work agencies. The same applies to clauses prohibiting or grossly preventing the hiring of outside labour (point 6.2 of the Policy rules).

In the view of the authors the new 'policy rules' on extension of collective agreements 'in macro' make the differentiation which 'Albany' imposes. It needs to be seen whether they do it also 'in micro'.

Not declaring a provision generally binding does not mean, that the provision is null and void. It continues to be a legally binding provision for all those who are directly bound to the collective agreement on the basis of the 1927 Act.

b) the power to quash clauses of a collective agreement

Finally, the Extension Act of 1937 gives the Minister another important power. Article 8 states:

The Minister may declare provisions of a collective agreement to be not binding if this is necessary in the public interest.

It is on the basis of this article that the Minister may quash a clause of a collective agreement. If, on the basis of this Article, the Minister declares provisions of a collective agreement inoperative, this actually means that these provisions of the agreement will be null and void then.

Parliament has given this power to the Minister during the 1930s (amidst the economic crisis, caused by the Great Depression) out of the fear that a collective agreement could be abused. This abuse could take place because employers and employees could in a certain sector through collective agreements raise the wages in such a way that the consumer was to pay the price. (Fase, 1980)

This clause in the Extension Act was a sort of a mirror of a comparable clause, which was inserted in 1935 in the Act on the Extension of company contracts. Notably the trade unions and the social-democrats vehemently opposed the insertion of this clause. Having lost the vote on an amendment to withdraw the clause the social democrats voted against the Extension Act although they approved the instrument of Extension.

The Minister may exercise his power to declare provisions in a collective agreement as not binding if this is 'in the public interest'. Now what is meant by 'public interest'? Obviously this is not a very clear definition.

Although Article 8 was adopted by Parliament, the Minister has never used the powers given to him under art. 8 of the Extension Act.

During the post-War period (which lasted until the 1980s) the Minister had wide powers to intervene in collective agreements on the basis of specific Wages regulations, lately laid down in the Wages Act of 1970.

But in 1986 these powers were reduced to be exercised only in virtually state-of-emergency-situations.

In the course of the political debates on the reduction of the Wages Act powers the no-use of the Art. The cabinet promised 8 Extension Act power.

Therefore it is very questionable whether the Minister could one day use this power within the framework of Competition Law.

If the Minister would consider the use of this power in that context this would almost certainly provoke a major political row.

The article in fact has become a dead-letter.

B) The legislation on competition

Dutch law for the first time regulated cartels in the aforementioned Act on the Extension of Company contracts on 1935, which was in essence a pro-cartel Act, although it contained a clause to combat the abuse of trusts and cartels of 1935. This act was repealed by the Act on Economic Competition of 1956.

The 1956 Act defined a cartel as an agreement whereby the economic competition between owners of enterprises is being regulated. The words economic competition is important in this context. According to all legal doctrine of those days agreements which regulate competition at the labour market did not fall under the concept economic competition. Therefore this Act was not applicable on collective agreements.

The 1956 Act was very permissive to cartels, being based on a system of abuse. Only in a very few limited number of cases, the Minister could prohibit cartels because of distortion of competition. But in principle, the Dutch law allowed all cartels.

This system was not consistent with the European system of competition law, because the European system stems from a system of prohibition: every cartel is in principle prohibited, unless it is allowed.

The Dutch legislation on competition was modified radically on 1 January 1998, when the new Competition Act came into effect, which is based on the European attitude towards cartels.

Article 6 of the Competition Act states

- 1. All contracts between enterprises, decisions of associations of enterprises and mutual coordinated factual behaviour of enterprises are prohibited, if these have the aim or the consequence that the competition at the Dutch market or a part of it will be prevented, restricted or tampered with.*
- 2. All such contracts and decisions are legally null and void.*

According to the Explanatory Memorandum by the Act (p. 12), written at a moment that the Albany case was not yet decided, Article 6 is not applicable on agreements between trade unions and employers' organisations on working conditions, within the sense of Collective Agreements Act. The explanatory memorandum continues by saying that with this view, Dutch legislation follows Community law. However, the memorandum says, it is also possible that in collective agreements provisions are included which have nothing to do with working conditions. If these provisions have the consequence that the competition at the market for goods and services will be prevented, restricted or tampered, the rule of Article 6 of the Competition Act will be applicable on them.

In the same way, the leading Dutch Professor on Economic Law, Mortelmans, writing on a moment that the Albany case was not yet decided, held that agreements on wages can actually be compared with minimum price regulations. An extended collective agreement may be seen as an imposed cartel. Provisions in collective agreements on working hours and leave are comparable to quota regulations.

For every collective agreement it has to be seen whether it exclusively regards social aspects or exclusively economic aspects, or both. In the first case it does not fall under the Competition Act, in the second case, it does and in the third case further investigation is necessary. (Sociaal Recht 1998)

However, the new Competition Act is not completely in force yet.

The Dutch national Competition Authority, set up under this Act, until 2003 refrains from scrutinizing 'contracts, decisions and behaviour subject to scrutiny under other statutes' (Art. 16 jo. Art. 107) and it is accepted that this provision covers collective labour agreements.

It is also accepted that as from January 1, 2003, the Competition Authority may scrutinize collective labour agreements.

Both employers' associations and trade unions (jointly sitting in the so-called Stichting van de Arbeid) feel very much at unease with the perspective that from January 1st, 2003, the Dutch national Competition Authority may scrutinize collective agreements on their possible infringements on Competition Law. They are afraid that this could impinge on the freedom to collective bargaining, seen as a fundamental right.

Therefore the Stichting van de Arbeid on 24 February 2000 sent a letter to the Minister in which the Minister was urged to review the Competition Act in order to make sure that the Dutch national Competition Authority cannot intervene in collective agreements on its own authority.

In the view of the authors the debate on Art. 16 jo. Art. 107 is a merely Dutch debate. It does not exclude, that - on the basis of 'Albany' - collective agreements can always be tested against EC anti-trust law.

Cases

Until recently there were no cases in Dutch courts connecting collective labour law with competition law. So there was no national practice of criteria of competition law used in assessing the validity of collective agreements.

However, since a few years a number of cases have come up in which this connection was laid. All these cases were referred to the EC Court of Justice.

The cases Albany, Brentjens and Drijvende Bokken (already decided by the EC Court of Justice) as well as the pending Pavlov-case, is about the obligatory affiliation to a pension scheme.

The pending Van Der Woude-case concerns provisions in a collective agreement on health insurance of which Van Der Woude states that these are contrary to the Competition Rules of the European Community.

In the Albany-case, Albany International BV refused to pay to the Textile Industry Trade Fund contributions. This Fund was established under the BPW, a law on compulsory affiliation to a sectoral pension fund. Affiliation to the Fund was made compulsory by an order of the

Minister for Social Affairs and Employment of 4 December 1975 on the basis of Art. 3 BPW as quoted above.

Albany operates a textile business, which has been an affiliated to the Fund since 1975. Until 1989, the Fund's pension scheme paid a flat-rate benefit. The pension awarded to workers was not proportional to the wage but was a fixed amount for each worker. Albany decided that the scheme was insufficiently generous and in 1981 concluded arrangements with an insurance company for a supplementary pension for its workers so that the total pension to which they would be entitled after 40 years employment amounts to 70% of their last salary. With effect from 1 January 1989 the Fund changed its pension scheme. Following the change to the Fund's pension scheme, Albany asked on 22 July 1989 to be exempted from affiliation. Since Albany had concluded arrangements for a supplementary pension scheme for its staff several years earlier and the latter arrangements had, since 1 January 1989, been similar to those introduced by the Fund. Its request was however, rejected by the Fund. Albany lodged an objection to the Fund's decision with the Insurance Board. But the Fund did not follow the advice of the Insurance Board and served Albany with a demand for a payment of 36.700,29 Dutch guilders. Albany challenged that demand before the Kantongerecht, Arnhem. It contended in particular that the system of compulsory affiliation to the Fund was contrary to the Treaty. The same facts lead to the Brentjens-case.

The facts leading to the judgement in *Drijvende Bokken* are a little bit different. Also here there was a compulsory affiliation to a certain pension scheme. But *Drijvende Bokken* was of the opinion that its workers were not covered by the order making affiliation compulsory. The Fund however, served *Drijvende Bokken* with a payment. *Drijvende Bokken* appealed against that demand to the Kantongerecht Rotterdam. By judgement of 2 May 1994, the Kantongerecht upheld the appeal of *Drijvende Bokken*, on the ground that the enterprises employees were not employed in a dock business within the meaning of the order making affiliation compulsory. The Fund appealed against that judgement by the Arrondissementsrechtbank Rotterdam. By judgement of 25 January 1996 that court amended the Kantongerechts' judgement on the basis that *Drijvende Bokken's* employees were principally employed in a dock business or a business treated as such and therefore fell under the order making the affiliation compulsory. The Arrondissementsrechtbank also judged that compulsory affiliation to the Fund was compatible with the Treaty because the Fund could not be regarded as an undertaking within the meaning of Article 85 and 86 of the Treaty and was more in the nature of a social security organisation. *Drijvende Bokken* appealed in cassation by the Hoge Raad, contending that the Arrondissementsrechtbank had erred in considering compulsory membership of the Fund to be compatible with Community law. The Hoge Raad found that that argument necessarily raised certain questions concerning the interpretation of Articles 85, 86 and 90 of the treaty. On the other hand, it considered that in the present case there was no restriction of the freedom to provide services or of the right of establishment.

In the *Van Der Woude* case the collective agreement has not been rendered generally binding, but the employer (*Beatrixoord*), as a member of the employers' organisation concluding the agreement, is directly bound by it. *M. van der Woude* is not a union member but the Dutch Act on collective agreements of 1927 prescribes that also non-trade union members are to be awarded the employment conditions of the collective agreement to which the employer is bound. The collective agreement includes a voluntary affiliation to a sickness fund and prescribes that the employer has to pay one half of the sickness fund contribution while the employee pays the other half. This arrangement concerns only a given sickness funds (*Stichting IZZ*) that has subcontracted the insurance activity to a non-profitable (mutual) insurance company since 1977. *Mr. Van Der Woude* would like to take his insurance via another insurance company whereas he would get better benefits for his teeth-care costs. The agreement does not prevent him from taking another insurance but in that case the employer doesn't pay its share of the contributions.

All these cases were novelties for Dutch case law. During all the decades preceding the start of the aforementioned cases, the relationship between competition law and labour law was never raised in court.

These novelties may be explained from two facts:

a) according to doctrine the power of the Minister to concede or to refuse a declaration to make collective agreements general binding erga omnes, is not open for judicial review. Only very exceptionally such a case was heard.

Testing the erga omnes declaration to competition law is seen as a new possibility for legal scrutiny.

b) the Netherlands law on competition until recent years was very permissive towards anti-competition agreements. Only after the Dutch law was changed (around 1997) the relationship between competition law and collective labour law emerged as a legal question.

As far as the second point is concerned, the permissiveness of the Dutch law towards cartels until 1998 does not mean that everything was OK in relation to EC law. So perhaps 'Albany' may provoke some new cases about situations of the past.

Constitutional Law:

As neither competition Law nor collective labour law is explicitly considered in the Dutch Constitution, no point of constitutional law has been risen yet.

However, both competition law and collective labour law do enter the Dutch legal system by way of international law, which - if directly applicable - overrules conflicting Dutch laws and regulations.

4. Does the possible exemption of collective agreements from competition rules cover also other agreements than sectoral ones (e.g. enterprise/works council agreements if affecting the status of workers as consumers, or interprofessional agreements)? If so, how exactly?

For the Netherlands this question could relate to agreements made between the employer and the works councils. Those agreements do not have a clear legal status under Dutch law. In case a judge should be asked to give binding effect to such an agreement the judge will presumably conclude that the 'immunity' for competition law of the parties to such an agreement is certainly not greater than of the parties to collective agreements.

5. Does national law on competition (legislation/case law/administrative procedure) apply to the social partners as organisations? If so, how exactly.

In Article 1 of the new Competition Act, a number of definitions are being given. For the definition of agreement, enterprise and employers' association, the Act refers to the relevant provisions in the EC Treaty (Art. 81). This therefore means that the definition of these concepts in EC law is decisive.

In the explanatory memorandum, the Minister has stated that the new Competition Act shall not be stricter, or more permissive than the Community competition rules.

