

Collective Agreements and EU Competition Law: Do we need an  
exemption?

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Thesis submitted for the degree of Doctor of Philosophy

University of East Anglia

UEA Law School

April 2019

Word Count – 97,980

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## Abstract

In *Albany*, the Court of Justice of the European Union held that collective agreements are exempt from the application of EU competition law such an agreement is (i) concluded between management and labour, or their representatives; and (ii) aimed at improving working terms and conditions. Subjecting collective agreements to competition law would, the Court argued, seriously undermine the social policy objective contained in collective agreements. This thesis examines whether we need to examine collective agreements from the scope of EU competition law. It concludes that, for reasons of legal certainty and predictability, the *Albany* exemption is necessary.

This thesis does the following. First, the thesis establishes that a trade union is an undertaking under EU competition law when engaged in collective bargaining. As such, EU competition law applies to collective agreements. This conclusion contrasts with EU jurisprudence and academic literature, which argues that a trade union is neither an undertaking nor association of undertakings. Second, the thesis explores *Albany* within its wider EU constitutional context. It shows that the EU resolves conflicts between objectives in two ways; (i) through interpreting EU law in way that considers wider objectives, and (ii) through balancing through the proportionality assessment. The discussion identifies how the CJEU in *Albany* balanced the competing objectives, concluding that it did so through a proportionality assessment. Third, the thesis will explore whether the application of Article 101 TFEU undermines the social policy objectives and fundamental rights present within collective agreements. Literature assumes that there is a clash between the respective policy considerations, and that these considerations can be neither reconciled nor accommodated within EU competition law. This thesis questions this approach and shows that such interests can be given adequate weight within Article 101's analysis. This approach, however, has detrimental effects on collective bargaining.

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## Acknowledgements

I would like to thank Gareth and Morten for their supervision throughout the duration of this PhD. I thank them for their tireless efforts.

I am also grateful to the Faculty of Social Sciences at UEA for funding my PhD, without which I would not have been able to undertake this study. I am also grateful to the Centre for Competition Policy, UEA Law School, and everyone who has provided support, feedback, conversation and encouragement through my research. There are too many of you to name but I am eternally thankful to you all.

Finally, I would like to thank Mum, Dad, Vicky, Ben and Rebecca, for all their support. They know I don't do emotional stuff so... Thank you.

## Chapter 1 – Introduction

### 1. Introduction

Trade unions are combinations of workers, which “could be construed as a labour cartel, fettering the operation of free market forces between union members over the terms on which they offer their services in the market for their services.”<sup>1</sup> Through collective agreements (and collective bargaining), trade unions restrict competition, undermining the low-cost, efficiency model that is vital to the competitive process. Therefore, one would expect the EU’s prohibition on collusive agreements – Article 101 of the Treaty on the Functioning of the European Union (TFEU) – to step in and prevent such agreements. Article 101 TFEU prohibits agreements “which may affect trade between Member States and have as their objective or effect the prevention, restriction or distortion of competition within the internal market.”<sup>2</sup> Agreements falling foul of the prohibition are automatically void,<sup>3</sup> unless the agreement benefits from exemption under Article 101(3) TFEU.

The application of Article 101 TFEU poses a problem. In restricting competition, trade unions seek to achieve social policy objectives and exercise human rights. They seek to protect their members’ interests by increasing wages and providing greater employment protection. As such, applying Article 101 TFEU to collective agreements may seriously undermine the social policy objectives pursued and human rights interests. In *Albany*, the Court of Justice of the European Union (CJEU) held that applying EU competition law would have this very effect: the social policy objectives would be seriously undermined. As such, the CJEU held that collective agreements were exempt from EU competition law where such an agreement (i) is between management and labour, or their representatives; and (ii) seeks to improve conditions of work and employment.<sup>4</sup>

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<sup>1</sup> Shae McCrystal and Phil Syrpis, ‘Competition Law and Worker Voice: Competition Law Impediments to Collective Bargaining in Australia and the European Union’, *Voices at Work* (Oxford: Oxford University Press 2014) 421.

<sup>2</sup> Article 101(1) TFEU

<sup>3</sup> Article 101(2) TFEU

<sup>4</sup> *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (Case C-67/96) [2000] 4 C.M.L.R. 446

*Albany's* exemption is important. Were EU competition law to apply, there would be significant negative effects on collective bargaining coverage rates across the EU.<sup>5</sup> Collective bargaining covers approximately 55.8% of workers within the EU, with individual Member State's coverage rates ranging from 98% (Austria and France) to 9.7% (Lithuania).<sup>6</sup> Applying competition law could dramatically reduce high coverage levels by undermining worker representation and trade union activities. Challenges to collective agreements under EU competition law could lead to situations where unions are challenged as a per se breach of competition law, as an unlawful labour cartel.<sup>7</sup> Collective bargaining as a social institution could disappear as trade unions find that the risks involved with collective bargaining outweigh its potential benefits.<sup>8</sup>

Subjecting a collective agreement to potential ex-post challenges under EU competition law would also reduce the certainty with which trade unions, employers and workers can rely on their terms. The social partners may be less inclined to conclude collective agreements if subsequently void due to third party challenges. These effects are worse than those faced by normal agreements. First, an agreement for the supply of goods or services does not, unlike collective agreements, contain inherent restrictions on competition. As such, the application of EU competition law would make collective agreements illusory: parties to normal arrangements would still conclude them. They are not seen as automatically anti-competitive. Second, as set out in section 3 below, trade unions pursue wider social policy objectives through collective bargaining. They provide a measure of countervailing power against their members' employers,<sup>9</sup> aim at improving the working conditions of workers, and achieve a level of solidarity. Applying EU competition law would arguably reduce the

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<sup>5</sup> This is the number of employees whose pay and/or conditions of employment are determined by one or more collective agreement as a percentage of the total number of employees.

<sup>6</sup> See

[http://www.ilo.org/ilostat/faces/oracle/webcenter/portalapp/pagehierarchy/Page27.jspx?subject=IR&indicator=ILR\\_CBCT\\_NOC\\_RT&datasetCode=A&collectionCode=IR&\\_afLoop=266172773530268&\\_afWindowMode=0&\\_afWindowId=14ng9yaaxz\\_1#!%40%40%3Findicator%3DILR\\_CBCT\\_NOC\\_RT%26\\_afWindowId%3D14ng9yaaxz\\_1%26subject%3DIR%26\\_afLoop%3D266172773530268%26datasetCode%3DA%26collectionCode%3DIR%26\\_afWindowMode%3D0%26\\_adf.ctrl-state%3D14ng9yaaxz\\_49](http://www.ilo.org/ilostat/faces/oracle/webcenter/portalapp/pagehierarchy/Page27.jspx?subject=IR&indicator=ILR_CBCT_NOC_RT&datasetCode=A&collectionCode=IR&_afLoop=266172773530268&_afWindowMode=0&_afWindowId=14ng9yaaxz_1#!%40%40%3Findicator%3DILR_CBCT_NOC_RT%26_afWindowId%3D14ng9yaaxz_1%26subject%3DIR%26_afLoop%3D266172773530268%26datasetCode%3DA%26collectionCode%3DIR%26_afWindowMode%3D0%26_adf.ctrl-state%3D14ng9yaaxz_49) [last accessed 10/08/2017, 14.48]

<sup>7</sup> The argument could be along the lines that a trade union is an association of undertakings—a cartel of workers—under Article 101 which has as its objective the fixing of prices in the labour market. For a historical approach, see the common law restraint of trade doctrine. See, for example, *Hornby v Close* (1867) 10 Cox CC 393. In the UK, trade unions are removed from the common law restraint of trade doctrine by statute; s.11 TULRCA 1992.

<sup>8</sup> This would create the situation seen in the BALPA dispute where the trade union did not call industrial action due to potential liability under EU free movement rules.

<sup>9</sup> See *Wilson and Palmer v United Kingdom* [2002] I.R.L.R. 568, [42]-[44]

attainment of these objectives. This effect is enhanced by the personal nature of the employment relationship; workers are in a position of dependency vis-à-vis their employer. Whilst there may be power imbalances, and a need to rectify such positions, the personal aspect of such imbalance is missing in other arrangements.

Applying Article 101 TFEU to collective agreements also raises issues where the agreement's provisions are incorporated into individual employment contracts. Voiding a collective agreement as anti-competitive post-incorporation raises similar concerns to those found by the European Court of Human Rights (ECtHR) to be a breach of Article 11 ECHR.<sup>10</sup> In *Demir*, the ECtHR held that the requirement for members of a trade union to repay the benefits obtained under a collective agreement that was subsequently void *ex tunc*, breached the right to collective bargaining under Article 11 ECHR.<sup>11</sup> A similar position could be possible under Article 28 of the Charter of Fundamental Rights of the European Union (CFREU).<sup>12</sup> Furthermore, where a collective agreement has been incorporated into a contract of employment, the certainty by which an employee would be able to enforce their contractual terms and conditions would be significantly reduced. If collectively agreed terms and conditions contained within employment contracts could be *ex post* void, collective representation would become highly unattractive, potentially rendering collective bargaining illusory.

The focus of this thesis is to examine whether we need to exempt collective agreements from EU competition law in order to protect the social policy objectives pursued by such agreements and wider fundamental rights considerations. It will explore whether the exemption in *Albany* is the most appropriate method of resolving the conflict between the competing objectives, identifying how the CJEU balanced the competing objectives present. The thesis will examine how the different components of the EU Treaties fit together, engaging in a constitutional investigation of how the Treaties, CJEU case law, and CFREU affect

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<sup>10</sup> *Demir and Baykara v Turkey* (2009) 48 E.H.R.R. 54.

<sup>11</sup> Charter of Fundamental Rights of the European Union OJ C 326, 26.10.2012. See Ewing and Hendy who argue that the CJEU's decisions on the interaction between trade union activities and EU law are irreconcilable with ECtHR jurisprudence. KD Ewing and John Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 *Industrial Law Journal* 2, 40–2.

<sup>12</sup> Charter of Fundamental Rights of the European Union OJ C 326, 26.10.2012. See Ewing and Hendy who argue that the CJEU's decisions on the interaction between trade union activities and EU law are irreconcilable with ECtHR jurisprudence. KD Ewing and John Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 *Industrial Law Journal* 2, 40–2.

the CJEU's approach in *Albany*. It will explore whether there is an alternative to the *Albany* exemption.

The thesis will address three broad questions:

1. Is the decision in *Albany* correct as a matter of law? (Chapters 4 – 7)
2. Do we need to adopt such an exemption? (Chapters 2, 4 – 7)
3. What would happen were collective agreements to be subject to Article 101 TFEU?  
Would the social policy objectives be seriously undermined? (Chapters 6 and 7)

How the thesis will address these questions is set out in depth in Section 5 below. Before doing so the introduction will do three things. First, section 2 will set out the methodology adopted in the thesis. Second, section 3 will identify the clash between the social policy objectives pursued by collective agreements and trade unions, and competition policy's objectives. The discussion in section 3 will provide an understanding of the background to the conflict present in *Albany*, providing the basis for subsequent discussion in the thesis. Third, section 4 will set out the economic understanding of trade unions and collective bargaining, demonstrating how economic theory has tended to see trade unions (and collective bargaining) as having negative market effects and being anti-competitive.

## 2. Methodology

The thesis adopts a doctrinal methodology. Doctrinal research aims to “systematise, rectify and clarify the law on any particular topic by a distinctive mode of analysis of authoritative text that consist of primary and secondary sources.”<sup>13</sup> This approach is appropriate given the thesis' aims and its focus on EU competition law. In answering the questions posed above, the thesis will provide a detailed, critical analysis of the CJEU's decision in *Albany*. A doctrinal methodology which examines the relevant primary and secondary legal sources will provide a sound basis by which these questions can be answered. For example, a doctrinal methodology in Chapter 4 is appropriate for examining the wider EU constitutional law context of the decision in *Albany*. Such discussion relies on detailed analysis of the CJEU's

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<sup>13</sup> Michael McConville and Wing Hong Chui (eds), *Research Methods for Law* (Second edition, Edinburgh University Press 2017) 4. See also, Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson/Longman 2007) 49.

jurisprudence, EU legislation, and academic literature of the approaches to reconciling competing objectives under EU law.

A drawback of such an approach is that it potentially gives little weight to other non-legal arguments.<sup>14</sup> For example, in focussing on EU law and CJEU jurisprudence, the thesis could miss the different approaches and arguments at Member State level and/or economic arguments which affect the application of Article 101 TFEU. As such, the thesis will have a limited interdisciplinary aspect, referring to wider considerations where appropriate.<sup>15</sup> For example, economic analysis will feature in the Introduction (see section 4 below) and Chapters 6 and 7. This is important as where a collective agreement has positive economic effects, it may benefit from exemption under Article 101(3) TFEU, which questions the need for the *Albany* exemption. Additionally, the thesis will refer to national level material where relevant. It will not, however, engage in a detailed analysis of the approaches adopted by individual Member States. As the CJEU's decision in *Albany* is binding, we would expect all Member States to not apply EU competition law to collective agreements; the only difference being the approach adopted by individual Member States. Such an analysis does not significantly add to the thesis' discussion.

The thesis will also adopt a comparative approach. Chapter 8 will examine how the US has sought to resolve the conflict between the competing objectives of trade unions and antitrust. The application of US antitrust law to trade union activities has been subject to significant discussion and consideration by both Congress and the US courts. This provides a point of comparison for the approach in *Albany*, allowing the thesis to explore what can be learnt from US approaches, and whether *Albany's* exemption can or should be adjusted.

### 3. A Clash of Objectives?

The goals of EU competition law and trade unions pull in opposite directions. Competition law pursues economic objectives; trade unions, through pursuing the interests of their members, pursue social policy objectives. In *Albany*, the CJEU held that applying EU

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<sup>14</sup> Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83, 118–9; D Vick, 'Interdisciplinarity and the Discipline of Law' (2004) 31 Journal of Law and Society 164.

<sup>15</sup> See Moti Nissani, 'Fruits, Salads, and Smoothies: A Wording Definition of Interdisciplinarity' (1995) 29 Journal of Educational Thought 121, 141. Nissani argues that there are varying degrees of integration that are possible with interdisciplinary approaches.

competition law to collective agreements would seriously undermine the social policy objectives pursued.<sup>16</sup> How this conflict can be resolved is explored in Chapters 4 and 5. This section shall identify the clash between EU competition policy and the objectives pursued by trade unions and collective bargaining.

Although subject to significant debate,<sup>17</sup> the goal of EU competition law is generally assumed to be the maximisation of consumer welfare.<sup>18</sup> However, this view has not been explicitly endorsed by the CJEU. The CJEU has avoided ascribing a single goal to EU competition law, referring in their judgements to, for example, market integration, consumer welfare, and the protection of the competitive process.<sup>19</sup> In *T-Mobile* the CJEU stated that Article 101 is designed to protect “not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.”<sup>20</sup> It was “not necessary for there to be ... a direct link between the concerted practice and consumer prices.”<sup>21</sup> However, there are compelling reasons to argue that consumer welfare is enhanced by achieving each of the goals relied on by the CJEU. For example, in achieving market integration, consumers have access to a wider choice of goods; by protecting the competitive process, consumers potentially receive lower prices and/or higher-quality goods.

In contrast to the CJEU, the European Commission has explicitly taken the view that consumer welfare lies at the heart of EU competition policy.<sup>22</sup> Its endorsement of this position is highly persuasive given the Commission’s role in enforcing EU competition law, however its

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<sup>16</sup> *Albany* (n.4) [59]

<sup>17</sup> See, for example, Wolf Sauter, *Competition Law and Industrial Policy in the EU* (Clarendon Press 1997); Simon Bishop and Mike Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (London: Sweet & Maxwell, 3rd ed 2010); G Monti, ‘Article 81 EC and Public Policy’ (2002) 39 *Common Market Law Review* 1057; Giorgio Monti, *EC Competition Law* (Cambridge: Cambridge University Press 2007); Okeoghene Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford; New York: Oxford University Press 2006).

<sup>18</sup> See Odudu (n 17); Okeoghene Odudu, ‘The Wider Concerns of Competition Law’ (2010) 30 *Oxford Journal of Legal Studies* 599.

