

Is a trade union an undertaking under EU competition law?

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Abstract

EU Competition law applies to undertakings. The status of a trade union under EU competition law is a contentious issue. In this paper, I argue that trade unions, contrary to existing CJEU jurisprudence, can be classified as “undertakings” when engaged in collective bargaining. Current case law argues that trade unions act as their members’ agent when engaged in collective bargaining. As workers are not undertakings under EU competition law, trade unions are not either. This paper argues primarily that a trade union is an undertaking and that Court’s approach on the agent-principal question is wrong. It further argues that a trade union is an undertaking when engaged in collective bargaining as they provide, and/or offer their services on a given market.

1. Introduction

The concept of an undertaking in competition law “makes it possible to determine the category of actors to which the competition rules apply.”¹ The classification of a trade union as an undertaking when engaged in collective bargaining is highly contentious. Such a definition would subject collective agreements between an employer (or employers’ association) and a trade union to analysis under Article 101 TFEU. However, current CJEU case law argues that a trade union, when engaged in collective bargaining, is not an undertaking for the purposes of competition law.² Such a finding questions the need for the *Albany* exemption. If a trade union is not an undertaking when engaged in collective bargaining, then there is no need for an exemption: competition law would simply not apply. In *Albany*, the Court held that collective agreements are exempt from EU

⁺ Thanks to Professor Morten Hviid, Professor Gareth Thomas, Professor Andreas Stephan and Dr Sebastian Peyer, and those who I have not mentioned, for their comments on this paper. Mistakes remain mine alone.

¹ Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [2000] 4 C.M.L.R. 446, [AG206]

² See *Albany* (n.1); Case C-22/98 *Criminal Proceedings Against Jean Claude Becu* [2001] 4 C.M.L.R. 96; Case C-413/13 *FNV Kunsten Informatie en Media v Netherlands* [2014] E.C.R. 00

competition rules where such an agreement is agreed between management and labour (or their representatives) **and** has as its objective improving conditions of work and employment.³ In the Court's opinion, applying competition to collective agreements would undermine the social policy objectives inherent within such agreements. This paper, however, argues that the Court erred in arguing that a trade union is not an undertaking.

This paper argues that the CJEU errs in their arguments that a trade union is not an undertaking for the purposes of EU competition law, and that under a strict application of competition law, a trade union is an undertaking. This question is important because it has implications not only for the need for an exemption, but also for the role of collective bargaining as a form of worker protection. Whilst trade unions provide a diverse number of services – ranging from collective bargaining to running supermarkets and travel agents – its core function is still the protection of its members' interest. Competition law could be used as a tool to challenge and undermine worker representation and trade unions.⁴ Trade unions becoming liable in damages for any anti-competitive collective agreements could lead to situations such as in *Taff Vale* becoming the norm.⁵ Furthermore, applying competition law to collective bargaining reduces legal certainty for employers, employees and unions themselves. Can collective agreements be relied upon if they can be ex-post declared void? In addition, declaring a collective agreement void post-implementation causes significant inroads into trade union freedom and the right to collective bargaining under Article 11 of the European Convention on Human Rights 1950.⁶ As seen in *Demir v Turkey*, the retroactive voiding of a collective agreement was a breach of the right to collective agreement.⁷ Retrospective voiding under EU competition rules has the same potential risk. In addition, it must be pointed out that this article does not suggest a return

³ *Albany*, [59]-[60]

⁴ See, for example, *Loewe v Lawlor* 208 US 274 (1908) for illustration of the early application of the Sherman Act in the United States to labour union.

⁵ *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] A.C. 426

⁶ This is also the case potentially for the Charter of Fundamental Rights of the European Union O.J. C 326, 26.10.2012. See Article 28 which states that "Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreement at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action."

⁷ *Demir and Baykara v Turkey* (2009) 48 E.H.R.R. 54. In *Demir*, the ECtHR held that the ex-post voiding of a collective agreement and requirement for individual trade union members to repay the benefits obtained (wage increase) under the agreement, was an infringement on the right to collective bargaining under Article 11 ECHR.

to the position under the common law: that trade unions are illegal as a combination in restraint of trade.⁸ This position is remedied by statute which removes the common law from applying to trade unions.⁹ The arguments presented below argue do not comment, or assess, whether competition law “should” apply, to which the restraint of trade literature is more suitable.

However, such effects are unlikely to happen. Leaving the exemption in *Albany* to one side, finding that a trade union is an undertaking when engaged in collective bargaining does not mean that an agreement is anti-competitive, or that the social objectives contained in collective agreements will be ignored. In order for an agreement to be anti-competitive under Article 101(1), it must either have the object or effect of restricting competition. Where there are countervailing efficiencies which outweigh any potential restrictions of competition, the parties can argue that the agreements should be exempted by Article 101(3).

Within the European Union, there is a wide divergence of collective bargaining models affecting aspects of collective bargaining such as their enforceability,¹⁰ and the level at which bargaining takes place.¹¹ Different models will affect whether a trade union, when engaged in collective bargaining, is an undertaking or not. The following discussion shall focus on a decentralised, firm-level bargaining system. The reason for this being that this closely resembles the UK industrial relations system. However, where helpful to do so, discussion will make use of other models, particularly the German model of collective bargaining.

Therefore, the following model will form the base of the analysis in the following sections.

⁸ See *Hornby v Close* (1867) 10 Cox CC 393. The Court held that trade unions were unlawful associations in so far as their objects included the raising of wages and the control of labour in the trades in which their members worked.

⁹ See ss. 2 and 3, Trade Union Act 1871; more recently, s.11 Trade Union and Labour Relations (Consolidation) Act 1992. The common law on restraint of trade has developed significantly since the 1870's and

¹⁰ Compare the UK, where collective agreements are presumed to be not legally enforceable against either party to it, and simply form a “gentleman's agreement”; see s.179 Trade Union and Labour Relations (Consolidation) Act 1992; *Ford Motor Co Ltd. v Amalgamated Union of Engineering and Foundry Workers* [1969] 2 All E.R. 481; with Germany whereby collective agreements are legally enforceable.

¹¹ For example, a decentralised bargaining system occurs within the UK, whereas in the Benelux and central European countries, bargaining is at a more centralised level.

Union A is recognised by Firm X to engage in collective bargaining. Membership of Union A is voluntary, with members being required to pay a subscription fee to the union. Fees are set on a sliding scale according to wage bands. Collective bargaining takes place at firm level, with any collective agreement is assumed to be legally unenforceable.