According to Mortelmans, writing before the judgement in the Albany case, trade unions are to be considered as enterprises if the agreements that they conclude mainly or exclusively apply to economic activities. However, if their agreements only consider labour relations, trade unions cannot be seen as enterprises in the sense of Community law and thus neither in the sense of the Dutch Competition Act. (Sociaal Recht, 1998)

6. Are the social partners involved in the anti-trust scrutiny? if so, how exactly? Is the distinction between automatically void and contestable provisions relevant? How is the nullity of a provision established? Who has the burden of proof in showing that collective agreements violate national competition rules?

The social partners are not directly involved in the anti-trust scrutiny. Indirectly they may exert some advisory or lobbying activities.

Under the Dutch Competition Act of 1998 prohibited contracts and decisions are automatically void (article 6).

However, collective labour agreements are until 2003 exempted from the scrutiny of this.

Until that moment - and given the fact that art. 8 of the Extension Act (see under 1) is a dead letter - there is no possibility under Dutch law for the authorities to quash clauses in collective agreements on the basis of anti-trust-scrutiny. Only the Courts may do that but there are no examples of that until now.

After 2003 the Competition Authority may quash clauses in collective agreements on that basis.

In those cases the burden of proof to show that collective agreements violate national competition rules will certainly rest upon the officers examining the case.

8b. Are there indications that the national immunity from competition law of collective agreements is narrower/broader than that affirmed in Albany? Assess the legal consequences if national competition law would be more stringent than EC-law in attacking "anti-competitive" practices, and this more stringent national competition law would affect collective agreements? I.e. does EC competition law pre-empt national law, or only set a minimum standard? ii. does EC-anti-trust immunity for collective agreements pre-empt national law which provides less (or more?) immunity.

Under Dutch law never an anti-trust-'immunity' for collective agreements was formulated, neither in statute nor in case law.

It is most likely that the Dutch judges after the decision of the EC Court in Albany will follow exactly the formulations of the EC Court.

As has been set before the new Dutch Competition Act has neither the pretension to be neither stricter, nor more permissive than the Community competition rules.

8c. How is Albany described in the national debate? Are there already reactions of authorities, social partners, legal doctrine etc.?

Up until now the Albany case was not widely debated in the Netherlands.

The social partners in the letter that they are near to write to the Minister, express, that they do not feel confident with the outcome of the Albany case. Therefore they urged more safeguards in Dutch law.

In academic writing

* Mortelmans and Temmink (NTER, 1999) have discussed the Albany-case from the view of the free movement of services and the freedom of establishment. In other words: Are the pension regulations in the Albany-case and the other cases compatible with these two fundamental freedoms in Community-law.

- Loozen (NTER, 1999) has stated that the judgements of the Court of Justice are important to define the relationship between labour law and competition law. Lately, two small labour unions and the works council of the Port of Rotterdam have submitted a complaint by the National Competition Board against two big labour unions. The reason is that the two big unions refused to admit the small ones at the negotiation table. The judgements of the Court can be of help to look at these kinds of complaints from the view of competition law.

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- 1 The most noticeable exception was a contribution of M.R. Mok to the *Liber Amicorum Levenbach* in 1966, titled: 'Kartel en Collectieve Arbeids-overeenkomst' (Hedendaags Arbeidsrecht, Deventer, 1966, p. 242-256) in which he clearly demonstrated the kinship between kartels and collective agreements.

COLCOM PROJECT

NATIONAL REPORT: SPAIN

Prof. Dr. Antonio Ojeda Avilés
University of Seville

PART I. NATIONAL LAW

1) Impact of the competition laws on collective labour law.

There are three Acts related to competition:

- The main one, Ley de Defensa de la Competencia (Act on Protection of Competition), n°. 16/1989, of 17th July 1989, has been widely modified with the Act n°. 52/1999, of 28th December. It deals with restrictive practices, as the 778abuse of dominant position, the limitation or control of the production, the sharing of the market, the subordination of contracting to the acceptance of supplementary conditions, etc.

- Another one is the Ley de Competencia Desleal (Unfair Competition Act) 3/1991, of 10th January 1991, dealing with certain practices during the competence considered not fair, but that not lead to limitation of it: gifts, denigrations, unequal comparisons, imitative acts, use of the alien reputation, etc.

- Finally, the Ley de Defensa de los Consumidores y Usuarios (Users and Consumers Protection Act) n°. 26/1984, of 19th July 1984, an Act related with the rights of the consumers in front of the market activities.

None of them speaks about the collective labour agreements or trade unions, mentioning usually the undertakings or organisations established in the market.

Art. 2, Ley de Defensa de la Competencia, excludes from the scope of the Law those "agreements, decisions, recommendations and practices" regulated by another Act, always respecting the EU rules on competition. This last phrase, the preemption of the EU rules, is now expressly remembered after the modification of the Act 16/1989, but it was clear since Spain became a part of the EU in 1985.

There are two important national Acts which regulate the collective agreements and make them legal, in accordance with the above-mentioned section of Act 16/1989:

•The Spanish Constitution of 1978, in which art. 28.1 declares that the freedom of association in trade unions is a fundamental right; the art. 28.2 declares that right to strike is as well a fundamental one. And art. 37.1 confirms the right to bargain collectively as constitutional a right of ordinary level.

•The Estatuto de los Trabajadores, Act 1/1995 (consolidated version of the original Act 8/1980) regulates in detail, in its Title III, that right of bargaining collectively.

Consequently, collective agreements are not considered restrictive practices, because, as the intellectual or industrial property too, are implicitly allowed, recognized and regulated by an Act.

Not being defined any relationship between competition and collective agreements, however, there is a way of making voids the clauses, or the whole agreement, when causing some damages to thirds. This is a question treated in the same Estatuto de los Trabajadores, art. 90, and in parallel in the arts. 161-164 Labour Courts Act, n°. 2/1995.

-In art. 90.5, Act 1/1995 (Est.Trab.) it is said that the labour authority (the Ministry of Labour and Social Assistance, and the respective authorities at the 17 regional Communities) will appeal to the Courts if he appreciates in the collective agreements a breach of Law or a serious damage to third interests, and the Court will assess the irregular clauses after having heard the parties to the agreement.

-In the art. 161, Act 2/1995, it is said that trade unions, workers' representatives and employers' associations may as well sue directly against an illegal agreement. But in the case of a damaging agreement, only the thirds affected can sue.

•So, in the judgement of the Social Court n°. 4 of Madrid, 17th November 1999 (AS. 3564), a woman challenged the collective agreement of Prado Museum because it required the university title of restorationist for the place of restorationist of pictures, and she had a similar British title, which the Spanish Ministry of Education did not fully accept. The judge went to the European Court of Justice with a prejudicial question, and

•In the judgement of 8th July 1999, Fernández de Bobadilla (TJCE 1999, 161), the ECJ decided that the European titles on these matters did not need any additional contrast.

After the ECJ decision, the Madrid Court held that the collective agreement was not to be invalidated, but only interpreted in the Community sense of accepting as valid the British and in general European titles of restorationist.

-In art. 163.1.b) of the same Act it is said that a worker or an employer *included* in the scope of the agreement is not considered a third in the sense of this section. That exclusion can be explained because the workers and employers included are supposedly represented by the unions and employers' associations who signed the agreement, and it is intended that they represented their interests quite fairly, when not demanded or accused of error, tort, etc.

The exclusion of the workers and employers included in the agreement's scope is much more important than the usual, due to the erga omnes effect of the ordinary Spanish agreements, which are signed by representative unions (mostly UGT and CCOO) and employers' associations in the 90 per 100 of the cases, and, being representatives, if they share the *majority* of the representation in the area, the clauses have normative effect in the sense of generally binding to all the workers and employers, even if not affiliated to the signing parts. The representativeness of a union is measured by assessing the number of workers' representatives elected in all the undertakings of the considered bargaining unit: a union is declared representative when it obtains at least ten per cent of the total of workers' representatives in the unit -when it obtains that percentage in the whole Spain is a most representative one and has the right to participate in every negotiation: CCOO and UGT have around 40 per cent each, that is, circa 90.000 delegates each-. If the bargaining parties sum more than 50 per cent, they have the majority of the unit and the agreement will reach erga omnes effect in front of the 100 per 100 of workers and employers, even if they expressly declare not desiring the vinculum: normative effect.

There are another kind of agreements, with limited and private effect, when the unions and associations involved in the bargain do not sum the majority, even if they are most representatives. They can be challenged as well, under art. 163 Act n°. 2/1995, by the interested persons, not by the public authority.

Conclusively can be affirmed, in line with Baylos Grau, Cruz Villalón and Fernández López (1995, 263), that the way of third interest's lesion is "practically unuseful". It is in that narrow field, almost unused, where the competition matter naturally arises, although it is not the only one:

- Workers and/or employers included in the application field of the agreement can ask to the Courts, not the invalidation, but the non-application of its clauses to them, when affected by an illegality or a serious and not justified damage. That is the doctrine of the Constitutional Court in the decisions n°. 81/1990, of 4th May 1990, and 145/1991, of 1st of July 1991, and in the judgment of the Supreme Court of 30th June 1997 (AR. 2794). As a complementary remark, this matter must be analyzed by the Court following the ordinary proceeding, arts. 80-101, Act n°. 2/1995 (Sala Franco and Albiol Montesinos, 1998, 342), and not accomplishing that of claiming the invalidity, arts. 161-164 of the same Act.

- During the eighties and the first part of the nineties, many firms bankrupted or failed in Spain, and many others suffered of redundancies. The collective agreements reflected the situation in many manners, one of them being the "pre-retirement" of mature workers -over 50- granting them an additional pension to bridge with, or to be added to the public, compulsory one. After some years or months of paying the voluntary pension, the following agreements or even the organs of the public limited companies engaged in the agreement decided to cut off, reduce or come back from the obligation, and those ex-employees sued against the agreements considering that they, the retired people, were thirds, and that the told agreements were seriously lesive against their interests. The Supreme Court judged instead that they were not thirds, because they, in fact, were people affected and included in the bargaining unit, and even they remained affiliated to the unions which had signed the

agreements: decisions of 20th December 1996 and 9th February 1999 (AR. 2483).

2. Criteria to assess the validity of collective agreements

As I told above, it is not in the Competition Acts, but in the labour Acts where we can find the criteria to assess the degree of contrast between those Acts and the collective agreements, but it is developed in a very biased way, because it comes under the cloudy surface of a "third interest's damage".

But a previous question must be solved before we enter in some explanation of the criteria, and that is the question of "active legitimation" to sue. Given that only external thirds can sue against the agreements' clauses because of damages, there are not many cases dealing with the question. But when some apparently legitimated third arrives in front of the Court, the restrictive rules governing the procedural legitimation come in action. A main problem is if the associations of damaged people can sue in representation of them, and until now the situation is doubtful.

- The decision of Audiencia Nacional 1st July 1997 (AS. 2276) refuses that the associations may act in Court instead of the affected, because the Act tells expressly "workers or employers".

- By the way of the facts, some Superior Courts of the regional communities accept the sue from an economic association -it is unknown the case of a trade union demanding in representation of third workers, except in the case of retired people, which we shall see immediately-. So has been the case in the decision of the Superior Court of Baleares dated 8th September 1998 (AS 3388).

- When the cause of acting in front of the Court is a mixed one, that is, of illegality and of third interest damages, the prohibition of representation disappears. So has been decided in several decisions of the Superior Courts of the regions in a very important case: under the wave of contesting the new presence of the employment (temporary) agencies thanks to the Act nº. 14/1994, many collective agreements included a clause stating that the bound firms under them would oblige to the agencies to pay the same wages for the sent workers than they, the firms under the agreement, paid to their own workers. The temporary agencies' associations sued in several occasions because of illegality and damages to their interests, and the Courts decided in favour of them, under the reasoning that an agreement cannot compel persons not included in their scope, and that the Act nº. 14/1994 assigns the amount of wages to the temporary agencies' agreements in the first step; of course the clause was as well harmful...because it rested competitiveness to the affected agencies. In this way spoke the decisions of the Superior Court of Murcia of 28th October 1996 (AS. 7797) and 28th July 1999 (AS. 2670), the one of Castilla-León of 23rd February 1999 (AS. 630), and the ones of Valencia of 19th January 1999 (AS. 195) and 9th February 1999 (AS. 816).

Under a big pressure of the trade unions, who condemned the agencies as the cause of the high level of precocity in the employment burdened for Spain -93 per 100 of the new labor contracts are of temporary duration-, last summer the Parliament passed a reform of the Act 14/1994 through the Act 29/1999, of 16th July

1999, in order to impose to the temporary agencies the payment of the same wage for the sent workers than that paid in the customer firm.