<sup>19</sup> See, for example, *T-Mobile Netherlands BV* (Case C-8/08) [2009] E.C.R. I-4529; *GlaxoSmithKline Services Unlimited v Commission* (Case C-501/09 P) [2009] E.C.R. I-9291, [63]; *Österreichische Postparkeasse AG v Commission* (Cases T-213/01 and 214/01) [2006] E.C.R. II-1601, [115]; *Konkurrensverket v TeliaSonera Sverige AB* (Case C-52/09) [2011] E.C.R. I-527, [22]; *Brasserie de Haetch v Consorts Wilkin-Janssen* (Case 23-67) [1967] E.C.R. 525; *Société Technique Minière v Maschinenbau Ulm GmbH* (Case 56-65) [1966] E.C.R. 235

<sup>20</sup> *T-Mobile* (n.20), [38]

<sup>21</sup> *ibid*, [39]-[41]. See also *GlaxoSmithKline* (n.20), where the CJEU states that “there is nothing in ... [Article 101(1)] ... to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive effect.” [63]

<sup>22</sup> Kiran Klaus Patel and Heike Schweitzer (eds), *The Historical Foundations of EU Competition Law* (First edition, Oxford University Press 2013) 222.

statements are neither definitive nor binding. Speeches by Joaquin Almunia<sup>23</sup> and Neelie Kroes<sup>24</sup> refer to consumer welfare as being the goal of EU competition law. For example, Almunia considered that consumer welfare was the “cornerstone, the guiding principle of EU competition policy.”<sup>25</sup> This can also be seen in official Commission documents.<sup>26</sup> In the Article 101(3) Guidance, for example, the Commission states that the objective of Article 101 TFEU “is to protect competition on the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources” and “the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers.”<sup>27</sup> (emphasis added)

EU social policy is aimed at achieving solidarity, social justice and social cohesion.<sup>28</sup> As Schubert states, EU social policy is based on two pillars: occupational safety laws and the principle of self-determination (including, one assumes, collective self-determination).<sup>29</sup> Additionally, the preamble to the Treaty on European Union (TEU) reaffirms the EU’s “attachment to fundamental social rights in the European Social Charter, its determination to promote economic and social progress, and desire to deepen [the] solidarity of its people.”<sup>30</sup> Trade unions aim at achieving these objectives. Through collective bargaining and collective action, they seek to achieve solidarity between, and the protection and improvement of the working conditions of, workers enabling self-determination within the workplace.<sup>31</sup>

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<sup>23</sup> Speech given at ‘Competition – what’s in it for consumers?’ Poznan, November 2011, SPEECH/1/2003803, <http://ec.europa.eu/competition/speeches>.

<sup>24</sup> Speech given at the ‘Delivering Better Markets and Better Choices’, European Consumer and Competition Day, London, 15<sup>th</sup> September 2005, SPEECH/05/512, <http://ec.europa.eu/competition/speeches>. Kroes stated that “the protection of competition in the market was a means of enhancing consumer welfare and ensuring an efficient allocation of resources.” These objectives are linked in that achieving allocative efficiency, consumer welfare is enhanced.

<sup>25</sup> Almunia (n.25). See also Monti who states that one of his most important achievements whilst Competition Commissioner was putting consumer welfare at “the top of the agenda of competition policy...”; ‘Competition for consumer’s benefit’ speech at European Competition Day, Amsterdam, 22<sup>nd</sup> October 2004 [http://ec.europa.eu/competition/speeches/text/sp2004\\_016\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2004_016_en.pdf) [last accessed 01/08/2017]

<sup>26</sup> Guidelines on Vertical Restraints [2010] O.J. C130/01, [7]; Guidelines on the Application of Article 81(3) of the Treaty [2004] O.J. C101/97.

<sup>27</sup> Article 81(3) Guidelines, *ibid*, [15]

<sup>28</sup> Dagmar Schiek, ‘The EU Constitution of Social Governance in an Economic Crisis: In Defence of a Transnational Dimension to Social Europe’ (2013) 20 Maastricht Journal of European and Comparative Law 185, 205.

<sup>29</sup> Claudia Schubert, ‘Collective Agreements within the Limits of Europe: Collective Autonomy as Part of the European Economic System’ (2013) 4 European Labour Law Journal 146, 170.

<sup>30</sup> [2012] O.J. C326/13. The preamble also adopts a commitment to liberty, democracy, respect for fundamental freedom and human rights and the rule of law.

<sup>31</sup> See Keith Ewing, ‘The Function of Trade Unions’ (2005) 34 Industrial Law Journal 1; Guy Davidov, ‘Collective Bargaining Laws: Purpose and Scope’ (2004) 20 International Journal of Comparative Labour Law and Industrial

The main purpose of trade unions is the protection of their members' interests. This is recognised by the wording of both Article 11 ECHR and Articles 12 and 28 CFREU,<sup>32</sup> and features heavily within ECtHR jurisprudence.<sup>33</sup> In *Wilson and Palmer*, for example, the ECtHR stated that a trade union must be "free to strive for the protection of its members' interests..."<sup>34</sup> Within the UK, a trade union is defined as an organisation which has as its principal purpose "the regulation of relations between workers ... and employers or employers' associations."<sup>35</sup> Trade unions, in protecting their members' interests, seek to prevent worker exploitation. They provide a counter to employer power in the labour market. Employer power derives from competition amongst workers, increasing where the employer is the only, or one of a few, employer(s) within their labour market.

In protecting workers from exploitation, trade unions aim to eradicate competition between workers.<sup>36</sup> They provide a constraint on the employer's ability or 'freedom' to act, potentially undermining the competitive process protected by EU competition law. This is seen most clearly through the monopoly union model of trade unions: unions "limit the supply of labor so that the employer cannot use competition among laborers to control the price of labor."<sup>37</sup> Through collective bargaining and collective action, trade unions increase wage levels, agree hiring and dismissal procedures and prevent the introduction of new technologies. From a competition policy viewpoint, each activity has the potential to raise prices, reduce allocative and productive efficiency, stifle innovation and/or prevent market harmonisation.

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Relations 81; Schubert (n 29). See also, the decision in *Sindicatul "Pastorul Cel Bun" v Romania* (2014) 58 E.H.R.R. 10, [130], where the ECtHR states that trade union freedom is "an essential element of social dialogue between workers and employers, and hence an important tool in achieving social justice and harmony."

<sup>32</sup> See also, Article 5, European Social Charter 1961; ILO Convention No 87 on Freedom of Association and Protection of the Right to Organize; ILO Convention No. 98 on the Right to Organize and Bargain Collectively.

<sup>33</sup> See *National Union of Belgian Police v Belgium* (1979-1980) 1 E.H.R.R. 578 [39]; *Wilson and Palmer v United Kingdom* [2002] I.R.L.R. 568, [42]-[44]; *Demir* (n.12) [141].

<sup>34</sup> *Wilson and Palmer* *ibid*.

<sup>35</sup> Section 1, Trade Union and Labour Relations (Consolidation) Act 1992

<sup>36</sup> See Lord Wedderburn, 'Freedom of Association and Philosophies of Labour Law' (1989) 18 *Industrial Law Journal* 1, 8, 28; Allan Flanders, *Trade Unions* (7th Edition, Hutchinson & Co 1968) 77; Richard A Posner, *Economic Analysis of Law* (Ninth edition, Wolters Kluwer Law & Business 2014) 421. In *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1941] AC 435, 447, Viscount Simon LC saw no problem with union action taken to prevent under-cutting and unregulated competition to create the better basis for collective bargaining. See also the CJEU in *Defrenne v Sabena (No.2)* (Case 43/75) [1976] ECR 455, [8]-[12] as to the purpose behind the equal pay provision (Article 157 TFEU).

<sup>37</sup> Posner (n 36) 421.

Whereas trade unions exist to prevent the exploitation of workers and a “race to the bottom”, competition is concerned with creating a free market with low costs to achieve allocative and productive efficiency.<sup>38</sup> Trade unions, through collective bargaining and collective action, undermine the low-cost efficiency model that is vital to the competitive process. Higher wages are passed on to consumers through higher prices; similarly, stoppages of production due to industrial action lead to reduced productivity. Where such actions are not accompanied by a consumer benefit, consumer welfare is reduced.

In applying competition law to remedy the harm to consumer welfare and competition caused by trade union activities, the social policy objectives pursued by trade union activities may be undermined. However, as will be explored in Chapters 6 and 7, does the application of EU competition law seriously undermines the social policy objectives? Having set out the potential conflict between the objectives of EU competition law and the objectives of trade unions, section 4 will introduce the economics associated with trade unions. It will show how trade unions have been understood from an economic perspective and identify a trade union’s economic effects on the market. It will show how economics literature has predominantly seen trade unions as being anti-competitive, and detrimental to consumer welfare. However, the section will also identify how unions may create potential positive market effects that could lead to a consumer welfare justification under Article 101(3) TFEU.

#### 4. The Economics

Labour is an essential input in the production process. It is through the employment relationship that firms hire labour to produce and deliver goods and services to be sold to consumers within the product market. Where labour is organised the bargaining position of labour is replaced by a trade union, raising competition law concerns. Economic literature argues that trade unions are anti-competitive: “[c]ombinations by workers through a trade union could be construed as a labour cartel, fettering the operation of free market forces between union members over the terms on which they offer their services in the market for their services.”<sup>39</sup> Unions, Posner argues, have the main purpose of limiting “labor so that the

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<sup>38</sup> See, for a neo-classical discussion of labour law and trade unions, Friedrich Hayek, *The Constitution of Liberty* (Routledge and Kegan Paul, London 1960); Richard Posner, ‘Some Economics of Labor Law’ (1984) 51 *The University of Chicago Law Review* 988.

<sup>39</sup> McCrystal and Syrpis (n 1) 421.

employer cannot use competition among laborers to control the price of labor.”<sup>40</sup> The effect of unionisation “is to reduce [the] supply of labor in the unionised sector.”<sup>41</sup> Through collective bargaining, unions increase wages to levels above that set by a competitive market. “The pursuit of collective bargains may be construed as conduct designed to lessen competition in the markets in which hirers of labour operate, limiting the capacity of firms to compete through adjustments to the price of labour, in particular where collective bargaining occurs on an industrywide scale.”<sup>42</sup>

Economics, however, does not offer a general theory of trade unions. Different models have been proposed, each adopting different assumptions about both trade unions and the labour market.<sup>43</sup> Section 4.1 provides a brief overview of the main economic models adopted by the economic literature in relation to trade unions and collective bargaining.

#### 4.1 Economic Models of Trade Unions

Neoclassical economic models assume that labour markets are competitive. They assume that where wages are low, demand exceeds supply; competition between employers for workers leads to higher wages. Conversely, where wages are high, supply exceeds demand, with competition between workers driving wages down. In both situations, traditional models assume that competition will ensure that an equilibrium is achieved. This has two main policy implications. First, there is no need for governmental intervention. Any intervention will lead to excess demand for (or supply of) labour. Second, where changes in income distribution are deemed desirable, it should be through tax and expenditure programs rather than non-competitive market intervention.<sup>44</sup> Trade unions interfere with this competitive model. Through seeking to eliminate wage competition and control the supply

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<sup>40</sup> Posner (n 36) 427.

<sup>41</sup> *ibid* 429.

<sup>42</sup> McCrystal and Syrpis (n 1) 421.

<sup>43</sup> For an overview, see George J Borjas, *Labor Economics* (Seventh edition, McGraw-Hill Education 2016); Alison L Booth, *The Economics of the Trade Union* (Cambridge: Cambridge University Press, 1995); Simon Deakin and Frank Wilkinson, ‘Labour Law and Economic Theory: A Reappraisal’ No. 92 ESRC Centre for Business Research Working Papers 1; Edward Lazear, *Personnel Economics* (3rd Edition, MIT Press: Massachusetts 1998).

<sup>44</sup> See Michael L Wachter, ‘Neoclassical Labor Economics: Its Implications for Labor and Employment Law’, *Research Handbook on the Economics of Labor and Employment law* (Edward Elgar 2012) 41.

of labour, trade unions prevent the operation of a competitive market. Wages are set above the equilibrium level, and employment below it.<sup>45</sup> This creates inefficiency.

The monopoly union model demonstrates this clearly. Under this model, the union sets the monopoly wage level; the employer, their level of employment accordingly. The employer shifts up along its demand curve, reducing employment to maintain its profits. This model, however, is unrealistic and rests on two major assumptions not reflective of labour markets. First, the model assumes that the union has a homogenous membership base—the preferences of each member are the same. However, as the literature shows, each member's preference differs according to age,<sup>46</sup> level of seniority,<sup>47</sup> labour market opportunities,<sup>48</sup> degree of commitment to the union movement,<sup>49</sup> and the preference for union-provided private goods such as representation at disciplinary proceedings.<sup>50</sup> Second, the model assumes a fixed membership level of all workers within the industry or sector. One union controls all potential labour supply. There is no non-union labour able to compete with union labour or for the employer to turn to.

These criticisms led to the adoption of different models of union monopoly; for example, the 'right-to-manage' model<sup>51</sup> and 'median-aged member' model.<sup>52</sup> The right-to-manage model assumes that unions and firms bargain over any surplus (profit) to determine wage levels. Once wage levels are set, the firm has the exclusive ability to set employment levels. Here, the union monopoly model is a "special" example. Union monopoly only holds where there is no non-union labour, or the competitive nature of the product market is such that the employer has no bargaining power. Where this is the case, the union can extract all

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<sup>45</sup> Booth (n 43) 53–8., identifies two conditions required for a union to raise wages above the nonunion level. These are (i) the existence of economic surplus in the product market, and (ii) the power of the union to act as a monopolist in the supply of labour. In a perfectly competitive product market, the firm must be making positive profits when employing  $N$  workers at wage  $W_c$ .

<sup>46</sup> H Farber, 'Individual Preferences and Union Wage Determination: The Case of the United Mine Workers' (1978) 86 *Journal of Political Economy* 932.

<sup>47</sup> G Grossman, 'Union Wages, Temporary Layoffs, and Seniority' (1983) 73 *American Economic Review* 277.

<sup>48</sup> Alison Booth, 'A Public Choice Model of Trade Union Behaviour' (1984) 94 *Economic Journal* 883.

<sup>49</sup> A Booth and M Chatterji, 'Reputation, Membership and Wages in an Open Shop Trade Union' (1993) 45 *Oxford Economic Papers* 23.

<sup>50</sup> A Booth and Chatterji, M, 'Union Membership and Wage Bargaining When Membership Is Not Compulsory' [1993] Birkbeck College London, Department of Economics Discussion Paper No.493.

<sup>51</sup> W Leontief, 'The Pure Theory of Guaranteed Annual Wage Contract' (1946) 54 *Journal of Political Economy* 76.

<sup>52</sup> See Booth (n 43) 111–6.

available surplus.<sup>53</sup> The median-aged member model is an adaptation of the median-voter model and proposes that the union chooses a wage and fringe-benefit package, subject to the labour demand curve, which maximises the utility of the median-aged member.<sup>54</sup> However, this does not produce a definitive equilibrium. The two choice variables present in the union model, wages and employment, do not provide a combination which wins a majority against all other options.<sup>55</sup> Depending on the combination being offered, a different median member will appear.

Economists have also constructed an efficiency bargaining model.<sup>56</sup> This model takes the opposite approach to the monopoly model, adopting the assumption that the union and firm bargain over wages and employment simultaneously. Where the union and firm bargain simultaneously, the outcome would be efficient in that at least one party would be made better off by shifting from a monopoly outcome to achieve a Pareto efficient outcome.<sup>57</sup> Where such bargaining occurs, it is irrelevant whether the union and/or firm is a monopolist—any bargain struck is efficient. An example of an efficient bargain could be a two-part tariff, i.e. lower wages combined with enhanced pension contributions by the employer. However, this does not mean that the outcome is efficient for society, or that such bargaining occurs in practice. For example, employers have greater control over employment levels than under an efficient bargaining model.

Empirical analysis shows no strong support for either the monopoly union or efficient bargaining models.<sup>58</sup> As Lawson points out, the monopoly model does not produce Pareto efficient outcomes, and the efficient bargaining model does not perfectly mirror reality in that direct bargaining on employment is rarely observed.<sup>59</sup> Some attempts have been made to adopt a middle course, which gives employers the ability to set employment whilst still

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<sup>53</sup> Similarly, where the employer has an elastic labour demand curve, the union wage gains will be low. The opposite is also true. Where the union is concerned with employment as well as wages, its ability to raise wage levels will depend on demand elasticity.

<sup>54</sup> This model is based on the median-voted models.