In section 2, the paper shall argue that the existing case law is wrong. It will argue that a trade union does act as its members' agent when engaged in collective bargaining and therefore can be an undertaking in its own right. This paper shall then examine, in section 3, whether a trade union can be an undertaking when engaged in collective bargaining. It will argue that collective bargaining is an economic activity. In sections 4 and 5, the paper will examine whether collective bargaining is either a public function or a solidarity function respectively. The sections will argue that neither applies, and will confirm that collective bargaining is an economic undertaking. Section 6 will conclude the paper – concluding that a trade union is an undertaking when engaged in collective bargaining.

2. Is a trade union an undertaking: the agent-principal issue?

Previous judicial discussion of whether a trade union is an undertaking when engaged in collective bargaining argues that a trade union is not an undertaking for the purposes of competition law.¹² Such argument appears premised on the basis that the union acts as agent of its members, and not in its own right. As an individual member, when employed is not an undertaking for the purposes of EU competition law, then the union, as its members' agent, is not an undertaking. An agent is a "legal or physical person vested with the power to negotiate and/or conclude contracts on behalf of another person (the principal), either in the agent's own name or in the name of the principal" for the sale or purchase of goods or services of the principle.¹³ Where the agent bears no, or an insignificant, risk, of the relation

¹² See *Albany* (n.1); *Becu* (n.2); *FNV Kunsten* (n.2)

¹³ Guidelines on Vertical Restraints (2010) O.J. C 130/01, [12]

to the contracts “concluded and/or negotiated” on behalf of the principle,¹⁴ the agent and principal form a single economic unit: the agent is an auxiliary organ.¹⁵

This section will argue that the reasoning adopted by the Courts is incorrect. It questions, first, whether the union does act as its members’ agent given the model set out in the introduction; and second, whether when engaged in collective bargaining, the individual worker can be “subsumed” within the employing undertaking but can be defined as an undertaking in their own right.¹⁶

2.1 The existing case law

Becu states that employees are not undertakings under the Treaty competition provisions.¹⁷ Furthermore, the Court states that “even taken collectively, the registered dockers in [the] port area cannot be regarded as constituting an undertaking.”¹⁸ The dockers were not linked by a “relationship of association or by any other form of organisation which would support the inference that they operate on the market in dock work as an entity or as workers of such an entity.”¹⁹ AG Colomer goes further arguing that a workers’ collective – a trade union – could be regarded as an undertaking where “they conduct themselves in matters of trade like an entity capable of being regarded as an undertaking...”²⁰, for example when “linked to other workers of that undertaking by a relationship of association.”²¹ However, on the basis of information provided at the Court’s request – whether they had a joint management or administrative structure or whether they took the form of associations or corporations in order to perform tasks or ensure discipline²² – there was “at least

¹⁴ *Ibid.*, [17]

¹⁵ Case C-279/06 *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL* [2008] ECR I-6681, [36]; Case 311/85 *ASBL Vereniging van Vlaamse Reisbureaus v ASBL Social Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1987] E.C.R. 3801, [19]-[20]; *Bundeskartellamt v Volkswagen AG and VAG Leasing GmbH* (Case C-266/93) [1995] E.C.R. I-3477, [19]; Case C-97/08 P *Akzo Nobel v Commission* [2009] E.C.R. I-8237, [55]; Alison Jones, ‘The Boundaries of an Undertaking in EU Competition Law’ (2012) 8 *European Competition Journal* 301.

¹⁶ See Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others v Commission* [1975] E.C.R. 1663, [539]

¹⁷ *Becu*, (n.2), [25]-[26].

¹⁸ *Ibid.*, [27].

¹⁹ *Ibid.*, [29].

²⁰ *Ibid.*, [AG57]

²¹ *Ibid.* One must assume that “that undertaking” refers to the trade union rather than the employer.

²² *Ibid.*, [AG58]

formally, no organisation between recognised dockers for the purposes of offering, concluding contracts for, and providing their services.”²³ AG Colomer holds that on the facts of *Becu* the collective organisation was not:²⁴ indeed, Colomer states that such discussion is beyond the facts of the preliminary reference.²⁵

Although *Becu* has been cited being authority for the point that a trade union is not an undertaking, this is not the case.²⁶ Although the Court states that even when acting collectively, the individual workers cannot be said to be undertakings, it does not say whether a trade union is or is not an undertaking. The discussion is not whether trade unions are undertakings, but whether individual workers, whilst “engaged in fixed term contracts of employment”, are undertakings.²⁷ The Court does not ask whether the collective organisation itself was an undertaking; only whether the dockers were. There is no discussion as to whether, when engaged in collective negotiations, collective organisations (trade unions) are undertakings or even associations of undertakings. Furthermore, if one considers the question referred to the CJEU, and the facts of the case, *Becu* was not concerned with whether collective bargaining or agreements fall within Article 101 TFEU. The Court was asked whether the Royal Decree preserving a specific area of work for recognised dockers, with associated set pay rates: specifically, whether Article 90(1) EC gave rights to individual persons which were directly enforceable.²⁸

AG Jacobs reaches a similar conclusion to that ascribed to *Becu* in his opinion in *Albany*.²⁹ He argues that a trade union, when engaged in collective bargaining, is not engaged in an economic activity.³⁰ However, AG Jacobs’ reasoning differs slightly from that in *Becu*. For Jacobs, unions act “merely as agent for employees ... and not in their own right

²³ Ibid.

²⁴ Ibid., [AG60]-[AG61]

²⁵ Ibid., [AG60]

²⁶ See, Directorate-General for Internal Policies, Policy Department A: Economic and Scientific Policy, *EU Social and Labour Rights and EU Internal Market Law*, p.36

²⁷ *Becu*, (n.2) [25]

²⁸ Ibid., [19]

²⁹ The Court did not address this issue within their decision.

³⁰ *Albany* (n.1) [AG201]. What is interesting is that AG Jacobs is of the opinion that employers, when engaged in collective bargaining, are undertakings. Although this is of significant academic interest, it is of practical insignificance when considered in light of the exemption. The exemption removes the agreement from Article 101’s scope, thus whether either party is an undertaking is irrelevant. See [AG228]-[AG236] for AG Jacob’s reasoning.

... That alone suffices to show that ... they are not acting as undertakings...³¹ As such, a union is only an undertaking when carrying out an economic activity in its own right.³² When engaged in collective bargaining a trade union is not an undertaking: collective bargaining is an activity attributable to its members. Therefore, as employees/workers are not undertakings under EU competition law,³³ a trade union, when acting for its members, is neither an undertaking nor association of undertakings. The union is not acting independently of its members; it is an “executive organ of an agreement between its members.”³⁴ This can be expanded further. Workers are incorporated into the undertaking that employs them.³⁵ Thus a union, acting as an executive organ or agent of the employees, is potentially incorporated into the employing undertaking as well.