The vague criterion exposed above has been detailed by the Supreme Court in the decisions of 15th March 1993 (AR.1859) and 11th March 1997 (AR. 2309): serious damage to the interest of third means a real and important damage, not merely possible, and objectively measured, without needing to obey to an *animus nocendi*. In the first of the cited judgements we can see a real case of unfair competition: the Association of Pharmacists sued against the collective agreement of Army Pharmacies because it provided cheapest medicines for their employees, what was considered lesive by the Court and consequently invalidated the clause. At the time of writing this paper, the Association of Physiotherapists has sued the national collective agreement of hairdressers and barbershops because allowing the auxiliary personnel to make "all kinds of physiotherapy massages".

3. National interpretation of "conditions of work and employment"

The Estatuto de los Trabajadores 1/1995 explains very widely what can be the content of the collective agreements, and for that reason it is very difficult to find any matter in them as falling outside.

-Art. 82.1 of the Act states that collective agreements regulate the conditions of work and the productivity, as well as the peace obligation.

-Art. 85.1 of the Act states that the agreements can regulate, in the frame of the respect to the Acts, the economic, working, union matters, and, in general, whatever questions related with conditions of employment and the relationships between workers and their organisations and employers and their organisations.

I do not know any judgement which deals with exclusion/quashing of matters in some agreement due to competitions restrains. Annulments of clauses are frequent, but for other reasons such as gender discriminations, etc. Sometimes can be seen a case very close to, but not qualifiable as, a competition matter: so, in the Supreme Court judgement of 30th June 1998 (AR. 5793), the collective agreement of a ship owner stated that the sailors working on board in the Canary Islands area would earn the same as the others, being that the tax system of the Island contemplates a 15 per 100 reduction of taxes which in that way were not respected to the sailors; the Court considered that the intention of the tax system were deviated, and invalidated the clause.

4. If the national competition law covers the social partners as organisations.

The Competition Acts speak always, either of firms, or undertakings, etc. At the vaguest speak of "economic operators" and "productions" (art. 19 Act 16/1989, modified by Act 52/1999), or even "whatever person who had executed or ordered or cooperated with any act of unfair competition" (Act 3/1991, art. 20.1), or by workers of the firm (art. 20.2 of the same Act), but never appear the unions as such, nor even the collective agreements. On the contrary, as legitimated for challenging the unfair act figure "any person who participates in the market", and the "associations, the professional or representative corporations of economic interests when affected their members" (art. 19, Act 3/1991).

5. Are the social partners involved in the anti-trust scrutiny?

Neither the Defence of the Competition Court, nor the Defence of the Competition Service control the collective agreements, whose natural jurisdiction is exercised by the Labour authorities and Courts, as above said.

In Spain the declaration of invalidity respecting a collective agreement is exclusively a judicial decision, and the same must be told referred to the non-application of some clause, following for one or the other demand a different procedural way, as we saw, but always in front of the same jurisdiction.

The judge only decides those questions under application of an interested party, although there are two ways to decide one or another without a demand:

- When a labour authority sends to him the text of a collective agreement because he doubts whether it is illegal or seriously damaging (art. 161, Act 2/1995). The judge operates under a petition of the labour authority, but on his turn this may act without the request of the interested parties (Montero, Iglesias, Marín and Sampedro, 1993, 926-929), although the normal situation is the stimulus of them.

- In the course of whatever process, the judge can discover that some collective clause breaches the Law, and even if the scope of the process is not addressed to that clause, he may consider it inapplicable.

PART II. EC LAW ADDITIONAL QUESTIONS.

1. National definition of collective agreements

Spanish Law and the jurisprudence have arrived to national definitions of collective agreements, which includes all kinds of arrangements made up between unions and workers' representatives, on the one hand, and employers and employers' associations, on the other. We can classify three categories of collective agreements:

- Convenios colectivos "estatutarios", the most formal and legalized instruments, to which the Constitutional Court gives the considerations of a norm, and highly protected by the Acts. It has binding and erga omnes effect.

- Convenios colectivos "extraestatutarios", which are agreed outside the formalities required for the typical agreements for the Estatuto (Act 1/1995), and has only limited effect, on the affiliates to the signing parties, but in any case has some kind of protection, as for instance the chance to ask in front of the tribunal when it holds some illegal or damaging clause, and the binding effect on the individuals.

- Acuerdos de empresa (firm or factory agreements), bargained out by one employer and the workers' committee not following the requisites of the Estatuto 1/1995 for the regular convenios, but provided of erga omnes effect on the whole payroll and binding effect on the employer and the workers.

Outside these three categories, the Spanish Law and Courts do not recognize any other kind of agreement: neither the one signed by an *ad hoc* delegation of workers, nor the one approved by a workers' assembly, etc.

2. National definitions of social partners

It is accepted traditionally that social partners in Spain are the trade unions, the workers' representatives and the employers and employers' associations.

- Art. 7 of the Spanish Constitution says briefly that trade unions and employers' associations contribute to the defense and promotion of their specific economic and social interests.

- Art. 129.2 of the Spanish Constitution says that the public powers will promote efficiently the several forms of participation in the undertaking and will foster, throughout an adequate legislation, the cooperatives.

For the rest, there is not a legal definition of the three actors. For instance, the Act 11/1985, on Freedom of Association of the Workers, only states in its art. 2 the specific liberties included in the freedom.

Workers' committees and delegates are only the elected ones by the payroll in a firm following the suit described in the Estatuto de los Trabajadores, Act 1/1995, and registered in the specific public register.

After the jurisprudence, unions and associations must be integrated by dependent workers or by employers, become registered in a special register, and must be functionally oriented to the industrial relations, otherwise the Courts could held that they belong to other kind of organisation:

- In its judgement of 25th January 1999 (AR. 1022), the Supreme Court stated that a National Association of Stock Market Advisers was not an employers' association because these are characterized by the field of action -the industrial relations- and the means used -collective agreements, industrial conflict, social dialogue and institucional participation in the social and economic public entities-, and the by-laws of the cited association did not indicated any of the features.

- In the judgement of 19th January 1996 (AS. 730), the Superior Court of Andalucía stated that a Professional Association of Tourist Guides was not a union because the members were not dependent workers, but autonomous professionals, and the challenge that it made for illegality against an agreement between the Association of Travel Agencies and a rival Professional Association of Tourism Informants was null and void because the agreement was not a labour one, and the challenged associations were not unions nor employers' associations, and because of that the Court declared itself incompetent to solve the conflict.

3. National definition of the social policy objectives and the measures to improve the conditions of work and employment.

As I told already under Part I.3, art. 85 of the Estatuto de los Trabajadores describes a very wide field of social policy objectives entitled to be covered by the collective agreements. When the instrument goes ahead to other fields and smashes

against another interests and Acts, it will be analysed by the labour Courts following the suits described *supra*.

4. The requirement of good faith to accomplish the labour regulations.

It is not needed to look for a wordy legal expression of good faith in the conclusion of a collective agreement, because the fraud and the simulation drive in Spanish Law to set aside the apparent negotiation and to enter the rules of the authentic contract.

5. Vinculation between the national competition law and the EU law.

All the successive competition Spanish Acts are anchored in the EC law.

- Even the ancient Act on Defence of Competition of 20th July 1963 was a "faithful rejoinder" to the EEC law principles (Broseta Pont, 1991, 121).

- The present Act on Defence of Competition 16/1989 is as well "inspired by the Community norms of competition policy" (Sánchez Calero, 1990, 93).

- The intense modification of that Act by Act 52/1999 declares itself orientated by the "Community context and, specifically, the conditioning of the Economic and Monetary Union" (Introduction to the Act, first paragraph).

The doctrinal debate around Albany International case is yet non-existent in Spain, and the labour case and judgement collections (Aranzadi Social ¹ and Relaciones Laborales) do not include the text, and only the last one offers the three conclusions of the judgement ².

¹ The annual index for 1999 of this collection includes a citation for the Albany case, the number 206 in the volume III/1999, that does not exist in the referred volume.

² In the vol. 20 of October 1999, page 74.

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Collective Agreements and Competition Law in Sweden

– a report to the COLCOM project

April 2000

Jonas Malmberg,
National Institute for Working Life,
Stockholm

Introduction

The purpose of this paper is to examine the relationship between collective agreements and competition law in Swedish law.¹ The task to describe the relationship is complicated. To get a good grasp of this relation it is useful first shortly to describe the actors in the industrial relation system and their legal and contractual relations and, second, to comment on the effects of their activities on different markets. This is necessary since the prohibitions which follow from the competition law mainly emerge from the fact that certain actors conclude agreements or in other ways co-operate or abuse a dominant position and that these activities distort the competition on a certain market.

A collective agreement is an agreement concluded by an employers' organisation or an employer and a trade union. An agreement concluded by an organisation is binding on its members, e.g. affiliated organisations as well as individual employers and employees. Employers and employees, who are bound by a collective agreement, may not enter into any contracts, which do not comply with the agreement. Such a contract is automatically void (article 23, 26-27 of the Co-Determination Act).

Collective agreements are concluded at three levels, namely the *national level* between the employer and the employee confederations, *industry wide level* between industry wide organisations on both sides and *local level* between the company and the local union. Since the 1980s, we have experienced a decentralisation of the collective bargaining system, especially concerning the wage setting.² The most important collective agreements are concluded at industry wide level. These agreements contain a comprehensive regulation of wages and general terms of employment. They also give rules concerning the co-operation between the organisations. The local agreements deal mainly with the implementation of the industry wide agreements. The agreements concluded at national level deal mainly – inasmuch as is of interest here – with different insurance schemes. According to these agreements the administration and maintenance of the insurance laid down in the agreement are entrusted to a separate body (insurance company or fund).

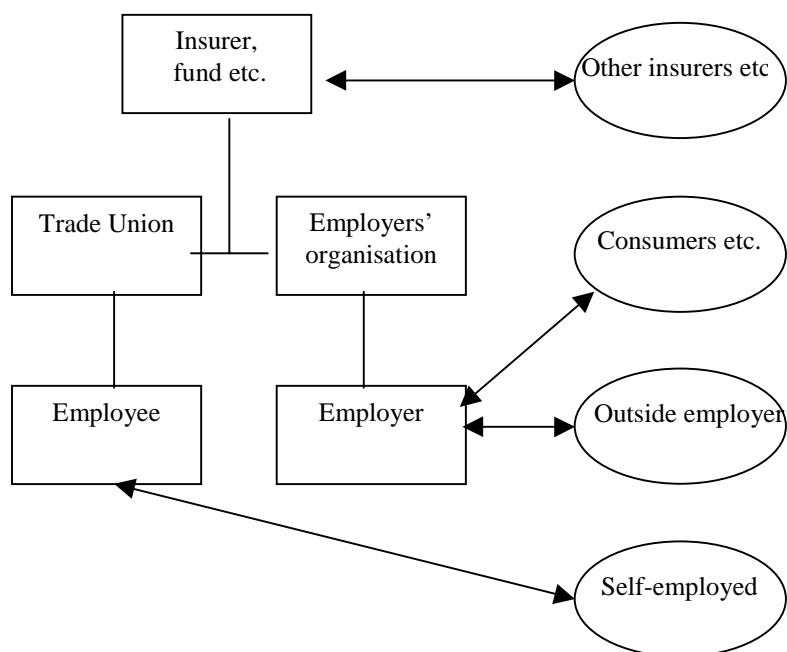
Employers, who are not members of an employers' organisation, are not bound by the collective agreement, unless they have concluded a substitute agreement directly with the trade union. The content of a substitute agreement is usually identical with the agreements that the trade union conclude with the employers' organisations.

From a comparative perspective it should be noted that the trade union is the only workers' representatives concluding agreements with the employer in Sweden. Works councils or other workplace-based arrangement for the representation of employees independent of the trade unions are rare.³ Further, Swedish labour law does not contain any rules on extension of collective agreements (*erga omnes* effect).

¹ This paper will not deal with the relationship between competition law and industrial actions.

² See, for instance, Eklund (1998-99) p. 542.

³ One exception is that works councils now exist in community-scale undertakings or groups of undertakings, as a consequence of the EWC-directive. However, Swedish members of the European Works Council shall be appointed by trade union, if the employer is bound by a collective agreement.