<sup>55</sup> See Douglas Blair and David Crawford, 'Labor Union Objectives and Collective Bargaining' (1984) 99 *The Quarterly Journal of Economics* 547. More generally, see, AB Atkinson and Joseph E Stiglitz, *Lectures on Public Economics* (Princeton University Press 2015) 302–7.

<sup>56</sup> Ian McDonald and Robert Solow, 'Wage Bargaining and Employment' (1981) 71 *The American Economic Review* 896.

<sup>57</sup> See Booth (n 43) 125–30. A Pareto efficient outcome is an outcome whereby one party cannot be made better off without the other being made worse off.

<sup>58</sup> See Nicholas Lawson, 'Is Collective Bargaining Pareto Efficient? A Survey of Literature' [2010] Princeton University Working Paper No. 558 13–5.

<sup>59</sup> *ibid* 18.

achieving Pareto outcomes. For example, Hall and Lilien suggest allowing the union to set not the individual wage but the total wage bill where it is a function of employment such that the employer's profit maximising choice of employment is the efficient amount.<sup>60</sup> Additionally, Kuhn suggests a model where the union specifies a seniority-wage profile which requires that, were the employer to reduce employment, they start with those at the bottom of the wage scale.<sup>61</sup> These studies, however, are questionable in their representation of reality.

#### 4.1.1 A Trade Union as a "Firm"

Despite the different models set out above, we can conceive of a trade union in the same way as a normal firm within the market. Firms arise due to market failures.<sup>62</sup> A market failure exists where the market fails to achieve an efficient outcome—an individual's pursuit of self-interest prevents a Pareto efficient outcome being reached. This can occur for many reasons; for example, the existence of public goods, monopolies, externalities and information asymmetries. Firms arise to resolve the causes of market failure, ensuring that a Pareto efficient outcome is achieved.<sup>63</sup> Within labour markets, three causes of market failure exist: inequality of bargaining power, informational asymmetries, and high transaction costs. These factors potentially contribute to the creation of trade unions as a tool to combat such failures. This section shall explore how these three causes of market failure can explain the existence of trade unions.

First, high transaction costs are present within labour markets. Individual bargaining over terms and conditions is costlier than having to bargain collectively. A trade union acting as a one-stop shop for negotiation will reduce transaction costs,<sup>64</sup> with the reduction varying according to the level at which bargaining occurs. Where bargaining occurs at national or sector level, the reduction achieved will be greater than under firm-level bargaining.

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<sup>60</sup> Robert Hall and David Lilien, 'Efficient Wage Bargains Under Uncertain Supply and Demand' (1979) 69 *The American Economic Review* 868.

<sup>61</sup> Peter Kuhn, 'A Nonuniform Pricing Model of Union Wages and Employment' (1988) 96 *Journal of Political Economy* 473.

<sup>62</sup> K Arrow, *The Limits of Organization* (WW Norton & Company; New York 1974); John Roberts, *The Modern Firm: Organizational Design for Performance and Growth* (Oxford University Press 2004).

<sup>63</sup> Roberts (n 62) 78.

<sup>64</sup> Anver Greif, Paul Milgrom and Barry Weingast, 'Coordination, Commitment, and Enforcement: The Case of the Merchant Guild' (1994) 102 *Journal of Political Economy* 745.

Second, unions arose as a response to employers' power within individual labour markets.<sup>65</sup> Trade unions provide a constraint on employers' ability to exercise their buyer power within labour markets. Were labour markets perfectly competitive, unions would not be needed to achieve a Pareto efficient outcome. Perfectly competitive markets would clear and be efficient, preventing the use, or creation, of monopsony power. However, the presence of a trade union potentially creates a bilateral monopoly where employer monopsony exists.<sup>66</sup> Although countering such monopsony, a bilateral monopoly does not guarantee that the supply of labour "will reach the competitive level, although wages will be higher than if there is just monopoly."<sup>67</sup> Where supply is not at the competitive level, power on at least one side increases: oversupply increases an employer's power, undersupply a union's power. Furthermore, countervailing power does not guarantee an improvement in terms and conditions. The bilateral monopoly that is created could be more harmful than beneficial. Wages set above the equilibrium level will lead to lower labour demand.<sup>68</sup> Such a situation could be resolved through efficient bargaining, for example through a two-part tariff. This would prevent double marginalisation from occurring, and ensure an efficient outcome.<sup>69</sup> An example of how this could occur is that identified by Kuhn<sup>70</sup>: the use of a seniority-wage profile where the marginal wage is equal to the opportunity cost of labour at the efficient employment level.<sup>71</sup> Where the employer reduces its number of workers, it must start with workers on the lowest pay scale.<sup>72</sup>

Third, there are informational asymmetries within labour markets. Firm theory assumes that it is impossible for all market participants to always have perfect information. As Aghion and Hermalin argue, freedom of contract can be restricted due to informational

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<sup>65</sup> John Kenneth Galbraith, *American Capitalism: The Concept of Countervailing Power*. (London: Hamilton 1961).

<sup>66</sup> Whether an employer has monopsony power varies according to a number of different factors. See W Abel, S Tenreyro and G Thwaites, 'Monopsony in the UK' [2018] Centre for Economic Performance Discussion Paper No.13625; Douglas Staiger, Joanne Spetz and Ciaran Phibbs, 'Is There Monopsony in the Labor Market? Evidence from a Natural Experiment' (2010) 28 *Journal of Labor Economics* 211.

<sup>67</sup> Posner (n 36) 322.

<sup>68</sup> As wages increase, and as shown in by the monopoly union model, employers will shift up their labour demand curve. This could/would mean that unemployment rates were artificially high in the economy.

<sup>69</sup> Double marginalisation occurs where monopolists at different levels in the market apply their own mark-ups.

<sup>70</sup> Kuhn (n 61).

<sup>71</sup> The opportunity cost of labour is the cost of the second-best alternative that a worker could take.

<sup>72</sup> Seniority is judged by number of years within the firm.

asymmetries, thereby enhancing efficiency.<sup>73</sup> What one party asks for in a contract can reveal information to the other party: the better-informed party can use this as an incentive to signal information through what they ask for. This can lead to the contract being distorted: the better-informed party can send false signals. This can also lead to a matching problem. An employer will want to know about a worker's effort, productivity and ability both before and during employment: a worker, whether the employer is a "good" employer and, for example, the employer's financial situation for wage bargaining purpose. Absent this information, the "wrong worker" could be hired by the "wrong employer". Freeman and Medoff's voice/exit "face" of unionism shows how unions can solve informational asymmetries.<sup>74</sup> Unions provide information to employers through acting as a "monitor" of employee effort but can also remedy information deficit to employees. Unions can use the information gained through collective bargaining to provide its members information about the state of the business.<sup>75</sup> Although most legal regimes require the employer to provide certain information to help unions bargain collectively,<sup>76</sup> other information may be forthcoming. For example, information about the financial state of the employer may include information about future business plans. This information would not be readily available for workers and is potentially gained through the use of union power during negotiations.

Trade unions do remedy other inefficiencies. Through collective bargaining, trade unions can overcome the free-rider issue and obtain public goods,<sup>77</sup> for example health and safety policies, and prevent inefficient actions such as preventing opportunistic decisions or discrimination between workers.<sup>78</sup> Additionally, a trade union can be a commitment device. They prevent employers from exploiting individual workers and enable employers to make

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<sup>73</sup> Phillipe Aghion and Benjamin Hermalin, 'Legal Restrictions on Private Contracts Can Enhance Efficiency' (1990) 6 *Journal of Law, Economics and Organization* 381.

<sup>74</sup> See Richard Freeman and James Medoff, *What Do Unions Do?* (Basic Books Inc, New York 1984); Richard Freeman and James Medoff, 'The Two Faces of Unionism' (1979) Working Paper No. 364 NBER Working Paper Series 1.

<sup>75</sup> John Kennan and Robert Wilson, 'Bargaining with Private Information' (1993) 31 *Journal of Economic Literature* 45, 56. The authors propose that strikes may be interpreted as the best option available for credibly communicating the value of an agreement to each side. A legal analogy is going to court in a civil dispute. Participants should settle, but this is not always achieved.

<sup>76</sup> See ss.181-185 Trade Union and Labour Relation (Consolidation) Act 1992 and ACAS Code of Practice No. 2 "Disclosure of information to trade unions for collective bargaining purposes."

<sup>77</sup> A free rider problem occurs where people take advantage of a common (public) good without paying for it.

<sup>78</sup> Davidov (n 31) 63.

credible promises about elements of the employment contract that cannot easily be written down.<sup>79</sup>

Resolving the above failures would remove the economic basis for unions; however, it may be impossible to rely on markets to do so. It may be necessary for policy decisions to be made to remedy such failures. But, it may be that in resolving these failures, unions enhance competition within such markets. The next subsection shall explore union effects, focussing on union effects on wages and productivity. It should be noted that where unions have positive productivity effects, this can lead to consumer welfare justifications under Article 101 TFEU. The discussion will also show how union power arises. The above economic models do not explain where union power comes from, or its effects.

#### 4.1.2 Union Market Effects

Union power derives from two main sources.<sup>80</sup> First, union power arises from their monopolisation of the labour supply. Where the union controls all potential workers, they can exercise almost unlimited pressure on the employer.<sup>81</sup> Where the union does not have monopoly control, or enough workers to put sufficient pressure on its members' employer(s) to achieve its objectives, their power depends on their ability to coerce non-union labour. Without this power, non-union labour will compete and drive down union demands.<sup>82</sup> This is a parallel to a "dominant" firm with a number of small rivals. The ability to coerce non-union workers stems from the incentives that exist for such workers. Although this is predominantly through the benefits associated with union jobs, this also stems from potential union spillover effects—wages and benefits in the non-union sector may be above the equilibrium level to prevent unionisation. Second, union power derives from its ability to organise strikes. "The strike is by far the most important source of union power..."<sup>83</sup> Yet this assumes either a "one

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<sup>79</sup> For an analogy with guilds, see Greif, Milgrom and Weingast (n 64). Greif, Migrom and Weingast explain how merchant guilds acted as a commitment device to ensure that trading centres did not discriminate amongst merchant traders and provided protection against a party reneging on unwritten promises.

<sup>80</sup> A potential third is power arising under the insider-outsider model developed by Lindbeck and Snower. The model argues that union members' critical source of power is in creating higher turnover costs for employed members. On the model, Assar Lindbeck and Dennis J Snower, *The Insider-Outsider Theory of Employment and Unemployment* (Cambridge, Mass; London: MIT Press 1988); Assar Lindbeck and Dennis J Snower, 'Insiders versus Outsiders' (2001) 15 *The Journal of Economic Perspectives* 165; Alan Carruth and Andrew Oswald, 'On Union Preferences and Labour Market Models: Insiders and Outsiders' (1987) 97 *The Economic Journal* 431.

<sup>81</sup> Hayek (n 38) 338.

<sup>82</sup> *ibid* 389. Note this depends on there being sufficient non-union labour in the market.

<sup>83</sup> Edward Rees, *The Economics of Trade Unions* (3rd Edition, University of Chicago Press, Chicago 1989) 29..

firm-one union”, or a “one union-all firms” bargaining model. Where the employer operates in a competitive product market, striking is potentially counterproductive. Striking causes a reduction in output, leading customers to switch.<sup>84</sup> Thus, the firm may fail: something possible even if the employer agrees to the increased costs.<sup>85</sup> This would cost union jobs as the firm folds. However, even where this does not happen, a trade-off must be made when calling a strike: are the potential gains from striking worth the losses to workers? Is the likelihood of the employer conceding to the union’s demands a sufficient incentive to compensate for the actual and/or potential losses incurred by going on strike? Where the union covers an industry the ability to strike increases the union’s power significantly.

It is through the exercise of their power that unions have an effect on markets. Economic literature, however, is split on whether unions have positive or negative effects on labour and product markets. Monopoly theory, for example, argues that unions have predominantly detrimental effects; institutional economists that unions can have some beneficial effects. These effects centre on wages and productivity. Whilst other effects are present, i.e. a reduction in profits and transaction costs, I will focus on wage and productivity effects. Whilst positive productivity effects lead to efficiency and welfare-enhancing effects, wage effects may have the opposite. These arguments are highly fact-specific and, as such, the discussion below will provide a generalised overview rather than a detailed examination. The discussion will show how such effects mean that unions are predominantly seen as anti-competitive, however, it will also highlight any pro-competitive effects. Such positive effects may support a consumer welfare justification under Article 101(3) TFEU.

#### 4.1.2.1 Union Wage Effects

As shown in the monopoly model above, unions raise wages above the competitive level. This is driven by a union’s monopoly power: “a power related to the wage sensitivity of the demand for organised labor ... that is, to the change in employment induced by a given change in wages.”<sup>86</sup> Any increase in wages is inefficient as it leads to employers reducing their labour demand and/or increasing prices. Workers who would have been employed had the union

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<sup>84</sup> *ibid* 30–3.

<sup>85</sup> c.f. Alex Bryson, ‘Union Effects on Workplace Closures, 1990-1998’ (2004) 42 *British Journal of Industrial Relations* 282.; who found that union effects are rarely sufficient to affect firm survival.

<sup>86</sup> Freeman and Medoff, *What Do Unions Do?* (n 74) 50.

not raised wages above the previous equilibrium are forced to work elsewhere. Furthermore, labour markets may become stagnant. Those employed on union wages are less likely to leave, only leaving for wage gains comparable to those moving from non-union to union employment.<sup>87</sup> Union wage levels also keep those who would otherwise be employed at the equilibrium wage out of labour markets—employers reduce their demand to accommodate the higher wage costs.<sup>88</sup>

In goods markets, the simplest impact of higher union wages is that wage increases are passed onto consumers in the form of higher-priced goods. This, however, is dependent on several factors; for example, where there are only few firms in the market leading to oligopolistic outcomes, and there is low or no demand elasticity. Additionally, higher wages can act as a barrier to entry. Labour supply is as affected by price as any other input, with any increase potentially producing “a differential shift in the level of average costs to the relative disadvantage of small-scale firms.”<sup>89</sup> This is most likely the case where centralised bargaining takes place. In a centralised bargaining regime, all firms in the industry are bound by the same wages. In this situation, it is possible to use wage bargaining as a method of raising rivals’ costs.<sup>90</sup>

However, an employer may pay a higher wage, not because of the union, but because it makes the cost of failure very high for the worker. This is called the efficiency wage theory.<sup>91</sup> Paying a higher wage, it is argued, can increase worker productivity. The worker works harder for fear of losing their job since their outside option is less attractive; alternative jobs pay at a significantly lower level. It is a way to create incentives for effort and increase productivity to match the higher pay.

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<sup>87</sup> *ibid* 45.

<sup>88</sup> This is shown clearly in the monopoly union model.

<sup>89</sup> Oliver Williamson and Scott Maston, *Transaction Cost Economics* (Edward Elgar; Aldershot 1995) 90. Small scale firms are relatively more dependent on labour.

<sup>90</sup> For an overview, see Morten Hviid and Matthew Olczak, ‘Raising Rivals’ Fixed Costs’ [2015] *International Journal of the Economics of Business* 1; Steven Salop and David Scheffman, ‘Cost-Raising Strategies’ (1987) 36 *The Journal of Industrial Economics* 19; Steven Salop and David Scheffman, ‘Raising Rivals Costs’ (1983) 73 *The American Economic Review* 267.

<sup>91</sup> See Wallace E Hendricks and Lawrence M Kahn, ‘Efficiency Wages, Monopoly Unions and Efficient Bargaining’ (1991) 101 *The Economic Journal* 1149; Robert Solow, *The Labor Market as a Social Institution* (Basil Blackwell, Cambridge 1990) 32.

#### 4.1.2.2 Union Effects on Productivity

Economic theory shows that unions can have both positive and negative effects on productivity. Several arguments support positive productivity effects. First, where unions raise wages, employers should respond by demanding increased productivity and hiring better workers.<sup>92</sup> Second, higher wages should attract a better calibre of candidate, allowing employers to choose better workers. Third, where unionised labour is more expensive than non-unionised, employers are induced to substitute capital for labour, leading to productivity enhancing capital-intensification. Fourth, the voice function of unions improves productivity in two ways.<sup>93</sup> Unionisation can reduce the frequency of resignations enabling workers to gain skills and experience, and can aggregate and convey preferences and knowledge to employers efficiently, ensuring that management are responsive to employee suggestions.<sup>94</sup> This assumes that productivity improvements are achieved through internal efficiency and good industrial relations in response to employee/union “voice”.