Furthermore, AG Jacobs sets out three reasons why an employee cannot be an undertaking.³⁶ First, the concept of an undertaking cannot be interpreted to include employees. AG Jacobs interestingly does not explain why this is. Second, employees are a form of dependent labour in that they do not bear the direct risk of a transaction. They are “subject to the orders of their employer. They do not offer services to different clients, but work for a single employer. For those reasons there is a significant functional difference between an employee and an undertaking providing services.”³⁷ Third, and finally, AG Jacobs argues that EU competition law is not tailored to be applicable to employees. Reference within Article 101(1) TFEU to “purchase or selling price” and “trading conditions” does not fit with worker concerns of wages and working conditions. To apply Article 101(1) TFEU would “necessitate the use of uneasy analogies between the markets for goods and services and labour markets.”³⁸

³¹ Ibid., [AG227]. See also [AG222] where AG Jacobs draws a distinction between a union acting in its own right and as a mere organ of “an agreement between its members.”

³² Ibid., [AG225]

³³ See *Becu* supra (n.2); *Albany* (n.1); Cases 40/73-48/73 *Coöperatieve Vereniging Suiker Unie UA v Commission* [1975] E.C.R. 1663

³⁴ *Albany* (n.1) [AG222]

³⁵ See *Becu* (n.2), [26]

³⁶ *Albany* (n.1) [AG212]-[AG216]

³⁷ Ibid., [AG215]

³⁸ Ibid., [AG216]

FNV Kunsten further confirms the view that a trade union is not an undertaking.³⁹ In *Kunsten*, the Court held that a collective agreement covering self-employed workers did not fall within the *Albany* exemption. In contrast to employees, self-employed workers are classified as undertakings for the purposes of EU competition law.⁴⁰ Therefore, a body representing self-employed workers “does not act as a trade union association and therefore as a social partner, but, in reality, acts as an association of undertakings.”⁴¹ When a trade union represents self-employed workers it can “hardly be regarded as an ‘association of employees’ ... it would be difficult to consider those trade unions as representing ‘labour’ within the meaning referred to in *Albany*.”⁴² The key distinction, therefore, is the position of the individual members. If a union member is a worker, it is not an association of undertakings; where the member is self-employed, it is.

The implications of *Kunsten* are immediately obvious: a body representing employees, and carrying out negotiations on their behalf, is not an association of undertakings. This must be true following *Becu*.⁴³ The Courts appear to assume that an employee, when engaged in collective bargaining, is not an undertaking in its own right. In the author’s view, this is not correct. As will be examined below, a worker is acting outside his employment relationship when engaged in collective bargaining.

2.2 Is the Court’s case law correct?

The above case law erred in its arguments that a trade union is not an undertaking. All the cases above appear to reach the conclusion that when engaged in collective bargaining, the union acts as its members’ agent. AG Jacobs adopts the test of simply whether the activity is attributable to the union in its own right or whether it is an economic activity. In arguing that the activity is attributable to the members – not the trade union – the trade union acts

³⁹ In *Kunsten* (n.1), AG Wahl devotes considerable time discussing the distinction between workers and self-employed. Although of importance to the *Albany* exemption itself, this shall not be discussed within the paper as will detract from the main question being asked.

⁴⁰ *Ibid.*, [AG30]-[AG32], [27]-[28].

⁴¹ *Ibid.*, [28]. See also AG Wahl at [AG32] who states that “a trade union acting on behalf of self-employed persons is to be regarded as an ‘association of undertakings’ within the meaning of Article 101(1) TFEU.”

⁴² *Ibid.*, [AG26]. The reference to *Albany* is in regard to paragraphs [55]-[60] of the decision setting out the exemption. It does not refer to any argument dealing with the undertaking question.

⁴³ An employee is not an undertaking under EU competition law, thus a body representing employees, cannot be an association of undertakings.

as its members' agent, AG Jacobs ignores the "proper" test for whether the entity acts as agent. As set out above, in order to be an agent, the entity must have the power to conclude and/or negotiate contracts for the sale or purchase of goods and services of the principal. Furthermore, the agent must bear no, or insignificant, financial or commercial risks related to the selling and/or purchasing of the contract goods or services.⁴⁴ Whilst trade unions through collective bargaining are negotiating with the employer to "sell" the (continued) services of its members, they do bear significant financial risks related to collective bargaining. However, such an argument does not fit easily within the previous case law and examples given in the Commission's Vertical Guidance. There are two types of risk to be considered when determining agency: contract-specific risks and transaction-specific risks.⁴⁵ Contract-specific risks are those directly related to the contract concluded or negotiated; transaction-specific risks are those which enable the agent to carry out the activity they are appointed to. These are primarily sunk costs.⁴⁶

In terms of contract-specific risks, it is unclear what risks there are for individual workers when engaged in collective bargaining. Financially, the only potential risk is when they take industrial action to try and persuade the employer to reach an agreement the employee considers favourable. Where bargaining is unsuccessful, they still continue to work on their previous terms and conditions. This contrasts with business transactions or other bargaining over services where a failure to reach an agreement can result in either the provision of services coming to an end or no services being provided at all. On the other hand, for trade unions the financial and commercial risks are substantial in this regard. Where industrial action is taken – in other words, where services are withheld – trade unions can be liable for damages and be required to pay strike pay. Within the UK, trade unions can be liable in tort for damages up to £250,000 where they have not complied with the very technical legal requirements for the union to call industrial action.⁴⁷ This could substantially affect the union's ability to engage in collective bargaining in future: they may

⁴⁴ Vertical Guidance, [18]; *CEPSA* (n.13), [36]

⁴⁵ Verticals Guidance [14]. The guidance also mentions a third type of risk, risks related to activities the principal requires the agent perform on the same product/services market. These risks are not present in regard to collective bargaining.

⁴⁶ Vertical Guidelines [14]

⁴⁷ In the UK context, see ss. 226-234A Trade Union and Labour Relations (Consolidation) Act 1992; *RMT v Serco* [2011] I.R.L.R. 399; *Metrobus v Unite the Union* [2009] I.C.R 173. For discussion, see generally Ruth Dukes, 'The Right to Strike under UK Law: Something More than a Slogan?' [2011] *Industrial Law Journal* 302; KD Ewing and John Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 *Industrial Law Journal* 2.

be unable to fulfil their role in protecting and representing their members in employment and industrial relations. This can be seen as a contract-specific risk. The withholding of services is as much a financial risk for trade unions as it is for individual members. Such risk is directly linked to the “sale” of its members continued services.⁴⁸

Furthermore, there are potential transaction-related risks for the union in engaging in collective bargaining. These take the form of training costs of its “negotiators”.⁴⁹ This can be either by union employees or individual union members. Where this is carried out by individual members as part of their role as either a union representative or shop steward, the union will need to train that member. Such costs are unlikely to be reimbursed by an individual membership fee and cannot be used for other activities if the union decides to stop engaging in collective bargaining. Union membership fees are to cover a whole host of administrative costs and other services that unions provide. There is no separate fee for training costs.