Collective agreements and other co-operation between the social partners may have restrictive effect on different markets. Of course these activities effect the competition on the labour market, e.g. the demand and supply of employees. The main function of collective agreements is to prevent employers from offering work below an agreed minimum standard and to stop “a race to the bottom” with regard to wages and working conditions. However, the industrial relation activities sometimes effect other markets than the labour market. The Swedish case law indicates mainly four kinds of “external” effects of the industrial relations activities. *Firstly*, it may effect the competition between undertakings (employers) competing on the same market of goods or services, through differing of the supply or cost of labour. This could, for instance, be the case if a substitute agreement concluded with employers, who are not members of the employers organisation, is economically more burdensome than the agreement applicable for employers members of the organisation. *Secondly*, a collective agreement could restrict the competition on the markets of the goods and services provided by an undertaking (employer), through, for instance, fixing the price in relation to customers or consumers. *Thirdly*, a collective agreement may restrict the competition on markets of services, which are substitutable with the work provided by the employees. It is not unusual that collective agreements contain provisions, which aim at protecting the work of the employees, by restricting the possibility for the employer (undertaking) to subcontract. *Fourthly*, a collective agreement may restrict the competition on a market for goods or services, which are purchased by the social partners or the employer. For instance, it is common that collective agreements contain a provision that the employer shall pay a group insurance and that this insurance shall be placed at a certain insurance company. Such an agreement is likely to effect the competitions between different insurance companies.

In the next section, I will first give a brief overview of the Swedish Competitions Act. The following sections deal with the three main limitations in the applicability of Swedish competition law relevant to collective agreement, that is the labour market exception (section 3), the concept of undertaking (section 4) and the possibility of social justification of market restrictions (section 5).

The Swedish legislation

The constitutional background

The Instrument of Government of 1974, which is a part of the Swedish constitution, contains a chapter on fundamental civil freedoms and rights (chapter 2). This chapter includes guarantees for the positive freedom of association (article 1). The freedom of association may be restricted by law to the extent it is provided for under certain enumerated grounds, such as if the restriction is necessary to achieve a purpose which is acceptable in a democratic society (article 12). Further, the chapter guarantees the right to take industrial actions, unless otherwise is provided by law or by agreement (article 17). It has not been discussed if these provisions should indicate that collective agreement, which may be seen as a result of the exercise of the freedom of association and the right to industrial action, should have a stronger legal position than other agreements.

The ECJ has declared that article 3(1)(g) and article 81 EC constitute a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market.⁴ In Sweden competition law is not regulated in the constitution. However, it has been argued that the Swedish Competition Act, which is almost identical to the EC competition law, has the same a fundamental character.⁵

Anyway, constitutional arguments have traditionally had a limited impact on the interpretation of law in Sweden and such arguments have not been used in the Swedish case law relevant to the field of law discussed in this paper.

The Swedish Competition Law

The Restrictive Practices Act of 1953 is regarded as the first real competition law in Sweden.⁶ The act was replaced by the Competition Act of 1982.⁷ According to both these acts only two kinds of behaviour were directly prohibited: vertical price-fixing and collusive tendering. Further, the acts contained general clauses concerning restrictive practice, which was considered having harmful effects on public interests. On the request of the competition authorities the court could in individual cases forbid the future use of such practice.

In 1993 a new Competition Act was introduced.⁸ The Act radically changed the Swedish competition law. The reason for this change was partly to strengthen the effectiveness of the law, partly to harmonise Swedish law and EC law. This Act is based mainly on the same principles as those that apply in the EC. According to the *travaux préparatoires*, the case law of the European Court of Justice shall be taken into account when applying the Act.⁹ The act contains two general prohibitions. One prohibition deals with anti-competitive co-operation between undertakings, that is, agreements, decisions by associations of undertakings and concerted practice (similar to article 81 EC). The other prohibition concerns abuse of a dominant position (similar to article 82 EC). The Swedish act is applicable even when there is no effect on the trade between member states. Further, the Swedish government has issued block exemptions, which are almost identical with the Community block exemptions.

Community law inspires even the enforcement of the act. The Act is mainly administered by the Swedish Competition Authority (*Konkurrensverket*), whose tasks are quite similar to the tasks of the Competition Directorate-General (ex DG IV), within the Commission. For instance, the authority may in individual cases grant an exemption from the prohibition against anti-competitive co-operation between undertakings and grant negative clearance.

The Competitions Act contains administrative as well as private law sanctions. In the event of an infringement of a prohibition, the Competition Authority may under penalty of a fine order an undertaking to terminate the infringement. Further, the District Court of Stockholm may, at the

⁴ See for instance, C-126/97 Eco Swiss 1999-06-01, not yet reported, paragraph 36.

⁵ Bernitz (1999) p. 65.

⁶ Lagen (1953:603) om motverkande i vissa fall av konkurrensbegränsningar inom näringslivet. Adlercreutz (1993) p. 12.

⁷ Konkurrenslagen (1982:729).

⁸ Konkurrenslagen (1993:20).

⁹ The governmental bill Proposition 1992/93:56 p. 21.

request of the Authority, order an undertaking to pay an administrative fine. In addition agreements or clauses in an agreement covered by the prohibition against anti-competitive co-operation are void. An undertaking may also be held liable to pay damages to another undertaking.

National practice and procedures

The question on the relationship between collective agreement and competition law may arise in the context of different competition rules and in several different proceedings.

Most frequently the conflict between collective agreements and competition rules concerns whether a collective agreement (or a decision by an employers' organisation to conclude a certain collective agreement, or the application of the agreement by individual employers) constitutes anti-competitive co-operation between undertakings (article 6 of the Competition Act). In Sweden the question has scarcely been discussed in relation to the prohibition on abuse of a dominant position. Neither, it has been discussed in relations to the rules concerning exclusive rights granted by public authorities.¹⁰ One reason for this is that public authorities, according to Swedish law, cannot extend collective agreement (the erga omnes effect). Further, the Swedish Competition Act does not contain any provision equivalent to article 86 (ex 90) EC. Instead the position of Swedish law is that the Competition Act is not applicable on exclusive rights granted by public authorities.¹¹

The question on the relationship between collective agreements and competition law often arises in the decisions of the Competition Authority (or, after appeal, the District Court of Stockholm or the Market Court) on whether it should require an undertaking to terminate an infringement of the prohibition. The same question has been discussed in connection with applications on negative clearance.

The procedure of the Competition Authority on an infringement of the Competition Act may be directed against the collective agreement. In such cases the parties to the agreement, e.g. the trade union and the employers' organisation, will be a party to the case (if it is regarded as an undertaking, see below).

However, the procedure may instead be directed against the decision of the employers' organisations (to conclude the agreement). The decision of the employers' organisation is then seen as a decision by an association of undertakings. The procedure may also be directed against the application of the collective agreement by individual employers (as concerted practice). Under such circumstances the trade union will not be a party to the case. The trade union will have the possibility to give its opinion to the authority (article 22 of the Competition Act) but will not have the right to appeal against the decision. This follows from the fact that only undertakings affected by the decision may appeal against the decision (article 60) and trade unions are usually not regarded as undertaking (see section 4 below). This situation does not seem fully satisfactory. According to article 7 of the Competition Law (as well as article 81 EC) agreements that are prohibited under article 6 are automatically void. Thus a decision declaring, for instance, the application of provision contrary to prohibition on anti-competitive co-operation, is likely to have private law effects on the collective agreement.¹²

In the Newspaper distribution case, the Competition Authority ordered the employers' organisation and some employers not to apply one of the provisions in the collective agreement for newspaper distribution.¹³ The Swedish Transport Workers' Union, which was not allowed to appeal against the decision, has complained to the EHCR. The union argues that the Swedish law is contrary, inter alia, to article 6 of the European Convention on Human Rights. The case is still pending.

In one judgement the Labour Court has tried the relationship between collective agreements and competition law.¹⁴ The case concerned damages for breach of a collective agreement and the

¹⁰ See, for instance, the fourth question in the *Brentjens* case.

¹¹ The governmental bill *Proposition 1992/93:56* p. 70.

¹² In Finland the concerned trade union has, under such circumstances, a right to appeal against the decision of the Competitive Council (Bruun (1995) p. 316-317).

¹³ The decisions of the Competitions Authority 1999-02-19 Dnr 555/1996.

¹⁴ The judgement AD 1998 nr 112 (about the case see below section 3.2.2)

employer argued that the agreement constituted an anti-competitive co-operation between undertakings and thus was void (according to article 7 of the Competitions Act).

The Labour market exception

Background

Even before World War II the collective labour law in Sweden was an integrated part of the Swedish society and law. Through the Collective Agreements Act of 1928 and the founding of the Labour Court in the same year, the system of collective regulation of the labour market was established in the Swedish legal system. In 1938 the Swedish Employers' Confederation¹⁵ and the Swedish Confederation of Trade Unions¹⁶ concluded an important basic agreement (often called the *Saltsjöbaden Agreement*, after the place outside Stockholm where it was concluded). One of the basic ideas of the agreement was that the parties themselves best managed to regulate of the relationship between the employer and the employee and would not need state interference. Thus, provisions protecting third parties in the event of industrial action were inserted in the agreement in order to avoid the risk of the Parliament adopting legislation concerning industrial conflicts. Until the 1970s the view, that the regulation of the relation between employer and employees was a question for the social partners, was accepted by the Swedish Parliament, and the labour law legislation was kept at a minimum.

When the Restrictive Practices Act of 1953 was introduced, the collective regulation of the labour market was a fully excepted feature of the Swedish society. In the *travaux préparatoires* it was noted that collective agreements often limit the competition. However, the risk of abuse was considered as low, since the parties on both sides were equal and since there already existed a legal framework governing collective bargaining.¹⁷ Thus, a labour market exception was introduced, which stated that the act would not be applicable on *agreements between employers and employees relating to wages and other conditions of employment* (article 28). The labour market exception was, without substantive alterations, included in the Competitions Act of 1982 (article 41)¹⁸ and 1993 (article 2).¹⁹

Since the competition law in Sweden was developed later than the collective labour law, the competition law had to be adjusted to the system on collective bargaining, and not the other way round, which for instance was the case in the United States.²⁰

The material scope of the exception

The normative competence of the social partners

According to the Act on Collective Agreements of 1928 (which was applicable at the time of the introduction of the labour market exception in 1953), a collective agreement was defined as an agreement which contained provisions regulating the conditions of employment or otherwise concerned “*the relationship between employers and employees*”. The concept covers not only the relationship between the employer and individual employees, but also the relationship between the employer and the trade union, and even questions concerning the relationship between trade unions and employers' organisations. What questions that would fall under the concept were not discussed further in the *travaux préparatoires*.²¹ However, there is case law, which indicates that provisions, which do not directly regulate the relationship between the employer and the employees, were accepted as collective agreements. The Labour Court has in several cases – before the introduction of competition legislation – accepted agreements concerning prices and opening hours in barbershops as valid collective agreements.²²

¹⁵ Svenska Arbetsgivarförbundet (SAF).

¹⁶ Landsorganisationen i Sverige (LO).

¹⁷ The governmental bill *Proposition 1953:103* p. 235-236.

¹⁸ The governmental bill *Proposition 1981/82:165* p. 196.

¹⁹ The governmental bill *Proposition 1992/93:56* p. 66.

²⁰ See, for instance, Fahlbeck (1988) p. 21 ff.

²¹ The governmental bill *Proposition 1928:39* p. 62.

²² The judgement of the Labour Court AD 1933 nr 32, AD 1933 nr 69, AD 1936 nr 37 and AD 1939 nr 49. See further Adlercreutz p. 10–12.

The concept of “*the relationship between employers and employees*” was transferred to the Co-Determination Act of 1976. The concept is used not only to lay down what questions could be regulated in a collective agreement. It is also used to determine the scope of the Co-Determination Act in general (article 1) and what question that may be subject to negotiation (article 10).

It follows from the *travaux préparatoires* that the concept is given a wide definition. The basic idea is that the employees, just as the employer, are depending on the development of the undertaking. Thus, every question that could effect the relationship between an undertaking or public authority and its employees could be subject to negotiations and collective agreements. The question does not need to have a direct or immediate effect on the employee. It is enough that it may have an impact on the future development of the undertaking.²³ The *travaux préparatoires* contain several examples, which show that the employers’ external business relations concern “the relationship between the employer and the employee” and, thus, such business relations could be regulated in a collective agreement.²⁴ Even the undertakings’ internal regulation, such as the company decision to choose a new managing director, may concern the relationship between employers and employees.²⁵

The Competition Act

The labour market exception in the Competition Act is narrower than the legal competence of the social partners (according to the Co-determination Act) and covers only questions “*relating to wages and other conditions of employment*”. The scope of the concept has been described as covering the core subjects of collective bargaining.²⁶

The basic idea behind the exception seems to be that restrictions of the competition on the labour market are perfectly well accepted. This idea seems to be upheld irrespectively of whether the restriction lays on the supply side (e.g. through provisions on minimum wage) or on the demand side (e.g. through provisions on maximum wage). Thus, the exception clearly applies to agreements or practices, which directly regulate the relationship between the employer and individual employees, without restricting the competition on other markets than the labour market.²⁷

A closed shop agreement, which, for instance, prevents the employer from employing workers not member of the trade union, certainly imposes restrictions on the supply of worker. According to what have been said above such an agreement falls under the labour market exception. Such agreements are under certain circumstances contrary to the negative freedom of association according, inter alia, to article 11 of the European convention on human rights.²⁸

In this connection it should be noted that the concept of an employee in article 2 of the Competition Act has the same connotation as in the Co-Determination Act.²⁹ According to article 1(2) of the Co-Determination Act an “employee” is to be regarded as including a person who performs work for another and is not an employee, but who is occupied in a position which is of essentially the same nature as that of an employee. Such an “employee-like” contractor is often denominated *dependent contractors*.³⁰ Thus, agreements and practices relating to conditions of dependent contractors are covered by the exception.