In terms of negative effects, it can be argued, first, that unions lead to sub-optimal deployment of labour through “restrictive practices”.<sup>95</sup> Where collective bargaining breaks down, subsequent industrial action can adversely affect productivity. Second, a union’s ability to protect against arbitrary employer action, may enable workers to take unauthorised absences or ‘shirk’.<sup>96</sup> As workers feel secure, they may choose not to work as hard. Finally, unions may create a “hold-up” problem.<sup>97</sup> Grout proposes that as unions extract rent from new investments, employers and investors may invest less than they otherwise would. This leads to sub-optimal capital investments.<sup>98</sup>

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<sup>92</sup> Borjas (n 43) 446.

<sup>93</sup> Summer Slichter, James Healy and E Robert Livernash, *The Impact of Collective Bargaining on Management* (The Brookings Institute; Washington DC 1960); Harry Katz, Thomas Kochan and Kenneth Gobeille, ‘Industrial Relations Performance, Economic Performance and the Effects of Quality of Working Life Effects: An Inter-Plant Analysis’ [1982] Sloan School Working Paper 1329-82.

<sup>94</sup> This does assume that productivity increases are due to internal efficiency and good industrial relations.

<sup>95</sup> David Metcalf, ‘Union Presence and Labour Productivity in British Manufacturing Industry. A Reply to Nolan and Marginson’ (1990) 28 *British Journal of Industrial Relations* 249.

<sup>96</sup> Erling Barth, Alex Bryson and Harald Dale-Olsen, ‘Union Density, Productivity and Wages’ [2017] IZA Discussion Paper Number 11111.

<sup>97</sup> Paul Grout, ‘Investment and Wages in the Absence of Binding Contracts: A Nash Bargaining Approach’ (1984) 52 *Econometrica* 449.

<sup>98</sup> At an extreme level, investors may decide to invest in a non-union sector where possible.

Empirical evidence shows that a union's impact on productivity is fact-sensitive, showing moderate increases and decreases in productivity.<sup>99</sup> As Doucouliagos and Laroche point out on a meta-analysis of the results in the literature, findings are country, time and/or industry specific.<sup>100</sup> In the UK, for example, economic literature shows either a neutral or negative impact on productivity.<sup>101</sup> Similarly, studies of the German system of unionisation have showed modest negative effects.<sup>102</sup> Addison, Schnabel and Wagner, in surveying early economic literature show that the general conclusions were that modest negative effects were seen.<sup>103</sup> They point out that discussion of the productivity effects of unions are not widespread due to the focus on the productivity impact of works councils. Economic literature, however, has not found any significant causal effects on productivity by works councils.<sup>104</sup> In contrast, Barth et al. find a significant causal relationship between increasing unionisation and productivity in the Norwegian manufacturing industry. They found a 1.7-1.9% increase in productivity as union density increased over the period 2001-2012,<sup>105</sup> yet are clear that this is highly dependent on the specific Norwegian industrial relations system examined.

Ultimately, it may be argued that productivity turns on the state of competition within the market. All parties in industrial relations are "likely to devote efforts to productivity augmenting activities when they face the gun of competition ... [I]n a competitive sector, only the unions and management that are able to raise productivity will survive in the long run."<sup>106</sup> This, however, assumes three things. First, it assumes wages are set at firm level. Where they are set across the industry, competitive restraints are irrelevant—all firms have the same

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<sup>99</sup> On increases see Robert Lande and Richard Zerbe, 'Reducing Unions' Monopoly Power: Costs and Benefits' (1985) 28 *Journal of Law and Economics* 297; Steve Allen, 'Unionized Construction Workers Are More Productive' (1984) 99 *Quarterly Journal of Economics* 251; Charles Brown and James Medoff, 'Trade Unions in the Production Process' (1978) 86 *Journal of Political Economy* 355. On decreases see, Posner (n 36) 1000-1; Metcalf (n 95).

<sup>100</sup> Christos Doucouliagos and Patrice Laroche, 'What Do Unions Do to Productivity? A Meta-Analysis' (2003) 42 *Industrial Relations: A Journal of Economy and Society* 650.

<sup>101</sup> See, for example, SJ Machin, 'The Productivity Effects of Unionisation and Firm Size in British Engineering Firms' (1991) 58 *Economica* 479; John Addison and Clive Belfield, 'Unions and Establishment Performance: Evidence from the British Workplace Industrial/Employee Relations Surveys' [2002] IZA Discussion paper series, No. 455 1, 6; Doucouliagos and Laroche (n 100) 655-6, 678.

<sup>102</sup> See, for an overview, John Addison, Claus Schnabel and Joachim Wagner, 'German Industrial Relations: An Elusive Exemplar' (1995) 2 *Industrielle Beziehungen* 25, 31.

<sup>103</sup> Addison, Schnabel and Wagner (n 102).

<sup>104</sup> See Felix FitzRoy and Kraft, Kornelius, 'Efficiency and Internal Organization: Works Councils in West German Firms' (1987) 54 *Economica* 493.

<sup>105</sup> Barth, Bryson and Dale-Olsen (n 96).

<sup>106</sup> Freeman and Medoff, *What Do Unions Do?* (n 74) 179.

labour cost increases. Second, it assumes that there is strong/perfect market competition. To achieve monopoly wages, competition would need to be weak. Where there is strong competition, wage differentials between union and non-union firms would not be that large.<sup>107</sup> Finally, this assumes that firms are operating at their marginal cost. Firms with higher profit margins can share rents: profitable firms generally pay more.<sup>108</sup> A good example of this can be seen in Germany, where the competitiveness of German industry has been attributed, in part, to trade union restraint in wage bargaining.<sup>109</sup>

The most significant criticism of positive productivity effects is that, if unionisation did increase productivity, then employers would voluntarily unionise; they would want to benefit from unionisation.<sup>110</sup> Increases in productivity are a big incentive, leading to an increasing union membership profile.<sup>111</sup> Additionally, where there is a causal link between productivity and unionisation, a consumer welfare justification can be made under Article 101(3) TFEU. Where productivity improves, consumers benefit. This, however, is highly context-specific.

#### 4.2 Summarising comments

The economic discussion above shows that trade unions can be anti-competitive. Where no efficient bargaining takes place, unions cause potentially detrimental effects in both labour and goods markets. However, economic evidence is unclear as to whether unionisation causes improvements in productivity which offset any anti-competitive effects. The actual effects of a trade union are highly fact-specific. As such, one would expect rules prohibiting anti-competitive conduct to step in and prevent such effects from occurring.

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<sup>107</sup> See Addison, Schnabel and Wagner (n 102). who argue that small wage differentials were a feature of ensuring that firm competitiveness under centralised bargaining.

<sup>108</sup> Although dated, see David Blanchflower and Andrew Oswald, 'The Wage Curve' (1990) 92 *Scandinavian Journal of Economics* 215.

<sup>109</sup> Addison, Schnabel and Wagner (n 102).

<sup>110</sup> See, Posner (n 36).

<sup>111</sup> The trend over recent decades has been a continuous decline in union membership. See for example the Certification Officer's Annual Report 2015-16, where membership decreased by 0.88% from the previous year. When compared to the UK's peak, the current figures represent approximately a 47% drop. Annual report available at <https://www.gov.uk/government/collections/certification-officer-annual-reports> [last accessed 31/07/2017, 13.11]

## 5. Structure of the Thesis

The thesis will adopt the following structure. It features 7 substantive chapters, with Chapters 1 and 9 introducing and concluding the thesis.

Chapter 2 will establish whether a trade union is an undertaking or association of undertakings. This is important as if a trade union is neither an undertaking or association of undertakings, EU competition does not apply. As such, the social policy objectives pursued by collective agreements are not undermined as there is no clash with competition policy's objectives. An exemption for collective agreements from Article 101 TFEU is therefore unnecessary. The chapter will examine whether collective bargaining can be defined as an economic activity, or whether it falls within the scope of a solidarity or public function. Where collective bargaining is not an economic activity, a trade union cannot be an undertaking or association of undertakings. It will also explore the existing approaches to this question in CJEU case law, examining first, whether a union acts as its members' agent, and second, whether a worker is subsumed within their employer's undertaking, and hence not an undertaking, when bargaining over conditions of work and employment. Chapter 2 will conclude that a trade union is an undertaking when engaged in collective bargaining. As such, Article 101 TFEU may apply to collective agreements and therefore necessary to exempt such agreements to protect the social policy objectives present.

Chapter 3 will examine the current exemption contained in *Albany*. It will explore the decision of the CJEU and the opinion of AG Jacobs, examining the scope of the exemption and criticisms of it. The chapter will provide the basis for discussion in subsequent chapters. It will show that the CJEU balanced the competing objectives and concluded that the social policy objectives always outweigh competition policy's objectives where its stipulated conditions are met. This will form the basis of the discussion in Chapters 4 and 5. Chapter 3 will also show that the CJEU did not examine whether collective agreements infringe EU competition law; in balancing the competing objectives, the CJEU simply assumed that collective agreements are always anti-competitive. If collective agreements do not infringe Article 101 TFEU, an exemption is unnecessary. Whether collective agreements infringe Article 101 TFEU is examined in detail in Chapters 6 and 7.

Chapter 4 will focus on the constitutional issues present in *Albany*. The chapter will explore how the Treaties and CJEU resolve conflicts. It will examine the conflict between the competing objectives present in *Albany*, seeking to identify how the conflict was resolved.

First, the chapter will show how the Treaty integration clauses and the CJEU's teleological approach require that EU law is interpreted in a manner consistent with wider Treaty objectives. In doing so, it will provide an argument that the exemption in *Albany* may not be needed. If Article 101 TFEU can be interpreted in a manner which gives adequate weight to the social policy objectives and fundamental rights interests, such considerations are not seriously undermined. Second, the chapter will show how the CJEU resolves conflicts through a balancing exercise. In doing so, it will identify how the CJEU in *Albany* balanced the competing objectives. Did the CJEU appropriately weigh the competing objectives? If not, the decision in *Albany* may be incorrect.

Chapter 5 will expand on the constitutional discussion in Chapter 4, examining the potential effects of the EU's approach to fundamental rights (and CFREU) on the decision in *Albany*. Fundamental rights, as general principles of EU law, require that they are considered in the application and interpretation of EU law. This, the chapter will argue, has two effects on *Albany's* exemption. First, where Article 101 TFEU can be interpreted in a manner which gives adequate weight to the right to collective bargaining, the right is not seriously undermined. As such, an exemption may not be necessary. Second, where such an interpretation is not possible, EU fundamental rights require that the CJEU balance the competing interests/rights/objectives. Chapter 5 will refer to the examination of the CJEU's balancing exercise in *Albany* set out in Chapter 4 and will propose that adding fundamental rights considerations may not alter the outcome of the balancing exercise in *Albany*. Chapter 5 will also examine two connected points: first, whether Article 28 CFREU is a right or principle; and second, the scope of Article 28 CFREU.<sup>112</sup> These points affect the strength of any right to collective bargaining under EU law, and any wider effect on the exemption in *Albany*.

Chapters 6 and 7 will focus on exploring what would happen were Article 101 TFEU to be applied to a collective agreement. The discussion will explore whether we can include the social policy objectives and Article 28 CFREU right within Article 101 TFEU. The chapters will draw on Chapters 4 and 5, examining whether Article 101 TFEU can be interpreted in a way

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<sup>112</sup> Article 28 CFREU states that “[w]orkers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.”

which gives adequate weight to the social policy objectives and fundamental rights present. Where this is possible, an exemption may not be necessary: the competing objectives are not seriously undermined. The discussion will show that existing case law allows for balancing within Article 101 TFEU itself. The discussion in Chapter 6 will focus on Article 101(1) TFEU; Chapter 7, Article 101(3) TFEU. Chapter 6 will also explore whether a collective agreement could fall outside of Article 101 TFEU, irrespective of its social policy objectives. It will examine whether the agreement falls within the Vertical Block Exemption, does not have an appreciable effect on trade, and/or appreciably restricts competition.

Chapter 8 explores the approaches adopted by the Supreme Court of the United States of America (US). The chapter tracks the development of two exemptions for trade union activities, identifying the different factors which have influenced the development of these exemptions. The significant discussion of these two exemptions allows the chapter to compare the approaches adopted by the US and EU courts and explore whether the EU can learn anything from the discussion and approaches taken. The chapter will show that the CJEU's approach in *Albany* provides greater certainty and predictability for those involved in the collective bargaining relationship and greater protection of the collective bargaining process than the US approaches do.

## 6. Limitation

This thesis does not define the relevant market. Defining the market will only affect the discussion in determining whether Article 101 TFEU applies in factual situations. Two examples demonstrate this. First, under a decentralised bargaining system the market may be defined sufficiently narrowly to conclude that there is no effect on interstate trade. Second, as a collective agreement is a vertical agreement, market definition and the identification of market shares could provide protections under either the Vertical Block Exemption Regulation or the de Minimis Notice. In either situation Article 101 TFEU would not apply. These arguments do not alter the application of Article 101 TFEU proposed in Chapters 6 and 7, nor the constitutional discussion in Chapters 4 and 5. Whether, and how, we can include the social policy objectives and fundamental rights considerations in the application of EU competition law is unaffected by market definition.

## Chapter 2 – Is a trade union an undertaking under EU competition law?\*

### 1. Introduction

EU competition rules only apply to undertakings. The concept of an undertaking “makes it possible to determine the category of actors to which the competition rules apply.”<sup>1</sup> 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.”<sup>2</sup> EU competition rules only apply to activities which are economic activities, and not to public or solidarity functions.<sup>3</sup> In creating an exemption for collective agreements, the CJEU in *Albany* assumed that EU competition law applied. This implies that a trade union is an undertaking or association of undertakings when engaged in collective bargaining. If not, EU competition law would not apply, and *Albany*’s exemption unnecessary.

Current CJEU jurisprudence suggests that a trade union, when engaged in collective bargaining, is not an undertaking or association of undertakings for the purposes of competition law; as a trade union operates as its members agent.<sup>4</sup> As union members, workers, are not undertakings, EU competition law would not apply to collective bargaining. This questions the need for the *Albany* exemption, as EU competition law would not apply to collective agreements. However, this does not necessarily mean that collective agreements would not be undermined by EU competition law. Where bargaining occurs at a centralised level, or through multi-employer bargaining, arrangements between employers operating on

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\* An earlier version of this Chapter is contained in European Competition Journal. See Shaun Bradshaw, ‘Is a Trade Union an Undertaking under EU Competition Law?’ (2016) 12 European Competition Journal 320.

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

<sup>2</sup> *Hofner and Elser v Macrotron GmbH* (Case C-41/90) [1993] 4 C.M.L.R. 306, [21]. See also AG Jacobs in *Albany*, (n.1); *Pavlov v Stichting Pensioenfonds Medische Specialisten* (Cases C-180-184/98) [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, Wouter 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; Alison Jones, ‘The Boundaries of an Undertaking in EU Competition Law’ (2012) 8 European Competition Journal 301.

<sup>3</sup> On public functions, see *Bodson v Pompes Funebres des Regions Liberees SA* (Case C-30/87) [1989] 4 C.M.L.R. 984; on solidarity functions, see *Poucet v Assurance Generales de France and Caisse Mutuelle Regionale du Languedoc-Roussillon* (Cases C-159-160/91) [1993] E.C.R. I-637.

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

the same market(s) exist; arrangements to which competition law would apply.<sup>5</sup> Applying competition law to such arrangement may undermine multi-employer collective bargaining, as employers may be prevented from negotiating as a collective. As such, protecting these arrangements may be as important as protecting collective agreements.

Given the wide divergence of collective bargaining models within the EU, the discussion in this Chapter will be more generalised. It will draw on aspects of both decentralised, firm-based bargaining models and centralised bargaining models, adopting the following model.

A trade union is engaged in collective bargaining on behalf of its members. The union bargains over all aspect of the employment relationship. Membership of Union A is voluntary, with members being required to pay a subscription fee to the union. The union is free to set subscription fees at any level they decide; however, the union sets fees on a sliding scale according to wage bands.