Therefore, it is argued that a union is not its member’s agent as it does assume significant financial risks when engaged in collective bargaining. This is, as set out above, primarily through the potential cost of taking industrial action to either put pressure on the employer to reach a collective agreement. In addition, there are financial risks associated with the provision of training to enable the union to offer collective bargaining. Such costs are sunk costs and are not reimbursed by the principal (the individual members) as such. The union charges a set fee which is partially linked to its (expected) costs, but based on the individual member’s income.

2.3 But what if the union is its members’ agent?

However, even where the union acts as its members’ agent, this does not mean that the employee is not an undertaking when engaged in collective bargaining. Under *Becu*, a worker is not an undertaking for the purposes of competition law as when engaged under a contract of employment the individual worker is subsumed within the employing

⁴⁸ Industrial action is a vital component to the right to collective bargaining. Without industrial action, collective bargaining is no more than collective begging. See, for example, Case C-438/05 *International Transport Workers’ Federation v Viking Line ABP* [2008] 1 C.M.L.R. 51; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2008] 2 C.M.L.R. 9

⁴⁹ See Vertical Guidelines [16], where training of personnel is listed as a market-specific investment.

undertaking. This appears to be AG Jacobs' concern in *Albany*. His first two concerns relate to acts done in the service of the employer. Where a worker is acting outside that employment relationship, they are not subsumed within the employer's undertaking, and can potentially be held to be an undertaking in their own right.⁵⁰ When involved in collective bargaining they are acting against the company: they are generally in conflict with the company's interests. The workers are not acting on their employer's behalf, thus cannot be "subsumed" within the employing undertaking. They are bargaining for improved terms and conditions: in effect, offering their continued services – their labour – under new terms and conditions. In extremis, this could be accompanied by a threat to quit and or industrial action.

Furthermore, it has been argued that employees should be treated as undertakings in their own right.⁵¹ "[W]e would treat such individuals if they were independently commercially exploiting their goods or services, as consultants."⁵² Although very impactful in that all workers can be exposed to competition law, this is unlikely to be the case: individual employees will not normally have appreciable market power, thus Article 101 and 102 TFEU will not apply.⁵³ If this were the case, any trade union would be either an association of undertakings or subsumed into its members' undertaking.

2.4 Summary

In summary, the above has argued that the previous decisional practice of the Court is incorrect. A trade union does not act as its members' agent when engaged in collective bargaining: there are potentially significant financial risks to the union when engaged in collective bargaining. Therefore, a trade union can be an undertaking for the purposes of EU competition law. In the following sections, this paper shall examine whether a trade union is an undertaking or not.

⁵⁰ See Paul Nihoul, 'Do Workers Constitute Undertakings for the Purposes of the Competition Rules?' [2000] *European Law Review* 408, 413–4. Although Nihoul is talking about the subordination present within the employment relationship, there is no problem in thinking wider. Collective bargaining, in providing countervailing power, augurs against a form of subordination.

⁵¹ Townley, Christopher (n 55) 14–16.

⁵² *Ibid.*

⁵³ *Ibid.*

3. Is a trade union an undertaking?

An undertaking is defined as an “entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed.”⁵⁴ Whether an entity is an undertaking depends on the “industrial and commercial nature of the activity.”⁵⁵ EU competition rules do not apply to an activity “which, by its nature, its aim and the rules to which it is subject does not belong to the sphere of economic activity ... or which is connected with the exercise of the powers of a public authority.”⁵⁶ Where the entity is engaged in an economic activity, the entity in question is an undertaking for the purposes of the Treaty competition provisions. In *Pavlov*, it was held that an economic activity consists of offering goods and services on a given market.⁵⁷ This definition has been given a wide interpretation. In *Spanish Courier Services*, for example, the Spanish Post Office was held to be an undertaking on the basis that it provided services on a given market.⁵⁸ Similarly in *Ambulanz Glockner*, the provision of ambulance services for remuneration was an undertaking for the purposes of competition law.⁵⁹ That the provider had public service obligations did not prevent such a finding.⁶⁰

In assessing whether an activity is an economic activity, the Court of Justice of the European Union (“CJEU”) takes a functional approach. An entity can be an undertaking when carrying out one activity but not when carrying out another.⁶¹ For example, in *SELEX*,

⁵⁴ Case C-41/90 *Hofner and Elser v Macrotron GmbH* [1993] 4 C.M.L.R. 306, [21]. See also AG Jacobs in *Albany*, (n.1); Cases C-180-184/98 *Pavlov v Stichting Pensioenfonds Medische Specialisten* [2001] 4 C.M.L.R. 1. See also, Article 1 of Protocol 22 EEA which defines an undertaking as “any entity carrying out activities of a commercial or economic nature.” See also, Woulter Wils, ‘The Undertaking as a Subject of E.C. Competition Law and the Imputation of Infringements to Natural or Legal Persons’ (2000) 25 *European Law Review* 99; Jones (n 16); Arved Deringer, *The Competition Law of the European Community* (Commerce Clearing House, New York 1968) 5–6; Alison Jones and Brenda Sufrin, *EU Competition Law : Text, Cases, and Materials* (Oxford, United Kingdom : Oxford University Press, [2014] Fifth edition 2014); Richard Whish and David Bailey, *Competition Law* (7th edn, Oxford University Press) 2012).

⁵⁵ Case 118/85 *Re Amministrazione Autonoma dei Monopoli di Stato: E.C. Commission v Italy* [1988] 3 CMLR 255, per AG Mischo

⁵⁶ Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] 4 C.M.L.R. 27,

⁵⁷ *Pavlov* (n.54), [75]

⁵⁸ [1991] 4 C.M.L.R. 560

⁵⁹ Case C-475/99 *Ambulanz Glockner v Landkreis Sudwestpfalz* [2002] 4 C.M.L.R. 21; [19]-[22]

⁶⁰ *Ibid.*, [21]

⁶¹ See Case C-49/07 *Motosykletistiki Omospondia Ellados NPID v Greece* [2009] 5 C.M.L.R. 11. “The classification as an activity falling within the exercise of public powers or as an economic entity must be carried out separately for each activity to be exercised by a given entity.” [7]; See also Case C-264/01 *AOK Bundesverband v Ichtjol Gesellschaft Cordes* [2004] 4 C.M.L.R. 22, [AG25], [AG45], [58]

the General Court held that some of Eurocontrol's activities, for example, setting technical standards and managing intellectual property rights, were not economic, however, some other activities, for example, the provision of technical assistance, were economic activities.⁶² This paper, therefore, shall focus solely on collective bargaining. Whilst trade unions have diversified beyond their original functions,⁶³ this has no influence on whether a trade union is an undertaking when engaged in collective bargaining.