In 1997 the Market Court denied an association of petrol filling station operator negative clearance.³¹ The operators had franchise contracts with different oil companies and the association acted as a negotiator with the oil company on behalf of its members, about the commercial marginal on petrol and diesel. The association argued that this practice was covered by the labour market exception. The court held that, although some of the members of the association may be regarded as dependent contractors, the labour

²³ The governmental bill *Proposition 1975/76:105 Annex 1*, p. 209.

²⁴ a.a. p. 326.

²⁵ The judgement of the Labour Court AD 1981 nr 8.

²⁶ The governmental bill *Proposition 1997/98:130 p. 45*. See also Edwardsson (1997–98) p. 959.

²⁷ Measuring fees, which are paid to the trade union in order control the correct payment of wages, have been regarded as covered by the exception (The decision of the Competitions Authority 1996-06-28 Dnr 1104/95).

²⁸ Young, James and Webster v. United Kingdom, Judgement of the 13 August 1981.

²⁹ See, for instance, the governmental bill proposition 1981/82:165 p. 194 ff.

³⁰ Sigeman (1993) p. 55.

³¹ MD 1997:8

market exception was not applicable to the co-operation as a whole.³² The Competition Authority reached the same decision in a case regarding a minimum price recommendation regarding freelance journalists put up by the trade union for journalists.³³

The interpretation of the material scope of the exception is more complicated where a provision in a collective agreement is directly regulating the relationship between employer and the employees, but at the same time restricts the competition on a market of goods or services. Already in the *travaux préparatoires* of the Restrictive Practices Act of 1953 it was indicated that the labour market exception might not always apply in such cases.³⁴ When a practice or agreement, relating to conditions of employment, effect the markets of goods and services, the exception is, as a guiding line, applicable if the restrictive effects are a *direct and necessary outflow of the regulation of the employment condition, or an inevitable consequence of the regulation*.³⁵

Sometimes it is possible to separate the effects on a provision on the labour market and the “external effects”. In such cases the prohibition may not be directed against the employment conditions itself, but only its “external effects”.

The Glazier case.³⁶ The collective agreement for glaziers’ workshops contains a provision that declared how long time different tasks would take to perform. The provision was adopted as a means to calculate the wages, but was in practice also used in order to determine the price. The latter use of the provision was, according the authority, not covered by the labour market exception.

Provisions not directly regulating the relationship between individual employer and employees have often been regarded as falling outside the labour exception, even if they do indirectly effect this relationship. One example is collective agreements that *directly regulate the employers’ external business regulation*. Already in the *travaux préparatoires* of act of 1953, the price regulation in the collective agreement regarding barbershops mentioned above was questioned from this point of view.³⁷

It has in case law been held that, provisions in collective agreements which regulate the employers’ *possibility to subcontract* certain tasks to independent service providers, fall outside the labour market exception. An example of this is a provision in the collective agreement for the newspaper distribution sector, which banned self-employed in distribution work done by walking, bike or care.³⁸

Another example is found in the judgement of the Market Court concerning the collective agreement for house painters.³⁹ According to the agreement painting work should normally be carried out by piecework and, thus, by the employees of the undertaking. The agreement allowed some exceptions. According to one of these exceptions the undertaking (employer) was allowed to engage a self-employed, or a self-employed working together with an apprentice, for very small tasks or after an application to an arbitration board.

Although the provision formally regulated, which work that should be carried out by employees, the Market Court, regarded it as a de facto restriction of the possibility for independent undertakings (the self-employed) to undertake such tasks. The application of the provision was considered to fall outside the scope of the labour market exception.

It is in open question how far-reaching conclusions could be drawn from these cases. The aim of the provisions in the collective agreements concerning the newspaper distribution and the housepainters were to prevent social dumping (through the use of cheap subcontractors). Thus, the provisions might well – with the words of the ECJ – be described as a measure to improve

³² In a judgement by the Labour Court from 1969 some petrol filling station operators, were regarded as a dependent contractors (AD 1969 nr 31).

³³ The decisions of the Competitions Authority 1994-05-19 Dnr 1115/93, 1158/93 and 1159/93

³⁴ The governmental bill *Proposition 1953:103* p. 234.

³⁵ The governmental bill *Proposition 1981/82:165* p. 196. See also the judgement of the Market Court MD 1997:8.

³⁶ The decision of the Competitions Authority 1994-12-30 Dnr 1183/93.

³⁷ SOU 1952:27 p. 568. This regulation was abolished after intervention of the competition authority (proposition 1981/82:165 p. 195).

³⁸ The Labour Court judgement AD 1998 nr 112.

³⁹ MD 1989:13

conditions of work and employment.⁴⁰ Arguably provisions in collective agreements regulating the possibility for the employers to subcontract services, substitutable with the work provided by the employees, should be regarded as falling under the labour market exception if the provision directly aims at counteracting undercutting of the standards in the collective agreement. Such an interpretation of the scope of application of the exceptions seems to be well in line with ratio legis of the exception, namely that collective agreements are excepted as a means to prevent competition on the labour market with, for instance, low wages. It should be stressed that the provisions in the newspaper distribution and the housepainter cases (mentioned above) went beyond that purpose and restricted also the use of self-employed on conditions similar to the conditions of the relevant collective agreement. It is only such far-reaching restrictions on the market of the self-employed, which have not been accepted by the courts.

The distortion of competition could also appear on *the market of goods and services provided by the employer*. This could for instance be the case if employers, who are members of an employers' organisation, are treated more favourable in a collective agreement, than other employers.

*The dock monopoly-case.*⁴¹ In the Swedish docks there is usually only one undertaking acting. The collective agreement concerning dock work contains a clause, which enumerates the undertakings, which are covered by the agreement. It has been argued that the trade union would refuse to conclude collective agreement with other undertakings, and thus the agreement would restrict the competitions in the docks. According to the Competitions Authority the Competition Act was applicable. However, it was not showed that the clause had hindered the establishing of new undertakings in the docks.

*The housepainters case.*⁴² According to a collective agreement by a trade union and an employers' organisation, the collection and administration of holiday compensation was entrusted to an association set up by the parties to the agreement. This association handled also holiday compensation from employers bound by a substitute agreement (and not members of the employers' organisation). The Competition Authority held that if the interest of the payments made to the association was transferred to the employers' organisation or its members, and not to the other employers, this could be regarded as a prohibited restriction on competition.

The personal scope of the exception

According to article 23 of the Co-Determination Act, a collective agreement may be concluded by an employers' organisation or an employer and a trade union. Although the labour market exception in the Competition Act, according to its wording, applies only to agreements concluded between employers and employees, it is, in the *travaux préparatoires* as well as in case law, accepted that the exception also covers *collective agreements*.⁴³ In fact, a collective agreement regulating wages and other employment conditions is the paradigmatic example of the exception. The personal scope of the exception covers collective agreements, which are concluded on the nation level, as well as on the industry wide and local level.

It could, however, be argued that the exception only covers agreements or other co-operation between the two sides of the labour market, but not concerted practice between employers or decisions made by employers' organisations.⁴⁴ Since every collective agreement concluded by an employers' organisation, by necessity includes a decision by an association of employers (normally regarded as an undertaking, see below), such an interpretation of the exception must be rejected. Thus, the exception must, at least insofar the collective agreement relating to wages and other conditions of employment, include decisions by the organisations on each side, as well as co-operation between the members of the organisations.⁴⁵

The personal scope of the exception is assumed to apply even where the agreements between employers' organisations and trade unions involve other actors, if the regulation is a direct and

⁴⁰ Cf. Brentjens paragraph 46. See further section 3.4 below.

⁴¹ The decision of the Competitions Authority 1999-06-28 Dnr 161/1999.

⁴² The decision of the Competitions Authority 1999-06-28 Dnr 1104/95

⁴³ See, for instance, the governmental bill *proposition 1981/82:165* p. 194 ff. and the judgement of the Market Court MD 1989:13.

⁴⁴ Such a view is touched upon in the decision of Competition Authority in Dock-monopoly case (1999-06-28 Dnr 161/1999 paragraph 12).

⁴⁵ For the same opinion see Edwardsson (1997–98) p. 960.

necessary outflow of the regulation of the employment condition, or an inevitable consequence of the regulation.

One example is when a collective agreement contains a provision according to which the employer shall provide specified benefits in kind and these benefits shall be delivered by a specific undertaking. According to the *travaux préparatoires* the labour market exception is applicable if the undertaking that shall deliver the goods belong to the same group of companies as the employer. The situation could be compared with the employer providing the goods. If, on the other hand, an independent undertaking shall provide the goods, the arrangement might effect the market of the goods to be provided by that undertaking, and thus be regarded as falling outside the labour market exception.⁴⁶ The principle, indicated in the *travaux préparatoires*, has been developed in case law of the Competition Authority.

The most important arrangements of this kind are the *collective agreement based occupational insurance schemes*. Such schemes cover many different benefits, such as pension, sickness and maternity leave etc. The schemes have a quite complicated contractual construction, which could be simplified as follows: A trade union and an employers' organisation (often the confederations) conclude a collective agreement. According to this agreement the employers' are to take out a specified insurance in a certain insurance company with the employees as the policyholder (insured). Further, the trade union and the employers' organisation have commissioned the insurance company to administer and supply the insurance. The terms of the insurance are fixed and may not be altered by individual employers or employees.

A provision in a collective agreement for the employers to secure, for instance, pension or sickness benefits, is an employment condition and, thus, covered by the labour market exception. When it comes to the employers duty to take out an insurance in a certain insurance company, the authority has argued, that the exception is applicable if the insurance company is *not an independent entity* and its activities are a direct and necessary outflow of the regulation of the employment condition. The insurance company has been regarded as not independent when the parties of the collective agreement own it and they appoint the members of the decision-making bodies.⁴⁷

Even if the insurance company is *independent* in relation to the parties to the collective agreement, the Competition Authority has regarded the arrangement as falling inside the labour market exception.⁴⁸

According to the authority the insurance fulfilled a social function. The scheme was also based on the principle of solidarity, since the contributions are the same for all employers and irrespectively of the risk in the specific company. If the insurance scheme was going to work, the authority continues, it is necessary that maintenance of the insurance be left to one or some insurance companies in co-operation. Thus, the insurance could not possible be offered by several insurance companies in competition.

The argument on the social function of the insurance scheme and that it was based on a principle of solidarity, seems to have been picked up from the *Pouchet-case*,⁴⁹ although it is used in another context. In the decision of the Swedish Competition Authority the question was whether the co-operation between the social partners and the independent insurance companies was a "direct and necessary outflow of the regulation of the employment condition" and thus subject to the labour market exception. In *Poucet* the question was if a sickness fund was an undertaking under the EC competition law.⁵⁰

The collective agreement based occupational insurance schemes often contain a provision according to which the insurance shall be offered employers, who are not members of the employers' organisation and

⁴⁶ SOU 1978:9 p. 265 and the governmental bill *Proposition* 1981/82:165 p. 196.

⁴⁷ Se, for instance, the decision of the Competitions Authority 1996-12-20 Dnr 1459/93 (*ITP-planen*) and Edwardsson (1997-98) p. 966-967. See also the decision of the Competitions Authority 1996-06-28 Dnr 1104/95, which concerned an association set up jointly by the parties to a collective agreement and entrusted with task to collect and administer the holiday compensation.

⁴⁸ The decision of the Competitions Authority 1997-04-29 Dnr 1472/93 (*ITPK-Familjeskydd*).

⁴⁹ Edwardsson (1997-98) p. 967.

⁵⁰ See section 4 below.

have not concluded a substitute agreement with the trade union. The labour market exception is not applicable on this provision. The provision will be discussed below (section 5).