This chapter will do the following. Section 2 will challenge the CJEU's view that a trade union is not an undertaking or association of undertakings when engaged in collective bargaining in two ways. First, section 2.1 will show that the incorrect test was adopted in determining whether a union acts as its members' agent and explore whether, when applying the correct test, a trade union acts as its members' agent when engaged in collective bargaining. Second, section 2.2 will explore whether a worker is subsumed within their employer's undertaking when bargaining over terms and conditions. Section 2 will conclude that a trade union does not act as its members agent when engaged in collective bargaining, and that a worker is not subsumed within their employer's undertaking when bargaining over terms and conditions. As such, a trade union may be an association of undertakings when engaged in collective bargaining. Section 3 will examine whether a worker is an undertaking when bargaining over terms and conditions of employment. The section will conclude that a worker is not an undertaking when bargaining over terms and conditions. Therefore, a trade union cannot be an association of undertakings when engaged in collective bargaining. Section 4 will explore whether a trade union is an undertaking when engaged in collective bargaining. It will

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<sup>5</sup> These arrangements are necessary to ensure that collective bargaining can work at a centralised (or multi-employer) level, for example, bargaining strategies and wage rates they are willing to agree to. AG Jacobs in *Albany* finds that there are implied (and explicit) agreements between employers for collective bargaining purposes; see [AG237]-[AG244].

analyse, in section 4.1, whether collective bargaining is an economic activity or, in section 4.2, whether collective bargaining is either a public or solidarity function. Section 5 will conclude the chapter.

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

Previous judicial discussion argues that a trade union is neither an undertaking or association of undertakings for the purposes of EU competition law.<sup>6</sup> Such an argument is based on the premise that the union acts as agent of its members, and not in its own right. Unions act “merely as agent for employees ... and not in their own right ... That alone suffices to show that ... they are not acting as undertakings...”<sup>7</sup> As a trade union’s members (workers) are not undertakings for the purposes of EU competition law,<sup>8</sup> then the union, as its members’ agent, is neither an undertaking or association of undertakings.

This, however, raises two issues. First, the incorrect test was adopted in concluding that a trade union acts as its members’ agent. 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 principal.<sup>9</sup> An agent bears no, or only an insignificant, risk in relation to the contracts “concluded and/or negotiated” on behalf of the principal.<sup>10</sup> and operates as an auxiliary organ of its principal.<sup>11</sup> In contrast, AG Jacobs in *Albany* simply considered whether collective bargaining was attributable to the union in its own right. Whether a trade union acts as its members’ agent on application of the correct approach is explored in section 2.1 below.

Second, the CJEU’s case law assumes that when bargaining over terms and conditions of employment (through collective bargaining) a worker is subsumed within their employer’s undertaking, and thus not an undertaking. In *Becu*, the CJEU concluded that workers, as

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<sup>6</sup> See *Albany* (n.1) [AG221]-[AGA227]; *Becu* (n.4) [AG57]-[AG60]; *FNV Kunsten* (n.4) [27]-[28]

<sup>7</sup> *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.”

<sup>8</sup> *Becu* (n.4) [26]

<sup>9</sup> Guidelines on Vertical Restraints (2010) O.J. C130/01, [12]

<sup>10</sup> *ibid.*, [15]

<sup>11</sup> *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL* (Case C-279/06) [2008] ECR I-6681, [36]; *Confederación Española De Empresarios De Estaciones De Servicio v Compañía Española De Petróleos SA* (Case C-217/05) [2007] 4 CMLR 5, [46]-[49]; *Bundeskartellamt v Volkswagen AG and VAG Leasing GmbH* (Case C-266/93) [1995] E.C.R. I-3477, [19].

defined under EU law, are not undertakings where they are acting for, and under the control of, their employer.<sup>12</sup> This point is important. If we conclude that a worker is not acting for, and under the control of, their employer when bargaining over terms and conditions of employment, they are not subsumed within their employer's undertaking. As such they may be an undertaking, and a trade union an undertaking or association of undertakings. Section 2.2 will explore this point further.

### 2.1 Does a trade union acts as its members' agent?

In *Albany*, AG Jacobs argued that, when engaged in collective bargaining, trade unions act "merely as agent for employees ... and not in their own right ... That alone suffices to show that ... they are not acting as undertakings..."<sup>13</sup> In reaching this conclusion, AG Jacobs adopted a two-stage test. First, AG Jacobs considered whether the activity is attributable to the trade union itself; and if so, second, whether the activity is of an economic nature.<sup>14</sup> A trade union, AG Jacobs stated, is only an undertaking when carrying out an economic activity in its own right.<sup>15</sup> As collective bargaining is an activity attributable to its members, a trade union is not an undertaking. The union is not acting independently of its members; it is an "executive organ of an agreement between its members."<sup>16</sup>

As already pointed out, AG Jacobs adopted the wrong test in determining whether a trade union acts as its members' agent. An agent, under EU competition law, must have the power to conclude and/or negotiate contracts for the sale or purchase of goods and services of the principal and bear no, or only an insignificant, risk in relation to the contracts "concluded and/or negotiated" on behalf of the principal.<sup>17</sup> The agent must also operate as an auxiliary organ of the principal.<sup>18</sup> This section will explore whether, on an application of the correct approach, a trade union acts as its members agent when engaged in collective bargaining. If a trade union does not act as its member's agent, it may be an undertaking or association of undertakings. The following discussion will examine, first, whether a trade

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<sup>12</sup> *ibid.*

<sup>13</sup> *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."

<sup>14</sup> *Ibid.*, [AG225]

<sup>15</sup> *ibid.*, [AG225]

<sup>16</sup> *Albany* (n.1) [AG222]

<sup>17</sup> *ibid.*, [17]

<sup>18</sup> *CEPSA* (n.11) [36]; *Confederación Española* (n.11) [43]-[44]; *Volkswagen* (n.11) [19].

union bears sufficient financial risk when engaged in collective bargaining and, second, whether a trade union operates as an auxiliary organ of its members.

In determining whether an agent bears no, or only an insignificant risk, the CJEU focuses on two separate types of risk: contract-specific risks and transaction-specific risks.<sup>19</sup> Contract-specific risks are those directly related to the contract concluded or negotiated. In *Confederación Española*, for example, the Court considered that the service station operator bore contract-related risks when, amongst others, they took possession of the fuel, assumed directly or indirectly the costs linked with the distribution of those goods, maintained stock at their own expense, and assumed responsibility for any damage caused to the goods and by the goods when sold to third parties.<sup>20</sup> In *Daimler-Chrysler*,<sup>21</sup> the CFI held that Mercedes-Benz's German agents were "true" agents under Article 101 TFEU as Mercedes-Benz, not its agents, determined "the conditions applying to all car sales, in particular the sale price" and bore "the principal risks associated with that activity, as the German agent is prevented by the terms of the agency agreement from purchasing and holding stocks of vehicles for sale."<sup>22</sup> The CFI concluded that "when a customer orders a vehicle, but the sale does not proceed, the financial implications and hence the risks associated with that transaction, remains with" Mercedes-Benz.<sup>23</sup> Mercedes-Benz was also "solely responsible for all risks associated inter alia with non-delivery, defective delivery and customer insolvency."<sup>24</sup>

Applying such an approach to collective bargaining creates difficult comparisons. Collective bargaining, and collective agreements, do not produce goods or services like those in the case law, but normally concern improvements to existing terms and conditions and the protection of their members' interests. As such, it is unclear whether a trade union bears contract-specific risks in relation to collective bargaining. This is because a trade union does not provide the services bargaining over; these are provided by the union's members. This is like examples found in CJEU case law, where the goods and services bargained over remain

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<sup>19</sup> *CEPSA* (n.11) [38]-[39]; *Confederación Española* (n.11) [51]-[59]. See also the Vertical Guidelines (n.9) [14]. The Guidance also mentions a third type of risk; risks related to the activities the principal requires the agent to perform on the same product or services market, for example after-sales and repairs. These are not present in collective bargaining, thus shall not be considered here.

<sup>20</sup> *Confederación Española* (n.11)

<sup>21</sup> *Daimler Chrysler AG v Commission* (Case T-325/01) [2005] E.C.R. II-3319

<sup>22</sup> *ibid.*, [102]

<sup>23</sup> *ibid.*, [101]

<sup>24</sup> *ibid.*

vested with the principal.<sup>25</sup> The trade union simply negotiates the conditions upon which those services (labour) are provided.

However, there may be contract-specific risks where industrial action is used to put pressure on employers to agree a collective agreement. Where industrial action occurs, trade unions may bear significant financial risk. Within the UK, trade unions can be liable in tort for damages up to £250,000 where they have not complied with the legal requirements that allow for the union to call industrial action.<sup>26</sup> This could substantially affect the union's ability to engage in collective bargaining in future: they may be unable to fulfil their role in protecting and representing their members in industrial relations. As industrial action is intrinsically linked with collective bargaining, such risk is directly linked to the "sale" of its members continued services.<sup>27</sup>

Transaction-specific risks are those which enable the agent to carry out the activity they are appointed for. These are "risks linked to investments specific to the market..."<sup>28</sup> In *Confederación Española*, the CJEU considered such risks to be "those required to enable the service-station operator to negotiate or conclude contracts with third parties."<sup>29</sup> The CJEU made reference to investments "such as premises or equipment such as a fuel tank, or commits himself to investing in advertising campaigns, such risks are transferred to the operator."<sup>30</sup> As such, transaction-specific risks are usually sunk costs,<sup>31</sup> including, one assumes, training costs and investment in human capital.<sup>32</sup> In relation to collective bargaining, there are potential transaction-related risks for the union. These take the form of the training costs of its "negotiators". Where bargaining 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 not necessarily fully reimbursed by individual

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<sup>25</sup> For example, in *Mercedes-Benz* the goods remain with the principal at all times.

<sup>26</sup> In the UK context, see ss.226-234A TULRCA 1992; *RMT v Serco* [2011] I.R.L.R. 399; *Metrobus v Unite the Union* [2009] I.C.R 173. For discussion, see Ruth Dukes, 'The Right to Strike under UK Law: Something More than a Slogan?' [2011] *Industrial Law Journal* 302.

<sup>27</sup> 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, *International Transport Workers' Federation v Viking Line ABP* (Case C-438/05) [2008] 1 C.M.L.R. 51; *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* (Case C-341/05) [2008] 2 C.M.L.R. 9

<sup>28</sup> *CEPSA* (n.11) [39]; *Confederación Española* (n.11) [51].

<sup>29</sup> *Confederación Española*, *ibid.*

<sup>30</sup> *ibid.*, [59]. See also *CEPSA* (n.11) [39]

<sup>31</sup> Vertical Guidelines (n.9) [14]

<sup>32</sup> *ibid.*, [16]

membership fees. Union membership fees cover a whole host of administrative costs and other services that unions provide, and are “sunk” costs in that they cannot be used for other activities. However, it should be noted that this is case-specific, and there will be situations where training costs are fully reimbursed by union membership fees.

Does a trade union operate as an auxiliary organ “forming an integral part of the principal's undertaking”?<sup>33</sup> The CJEU has provided no clear definition or approach to this limb.<sup>34</sup> In *Minoan Lines*, the CJEU implied that where an agent engages in business for themselves on the same market, they are not incorporated into the principal's undertaking.<sup>35</sup> This potentially creates a situation of exclusivity: only where the agent works for one principal, or where the work for that principal consists of a significant proportion of the agent's business, will the agent be held to be an auxiliary organ of the principal.<sup>36</sup> This can be seen in the CJEU's analysis in both *CEPSA* and *Confederación Española*, where the agency agreement prevented the service stations from selling or using fuel and other products supplied by any undertaking not specified within the agency agreement.

When engaged in collective bargaining, a trade union does not operate as the auxiliary organ of its members. There is no element of exclusivity; the union (as agent) can, and does, represent multiple competitors (principals) within the market. Representing one worker in collective bargaining does not constitute a significant portion of the union's work. The union conducts a “considerable” amount of business for other principals on the same market, with a union contract of membership not preventing a trade union from representing other workers on the same market. Indeed, for collective bargaining to be successful, it is necessary for the trade union to represent as many workers in the same employer and/or sector as possible. This scenario, one agent and multiple principals operating on the same market, has not been considered by the CJEU. CJEU case law all operates with one principal and multiple agents; for example, Mercedes-Benz and its agents. However, could we consider the

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<sup>33</sup> *Volkswagen* (n.11) [19].

<sup>34</sup> See Emmanuel Diény, ‘The Relationship between a Principal and Its Agent in Light of Article 81(1) EC: How Many Criteria’ [2008] *European Competition Law Review* 5, 8. See also *Vertical Guidelines* (n.7) [13], which states that the “determining factor defining an agency agreement ... is the financial or commercial risk borne by the agent in relation to the activities for which it has been appointed as an agent by its principal.” See also *Volkswagen* (n.11) [19]; *Daimler Chrysler* (n.21) [116]-[117]. In *Daimler Chrysler*, for example, Mercedes-Benz challenged the Commission's assessment on risk to no avail. The Commission had dismissed Mercedes-Benz's argument, stating simply that this was not a separate criterion for distinguishing a commercial agent from an independent dealer. See *Mercedes-Benz* (Case COMP/36.264) [2002] O.J. L 257 [162]-[168].

<sup>35</sup> *Minoan Lines v Commission* (Case T-66/99) [2003] E.C.R. II-5515; [127]-[128].

<sup>36</sup> See Diény (n 34) 10.

relationship between a trade union and its members as a situation of “collective exclusivity”? In acting exclusively for workers, the union (as agent) represents the interests of those on one side of the market.

To summarise, a trade union does not act as its member’s agent when engaged in collective bargaining. The discussion showed that a union probably bears significant financial risk when engaged in collective bargaining and does not act as an auxiliary organ of its members. The union represents other workers (principals) on the same market; there is no exclusivity. As such, the union and worker do not form a single economic entity when engaged in collective bargaining. A trade union may, therefore, be an undertaking or association of undertakings. In order to be an association of undertakings, a trade union’s members must be undertakings, and the challenged decision must fall within the sphere of an economic activity.<sup>37</sup> Are workers, when bargaining over terms and conditions of employment, undertakings, or are they subsumed within their employer’s undertaking? Section 2.2 will explore whether this is the case.

## 2.2 Is a worker subsumed within their employer’s undertaking when bargaining over terms and conditions of employment?

Current CJEU case law concludes that workers are not undertakings under EU competition law.<sup>38</sup> In *Becu*, the CJEU held that workers, as defined under EU law, are not undertakings because they perform work “for and under the direction” of their employer. Thus “for the duration of [the employment] relationship, [they are] incorporated into the undertakings concerned and thus form an undertaking within the meaning of Community competition law.”<sup>39</sup> Similarly, in *FNV Kunsten*, the CJEU held that workers are not undertakings as they act “under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work ... does not share in the employer’s commercial risks ... and, for the duration of that relationship, *forms an integral part of the employer’s undertaking, so forming an economic unit.*”<sup>40</sup> (emphasis added) In *FNV Kunsten*, the CJEU argued that as self-

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<sup>37</sup> *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* (Case C-309/99) [2002] 4 C.M.L.R. 27, [45]-[48]; *Pavlov* (n.2) [82]

<sup>38</sup> See *Becu* (n.4) [26]; *Suiker Unie and Others v Commission* (Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73) [1975] E.C.R. 1663 [537]-[557].

<sup>39</sup> *Becu* (n.4) [26].

<sup>40</sup> *FNV Kunsten* (n.4) [36]. See also AG Jacobs in *Albany* (n.4) [212]-[215]. In addition to arguing that (i) Article 101 is not tailored to be applied to workers and (ii) that we cannot interpret the term undertaking to include

employed workers are undertakings for the purposes of EU competition law,<sup>41</sup> 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.”<sup>42</sup> Such an association 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*.”<sup>43</sup> The implications of this is clear, a body representing employees, and carrying out negotiations on their behalf, is not an association of undertakings.

What the CJEU in *Becu* and *Kunsten* did not do, however, is examine whether an individual meets the conditions required to be subsumed with their employer’s undertaking when bargaining over terms and conditions. If a worker, when bargaining over terms and conditions, acts outside of the employment relationship, they are not subsumed within the employing undertaking, and can potentially be defined as undertakings.<sup>44</sup> As such, a trade union may be an association of undertakings. For a trade union to be an association of undertakings two conditions must be met. First, a trade union’s members must be undertakings; and second, the challenged decision must fall within the sphere of an economic activity.<sup>45</sup>

When bargaining over terms and conditions of employment, either individually or through collectively bargaining, it can be argued that workers are acting outside the scope of their employment contract and not subsumed within their employer’s undertaking. At a rudimentary level, when bargaining over terms and conditions of employment, workers are acting against their employer and are generally in conflict with their employer’s interests. They do not act on their employer’s behalf, nor are they engaged in activities for, and under

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worker, AG Jacobs argued that employees are a form in dependent labour in that they do not bear the direct financial risk of a transaction. Workers 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.”