3.1. *Is collective bargaining an economic activity?*

An economic activity is defined as "consisting in offering goods or services on a given market..."⁶⁴ Trade unions, when engaged in collective bargaining, do offer services on a given market.⁶⁵ Trade unions, specifically within the UK, do not engage in collective bargaining unless they have members within a given firm. In return for subscription fees, the union will bargain on its members' behalf. Without members there is no incentive for trade unions to engage in collective bargaining, nor does it make economic sense for them to do so. At a rudimentary level, the union supplies its services in collective bargaining in return for membership fees. Within the UK's industrial relations setting, a trade union will not engage in collective bargaining absent members. Although a union can engage in collective bargaining for altruistic reasons,⁶⁶ this does not alter the outcome. Although such altruistic reasons may make such a provider less competitive, such reasons do not affect the provision of services on a given market.

⁶² Case T-155/04 *SELEX Sistemi Integrati SpA v Commission* [2007] 4 C.M.L.R. 1096, [90]. Although the CJEU disagreed with the GC's classification on appeal, it did not question the approach taken; see Case C-113/07 P [2009] 4 C.M.L.R. 1083, [77]-[79]

⁶³ *Albany* (n.1) [AG226]. For example, some trade unions now operate supermarkets, savings banks, travel agencies and other forms of business. Unite, on their website, state that "many unions have agreements with third parties for additional benefits, such as cheaper insurance and discounts". These are solely for their members. < <http://www.unitetheunion.org/how-we-help/whybecomeamember/tradeunionsknowyourfactsfromthefiction/>> [last accessed 19/11/2016, 11.30]

⁶⁴ *Pavlov*, (n.54), [AG107], [75]; see also Case 118/85 *Commission v Italy* [1988] 3 C.M.L.R. 255

⁶⁵ In Case C-319/07 P 3F (*formerly Specialarbejderforbundet i Danmark (SID) v Commission of the European Communities* [2009] 3 C.M.L.R. 40, the Court, at [52] states that a trade union "is an economic operator which negotiates the terms and conditions on which labour is provided to undertakings".

⁶⁶ See, for example, Bob Hepple, *The Making of Labour Law in Europe* (Mansell; London 1986) 11; Otto Kahn-Freund and others, *Kahn-Freund's Labour and the Law* (London : Stevens, 1983 3rd ed / by Paul Davies, Mark Freedland 1983) 1, 7.

Furthermore, the trade union must bear the financial/economic risks associated with collective bargaining.⁶⁷ If the trade union is unsuccessful in collective bargaining, its members can go elsewhere. As stated by AG Colomer, “[i]t is the ability to take on financial risks which gives an operator sufficient significance to be capable of being regarded as an entity genuinely engaged in trade, that is to say to be regarded as an undertaking. In other words, recognition as an ‘undertaking’ requires, at least, the existence of an identifiable centre to which economically significant decisions can be attributed.”⁶⁸ It is arguable that the trade union bear the financial risks of collective bargaining. The union has a financial incentive to achieve a favourable outcome. If collective bargaining is successful, the union has potential financial gains through attracting new members. A union with a good record of attaining benefits for its members is more attractive than one that does not. In contrast, a union that ‘fails’ in collective bargaining runs the risk of losing members. Members can leave the union, possibly seeking out another union who may achieve better results. As the main revenue source of financial income for unions is through their members’ subscription fees,⁶⁹ a loss of members has financial repercussions. Thus, collective bargaining has a significant financial risk for unions.

Finally, the activity must, at least in principle, be capable of being carried on by a private undertaking on order to make a profit.⁷⁰ As AG Jacobs states, “the basic test appears ... to be whether it could, at least in principle, be carried on by a private undertaking in order to make profits.”⁷¹ It is irrelevant that the entity lacks a motivation to create

⁶⁷ See *Pavlov* (n.54), where the Court held that an undertaking must “assume the financial risks attached to the pursuit of the activity.” [76]

⁶⁸ *Becu*, (n.2) [AG53]-[AG54]

⁶⁹ For example, out of Unite the Unions’ £165,424 annual income, £153,839 was generated from membership subscriptions; see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/538434/795T_2015.pdf [last accessed 30/08/2016, 12.51]; out of UNISON’s £201,724 annual income, £158,304 was from its members. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/528258/736T_2015.pdf [last accessed 30/08/2016, 12.54]

⁷⁰ *Albany*, (n.1) *Pavlov* (n.54), *AOK Bundesverband* (n.61) [AG59], “If there were no possibility of a private undertaking carrying on a given undertaking, there would be no purpose in applying the competition rules to it.”; Okeoghene Odudu, *The Boundaries of EC Competition Law : The Scope of Article 81* (Oxford ; New York : Oxford University Press 2006).

⁷¹ *AOK Bundesverband* (n.61) [AG27]. See also Case C-364/92 *Sat Fluggesellschaft mbH v European Organisation for the Safety of Air Navigation* [1994] 5 C.M.L.R. 208, [AG9]. Ag Tesaro states that the possibility to make a profit is “the essential factor in classifying a body as an undertaking...”

profit,⁷² or does not have any economic purpose.⁷³ That there is the possibility is sufficient. As applied to collective bargaining, it is irrelevant whether a trade union makes a profit from collective bargaining. That there is the potential to make a profit is key.

It is possible for profit to be made through offering services for the purposes of collective bargaining. Trade unions do not offer their bargaining services for free.⁷⁴ Although there are free-riders, in that the outcome of collective bargaining is normally applied to non-members as well as members, a significant proportion of those benefiting from collective bargaining will be fully paid members. Trade unions can set membership subscriptions at a level at which it is possible for them to operate at a profit. That trade unions do not, does not alter this conclusion. This follows the decisional practice of the CJEU. In *Ambulanz Glockner*, for example, it was argued that there was nothing about the nature of providing emergency or patient transport that necessitated that it be carried out by public entities.⁷⁵ Such an activity could in principle be carried out for a profit, thus was an undertaking under EU competition law. Although collective bargaining must be carried out by a trade union,⁷⁶ there is no prohibition against unions making a profit through collective bargaining: it is entirely a matter for a trade union to set the level of fees applicable.⁷⁷

Therefore, when engaged in collective bargaining, a trade union is, prima facie, an undertaking for the purposes of EU competition law in its own right. It provides services, collective bargaining, on the market, bears the financial risks involved, and has the potential to make a profit. However, there are potential arguments against this argument. These focus on, first, whether collective bargaining is a public function (section 4), and second, whether collective bargaining is a solidarity function (section 5).