The labour market exception is not applicable when trade unions act in the interest of their members in ways other than through agreements or other co-operation with employers or employers' organisations. One example is when trade unions conclude agreements with insurance companies in order to collectively take out household insurance on behalf of its the members. If the trade union under such circumstances is acting in the capacity of an undertaking will be discussed below (see section 4).

The relation to the EC labour market exception

Through the *Albany*, *Brentjens'* and *Drijvende Bocken* cases a labour market exception has been established by the ECJ. According to this exception agreements concluded in the context of collective negotiations between management and labour in pursuit of social policy objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 81(1) of the Treaty. This exception applies at least when the social partners jointly are seeking to adopt measures to improve conditions of work and employment.

How does this exception relate to the labour market exception in the Swedish Competition Act? A governmental commission recently held that the labour market exception in article 2 of the Competition Act seems to be well in line with the exception established by the ECJ.⁵¹ Nevertheless there are some differences between the exceptions.

First it may be noted that the different wording ("conditions of work and employment" compared with "wages and other conditions of employment", which is used in the Swedish act) does not imply any differences in the material scope of the exceptions. However, while the ECJ seems to stress the *purpose* of the provisions in a collective agreement ("measures to improve conditions work"), the case law concerning the Swedish exceptions is mainly focus on the question if the provisions regulates the relationship between the employer and the employee. This difference might suggest that the EC exception has a wider scope of application than the exception in the Swedish Competition Act.

Further, the EC exception – at least as it is described in the above mentioned cases – only apply to article 81 EC, while the Swedish exception covers the whole of the Competition Act, e.g. including the prohibition of abuse of dominant position. This limitation is – at least to some extent – compensated through the "social" limitation in the application which follows from the interpretation of the concept of undertaking (section 4) and the possibility to justify some restrictions of the competition (section 5).

As has been mentioned above the Swedish Competition act has to a large extent been modelled after the EC competition law and the case law of the ECJ shall be taken into account when interpreting the Swedish law. Even though no labour market exception was known in EC competition law when the Swedish Competition Act was adopted, it seems likely that the Swedish courts and the Competition Authority will normally interpret the Swedish exception in a way which will not be contrary to the case law of the ECJ.

The concept undertaking

It follows from the above that the Competition Act does not apply to trade union and employers' organisation regarding activities regulating the conditions of employment. If a certain activity falls outside the labour market exception (in article 2 of the Competition Act), the next question will be whether the trade union or the employers' organisation is acting in the capacity of an undertaking.

The Competition Act of 1993 applies to all *undertakings*. An undertaking shall be defined as any natural or legal person engaged in activities of an economic or commercial nature. To the extent that such activities involve the exercise of authority they shall not fall within the scope of this definition (article 3). The concept has a similar connotation as the one in EC law and, according to the *travaux préparatoires*, the case law of the ECJ shall be taken into account when interpreting the concept.⁵²

⁵¹ SOU 2000:4 p. 155.

⁵² The governmental bill *Proposition* 1992/93:56 p. 66.

According to case law of the ECJ the concept of an undertaking, in the context of competition law, has been given a broad interpretation and encompasses every entity engaged in an economic activity. The specific legal form under which the undertaking is run, or how it is financed, is immaterial.⁵³

The function of the concept is – as far as is of interest here – to determine the categories of actors to whom the competition rules apply. Contrary to what the term implies, the concept of an undertaking does not refer to any specific characteristic of a certain legal or natural person, but to the activities which it perform. Thus, e.g., a trade union may be regarded as an undertaking when performing some activities, but not when performing other activities. The same goes for employers' organisations. The question that shall be put in this connection is when a legal or natural person is involved in activities of economic or commercial nature.

Activities of an economic or commercial nature are, in the first place, referring to the supply-side of a market, that is the offering of goods or services.⁵⁴ An entity performing such activities is normally regarded as an undertaking. Nevertheless, the ECJ has accepted that even such activities may, by virtue of their nature and purpose, fall outside the scope of what is considered as an undertaking.

In *Poucet* a sickness fund was regarded not as an undertaking, since it fulfilled an exclusively social function. The court stressed that the fund and its administration were compulsory and based on the principle of solidarity. The principle of solidarity was showed in the fact that the benefits were the same for all beneficiaries, even though contributions were to some extent proportional to income, and was entirely non-profit-making, and the benefits paid were statutory with no relation to the amount of the contributions. The solidarity made it necessary for the various schemes to be managed by a single organisation and for affiliation to the schemes to be compulsory.⁵⁵ On the other hand, it follows from the *Fédération Française des Sociétés d'Assurance*⁵⁶ that neither a social objective, nor the fact that the entity is non-profit-making, nor the requirements of solidarity are enough to exclude it from being regarded as performing an economic activity.⁵⁷

The case law might be summarised as follows: An entity performing activities normally regarded as economic, will not be considered as an undertaking if it pursues a social objective, and the construction of the activities makes the restrictive practise necessary to fulfil this objective.

The Swedish Competition Authority has applied the principle laid down by the ECJ in *Poucet*, in a case that was clearly outside the scope of the labour market exception in article 2 of the Competition Act.

*The collective household insurance case.*⁵⁸ The insurance Company Folksam and LO had concluded an agreement, which gave the trade unions affiliated to LO a right to conclude collective insurance for their members. The insurance was of a comprehensive character and included, inter alia, property and liability insurance and legal aid in case of disputes. The authority noted that the collective household insurance had a social purpose, was financed after a principle of solidarity and was not introduced for commercial reasons. Taking this considerations into account, the authority concluded in its decision, the trade union was not to be considered an undertaking, despite the economic activity that the trade unions could be said to exercise in this respect.⁵⁹

Employers' organisations, on the other hand, are normally held as an association of undertakings and the Competition Act may apply to the decisions of employers' organisations, even if these decisions are anchored in a collective agreement.⁶⁰ This does not mean that the Competition Act is applicable to every co-operation between employers or decisions of employers' organisation. As has been indicated above, the labour market exceptions do not only cover the agreements between the

⁵³ Cf. C-41/90 Höfner ECR 1991 I-1979 paragraph 21.

⁵⁴ Carlsson et al. 1999 p. 44.

⁵⁵ C-159/91 and C-160/91 Poucet ECR 1993 I-0637.

⁵⁶ C-244/94 ECR 1995 I-4013

⁵⁷ See also the *Albany*, *Brentjens*' and *Drijvende Bokken* cases.

⁵⁸ The decision of the Competition Authority 1997-05-02 Dnr 533/95.

⁵⁹ For a critical view of the decision, see Edwardsson (1997–98) p. 975.

⁶⁰ Cf. the judgement of the Market Court MD 1989:13. Se also C-179/90 Porto di Genoa ECR 1991 I-5889.

social partners, but also the co-operation between employers and the activities of employers' organisations, as long as it is related to collective agreement regulating wages and other conditions of employment.

On the other hand, if a provision in a collective agreement falls outside the material scope of the labour market exception, already the decision of the employers organisations⁶¹ or the application of the provisions by individual employers⁶² could constitute an anti-competitive co-operation between undertakings, even if the trade union is not considered as an undertaking. Thus, the Competition Authority could take action directly against activities of employers' organisation or individual employers, and not against the collective agreements.

Further, it should be noted that according to the definition of an undertaking, the legal form under which the undertaking is run is immaterial. "From this follows that even the activities of an employers' organisation, may by virtue of their nature and purpose, fall outside the scope of what is considered as an undertaking. However, case law provides, as far I know, no such examples.

A last remark. To a large extent the concept of an undertaking and the labour market exception are functionally equivalent in drawing the dividing line between collective labour law and competition law. It should be noted that, according to Swedish law, there are some differences in effect if a certain activity falls under the labour market exception or if the character of the activity is such that, for instance, a trade union is not regarded as an undertaking. The fact that the trade unions were not considered to be undertakings in the *collective household insurance case* (see above) did not prevent the Competitions Authority from considering whether the insurance company held a dominant position or not. On the other hand, in cases covered by the labour market exception are even the activities of the insurance company immune from the competition law.

Social justification of restrictions on competition

The effect of the EC competition law on the social policy of community and member states was not addressed when the Treaty was adopted. It seems as though the authors of the Treaty either were not aware of the problem or could not agree on a solution.⁶³ This is not only showed in the absence of an explicit labour market exception in the Treaty but also in how the possibilities to justify activities, which prima facie would appear to be contrary to competition regulation, are formulated. According to the wording of the Treaty restrictions on competition are often accepted if these restrictions are likely to lead to economic efficiency. Such a view is consistent with the opinion that competition law is only a means to an efficient end.⁶⁴ One classic example is that so called natural monopolies, like supply of water, is accepted.

Despite the fact that the justification of exceptions from the EC competition law usually is framed in purely economic terms, the case law of the ECJ contains several examples where restrictions have been accepted with reference to social objectives, without support in the wording of the Treaty.

The most obvious example is, of course, the labour market exception elaborated in the *Albany*, *Brentjens'* and *Drijvende Bocken* cases.

Further, it follows from article 86(1) EC that the EC competition law is applicable on undertakings which a member state has granted special or exclusive rights. However, this rule does not apply to undertakings entrusted with the operation of services of, inter alia, *general economic interest* (article 86(2) EC). Despite the wording, this exception has been applied to social policy objective.

In the *Albany case* the ECJ held that although the pursuit of a social objective and the requirements of solidarity did not prevent the fund from being regarded as an undertaking, these circumstances justified granting the Fund the exclusive right to manage the supplementary pension scheme. According to the Court the removal of the exclusive right conferred on the Fund might have made it impossible for it to

⁶¹ Cf. the judgement of the Market Court MD 1989:13

⁶² The decision of the Competition Authority 1999-02-19 Dnr 555/1996 (newspaper distribution).

⁶³ The opinion of the advocate general Jacobs in the *Albany*, *Brentjens'* and *Drijvende Bokken* cases, paragraph 179.

⁶⁴ See, for instance, Weatherill & Beamont (1995) p. 721.

perform the tasks of general economic interest entrusted to it under economically acceptable conditions and threatens its financial equilibrium.⁶⁵

According to article 81 agreements, decisions by associations of undertakings and concerted practices which distort the competition are prohibited. Such activities may, however, be acceptable if they contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits. Further, it shall not impose restrictions which are not indispensable to the attainment of these objectives or afford the undertaking the possibility of eliminating competition in respect of a substantial part of the products in question.

Although the only justifications for exceptions mentioned in article 81 concerns economic efficiency, it may very well be argued that also social policy objectives shall be taken into account. As one example where such arguments have been taken into account a decision by the Swedish Competition Authority could be mentioned.⁶⁶

As mentioned above the collective agreement based occupational insurance schemes often contains a provision according to which the insurance shall be offered employers, who are not members of the employers' organisation and have not concluded a substitute agreement with the trade union. The labour market exception is not applicable on this provision. The insurer may not provide insurance on other conditions than those laid down in the collective agreement, and the parties to the collective agreement to a large extent control have the insurance is maintained. Referring, inter alia, to the social function of the scheme, and that is was based on the solidarity principle, the authority found the arrangement not being contrary to prohibition on anti-competitive co-operation.

⁶⁵ See also the *Drivende Bokken* and *Brentjens* cases

⁶⁶ The decisions of the Competitions Authority 1997-04-29 (ITPK-Familjeskydd).

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COLCOM PROJECT

COLLECTIVE AGREEMENTS AND COMPETITION LAW

THE LEGAL POSITION IN THE UNITED KINGDOM

Professor Brian Bercusson
The University of Manchester

London
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Introduction

The relationship between collective agreements and competition law in the UK can be described, but only as regards the past. This is because the UK competition law is being radically transformed.

The Competition Act 1998 comes into force on 1 March 2000. It repeals the previous law, which took the form of:

- the Restrictive Trade Practices Act 1976
- the Resale Prices Act 1976, and
-
- the Competition Act 1989, sections 2-10.

The previous competition law looked to the form of anti-competitive agreements and banned particular types of restrictions per se. The new law is based on effects; it bans restrictions which are seen to have anti-competitive effects.

As will be explained below, the Act follows the wording of Article 85 of the EC Treaty (prohibiting anti-competitive agreements or concerted practices) and Article 86 of the EC Treaty (prohibiting abuse of a dominant position). Significantly, section 60 of the 1998 Act requires issues to be determined consistently with EC law.

As a result, what follows describes the relationship between UK competition law and collective agreements as it has been until 1 March 2000. Thereafter, it is not certain that the same position will apply. What can be said is that, thereafter, the relationship should be consistent with the position under EC law.