<sup>41</sup> *ibid.*, [AG30]-[AG32], [27]-[28].

<sup>42</sup> *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.”

<sup>43</sup> *ibid.*, [28]. 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.

<sup>44</sup> 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, it is possible to think wider. Collective bargaining, in providing countervailing power, augurs against a form of subordination.

<sup>45</sup> *Supra* n.37.

the control of, their employer.<sup>46</sup> There is no element of subordination of the worker by their employer.<sup>47</sup> The worker is (nominally) free to choose whether to engage in collective bargaining: the adversarial nature of such bargaining argues against any control by the employer. They are bargaining for improved terms and conditions; in effect, offering their continued services, their labour under new terms and conditions. In such a situation, to consider workers and employers as constituting a single entity would be illogical. As AG Jacobs accepts, from an economic perspective this is an exchange for the provision of services.<sup>48</sup>

This conclusion raises difficulties. First, it should be remembered that collective agreements generally cover more workers than those who are union members and engage in collective bargaining. This would create a situation where some workers covered by a collective bargaining agreement could be undertakings, others not. Both benefit from any improvement in terms and conditions, however only some covered may be subject to EU competition law.<sup>49</sup> This could lead to significant uncertainty, for example where an agreement is held to be void under EU competition law,<sup>50</sup> and would potentially undermine attempts at collective bargaining. Second, when bargaining over terms and conditions of employment, workers still fulfil the terms of their existing contracts. They are simply negotiating for an adjustment to the employment relationship. They are still “subject to the orders of their employer”.<sup>51</sup> They still work for, and under the direction, of their employer. To consider them as workers and not workers at the same time could be considered implausible. However, this argument ignores the functional approach adopted by EU competition law.<sup>52</sup> An individual may be an undertaking when engaging in one activity, and not an undertaking for others.

One way of avoiding this would be to adopt the approach proposed by Townley; treat workers as undertakings regardless of whether they act for or against their employer. “[W]e would treat such individuals if they were independently commercially exploiting their goods

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<sup>46</sup> See Nihoul (n 44) 413–4.

<sup>47</sup> *ibid.*

<sup>48</sup> *Albany* (n.1) [212]

<sup>49</sup> This assumes that a worker is an undertaking.

<sup>50</sup> For example, would those who have benefitted from the collective agreement, but did not engage in collective bargaining, would have to repay back the gains received, or whether only those who participated would.

<sup>51</sup> *Albany* (n.1) [AG215]

<sup>52</sup> See *Motosykletistiki Omospondia Ellados NPID v Greece* (Case C-49/07) [2009] 5 C.M.L.R. 11, [7]

or services, as consultants.”<sup>53</sup> This would avoid creating the distinctions between workers covered by a collective bargaining relationship set out above. However, such an approach, as Townley accepts, has wider implications. As Townley states, such an approach would mean that “[i]n theory, all instructions within a firm would have to be assessed for competition law compliance.”<sup>54</sup> Although it is unlikely that individual workers would have appreciable market power, this would still create uncertainty and be costly in regard to time and money.<sup>55</sup> Similarly, such approach would remove any distinction between workers and self-employed workers, and ignore the realities of the employment relationship, specifically where workers bear no risk of the activities involved.

The issues highlighted above do not avoid the conclusion that, when bargaining over terms and conditions of employment, workers are not acting for, or under the control of, their employer. As such, they are not subsumed within their employer’s undertaking. A worker may therefore be an undertaking. This means that a trade union may be an association of undertakings when engaged in collective bargaining. However, if a worker is not an undertaking, then the issues identified in this section do not apply. EU competition law would not apply to any workers engaged in bargaining. Section 3 will examine whether a worker is an undertaking.

### 2.3 Summary

The above discussion has done two things. First, section 2.1 showed that the CJEU erred in concluding that a trade union is neither an undertaking or association of undertakings as it acts as its member’s agent. It demonstrated that when engaged in collective bargaining a trade union can bear financial risk and does not form an auxiliary organ of its members. The section concluded, therefore, that a trade union may be an undertaking or association of undertakings. Second, section 2.2 concluded that a worker is not subsumed within their employer’s undertaking when engaged in bargaining over terms and conditions of employment. In such a situation, a worker does not act for or under the control of their

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<sup>53</sup> Christopher Townley, ‘The Concept of an “Undertaking”’: The Boundaries of the Corporation - A Discussion of Agency, Employees and Subsidiaries’, *EC Competition Law: A Critical Analysis* (Hart Publishing; Oxford 2007) 14–16. See also Mary Catherine Lucey, ‘Should Professionals in Employment Constitute “Undertakings”?: Identifying “False Employed”’ (2015) 6 *Journal of European Competition Law and Practice* 702.

<sup>54</sup> Townley (n 53) 16.

<sup>55</sup> *ibid.*

employer. The conclusions in sections 2.1 and 2.2 mean that a trade union may be an association of undertakings or an undertaking when engaged in collective bargaining. Therefore, EU competition law may apply.

Section 3 will focus on whether a worker is an undertaking when bargaining over terms and conditions of employment. If workers are undertakings, then a trade union may be an association of undertakings. For a trade union to be an association of undertakings, two conditions must be met. First, its members must be undertakings; and second, the challenged decision must fall within the sphere of an economic activity.<sup>56</sup> In *Albany*, AG Jacobs argued that a trade union was not an association of undertakings because workers “cannot be qualified as undertakings...”<sup>57</sup> Section 3 will argue that a worker is not an undertaking when bargaining over terms and conditions of employment. As such, a trade union cannot be an association of undertakings when engaged in collective bargaining.

### 3. Is a worker an undertaking?

In *Albany*, AG Jacobs argued that “since employees cannot be qualified as undertakings for the purposes of [Article 101], trade unions, or other associations representing employees, are not ‘associations of undertakings.’”<sup>58</sup> However, as argued in section 2.2, workers may be undertakings when bargaining over terms and conditions of employment. When bargaining over their terms and conditions of employment they are not performing work for or under the direction of their employer: they are not subsumed within their employer’s undertaking. Where a worker is an undertaking, a trade union can be an association of undertakings. If these assumptions are true, EU competition law would apply to collective agreements.

An undertaking is defined as an “entity engaged in an economic activity regardless of [its] legal status ... and the way in which it is financed.”<sup>59</sup> Whether an entity is an undertaking depends on the “industrial and commercial nature of the activity.”<sup>60</sup> 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

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<sup>56</sup> See *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* (Case C-309/99) [2002] 4 C.M.L.R. 27, [45]-[48]; *Pavlov* (n.2) [82]; *Commission v Italy* (Case C-35/96) [1998] E.C.R. I-3855, [37]-[41].

<sup>57</sup> *Albany* (n.1) [AG218]

<sup>58</sup> *Albany* (n.1) [AG218]

<sup>59</sup> *Hofner* (n.2) [21].

<sup>60</sup> *Re Amministrazione Autonoma dei Monopoli di Stato: E.C. Commission v Italy* (Case 118/85) [1988] 3 CMLR 255, 258; per AG Mischo

the powers of a public authority.”<sup>61</sup> Where the entity is engaged in an economic activity, it is an undertaking for the purposes of the Treaty competition provisions. In assessing whether an activity is an economic activity, the CJEU takes a functional approach: an entity can be an undertaking when carrying out one activity but not when carrying out another.<sup>62</sup> For example, in *SELEX*, the General Court held that some of Eurocontrol’s activities, for example, setting technical standards and managing intellectual property rights, were not economic, whereas others, for example the provision of technical assistance, were.<sup>63</sup> The following discussion will focus solely on when a worker bargains over new and/or improved terms and conditions.

An economic activity consists of offering goods and services on a given market.<sup>64</sup> This 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.<sup>65</sup> Similarly in *Ambulanz Glockner*, the provision of ambulance services for remuneration was an undertaking for the purposes of competition law.<sup>66</sup> The provider’s public service obligations did not prevent such a finding.<sup>67</sup> When engaged in bargaining, individual workers do offer goods and services on a given market. Workers offer their (continued) services in return for new or improved terms and conditions. From an economic viewpoint, as AG Jacobs accepted in *Albany*, this is similar to a sale of goods or provision of services.<sup>68</sup>

Additionally, the activity must, at least in principle, be capable of being carried out by a private undertaking in order to make a profit.<sup>69</sup> 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

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<sup>61</sup> *Wouters* (n.56) [57]

<sup>62</sup> *MOTOE* (n.52) [7], “[t]he 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 *AOK Bundesverband v Ichtjol Gesellschaft Cordes* (Case C-264/01) [2004] 4 C.M.L.R. 22, [AG25], [AG45], [58]

<sup>63</sup> *SELEX Sistemi Integrati SpA v Commission* (Case T-155/04) [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]

<sup>64</sup> *Pavlov* (n.2) [75]

<sup>65</sup> Commission decision 90/456/EEC (1990) O.J. L233

<sup>66</sup> *Ambulanz Glockner v Landkreis Sudwestpfalz* (Case C-475/99) [2002] 4 C.M.L.R. 21; [19]-[22]

<sup>67</sup> *ibid.*, [21]

<sup>68</sup> *Albany* (n.1) [AG212]

<sup>69</sup> See *AOK Bundesverband* (n.62) [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.”

to make profits.”<sup>70</sup> It is irrelevant that the entity lacks a motivation to create profit,<sup>71</sup> or does not have an economic purpose.<sup>72</sup> Such a profit-making function can be seen where workers bargain over their terms and conditions. Workers seek to maximise their utility, by seeking to extract the maximum possible value for their services (their labour). In seeking better pay, more favourable working hours, and better working conditions, they seek terms and conditions which are more beneficial (and profitable) to them than those currently offered by their employer.

Furthermore, an undertaking must bear the financial or economic risks associated with the activity.<sup>73</sup> 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, be regarded as an undertaking.”<sup>74</sup> It is questionable, however, whether an individual worker bears the financial or economic risks associated with bargaining over terms and conditions of employment. Although workers bear direct financial risks in bargaining over terms and conditions when initially seeking work<sup>75</sup>; a worker bargaining for improved terms and conditions whilst employed faces no significant financial risks. Where a worker is successful in bargaining for improved terms and conditions, for example, a pay increase or improved hours, they benefit financially. Where they are unsuccessful, the worker continues to work on their current terms and conditions. They are not in danger of losing their job,<sup>76</sup> and only risk not attaining improved working terms and conditions. It may be possible to view this risk as a financial risk; however, this is not a significant risk. Even where a worker engages in industrial action to persuade their employer to agree to improved terms and conditions, the financial and economic risks encountered are minimal. Whilst a worker

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<sup>70</sup> *AOK Bundesverband*, *ibid*, [AG27]. See also *Sat Fluggesellschaft mbH v European Organisation for the Safety of Air Navigation* (Case C-364/92) [1994] 5 C.M.L.R. 208, [AG9], where AG Tesouro states that the possibility to make a profit is “the essential factor in classifying a body as an undertaking...”

<sup>71</sup> *Van Landewyck v Commission* (Cases 209/78 etc.) [1980] E.C.R. 3125, [88]; *Distribution of Package Tours During the 1990 World Cup* [1992] O.J. L 326/31, [43]

<sup>72</sup> *Cassa di Risparmio di Firenze* (Case C-222/04) [2006] E.C.R. I-289, [123]

<sup>73</sup> See *Pavlov* (n.2) where the Court held that an undertaking must “assume the financial risks attached to the pursuit of the activity.” [76].

<sup>74</sup> *Becu* (n.4) [AG53]-[AG54]

<sup>75</sup> In bargaining over terms and conditions, the worker, if unsuccessful, bears the financial risk in that the employer may turn to someone who is willing to work on less favourable terms and conditions. Where this happens, the worker risks their future position.

<sup>76</sup> This assumes that workers are able to bargain over their terms and conditions of employment before taking employment. In most situations, workers are unable to negotiate away from an employer’s offered terms and conditions

may not be paid for the period during which they are on strike,<sup>77</sup> a worker is unlikely to lose their job and receives protection from employer action.<sup>78</sup> It should be noted that this is a fact-sensitive assessment, however, on balance, it is unlikely that a worker bears any financial and economic risks when bargaining over improved terms and conditions. Only where there is a lengthy strike, or the worker can lose their job through strike action, will a worker bear any significant financial or economic risk in engaging in collective bargaining.

Therefore, a trade union cannot be an association of undertakings when engaged in collective bargaining. Whilst workers offer their (continued) services when bargaining over terms and conditions of employment and can profit from such an activity, it is highly likely that they do not bear any significant financial and/or economic risks. However, if the CJEU were to conclude otherwise; for example, that a worker does bear financial and economic risks, a trade union would be an association of undertakings when engaged in collective bargaining, and EU competition law would apply.

This does not mean that EU competition law cannot not apply to collective agreements. A trade union may be an undertaking in its own right when engaged in collective bargaining. Section 4 will examine whether this is the case.

#### 4. Is a trade union an undertaking?

As set out above, 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.”<sup>79</sup> Only where an entity is engaged in an economic activity, is it an undertaking. The CJEU has held that EU competition rules do not apply to activities which are either solidarity functions or “connected with the exercise of the powers of a public authority”<sup>80</sup> Section 4.1 will explore whether collective bargaining can be an economic activity; section 4.2 whether collective bargaining

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<sup>77</sup> Note, however, that different EU Member States adopt different approaches to the withholding of pay during industrial action. For example, in the UK an employer can withhold up to 100% of pay; see the decisions in *Hartley v King Edward VI College* [2017] 4 All ER. 637; *Miles v Wakefield Metropolitan DC* [1987] 1 All ER. 1089; *Wiluszynski v London Borough of Tower Hamlets* [1989] I.R.L.R 259.

<sup>78</sup> Industrial action is protected as a qualified human right under Article 8 of the European Convention on Human Rights 1950, Article 11 and see the decision in *RMT v UK* [2014] I.R.L.R. 467. On the protection within the EU, see the discussion of fundamental rights in Chapter 5. At a national level, within the UK workers are protected from suffering a detriment short of dismissal when on industrial action; see ss.237-238A TULRCA 1992.

<sup>79</sup> *Hofner* (n.2), [21].

<sup>80</sup> *Wouters* (n.56) [57].

can be either a solidarity or public function. Where collective bargaining is an economic activity, a trade union is an undertaking, and EU competition law may apply to collective agreements. As such, an exemption may be necessary to protect the social policy objectives pursued by such agreements.

#### 4.1 Is collective bargaining an economic activity?

An economic activity is defined as “consisting in offering goods or services on a given market...”<sup>81</sup> Trade unions, when engaged in collective bargaining, do offer services on a given market.<sup>82</sup> Trade unions generally do not engage in collective bargaining unless they have members within a given firm or industry. In return for subscription fees, the union provides it representational services, including for collective bargaining.<sup>83</sup> 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. Although a union can engage in collective bargaining for altruistic reasons,<sup>84</sup> 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.

Furthermore, an entity must bear the financial/economic risks associated with economic activity.<sup>85</sup> Trade unions do 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, if the trade union is unsuccessful in collective bargaining, it runs the risk that its members leave, possibly seeking out another union who may achieve better results. As

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<sup>81</sup> *Pavlov*, (n.2) [75].

<sup>82</sup> In *3F (formerly Specialarbejderforbundet i Danmark (SID)) v Commission* (Case C-319/07 P) [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”.

<sup>83</sup> Note, however, that within the UK it is possible that a trade union can engage in collective bargaining, irrespective of whether they have any members within that employer. See, for example, in *R (NUJ) v CAC and MGM*, where the AJ legitimately was recognised for the purpose of collective bargaining despite only having 1 member.

<sup>84</sup> See, for example, Bob Hepple, *The Making of Labour Law in Europe* (Mansell; London 1986); Otto Kahn-Freund and others, *Kahn-Freund's Labour and the Law* (London: Stevens, 1983 3rd ed 1983) 7.

<sup>85</sup> See *Pavlov* (n.2) [76], where the Court held that an undertaking must “assume the financial risks attached to the pursuit of the activity.”

the main revenue source for unions is through their members' subscription fees,<sup>86</sup> a loss of members has financial repercussions. Thus, collective bargaining has a significant financial risk for unions.