4. Is collective bargaining a public function?

⁷² Cases 209/78 etc. *Van Landewyck v Commission* [1980] E.C.R. 3125, [88]; *Distribution of Package Tours During the 1990 World Cup* [1992] O.J. L 326/31, [43]

⁷³ Case C-222/04 *Cassa di Risparmio di Firenze* [2006] E.C.R. I-289, [123]

⁷⁴ See (n.67) for the proportion of income made by trade unions.

⁷⁵ *Ambulanz Glockner* (n.59), [AG68]

⁷⁶ See section 178, Trade Union and Labour Relations (Consolidation) Act 1992

⁷⁷ *Ibid.* AG Jacobs states that in regard to the transport services whether profit is made depends on the cost set by the operator for his services. The same applies in regard to collective bargaining.

If collective bargaining can be defined as a public function, it will not fall within the definition of an economic activity. Activities connected with the exercise of public powers are not of an economic nature and thus do not classify as an undertaking.⁷⁸ In *Bodson*, the CJEU held that Article 101 did not apply to “contracts for concessions concluded between communes acting in their capacity as public authorities and undertakings entrusted with the provision of a public service.”⁷⁹ Furthermore, in *Cali*, the Court held that an entity acts in the exercise of official authority where a task is in the public interest and forms part of the essential functions of the state, and, “is connected by its nature, its aims and the rules to which it is subject with the exercise of public powers...”⁸⁰

First, it is possible that collective bargaining can be the exercise of public powers. Collective bargaining is always in the public interest: strong worker representation and regulation of the employment relationship is a good thing. Second, where labour relations are characterised by collective laissez faire and/or abstentionism, collective bargaining plays a regulatory role, forming an essential function of the state.⁸¹ Collective bargaining in regulating the employment relationship in terms of setting terms and conditions, ensures that worker voice is heard and preventing exploitation of workers. In the absence of state regulation of labour relations and the employment relationship, collective bargaining is strongly in the public interest and arguably forms part of the essential functions of state. A good example of this is seen in the German model collective bargaining. In German industrial relations, collective bargaining sets industry standards. Collective agreements set wages and terms and conditions of employment for all workers in a given sector. A good example of this is that prior to 2015, there was no statutory minimum wage within Germany. Wage regulation was the sole prerogative of the collective bargaining regime. This form of collective bargaining fits more closely with *Bodson* and *Cali*. In *Cali*, for example, the private enterprise was entrusted with carrying out anti-pollution surveillance in Genoa. In a collective bargaining model such as in Germany, the social partners, trade

⁷⁸ See, eg, *Wouters* (n.56)

⁷⁹ Case C-30/87 *Bodson v Pompes Funebres des Regions Liberees SA* [1989] 4 C.M.L.R. 984, [18]

⁸⁰ Case C-343/95 *Deigo Cali & Figli SRL v Servizi Ecologici Porto di Genova* [1997] 5 C.M.L.R. 484, [23]

⁸¹ For discussion on this, see Kahn-Freund and others (n 67); Lord Wedderburn, ‘Freedom of Association and Philosophies of Labour Law’ (1989) 18 *Industrial Law Journal* 1; Keith Ewing, ‘The Function of Trade Unions’ (2005) 34 *Industrial Law Journal* 1.

unions and employers' associations, are entrusted with the regulation of the employment relationship through collective bargaining.

This, however, is missing from the model in this paper – and UK collective bargaining. Whilst the legislative framework is supportive of collective bargaining, this is not to the extent seen in Germany. Collective bargaining is free to set terms and conditions of employment, but is not entrusted with the regulation of the employment relationship. Whilst collective bargaining still has a regulatory function over employment relationships, this is not “granted” by the state, as understood in competition law. In *Bodson* and *Cali*, the activities were carried out in pursuance of their powers granted under statute.⁸² This is not present within the UK collective bargaining regime. Thus, collective bargaining within a UK context, is not the exercise of public powers.

5. Solidarity

The CJEU has held that entities adopting a solidarity function are not undertakings for the purposes of the Treaty competition provisions.⁸³ Where collective bargaining can be defined as a solidarity activity, then a trade union, when engaged in collective bargaining, is not an undertaking (or association of undertakings) under EU competition law. Solidarity is defined as “the redistribution of income between those who are better off and those who, in view of their resources ... would be deprived”,⁸⁴ and, “the inherently uncommercial act of involuntary subsidisation of one special group by another.”⁸⁵ However, cases involving solidarity have been few and far between,⁸⁶ and have all concerned insurance and pension schemes. For example, in *Poucet*, funds managing the sickness and maternity insurance scheme for self-employed individuals in non-agricultural occupations were not undertakings

⁸² The same applies in *Cali e Figli* (n.80)

⁸³ See, eg, Case C-159-160/91 *Poucet v Assurance Generales de France and Caisse Maituelle Regionale du Languedoc-Roussillon* [1993] E.C.R. I-637; Case C-244/94 *Federation Francaise des Societes d'Assurance v Ministere de l'Agriculture et de la Peche* [1995] E.C.R I-4013; Case C-238/94 *Jose Garcia v Mutuelle de Prevoyance Sociale d'Aquitaine* [1996] E.C.R. I-1673. The author is unaware of any Treaty provisions on this solidarity function.

⁸⁴ *Ibid.*, [10]

⁸⁵ Case C-70/95 *Sodemare SA v Regione Lombardia* [1997] E.C.R. I-3395, [AG29]. See also AG Jacobs in *AOK Bundesverband* (n.61) [AG32]

⁸⁶ In a search of Eur-lex using the terms “solidarity” AND “Poucet”, only 48 results were found. This included cases unrelated to both the competition and free movement provisions.

due to the solidarity function they carried out.⁸⁷ The scheme was “intended to provide cover for all the persons to whom they apply, against the risks of sickness, old age, death and invalidity, regardless of their financial state and their state of health at the time of affiliation.”⁸⁸

Furthermore, the exemption for solidarity functions is based on the view that social programmes should be protected “from the Community’s economic law.”⁸⁹ Competition law “recognises national solidarity as the political expression a set of obligations citizens wish to extend towards one another.”⁹⁰ Where it is demonstrated that such an obligation was essential for the achievement of the social goal, through the use of a system of redistribution based on solidarity rather than market activity, this will be respected by the Court. Competition law will not apply.⁹¹

The CJEU has been consistent in its assessment of whether a specific activity can be classified as a solidarity function.⁹² In doing so, the CJEU will look at the activity as a whole, including the way in entity carrying out such an activity. From the CJEU case law, we can distil 6 key factors that the Court will consider in answering this question. The Court will look at (1) the objective being pursued; (2) the nature of the activity; (3) the manner in which contributions and benefits are calculated and managed; (4) the overall degree of state control; (5) the activities’ redistributive aspects; and (6) the existence of competing entities. These factors are not cumulative; the Court will balance arguments and factors in favour and against solidarity.⁹³ The following discussion, therefore, will focus on the above factors, examining how they apply to collective bargaining.