1. Defining the relationship between competition law and collective agreements

As early as 1720, UK legislation targeted organisations of workers on grounds of their restrictive or anti-competitive practices:⁶⁷

"...great numbers of journeymen tailors... have entered into combinations to advance their wages to unreasonable prices, and lessen their usual hours of work, which is of evil example and manifestly tends to the prejudice of the trade..."

In the 19th century, the common law doctrine of "restraint of trade" was aimed at restrictive, or anti-competitive practices. This was used against trade unions, so that they were deemed unlawful associations and their internal constitutions as

⁶⁷ Act of Parliament, 7 Geo I Stat 1, c. 13, quoted in S. Deakin and G. Morris, Labour Law, 2nd ed., 1998, p. 7.

associations were unenforceable. It was only a minority report of a Royal Commission of 1867 which proposed that trade unions be declared immune from the laws on restraint of trade. That recommendation was embodied in the Trade Union Act of 1871 which stated in section 3 that trade unions were not to be unlawful "by reason merely that they are in restraint of trade". Section 4 of the 1871 Act, which prevented the internal rules of trade unions as being enforced as contracts, had the result that collective agreements also were not legally enforceable.

The majority report of another Royal Commission of 1875 extended the principle of freedom of contract to include collective action, so as to override common law doctrines on restraint of trade:⁶⁸

"(Combination of workers in a union), though obviously operating in restraint of the freedom of trade, is no more than necessarily flows from the right, now fully admitted, of every man to dispose of his labour as he thinks proper, and to combine with others in order to obtain the best terms he can".

This immunity is currently in the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), section 11:

- "(1) The Purposes of a trade union are not, be reason only that they are in restraint of trade, unlawful so as-
- (a) to make any member of the trade union liable to criminal proceedings for conspiracy of otherwise, or
 - (b) To make any agreement or trust void or avoidable.
- (2) No rule of a trade union is unlawful or unenforceable by reason only that it is in restraint of trade".

Judicial decisions at the end of the 19th and beginning of the 20th century once more subjected trade unions to legal actions based on complaints of economic loss, and these were met by legislation conferring immunity against these economic torts (delicts) (the Trade Disputes Act 1906; now in the Trade Union and Labour Relations (Consolidation) Act 1992, sections 219 et seq.).

The 1950's saw a revival of interest in the idea that restrictive practices by workers or unions should be subject to competition law.⁶⁹ However, the Restrictive Trade Practices Act 1956 excluded from the scope of the legislation: (section 7 (4))

"any restriction which affects or otherwise relates to the workmen to be employed by any person or as to the remuneration, conditions of employment, hours of work or working conditions of such workmen".

⁶⁸ Parliamentary Papers (1875) XXX, at p. 26; quoted in Deakin and Morris, *op. cit.*, p. 10.

⁶⁹ Lord Wedderburn, "Freedom and frontiers of labour law", chapter 10 in Labour law and Freedom, Lawrence & Wishart, London, 1995, p. 350 at pp. 370 ff.

This formula was retained in the later competition legislation of 1973 (the Fair Trading Act, section 114(6)) and 1976 (the Restrictive Trade Practices Act, sections 9 (6) and 18 (6)).

2. National practice

In the Restrictive Trade Practices Act of 1956, as regards resale price maintenance, the trade union immunity was deleted, raising the possibility of liability (Restrictive Trade Practices Act 1956, section 24 (8)). Wedderburn notes that the Engineering Employers' Federation in the mid-1960s attempted to subject union restrictive practices to legal controls,⁷⁰ a move resisted by the "Donovan" Royal Commission of 1968.

The legislation on restrictive practices did allow for the government to refer "restrictions and requirements" relating to workers to the Monopolies and Mergers Commission. The government asks for a report on whether practices not necessary for the "efficient conduct" of the enterprise (except for pay) are against the public interest. However, there is no legal machinery to enforce any recommendations.⁷¹

This power was never used until the Conservative Government of Margaret Thatcher in 1988 called on the Monopolies and Mergers Commission to investigate labour agreements and practices in film and television companies. The Report absolved the unions and was not used again.

3. Material scope of the immunity

The extent to which UK competitive law intervenes in matters concerning labour depends on:

- i. the extent of the immunity of trade unions from common law doctrines of "restraint of trade";
- ii. The extent of the immunity of trade unions from common law liability for economic torts;
- iii. the scope of the Restrictive Trade Practices legislation.

i. Trade union immunities from "restraint of trade"

As defined in the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), section 1):

"In this Act a trade union means an organisation (whether temporary or permanent) -

⁷⁰ Ibid., pp. 372-373.

⁷¹ Fair Trading Act 1973, section 79.

- (a) which consists wholly or mainly of workers of one or more descriptions and whose principal purposes include the regulation of relations between workers of that description or those descriptions and employers or employers' associations; or
- (b) which consists wholly or mainly of -
 - (i) constituent or affiliated organisations which fulfil the conditions in paragraph (1) (or themselves consist wholly or mainly of constituent or affiliated organisations which fulfil these conditions), or
 - (ii) representatives of such constituent or affiliated organisations,
 and whose principal purposes include the regulation of relations between workers and employers or between workers and employers' associations, or the regulation of relations between its constituent or affiliated organisations".

The definition of "worker" is very broad, and is not limited to those with a contract of employment. Trade unions will include any person who:⁷²

"under any other contract... undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his".

The "regulation of relations" probably implies some direct link with employers, which goes beyond consultation. Purely political activities would probably not qualify an organisation as a trade union.

In practice, it is "collective bargaining" which is the hallmark of a trade union. "Collective bargaining" is defined as: (the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), section 178 (1))

"negotiations relating to or connected with one or more of (the) matters" (included in the definition of a collective agreement).

A "collective agreement" is defined in the same section of TULRCA 1992 (section 178 (1)):

"any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers associations and relating to one or more of the matters specified in TULRCA 1992, section 178 (2)".

The matters specified in section 178 (2) are:

⁷² TULRCA, section 296 (1).

- "(a) terms and conditions of employment, or the physical conditions in which any workers are required to work;
- (b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;
- (c) allocation of work or the duties of employment between workers or groups of workers;
- (d) matters of discipline;
- (e) a worker's membership or non-membership of a trade union;
- (f) facilities for officials of trade unions;
- (g) machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures".

Deaking and Morris give as an example of an agreement which falls outside this definition of "collective agreement" one "concerning union involvement in future investment decisions or product development relating to the undertaking".⁷³

In sum, trade union immunities against restraint of trade are defined in large part by their engaging in collective bargaining, and collective bargaining is defined in terms of a specific material scope: the list in TULRCA 1992, section 178(2). A trade union does not need to engage in all these activities, and may engage in others. But so long as it qualifies as a "trade union", it will be protected from the common law doctrine of "restraint of trade".

ii. Trade union immunities from economic torts

The immunities from economic torts are confined to action taken "in contemplation or furtherance of a trade dispute".⁷⁴ "Trade dispute" is defined in TULRCA, section 244 in terms identical to those defining "collective agreement" in TULRCA 1992, section 178(2).

"Trade dispute' means a dispute between workers and their employer which relates wholly or mainly to one or more of the following (then follows the list in TULRCA 1992, section 178(2)).

In other word, the material scope of the immunity of trade union action follows the same contours as that of the immunity defining the trade union itself. The material scope of the immunity of the organisation (trade union) from competition law in the

⁷³ Op. cit., p. 771.

⁷⁴ TULRCA 1992, sections 219(1), 220(1).

form of restraint of trade is paralleled by an identical immunity for the action of the organisation. As put by Deaking and Morris: "the scope of 'legitimate' industrial action and that of 'collective bargaining' are therefor co-extensive".⁷⁵

iii. The scope of the Restrictive Trade Practices legislation

The material scope of this immunity is confined to practices involving "workmen" and their "remuneration, conditions of employment, hours of work or working conditions". The precise scope of these terms is more hypothetical, as the Act has not been used, though, for example, it can be said that the definition of "workmen" is wider than employees, and includes persons providing services.

It is an open question whether the future changes in UK competition law will affect trade unions. A hypothetical example is the case of social security rules. The question of whether provisions in collective agreements related to social security might in future fall within the scope of competition law is raised by the UK Competition Act 1998's mandatory following of EC law. The European Court has held that the social security field is not per se exempted from EC competition rules. One review of the case law concluded that:⁷⁶

"even where there are reasons for not applying the competition rules to certain schemes... this non-application should not extend to the competitive behaviour of the bodies administering those schemes as regards their non-core activities".

4. Personal scope of immunity

In UK law, collective agreements are not normally legally binding. The Trade Union and Labour Relations (Consolidation) Act 1992 provides:⁷⁷

"A collective agreement shall be conclusively presumed not to have been intended by the parties to be a legally enforceable contract unless the agreement.

- (a) is in writing, and
- (b) contains a provision which (however expressed) states that the parties intend that the agreement shall be a legally enforceable contract".

However, the concept of "agreement" in the Restrictive Trade Practices Act 1976 is defined in section 43 as:

⁷⁵ Op. cit., p. 798.

⁷⁶ Alexander Winterstein, "Nailing the jellyfish: Social security and competition law", (1999) European Competition Law Review 324.

⁷⁷ Section 179(1).

"(1) 'Agreement' includes any agreement or arrangement whether or not it is intended to be enforceable... by legal proceeding...".

In the House of Lords decision in Director-General of Fair Traing v. Pioneer Concrete (Thames Valley) Ltd., Lord Nolan agreed that "the approach of this Act to the word 'agreement' differs widely from that of the law of contract".⁷⁸

It would seem that, in theory, therefore, the fact that most collective agreements in the UK are not legally binding would not prevent them falling within the scope of UK competition law.

The potential reach of "collective agreements" has recently been illustrated by the decision of the Employment Appeal Tribunal in Edinburgh Council v. Brown.⁷⁹ A joint consultative committee including employer and union representatives had recommended a change in policy, and a local authority committee, which did not include trade union representatives, adopted the recommendation. The employer argued that the decision of the committee to adopt the policy was not a collective agreement, as the committee was free to change its policy at any time without agreement with the union. The Employment Appeal Tribunal rejected that argument. Referring to the definition in TULRCA 1992 section 178 it stated:⁸⁰

"... while 'collective agreement' is thus defined, no part of the statute seeks to lay down any particular way in which such should be achieved, save, obviously, that by definition it must involve negotiation between the parties, as does any agreement...

... We consider that the deliberations of the consultative committee involving the trade union and its subsequent recommendations which were accepted by the council in precise terms..., should properly be regarded as bargaining or negotiations to achieve an agreement which is collective since it applies to the whole workforce".

5. Basic status of organisations

The conventional view is that competition law does not apply to trade unions. Kiran S. Desai, a lawyer working in the Brussels law office of a leading UK law firm, reflects growing skepticism about this conventional view when he states, under the heading "A Trade Union is an Undertaking":⁸¹

⁷⁸ (1995) Industrial Relations Law Reports 94, paragraph 36.

⁷⁹ (1999) Industrial Relations Law Reports 208.

⁸⁰ Ibid., paragraphs 19-20.

⁸¹ K.S. Desai, "E.C. Competition Law and Trade Unions", in (1999) European Competition Law Review 175.

"This statement is not obvious, and indeed some commentators have suggested that this is not the case".

He cites both the following leading authorities in footnote 1 on p. 175. First, R. Whish:⁸²

"A trade union is probably not an undertaking, as it does not carry on commercial activity".

However, the authority of this statement from Whish is undermined by the preceding sentence in his text, in which it is stated that:

"Employees acting in their capacity as such are not undertakings within Article 85(1)...".

The authority cited for this proposition is Cases 40/73 etc. Suiker Unie v. Commission.⁸³ However, a later decision of the House of Lords in the UK, Director-General of Fair Training v. Pioneer Concrete (Thames Valley) Ltd. held that:⁸⁴

"...an agreement providing for restrictive trade practices reached between employees acting in the course of their employment is made between 'persons carrying on business' within the meaning of the (Restrictive Trade Practices) Act".

Desai cites, secondly, Bellamy and Child:⁸⁵

"A workers' organisation is probably not an undertaking, at least as regards its industrial relations activities".

After reviewing the characteristics which might qualify a trade union as an undertaking within the meaning of Articles 85-86, Desai concludes:⁸⁶

"... as a general rule a trade union can be an undertaking for the purposes of E.C. competition law. This should at least be the case for a trade union carrying out economic trade which is separable from its other activities".

He adds:⁸⁷

⁸² Competition Law, 3rd ed., Butterworths, 1993, p. 189.

⁸³ (1975) European Court Reports 1663, 2007.

⁸⁴ (1995) Industrial Relations Law Reports 94.