Finally, collective bargaining must, at least in principle, be capable of being carried on by a private undertaking in order to make a profit.<sup>87</sup> It is sufficient that there is the potential to make a profit, not whether the entity actually makes a profit.<sup>88</sup> It is possible for trade unions to profit through offering their services for the purposes of collective bargaining. Trade unions do not offer their bargaining services for free. 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 up members. Trade unions can set membership subscriptions at a level at which it is possible for them to operate at a profit. This conclusion is not altered when trade unions do not operate at a profit. 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.<sup>89</sup> Such an activity could in principle be carried on for a profit, and thus the body in question was an undertaking under EU competition law. Although collective bargaining must be carried out by a trade union,<sup>90</sup> 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.<sup>91</sup>

#### 4.2 Is collective bargaining a solidarity or public function?

The above section shows that collective bargaining can be an economic activity. As such a trade union is, *prima facie*, an undertaking when engaged in collective bargaining. It provides

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<sup>86</sup> For example, out of Unite's £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](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](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/528258/736T_2015.pdf) [last accessed 30/08/2016, 12.54]

<sup>87</sup> *Albany* (n.1); *Pavlov* (n.2); *AOK Bundesverband* (n.63) [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."

<sup>88</sup> See *Van Landewyck v Commission* (n.71), [88]; *Cassa di Risparmio di Firenze* (n.72) [123]

<sup>89</sup> *Ambulanz Glockner* (n.66) [AG68]

<sup>90</sup> See section 178, TULRCA 1992

<sup>91</sup> *Ambulanz Glockner* (n.66). AG Jacobs states that whether profit is made depends on the cost set by the operator for his services. The same applies regarding collective bargaining.

services in the market, bears the financial risks involved, and has the potential to make a profit. However, there are possible arguments against this conclusion. These arguments focus on, first, whether collective bargaining is a public function (Section 4.2.1), and second, whether collective bargaining is a solidarity function (Section 4.2.2). Where collective bargaining falls within either of these categories, it is not an economic activity. Thus, a trade union is not an undertaking when engaged in collective bargaining and the Treaty competition rules would not apply. The following discussion will explore whether collective bargaining is either a public function or solidarity function.

#### 4.2.1 A Public Function?

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.<sup>92</sup> In *Bodson*, the CJEU held that Article 101 TFEU 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.”<sup>93</sup> Furthermore, in *Cali*,<sup>94</sup> 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...”<sup>95</sup> This section will consider whether collective bargaining is; first, in the public interest, and second, whether trade unions when collectively bargaining are entrusted with a public function.

First, it can be argued that collective bargaining is generally considered to be in the public interest: strong worker representation and regulation of the employment relationship is a good thing.<sup>96</sup> Collective bargaining, and collective representation more generally, prevents worker exploitation and provides countervailing bargaining power for workers as against their employer. Second, where national labour relations are characterised by collective laissez faire and/or State abstentionism, collective bargaining plays a regulatory role, forming an essential function of the state. Collective bargaining, through regulating the

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<sup>92</sup> See, for example, *Wouters* (n.56)

<sup>93</sup> *Bodson* (n.3) [18]

<sup>94</sup> *Deigo Cali & Figli SRL v Servizi Ecologici Porto di Genova* (Case C-343/95) [1997] 5 C.M.L.R. 484

<sup>95</sup> *ibid* [23]

<sup>96</sup> See AG Wahl in *FNV Kunsten* (n.4) [AG33]. At footnote 14, Wahl describes the importance of collective bargaining.

employment relationship, ensures that worker voice is heard and prevents the 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 of 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. 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. Under a collective bargaining model such as in Germany, the social partners, trade unions and employers' associations, are potentially entrusted with the regulation of the employment relationship through collective bargaining. However, changes in German industrial relations towards more firm-level bargaining and legislative provisions, implies that this may no longer be the case.

At a decentralised level, collective bargaining is highly unlikely to be a public function. As seen within the UK, trade unions are free to set terms and conditions of employment through collective bargaining. However, they are not entrusted with the regulation of the employment relationship. Collective bargaining's regulatory function over the employment relationships is, as understood in EU competition law, not "granted" by the State. Whilst trade unions through collective bargaining, and collective agreements, are free to build on existing labour law legislation, the State predominantly reserves the primary role of regulation for itself. The level of entrustment seen in *Bodson* and *Cali*, for example, is not present within such a collective bargaining system.

The above conclusions are not altered when considering the factual situation in *Albany*. In *Albany*, Dutch pension legislation allowed the Minister of State to make affiliation to a supplementary pension scheme set up by a collective agreement compulsory for the entire sector. Although tempting to argue that this means that collective bargaining under such a framework is a public function, this insufficiently considers the legislative framework under which the collective agreement was agreed, and to which affiliation was made compulsory. Whilst affiliation to, and the provision of, a pension scheme is in the public interest, trade unions were not entrusted with creating such a scheme through collective

agreements. The applicable legislation allowed sectoral pension schemes to be negotiated by trade unions and to which affiliation could be made compulsory, but did not entrust trade unions with such a function.<sup>97</sup> It simply set the requirements that it had to meet for affiliation to be made compulsory.<sup>98</sup> In contrast, the activities in *Bodson* and *Cali* were entrusted only to the entity in question.<sup>99</sup> However, where such an activity is entrusted solely to trade unions, and provided that the activity is in the public interest, it will be a public function, not an economic activity.

#### 4.2.2 A Solidarity Function?

The CJEU has held that entities adopting a solidarity function are not undertakings for the purposes of the Treaty competition provisions.<sup>100</sup> Where collective bargaining can be defined as a solidarity activity, a trade union, when engaged in collective bargaining, is not an undertaking under EU competition law. Solidarity for these purposes is defined as “the redistribution of income between those who are better off and those who, in view of their resources ... would be deprived”,<sup>101</sup> and, “the inherently uncommercial act of involuntary subsidisation of one special group by another.”<sup>102</sup> However, cases involving solidarity have been few and far between, all concerning insurance and pension schemes.<sup>103</sup> For example, in *Poucet*, funds managing the sickness and maternity insurance scheme for self-employed individuals in non-agricultural occupations were not undertakings due to the solidarity function they carried out.<sup>104</sup> The scheme was “intended to provide cover for all the persons

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<sup>97</sup> *Albany* (n.1) [7]-[24]

<sup>98</sup> Note that although this was normally the common manner in which they were provided for legislative provisions did not require that it was. This is supported by the legal provision requiring exemption be granted from a compulsory scheme where the employer provided, for at least 6 months prior to exemption being requested, a scheme at least comparable to the compulsory scheme. Additionally, even where the scheme set up by collective agreement met the conditions for compulsory affiliation to be granted, the Minister is not required to do so.

<sup>99</sup> In *Bodson* this was the provision of specific services for funerals in communes; in *Cali*, preventative anti-pollution measures in the oil port of Genoa.

<sup>100</sup> See *Poucet* (n.3); *Federation Francaise des Societes d'Assurance v Ministere de l'Agriculture et de la Peche* (Case C-244/94) [1995] E.C.R I-4013; *Jose Garcia v Mutuelle de Prevoyance Sociale d'Aquitaine* (Case C-238/94) [1996] E.C.R. I-1673.

<sup>101</sup> *Poucet* (n.3), [10]

<sup>102</sup> *Sodemare SA v Regione Lombardia* (Case C-70/95) [1997] E.C.R. I-3395, [AG29]. See also AG Jacobs in *AOK Bundesverband* (n.62) [AG32]

<sup>103</sup> 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.

<sup>104</sup> *Poucet* (n.3), [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); *Kattner Stahlbau GmbH v*

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.”<sup>105</sup>

The exemption for solidarity functions is based on the view that social programmes should be protected “from the Community’s economic law.”<sup>106</sup> Competition law “recognises national solidarity as the political expression of a set of obligations citizens wish to extend towards one another.”<sup>107</sup> 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. EU competition law will not apply.<sup>108</sup>

The CJEU has been consistent in its assessment of whether a specific activity can be classified as a solidarity function for the purposes of EU competition law.<sup>109</sup> In doing so, the CJEU will look at the activity as a whole, including the entity carrying out such an activity. From the CJEU’s 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) how 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.<sup>110</sup> The following discussion will examine how the above factors apply to collective bargaining.

#### 4.2.2.1 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 to protect and further worker interests

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*Maschinenbau- und Metall- Berufsgenossenschaft* (Case C-350/07) [2009] E.C.R. I-1513; *Cisal di Battistello Venanzio & C. Sas v Istituto nazionale per l’assicurazione contro gli infortuni sul lavoro (INAIL)* (Case C-218/00) [2002] E.C.R. I-691

<sup>105</sup> *ibid.*, [9]

<sup>106</sup> Nina Boeger, ‘Solidarity and EC Competition Law’ [2007] *European Law Review* 319, 324.

<sup>107</sup> *ibid* 338.

<sup>108</sup> *ibid* 338–9.

<sup>109</sup> See *Federation Francaise*, (n.100) [17]-[21]; *INAIL* (n.104).

<sup>110</sup> *ibid.*, [19]-[21]. Here the Court held that the principle of capitalisation and linkage of benefits to contributions outweighed the other factors in favour.

through redistributive measures.<sup>111</sup> This is evident from case law establishing collective bargaining as a fundamental right protected under Article 11 ECHR.<sup>112</sup> Collective bargaining, according to the ECtHR, is “an essential means to promote and secure the interests of its members.”<sup>113</sup> It is not an economic activity, but an exercise of social solidarity.

When linked with the second and fifth factors, the nature of the activity and its redistributive qualities, this argues in favour of collective bargaining being a solidarity activity. Collective bargaining is a form of countervailing power against the employer.<sup>114</sup> 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, bargaining redistributes rents in favour of the employee.

In addition, there is no link between the contributions paid and the benefits received through collective bargaining. Contributions vary according to an individual’s salary, yet there is no differentiation as to the benefits received. This, however, depends on the counterfactual adopted. A less productive worker benefits more than a more productive worker receiving the same high wage: the less productive worker’s outside option is worse. Furthermore, benefits also accrue to non-union workers.<sup>115</sup> Collective agreements are generally applied to members and non-members alike under both centralised and decentralised collective bargaining, provided that the employer is covered by the relevant collective agreement.<sup>116</sup> Therefore, no principle of capitalisation, as shown in *Federation Francaise*,<sup>117</sup> is present, thus strongly indicative of a solidarity function.

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<sup>111</sup> In *Albany*, the Fund and Government intervenors argued that the scheme pursued an essentially social function as it constituted a part of the Dutch social security system, operated on a non-profit basis, accepted all workers without prior screening, and did not link the contribution to pension rights. See [74]-[76]. However, the fund in question operated on a capitalisation basis (benefits were linked to investment), ultimately leading the CJEU to conclude that the fund was an undertaking; [82]-[86].

<sup>112</sup> See *Demir and Baykara v Turkey* (2009) 48 E.H.R.R. 54.

<sup>113</sup> *ibid.*, [157]

<sup>114</sup> John Kenneth Galbraith, *American Capitalism: The Concept of Countervailing Power*. (London: Hamilton 1961).

<sup>115</sup> See *Poucet* (n.3) and *Federation Francaise* (n.100) 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.

<sup>116</sup> This can be seen more evidently where a collective agreement covers an entire sector or is subject to an erga omnes extension. In such situations employers and workers are bound by the agreement regardless of whether they agreed to its terms or not.

<sup>117</sup> The benefits received are not linked to the contributions made **and** the financial results of the investments made.

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,<sup>118</sup> and there is a corresponding negative right under Article 11 ECHR not to be a member.<sup>119</sup> The presence of free-riders, when considered in light of the nature and purpose of collective bargaining, points strongly towards the conclusion that collective bargaining is a solidarity function.<sup>120</sup> Everyone covered by the collective agreement benefits from it: collective bargaining has a compulsory effect, even though not compulsory in nature. Where bargaining occurs at national or sector level, and/or the collective agreement benefits from erga omnes extension, this argument is strengthened considerably. This can be seen when considered in light of the facts of *Albany*. In *Albany*, membership of the pension scheme was made compulsory by order of the Minister of State: all workers in the industry would benefit from the pension scheme provided for by the collective agreement.

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 EU 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.<sup>121</sup> These are largely public functions carried out by a public or quasi-public body. In contrast, and as set out in the previous subsection, 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 but there is no “right to prevail”.<sup>122</sup> An employer can be forced to bargain, or at best 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

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<sup>118</sup> See ss.137 and 152 TURLCA 1992 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

<sup>119</sup> 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.

<sup>120</sup> 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.

<sup>121</sup> See, for example, *Poucet* (n.3); *AOK Bundesverband* (n.62)

<sup>122</sup> Sections 178-188, and Schedule A1 TULRCA 1992 place various duties on the employer to recognise, provide bargaining information and consult, for example, with the employer.

activity was a solidarity function, redistribution was guaranteed. The “process” always reached a positive outcome. This implies that redistribution is required for there to be a solidarity function. Under collective bargaining, there is no guaranteed redistribution or “positive” outcome. Collective bargaining can, and does, frequently reach no concrete outcome. The employee, and trade union, can be in the same position many years after commencing collective bargaining.

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.<sup>123</sup> Looking at the CJEU case law makes this distinction clearer. The insurance/sickness funds found to operate on a solidarity basis all operated via either inter-generational subsidisation<sup>124</sup> and/or compulsory subsidisation between entities.<sup>125</sup> 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 centralised 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.<sup>126</sup> This, however, does not occur under a decentralised model.

Furthermore, under decentralised bargaining systems there is, prima facie, the potential for competition between unions. Although competition is allowed provided that it does not affect the actual accrued benefits,<sup>127</sup> 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

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<sup>123</sup> Note that this includes situations where the employer concedes to the union demands following concerted industrial action.

<sup>124</sup> *Poucet* (n.3) [12]

<sup>125</sup> *Poucet* (n.3); *Federation Francaise* (n.100).

<sup>126</sup> 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).

<sup>127</sup> *AOK Bundesverband* (n.62) [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 no effect on the overall benefits or the nature of the scheme.

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 illusory.<sup>128</sup> As such, competition between unions is generally discouraged. Within the UK, for example, competition is muted by affiliation to the TUC.<sup>129</sup> This, however, has not stopped some inter-union competition from occurring.<sup>130</sup> Competition between unions under a centralised bargaining system, however, is unlikely and thus this consideration is not present.

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.<sup>131</sup> The body carrying out the solidarity activity does not profit from such activities. Trade unions set their own membership fees. Although generally linked to wage scales, there is nothing to prevent a union from setting membership dues at a level which enables it to profit from collective bargaining, nor is there anything to prevent a union from introducing an additional fee specifically for the union to engage in collective bargaining.<sup>132</sup> Additionally, workers when bargaining over new terms and conditions seek to maximise their utility. Although workers will engage in collective bargaining for altruistic reasons, they also profit from such activities.

#### 4.2.2.2 Summary

To summarise, 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

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<sup>128</sup> This depends 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.

<sup>129</sup> 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). See Trades Union Congress, *TUC Disputes, Principles and Procedures*. (Trade Union Congress 2007).

<sup>130</sup> 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].

<sup>131</sup> Duncan Sinclair, “Undertakings” in Competition Law at the Public-Private Interface - an Unhealthy Situation’ [2014] *European Competition Law Review* 167, 170.

<sup>132</sup> *Ambulanz Glockner* (n.66). 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.

the consideration that collective bargaining can theoretically 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”.<sup>133</sup> As collective bargaining can be carried out by the union with a view to a profit, it is an economic, rather than a solidarity function.

## 5. Conclusion

The discussion in this chapter has shown that the existing view that a trade union is neither an undertaking nor association of undertakings is incorrect. Section 2 demonstrated that the CJEU’s approach is incorrect in two ways. First, section 2.1 argued that a trade union does not act as its members’ agent when engaged in collective bargaining. The section showed that AG Jacobs did not apply the correct test for agency, and that the application of the ‘proper’ test a trade union leads to the conclusion that a trade union does not act as its member’s agent. When engaged in collective bargaining a trade union can bear significant financial risk when engaged in collective bargaining and does not form an auxiliary organ of its members. Second, section 2.2 concluded that workers, when bargaining over conditions of work and employment, are not subsumed within the employing undertaking. When bargaining over terms and conditions, a worker is acting against their employer’s interests and are not acting within the bounds of the employment relationship.

This means that a trade union may be an association of undertakings or an undertaking when engaged in collective bargaining. Section 3, however, demonstrated that a trade union is not an association of undertakings. The section showed that workers are not undertakings when bargaining over terms and conditions of employment. Workers do not bear any significant financial and/or economic risks. Workers bargaining over new and improved terms and conditions, absent a lengthy strike, only risk the loss of a chance of improved working terms and conditions. Workers do not risk their jobs in bargaining or a reduction in their existing terms and conditions.