⁸⁷ *Poucet* (n.83), [8]. The complaint challenged the orders that they pay contributions to the scheme and that the complainants should be free to approach any insurance provider in the Community and not be subject to the unilateral rules of the provider in question. See also the schemes in *Albany* (n.1); Case C-350/07 *Kattner Stahlbau GmbH v Maschinenbau- und Metall- Berufsgenossenschaft* [2009] E.C.R. I-1513; Case C-218/00 *Cisal di Battistello Venanzio & C. Sas v Istituto nazionale per l’assicurazione contro gli infortuni sul lavoro (INAIL)* [2002] E.C.R. I-691

⁸⁸ *Ibid.*, [9]

⁸⁹ Nina Boeger, ‘Solidarity and EC Competition Law’ [2007] *European Law Review* 319, 324.

⁹⁰ *Ibid.*, p.338

⁹¹ *Ibid.*, p.338-9

⁹² See *Federation Francaise*, (n.83) [17]-[21], *INAIL* (n.87), *Albany* (n.1), and case law cited within.

⁹³ *Ibid.*, [19]-[21]. Here the Court held that the principle of capitalisation and linkage of benefits to contributions outweighed the other factors in favour.

5.1 Does the solidarity principle apply here?

In applying these criteria to collective bargaining, there are several factors strongly in favour of holding that collective bargaining performs a solidarity function. First, collective bargaining clearly has a social objective. It seeks to improve the social and economic position of its members. Its purpose is not to make a profit, but is aimed at protecting and furthering worker interests through redistributive measures. This is evident from case law establishing collective bargaining as a fundamental right protected under Article 11 ECHR.⁹⁴ Collective bargaining, according to the ECtHR, is “an essential means to promote and secure the interests of its members.”⁹⁵ It is not an economic activity for trade unions, but an exercise of social solidarity.

This, when linked with the second and fifth factors – the nature of the activity and its redistributive qualities – argues in favour of collective bargaining being a solidarity activity. Collective bargaining is a form of countervailing power against the employer.⁹⁶ It is to provide protection for employees and, as already stated, improve their working terms and conditions. Furthermore, collective bargaining has a redistributive nature and function, aiming to improve the position of its members, generally at the cost of its members’ employer(s). In wage bargaining, the collective bargaining redistributes rents in favour of the employee: wage bargaining is all about redistribution of rents.

Additionally, there is no link between the contributions paid and the benefits received under collective bargaining. Contributions vary according to the level of income an individual receives, yet there is no differentiation as to the benefits received from collective bargaining. Furthermore, benefits also accrue to those who are not union members, common to the UK tradition of collective bargaining.⁹⁷ Therefore, no principle of capitalisation, as shown in *Federation Francaise*,⁹⁸ is present, thus strongly indicative of a solidarity function.

⁹⁴ See *Demir* (n.7)

⁹⁵ *Ibid.*, [157]

⁹⁶ John Kenneth Galbraith, *American Capitalism : The Concept of Countervailing Power*. (London : Hamilton 1961).

⁹⁷ See *Poucet* (n.83) and *Federation Francaise* (n.83) whereby in some cases there was no contributions to the fund yet still had access to the benefits payable under them. In a sense bargaining is not based on the principle of capitalisation.

⁹⁸ The benefits received are not linked to the contributions made **and** the financial results of the investments made.

Moreover, the non-compulsory nature of trade union membership has little weight against finding that collective bargaining is a solidarity function. Within the UK closed shops are unenforceable,⁹⁹ and in addition to the right to join a union, there is a corresponding negative right not to be a member.¹⁰⁰ The presence of free-riders points towards a solidarity function, when considered in light of the nature and purpose of collective bargaining, strongly leads towards the conclusion that collective bargaining is a solidarity function.¹⁰¹ Everyone covered by the collective agreement benefits from it: collective bargaining has a compulsory effect, even though not compulsory in nature.

However, there are strong arguments against collective bargaining being a solidarity function. First, there are differences between what the CJEU case law has identified as solidarity functions under competition law and the social function performed by trade unions. The nature of the activities differs considerably. The cases involving solidarity and social protection concern the implementation and payment of state benefits and pensions.¹⁰² These are largely public functions carried out by a public or quasi-public body. In contrast, and as set out in section 4 above, collective bargaining is not a public function. At best, one can argue that there is a duty on the state to facilitate and enable certain trade union functions,¹⁰³ there is no “right to prevail”. An employer can be forced to bargain – or at best, forced to go through a process – but not to reach an agreement. One can therefore draw a distinction between the solidarity cases and collective bargaining. In the cases where the activity was a solidarity function, redistribution was guaranteed. The “process” always reached a positive outcome. Under collective bargaining, there is no guaranteed redistribution or “positive” outcome. Collective bargaining can, and does, frequently reach

⁹⁹ See ss.137 and 152 TURLCA which prevent enforcement of both pre and post-entry closed shops. See, also, ss.145A, 146 TURLCA. In RJ Harvey, *Harvey on Industrial Relations and Employment Law*. (Butterworths 2001), it is argued that the Human Rights Act 1998, in incorporating Article 11 of the ECHR into UK law, “virtually guarantees that a closed shop may not be lawfully maintained.” NI.11.A.3[3107]; see also [3133]-[3135]. For an ECHR perspective, see *Sørensen and Rasmussen v Denmark* (2008) 46 E.H.R.R. 572

¹⁰⁰ Article 11 ECHR gives the right to join a trade union, and has been interpreted, albeit controversially, as giving the freedom to join a union, which therefore assumes that there is a freedom not to join a union. One can interpret this to prevent compulsion to join a union as well. See the corresponding rights in *Young, James and Webster v United Kingdom* [1981] I.R.L.R. 408; *ASLEF v United Kingdom* [2007] I.R.L.R. 361. See also *Sorensen v Denmark* (2008) 46 E.H.R.R. 572.

¹⁰¹ Even in Germany where by law the benefits of a collective agreement only accrue to union members, employers will still extend the benefits to non-members.