⁸⁵ Bellamy and Child, Common Market Law of Competition, 4th ed., Sweet & Maxwell, 1993, para. 2-007.

⁸⁶ Op. cit., p. 176.

⁸⁷ Ibid., p. 177.

"...each Member State has its own labour laws... such laws provide immunity for certain activities of a trade union. Where immunity does not exist, those laws based on principles of economic interference may apply and be more suited than the application of E.C. competition law".

With a view to UK law's imminent approximation to EC competition law, the question is to what extent there will be in future an immunity of trade unions from competition law. Desai's article is an indication of UK legal thinking, at least as far as EC law is concerned.

6. Procedure

In some recent decisions, the UK courts appear to deny access to the courts to challenge agreements which are said to violate EC competition law. The cases involved agreements between pub tenants and petrol station licensees and their suppliers (of beer and petrol) which tied them to the supplier. Challenges to these agreements by the tenants and licensees were rejected on the grounds on the grounds, *inter alia*, that the parties to an illegal agreement should suffer the consequences. As stated in one case: the law did not provide any remedy to parties who were the cause not the victims of the distortion, restriction or prevention of competition".⁸⁸

A commentator on these cases observed:⁸⁹

"the English courts have, at a stroke deprived a large number of individuals and firms of any right of redress for breach of Article 85".

On the one hand, this would prevent employers, parties to collective agreements, challenging the agreements. On the other hand, it might allow for employees, not parties, to challenge them. And there is a tradition of employers "finding" individual employees to challenge agreements they want to get rid of.

7. Extension

There is currently no procedure for extension erga omnes of collective agreements in UK law. Such a procedure did exist for a period of a few years after 1975 (the Employment Protection Act 1975, Schedule 11). It did not give rise to any considerations related to competition law. It was abolished by the Conservative Government elected in 1979.

⁸⁸ Gibbs Mews v. Gemmell, 5 Common Market Law Reports 210; Court of Appeal, 22.7.1998.

⁸⁹ J. Maitland-Walker, "Have English courts gone too far in challenging the effectiveness of EC competition law", (1999) European Competition Law Review 1.

8. UK competition law and EC competition law

The UK Competition Act 1998 aims to bring UK law into line with EC competition law. Agreements which are legal today under the Restrictive Trade Practices Act may not be legal under the new law which comes into effect on 1 March 2000.

The Act prohibits agreements which damage competition and are harmful to trade. The prohibitions are modelled on the EU competition rules in Articles 85-86 of the EC Treaty. The legality of agreements will not depend on their form - so that careful drafting to escape the current law will no longer avail. Legality of agreements will depend on the assessment of their economic effects - all forms of anti-competitive behaviour covered by agreements will be caught if they violate EU norms.

A key provision is section 60 of the 1998 Act. Section 60 (1) states:

"The purpose of this section is to ensure that so far as possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community".

The section goes on to specify that in determining questions arising under the 1998 Act, courts and tribunals:

"must act (so far as compatible with the provisions of this Part...) with a view to securing that there is no inconsistency between

- (a) the principles applied and the decision reached by the court in determining that question; and
- (b) the principles laid down by the Treaty (of Rome) and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law".

UK courts and tribunals:

"must, in addition, have regard to any relevant decision or statement of the (EC) Commission".

It has been stated that:⁹⁰

"This means that the (UK) Director General of Fair Trading must have regard not only to the way in which Articles 85 and 86 EC Treaty have been interpreted by the European Court of Justice and the European

⁹⁰ J. Nazerali and D. Cowan, "Importing the EU Model into UK Competition Law: A Blueprint for Reform or a Step into 'Euroblivion'?" (1999) European Competition Law Review 55 at p. 56.

Court of First Instance but also to any relevant decisions or statements made by the European Commission".

This same author, however, points out that:

"It has been argued by some commentators that such an approach of importing EU interpretation into domestic competition law is from the outset fundamentally flawed. This is because the objectives of UK and EU competition policy are ideologically and historically different. EU competition, has sought to prevent partitioning of the single market. The United Kingdom has been more concerned with preventing excesses of market power. It is argued therefore that the transposition of the EU competition model into the United Kingdom could lead to a de facto incompatibility".

In contrast, another commentator on this provision has expressed the view that, since the European Court has interpreted concepts of free trade and competition in the Treaty of Rome in light of specific factors, such as economic integration, a supranational legal order and abolition of disparities between Member States:⁹¹

"the incorporation of EC law by section 60 of the Act also incorporates this concept... It would seem to follow from this that the interpretation of provisions in similar terms should reach the same Result, even though the context is different".

The question is whether this implication for UK courts and tribunals will also mean that the results of decisions such as Albany will be followed and applied in the different UK context.

⁹¹ J.D.C. Turner, "The UK Competition Act 1998 and Private Rights", (1999) European Competition Law Review 62 at p. 63.

Annex I

Table of the competence of social partners and immunity of collective agreements

<u>State</u>	<u>Summarising the Competence of Social Partners (A)</u>	<u>Exclusion of Collective Agreements (B)</u>	<u>Comments</u>
Austria	duties and rights arising from employer-employee relationship	-	B: no case law
Belgium	individual and collective relations between employers and employees broadly interpreted (e.g. recruitment is covered)	-	B: Becu the only case; traditional doctrine that since trade unions have no legal personality, they are not undertakings and competition law does not apply
Denmark	no statutes; rather broad in doctrine and case law	wages and labour relations	B includes social partners' duty of information; cases: price setting prohibited, recruitment provisions approved
Finland	terms and conditions of employment (A1); broader at company level (A2)	agreements concerning the labour market	B wider than A1 but not in case law (paper mills case) and subsequent competition law
France	working and employment conditions plus complementary social security	-	B: uncertainty prevails; artists case of 1990 contested by the doctrine (unions not commercial actors, competition law cannot apply)
Germany	conditions of work and economy	-	B: a de facto immunity exists by constitutional case law
Italy	no ordinary law; however, a constitutional anchorage	-	A: in practice even some investments covered (FIAT); B: no case law
Netherlands	conditions of work broadly interpreted	present law: de facto yes future law: no	A: e.g. vocational training and 'social plans' covered; B: future law in EC format
Spain	conditions of work broadly interpreted: productivity and economic matters covered	-	A + B: general possibility to quash provisions in collective agreement by a third's suit nears competition suits; such rare case law exist
Sweden	relationship between employers and employees	wages and other conditions of employment	A wider than B; B narrowly interpreted in newspaper case; B: no locus standi in -"-
United Kingdom	detailed definition in TULCRA; e.g. employing and manning covered	previous law excluded social partners present law does not	present law in EC format
Norway	wage and working conditions	wages and working conditions	pending case KPL is similar to Albany without erga omnes (= van der Woude)

Annex II

Niklas Bruun and Jari Hellsten in cooperation with Brian Bercusson

8th December 1999

COLCOM PROJECT

General

1. The COLCOM project will examine the relationship between collective labour agreements and competition law both in Community and national law. Thirteen national trade union confederations have committed themselves to co-finance the project¹. ETUI will participate in the steering group. Community financing has been applied for and seems likely.

2. On the national level the aim is to carry out legal studies in sufficient detail in the following Member States: Austria, Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Spain, Sweden and United Kingdom. If materials will come up from other EC Member States, they will be presented as well. In the listed Member States national researchers will be directly engaged. The members of the steering group² guarantee their scientific support in the form of a direct participation in the project. The participation of the representative of the European Trade Union Institute ensures the assistance of Netlex lawyers and researchers. The national profiles and the description of EC law will be presented in a single English report.

3. The project thus deals with elementary aspects of collective bargaining and social dialogue, aiming to promote them in the sense of Articles 139(1) and 140 of the EC Treaty.

Background

4. The application for Community financing states under “project aims and links to budget line objectives”, as follows:

“The aim is to study the following questions:

- what is the legal status of collective agreements in EC law, case-law included, in relation to competition law?
- how is the problem of the relationship between labour law and competition law solved in the Member States? This question includes especially the

¹ ÖGB (A), DGB (G), FNV (NL), CSC (B), FGTB (B), LO-DK, LO-S, TCO (S), LO-N, AF (N), AKAVA (FI), STTK (FI) and SAK (FI).

² Professors Niklas Bruun (chair), Brian Bercusson, Thomas Blanke, Antoine Jacobs, Antonio Ojeda-Aviles and Bruno Veneziani. Researcher Stefan Clauwaert will represent ETUI. Researcher Christophe Vigneau is participating in the group and researcher Jari Hellsten will act as assistant of Niklas Bruun.

following aspect: To what extent are collective agreements sheltered from competition law;
- what is the relevant EC competence in this field?"

5. Another important background document for the study is the Albany case (C-67/96). The reasoning that analyses the relationship between Article 81(1) (ex Article 85(1)) EC and collective agreements culminates in Albany's paragraphs 59 and 60. The former denotes that

"59. It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.

6. Paragraph 60 of Albany draws the conclusion concerning the demarcation line between competition rules and collective agreements:

"60. It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85 (1) of the Treaty."

7. It is elementary to study within the project all the questions flowing from these two passages in Albany, including their repercussions on national law.³ As to EC law, the project has to focus on the interpretation of judgements Albany, Brentjens, Drijvende Bokken and Becu. It is presumed that judgement in case Van der Woude (C-222/98), similar to Albany, will not be given during the project.

Questionnaire

8. Questions For National Reports

1) Defining the relationship between competition law and collective agreements. Is the impact of competition law on collective labour law defined by legislation, case law and/or in administrative procedure, or by legal doctrine? Does constitutional law have any impact in this field?

2) National practice. If there is national practice, which criteria of competition law (such as abuse of dominant or monopoly position⁴ or prohibition of cartels) are used in assessing the validity of collective agreements, and which subject matters of collective agreements are dealt

³ Less far-reaching 'independent' conclusions should be drawn from paragraphs 61 to 64 in Albany since they are an application limited to the case.

⁴ Cfr. Case Merce, C-179/90, [1991] ECR I-5889.

with (e.g. manning provisions, pension or other agreement-based funds, status as worker in relation to entrepreneurship)?

3) Material scope of the immunity. What could be regarded as the national interpretation of “conditions of work and employment” (Albany, paragraph 59)? Does it correspond to the national definition of the normative competence of the social partners, normally done in law or by practice? Are there practical examples of terms and conditions in agreements that might fall outside the category of ‘conditions of work and employment’? ⁵ What is the possible meaning of “social policy objectives” and the “measures to improve conditions of work and employment” in this context?

4) Personal scope of immunity. Does the possible exemption of collective agreements from competition rules cover also other agreements than sectoral ones (e.g. enterprise/works council agreements if affecting the status of workers as consumers, or interprofessional agreements)? If so, how exactly?

5) Basic status of organisations. Does the national law on competition (legislation/case law / administrative procedure) apply to the social partners as organisations? If so, how exactly?

6) Procedure. Are the social partners involved in the anti-trust scrutiny? If so, how exactly? Is the distinction between automatically void and contestable provisions relevant? How is the nullity of a provision established? ⁶ Who has the burden of proof in showing that collective agreements violate national competition law?

7) Extension. Does the extension (the *erga omnes* effect) of collective agreements create specific problems in relation to competition rules?

⁵ An illustration is a Finnish site-adjusted collective agreement appointing one of the canteen keepers on a building site. In the preparatory works of the national law it was deemed unlawful.

⁶ An illustration is the case of competition using (bogus) self-employment with terms and conditions below the collective agreement concerned. In Sweden there is such a case, involving the Transport Workers’ Union. The collective agreement for newspaper distribution sector traditionally banned self-employment in distribution work done by “walk, bike or car”. The competition authority ordered this provision not to be applied as violating national competition law. This was done administratively without the union being a party and also remaining without the possibility to appeal. The case is now in the EHRC, Strasbourg, among others on fair trial grounds.

The EC case law necessitates some further questions to be answered also by the national COLCOM reports.

- 8 a) Is the national competition law, in relation to collective agreements, ipso jure, in light of travaux préparatoires or by case law, anchored in EC law?
 - 8 b) Are there indications that the national immunity from competition law of collective agreements is narrower/broader than that affirmed in Albany? Assess the legal consequences if national competition law would be more stringent than EC-law in attacking “anti-competitive” practices, and this more stringent national competition law would affect collective agreements? I.e.
 - i. does EC competition law pre-empt national law, or only set a minimum standard?
 - ii. does EC anti-trust immunity for collective agreements pre-empt national law which provides less (or more?) immunity?
 - 8 c) How is Albany described in the national debate? Are there already reactions of authorities, social partners, legal doctrine etc?
-