¹⁰² See, for example, *Poucet* (n.36), *AOK Bundesverband* (n.15)

¹⁰³ The Trade Union and Labour Relations (Consolidation) Act 1992 places various duties on the employer to recognise, provide bargaining information and consult, for example, with the employer.

no concrete outcome. The employee, and trade union, can be in the same position many years after commencing collective bargaining.

Furthermore, whilst there is a redistributive element in collective bargaining, there is no “involuntary subsidisation” of one group by another. The employer makes a voluntary choice to increase wages.¹⁰⁴ Looking at the CJEU case law make this distinction clearer. The insurance/sickness funds found to operate on a solidarity basis all operated via either inter-generational subsidisation¹⁰⁵ and/or compulsory subsidisation between entities.¹⁰⁶ Such redistribution is not generally present in collective bargaining. Although collective agreements setting up social security schemes, such as in *Albany*, do this, a simple wage agreement does not. It operates to improve the wages of those currently employed by a specific employer. However, when viewed from a German collective bargaining model, this argument falls away. Where sectoral wage bargaining occurs to set wages, the agreed upon wages apply across the board regardless of whether the individual employer agrees. Even if the employer leaves the employers’ association, they are still bound by the collective agreement until its expiry.¹⁰⁷ This, however, does not occur under a decentralised model, typical of much collective bargaining in the UK.

Furthermore, there is, prima facie, the potential for competing unions. Although competition is allowed so far as it does not affect the actual accrued benefits,¹⁰⁸ competition between unions when engaged in collective bargaining has the potential to affect the actual accrued benefits. Competition between unions can prevent counterbalancing power against the employer being brought, and can render collective bargaining illusory. Employers, averse to collective bargaining, could play one union off against the other rendering any outcomes either significantly less beneficial or indeed

¹⁰⁴ Note that this includes situations where the employer concedes to the union demands following concerted industrial action.

¹⁰⁵ *Poucet* (n.83), [12]

¹⁰⁶ *Poucet* (n.83), *Federation Francaise* (n.83).

¹⁰⁷ Note that conformity with the collectively agreed terms is prominent within the non-unionised sector. Firms not belonging to employers’ association generally follow the collective agreed terms. See, for example, Heinz Tüselmann and Arne Heise, ‘The German Model of Industrial Relations at the Crossroads: Past, Present and Future’ (2000) 31 *Industrial Relations Journal* 162, 164; Stephen J Silvia, *Holding the Shop Together: German Industrial Relations in the Postwar Era* (ILR Press, an imprint of Cornell University Press 2013).

¹⁰⁸ *AOK Bundesverband* (n.61), [56]. The Court held that competition was restricted solely to contributions and to attract members. This did not deviate from the solidarity function as this had not effect on the overall benefits or the nature of the scheme. The aim, as accepted by the Court, was to “encourage the sickness funds to operate in accordance with principles of sound management that is to say in the most effective and least costly manner possible, in the interests of the proper functioning of the German social security system.”

illusory.¹⁰⁹ As such, competition between unions is generally discouraged by trade union associations. Within the UK, competition is muted by affiliation to the TUC.¹¹⁰ This, however, has not stopped inter-union competition from occurring.¹¹¹

However, the strongest argument against collective bargaining as a solidarity function is the possibility of it being carried out with a view to making a profit. As Sinclair states, in many social/public cases, there is no commercial provision of services, nor is one possible.¹¹² The body carrying out the solidarity activity does not profit from such activities. As argued in section 3.1, there is nothing preventing a trade union making a, or seeking to, profit from collective bargaining. There is no legal impediment to a trade union adopting such an approach, nor is there any inter-union subsidy. As collective bargaining can be carried out with a view to a profit, it is an economic activity, not a solidarity function.

5.2 Summary

Overall, trade unions, when engaged in collective bargaining, are not carrying out a solidarity function. Whilst it is accepted that the aim of improving terms and conditions of employment through redistributive methods is clearly of a social nature, this is negated by the consideration that collective bargaining can, in theory, be conducted for the purposes of profit-making. Collective bargaining can be a commercial activity. As AG Tesauro states, an economic activity is something “which, could at least in principle, be carried on by a private undertaking in order to make a profit”.¹¹³ As collective bargaining can be carried out with a view to a profit, it is an economic, not a solidarity, function. Thus, a trade union when engaged in collective bargaining does not fall within the solidarity principle.

¹⁰⁹ However, this does depend on what the “benefit” of collective bargaining is. If it is the representational aspect that is the benefit, then competition will not undermine this function. Indeed, it may enhance it. However, if one views the outcome as the benefit, then the opposite is possible. Competition may undermine its redistributive function.

¹¹⁰ Note that TUC members are subject to the TUC Dispute Principles and Procedures which prevent competition for members unless agreed in advance or with the TUC’s permission (Principle 2) and prevent unions from seeking to organise within organisation where another TUC member is present unless certain conditions are met (Principle 3).

¹¹¹ See for example, the dispute between Serco and Community, Appendix 4, 2013 TUC General Council Report, <http://www.tuc.org.uk/about-tuc/congress/congress-2013/tuc-congress-2013-general-council-report> [accessed 18/02/2015].

¹¹² Duncan Sinclair, “Undertakings” in Competition Law at the Public-Private Interface - an Unhealthy Situation’ [2014] European Competition Law Review 167, 170.

¹¹³ *Poucet* (n.83), [AG8]

6. Conclusion

The above arguments reach the conclusion that a trade union, when engaged in collective bargaining, is an undertaking, or association of undertakings, for the purposes of EU competition law. On a strict application of competition law, the paper argues that collective bargaining is an economic activity. Therefore, Article 101 TFEU can apply to collective agreements. Trade unions offer collective bargaining on a given market – the labour market – with collective bargaining potentially being carried out for with a view to making a profit. Furthermore, the trade union also bears the financial risk of collective bargaining.

Such an argument differs from the existing case law. The existing case law, as set out in section 2, argues that a trade union acts as its members' agent when engaged in collective bargaining. As such, it cannot be an undertaking. However, this paper argues that this is not correct. Although trade unions are "selling" their members' services, the trade union has significant financial risks when engaged in collective bargaining. Where members withhold their services in order to strengthen their bargaining position, their trade union can be liable for damages where they fail to comply with legislative requirements. Such considerations are fatal to the view that trade unions are their members' agent under EU competition law.

Furthermore, the paper has argued that collective bargaining is not a public function. Collective bargaining as a form of regulating the employment relationship is not entrusted to the social partners by the state, but is an accompaniment to the regulatory framework. In addition, collective bargaining is not a solidarity function. Whilst collective bargaining satisfies several of the solidarity factors established in the case law, collective bargaining cannot be classified as such. The potential to make a profit creates a significant outweighing argument, as a solidarity function is generally seen as being incompatible with the ability to make a profit.