However, section 4 demonstrated that a trade union can be an undertaking when engaged in collective bargaining: collective bargaining is an economic activity. Trade union offer their services for collective bargaining on a given market (the labour market), bear the

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<sup>133</sup> *Poucet* (n.3) [AG8]

financial risks of collective bargaining, and can profit from such activities. The section also argued that collective bargaining is neither a public or solidarity function. Section 4.2.1 showed that collective bargaining is unlikely to be a public function in that, whilst it may be in the public interest, it rarely forms part of the essential function of the State. Trade unions are unlikely to be entrusted with the regulating the employment relationship through collective bargaining. Collective bargaining predominantly operates alongside legislative protections. Section 4.2.2 demonstrated that that collective bargaining is not a solidarity function. Whilst it was shown that collective bargaining does have solidarity features, the ability for trade unions to profit negated these considerations.

The conclusions reached in this chapter mean that Article 101 TFEU can apply to collective agreements. This provides the basis for examining the questions posed in the Introduction. As a trade union is an undertaking when engaged in collective bargaining, EU competition law applies. This means that there may be a conflict between the social and competition policy objectives, such that the social policy objectives are seriously undermined by the application of EU competition law. Where the application of Article 101 TFEU seriously undermines the social policy objectives present in collective agreements the exemption in *Albany* may be necessary.

The discussion in Chapter 3 will set out the exemption created by the CJEU in *Albany*. It will set out the CJEU's decision and criticisms of it. It will show how the exemption has been developed in the subsequent case law and how the CJEU has refused to create a similar exemption in other fields of EU law. Chapter 3 will provide the basis for the discussion in the remaining chapters of the thesis. The chapters will explore the exemption in its constitutional setting, examining how it balanced the competing objectives (Chapters 4 and 5), and whether the application of Article 101 TFEU seriously undermines the social policy objectives (Chapters 6 and 7).

## Chapter 3 – The Exemption

### 1. Introduction

In Chapter 2, the thesis argued that a trade union is an undertaking under EU competition law when engaged in collective bargaining. It offers services (collective bargaining) on a given market (the labour market). Collective bargaining can be carried out with a view to making a profit, with the trade union bearing financial risk associated with the activity. Collective bargaining, the Chapter argued, is neither a public or solidarity function. The discussion concluded that a trade union does not act as its members agent when engaged in collective bargaining. It showed that when engaged in collective bargaining a trade union can bear financial risk when engaged in collective bargaining and does not form an auxiliary organ of its members. This means that EU competition law applies. This creates the problem that the social policy objectives pursued by collective may be seriously undermined by the application of Article 101 TFEU. Where this is the case, the exemption in *Albany* may be necessary.

This chapter will explore the decision of the CJEU in *Albany*. In *Albany*, the CJEU held that collective agreements are exempt from the application of Article 101 TFEU where they are (i) between management and labour, or their representatives, and (ii) aimed at improving working terms and conditions.<sup>1</sup> This chapter will, in section 2, set out the exemption in *Albany*, and, in section 3, examine the extent to which the decision in *Albany* has been challenged, focussing on academic literature critical of the Court's approach. Sections 4 and 5 of this chapter will explore how the decision in *Albany* has developed in subsequent cases, and how the exemption has been strictly confined to the Treaty competition rules. Section 6 will summarise and conclude the chapter.

### 2. The Exemption

Collective agreements are exempt from the application of EU competition law where the two conditions set out in *Albany* are met. In *Albany*, the CJEU held that

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<sup>1</sup> *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (Case C-67/96) [2000] 4 C.M.L.R. 446, [59]-[60]

...agreements concluded in the context of collective negotiations between management and labour in pursuit of [their social policy] objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of [Article 101(1)] of the Treaty.<sup>2</sup>

Therefore, any agreement, concluded in the context of collective negotiations between an employer and labour, or their representatives, aimed at improving working terms and conditions, falls outside the scope of EU competition law. The reach of the exemption is wide. It potentially exempts agreements aimed at fixing prices or colluding within a product market, provided that the agreement also has the aim of improving working terms and conditions. Whether the aim must be the sole aim, the primary aim, or simply one of several aims, will be explored further in section 3 below. Furthermore, *Albany* potentially exempts collective agreements extending beyond the employer's own workers. The exemption's wording does not restrict a collective agreement to an employer and its workers (or respective representatives); it allows agreements between management and labour more generally.

*Albany* concerned the decision of the Minister of State to make affiliation to a supplementary pension scheme created by an industry-wide collective agreement compulsory. The scheme itself had the power to exempt individual employers from its purview. Albany, having set up its own pension scheme, asked to be exempt on the basis that their scheme was more beneficial to its workers and that to modify their scheme would be disproportionate and burdensome. The Fund administering the scheme refused to grant an exemption as Albany's scheme had not been in existence long enough to qualify for exemption. Albany appealed the refusal. Whilst the Insurance Board hearing the appeal found that the Fund had been right under its own Guidelines not to grant an exemption, it felt that it was reasonable to request that the Fund make use of its exemption powers or demonstrate that there was no justification for doing so.

The Fund did not reconsider their decision and served an injunction on Albany requiring it to pay the missing statutory contributions, interest on those contributions and collection costs. Albany appealed against the injunction to the Arnhem District Court contending that compulsory affiliation to the pension scheme was incompatible with EU competition provisions. The District Court referred three questions to the ECJ: first, was the sectoral pension scheme an undertaking under Articles 85, 86 or 90 (Articles 101, 102 and 106

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<sup>2</sup> *ibid.* [60]

TFEU respectively); second, was compulsory membership a measure which nullified the effect of competition rules applicable to undertakings; and third, if the second question was answered in the negative, could other circumstances render membership incompatible with Article 90? This Chapter will focus on whether the agreement breached Article 101 (ex-Article 85 EC) TFEU.

## 2.1 AG Jacobs' Opinion

In his opinion, AG Jacobs held that there is no general exemption for the social provisions of the Treaty from the Treaty competition rules.<sup>3</sup> However, in relation to collective agreements, AG Jacobs argued that

[s]ince the Treaty rules encouraging collective bargaining presuppose that collective agreements are in principle lawful, [Article 101(1)] cannot have been intended to apply to collective agreements between management and labour on core subjects such as wages and other working conditions. Accordingly, collective agreements between management and labour on wages and working conditions should enjoy automatic immunity from antitrust scrutiny.<sup>4</sup> [emphasis added]

Any exemption for collective agreements, AG Jacobs argued, should not be without limitation. Jacobs proposed three conditions that must be met before the exemption applies. First, the agreement must be made within the “formal framework of collective bargaining between both sides of industry.”<sup>5</sup> Second, the agreement should be concluded in good faith. Attention should be paid to agreements which “apparently deal with core subjects of collective bargaining ... but which merely function as cover for a serious restriction of competition between employers on their product markets.”<sup>6</sup> Competition authorities should be able to examine the agreement where this is the case. Third, the exemption should only apply where the collective agreement concerns core subjects of collective bargaining and does “not directly affect third markets and third parties...”<sup>7</sup> In this regard, AG Jacobs proposed that the test to be applied should be “whether the agreement merely modifies or establishes rights

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<sup>3</sup> *ibid.*, [AG123]-[AG130]. AG Jacobs' main argument is that if there was to be an exemption for social policy objectives, then there would be an explicit Treaty provision. As there is not, there is no generalised exception.

<sup>4</sup> *ibid.*

<sup>5</sup> *ibid.*, [AG191]

<sup>6</sup> *ibid.*, [AG192]

<sup>7</sup> *ibid.*, [AG193]

and obligations within the labour relationship between employers and employees or whether it goes beyond that and directly affects relations between employers and third parties, such as clients, suppliers, competing employers, or consumers.”<sup>8</sup> Collective agreements directly affecting third parties and/or markets have potentially harmful effects on the competitive process that should be the subject of examination by the competition authorities.<sup>9</sup>

In AG Jacobs’ view, the need to exempt collective agreements stems from the tension between the two sets of Treaty rules: the competition rules and those encouraging collective agreements.<sup>10</sup> Collective agreements on core subjects such as wages and working conditions restrict competition between employers: “they cannot offer to work below the agreed minimum.”<sup>11</sup> The Treaty competition rules void anti-competitive agreements falling within their scope. The Treaty does not provide a solution to this tension so established rules of interpretation must be used.<sup>12</sup> This implies the use of a proportionality approach. Since neither set of rules has absolute precedence over the other, neither should be “emptied of its entire content.”<sup>13</sup> In adopting such an approach, AG Jacobs stated that because the Treaty rules encouraging collective bargaining presuppose the lawfulness of collective agreements, the Treaty competition provisions cannot have been intended to apply to such agreements on core subjects.<sup>14</sup>

AG Jacobs argued that by encouraging the conclusion of collective agreements, “the Treaty recognises the possibility of an exemption to the general presumption on the consequences of agreements between private actors on the ground that under normal circumstances this category of agreements furthers the public interest.”<sup>15</sup> AG Jacobs points out that this understanding of collective agreements is confirmed by the practices in Member States, and that subjecting collective agreements to competition law would reverse the

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<sup>8</sup> *ibid.*

<sup>9</sup> *ibid.* As an example, AG Jacobs points to the national exemptions in existence. For example, the Finnish Supreme Administrative Court has held that the Finnish statutory exemption only applies to agreement directly affecting working conditions.

<sup>10</sup> *ibid.*, [AG177]-[AG179]

<sup>11</sup> *ibid.*, [AG178]

<sup>12</sup> *ibid.*, [AG179]

<sup>13</sup> *ibid.* This can be seen in how AG Jacobs narrowly prescribed his proposed exemption. By restricting the exemption to agreements which are in good faith and do not directly affect third parties, AG Jacobs retains scope for the application of the Treaty competition rules to collective agreements.

<sup>14</sup> *ibid.*, [AG179]

<sup>15</sup> *ibid.*, [AG185]

practices followed in the Member States.<sup>16</sup> The consistency in shielding collective agreements from national competition law, reinforces the public interest basis of the exemption.<sup>17</sup>

This public interest basis can also be seen in earlier statements made by AG Jacobs as to the tension between the different Treaty rules. In contrast to the employer-focused efficiency benefits achieved through collective bargaining,<sup>18</sup> Jacobs stated that the goal of preventing a “race to the bottom” as regards wages and working conditions “is why collective bargaining is encouraged by all national legal orders, international legal instruments and more particularly by the Treaty itself...”<sup>19</sup> Although AG Jacobs used this point to highlight the tension between trade unions, and collective bargaining, and the Treaty competition rules, it can be argued that this consideration played a role in AG Jacobs’ decision to propose an exemption. This thesis will explore the constitutional tension in *Albany* in Chapters 4 and 5. As such, I shall leave discussion to then.

In his Opinion, AG Jacobs dismissed the argument that an “alleged” fundamental right to collective bargaining required the giving of special status under the competition rules to collective agreements.<sup>20</sup> This is because the right to collective bargaining was not recognised as a “specific [EU] fundamental right”.<sup>21</sup> In line with contemporary jurisprudence of the European Court of Human Rights (ECtHR), AG Jacobs held that the EU legal order only protects the right to form and join trade unions and employers’ associations.<sup>22</sup> There is a lack of “sufficient convergence of national legal orders and international legal instruments on the recognition of” a right to collective bargaining to find such a right under EU law.<sup>23</sup> However, AG Jacobs concluded that “the right to protect collective action in order to protect occupational interests in so far as it is indispensable for the enjoyment of freedom of association is ... protected by Community law.”<sup>24</sup> If the right to collective action is protected in order to safeguard occupational interests, why is collective bargaining treated differently?

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<sup>16</sup> *ibid.* AG Jacobs, earlier in his opinion, conducts a small comparative survey of the approaches in some Member States. See [AG80]-[AG112]

<sup>17</sup> *ibid.*

<sup>18</sup> *ibid.*, [AG181]-[AG182]. These are preventing labour conflict, reducing transaction costs, predictability and transparency, and achieving an equilibrium in bargaining power.

<sup>19</sup> *ibid.*, [AG178]. At [AG164] AG Jacobs refers to the “international consensus on the legitimate and socially desirable character of collective bargaining.

<sup>20</sup> *ibid.*, [AG132]-[AG164]

<sup>21</sup> *ibid.*, [AG160]

<sup>22</sup> *ibid.*, [AG158]

<sup>23</sup> *ibid.*

<sup>24</sup> *ibid.*, [AG 159]

If one considers the statements made by AG Jacobs about the right to collective bargaining, the same applies to the right to industrial action. In 2000, the ECtHR had not recognised a right to industrial action, and there was no convergence at national and international level. Furthermore, one of the main purposes of industrial action is to provide enforcement and strength to collective bargaining and collective agreements.<sup>25</sup> Most industrial action will be preceded by collective bargaining and/or a concluded collective agreement. Collective bargaining without the threat industrial action is no more than “collective begging.”<sup>26</sup> Thus, collective bargaining should also have been given fundamental status under the Treaty.

However, AG Jacobs argued that even were such a right present, it would not be sufficient to protect collective agreements from Article 101 TFEU. Drawing an analogy with the protection provided to collective agreements under the general principle of freedom of contract,<sup>27</sup> AG Jacobs pointed out that fundamental rights can be restricted by objectives of general interest pursued by the Community, where the restriction is proportionate and does not impair the substance of the right. In the context of applying EU competition law to collective agreements, AG Jacobs was clear: “[t]here can be no doubt that in the present cases [Article 101 TFEU] pursues an important aim of the Treaty, namely the creation of a system ensuring that competition in the internal market is not distorted...”<sup>28</sup> A right to collective bargaining would not be sufficient to “shelter collective bargaining from the applicability of the competition rules.”<sup>29</sup> This is true, however in such a situation the social policy and fundamental rights interests are not seriously undermined. Through the application of a proportionality assessment such interests are given adequate weight. I shall return to this argument in Chapters 4 and 5.

To summarise, AG Jacobs proposed that collective agreements should be exempt from the Treaty competition rules where such agreement is: (i) made within the framework of collective bargaining by both sides of industry; (ii) concluded in good faith on core subjects of bargaining; and, (iii) does not directly affect third parties or markets.

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<sup>25</sup> Simon F Deakin and Gillian S Morris, *Labour Law* (6th Edition, Oxford: Hart 2012) para 11.2.

<sup>26</sup> ATJM Jacobs, ‘The Law of Strikes and Lockouts’, *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (8th Edition, Kluwer: Deventer 2001) 660.

<sup>27</sup> Albany (n.1) [AG161]-[AG162]

<sup>28</sup> *ibid.*, [AG162]

<sup>29</sup> *ibid.*, [AG163]

## 2.2 The Court

The decision of the Court is short and stark. Having set out the prohibition in Article 101 TFEU, the Court stated that:

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 101(1)] ... when seeking jointly to adopt measures to improve conditions of work and employment.<sup>30</sup>

As such, the Court held that collective agreements fall outside of the scope of Article 101 TFEU.<sup>31</sup> In a similar vein to AG Jacobs, the Court held that

[i]t 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 [101(1)] of the Treaty.<sup>32</sup>

To benefit from the exemption, a collective agreement must fulfil two criteria. First, the collective agreement must be “concluded in the context of collective negotiations between management and labour”,<sup>33</sup> and second, it must seek to “improve conditions of work and employment.”<sup>34</sup> It should be noted that the CJEU does not require the factors highlighted by AG Jacobs to be met; namely the requirements for good faith and that the agreement does not directly affect third parties. This is significant in that by not requiring the agreement to meet such conditions the CJEU’s exemption is much wider than that proposed by AG Jacobs.

In reaching such a decision, the CJEU balanced the competing objectives: “the social policy objectives would be seriously undermined” and the exemption “follows from an

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<sup>30</sup> *ibid* [59]; note that the French language version refers to “nature et objet”. One can infer that that effects are superseded by the social objectives of the agreement. Its objective of protecting workers outweighs the restrictive effects on competition.

<sup>31</sup> *ibid.*, [60]

<sup>32</sup> *ibid.*

<sup>33</sup> *ibid.*

<sup>34</sup> *ibid.* Note that even if the collective agreement does not satisfy the *Albany* exemption the agreement may well fall outside the Article 101 prohibition as it does not have either an anti-competitive object or anti-competitive effects.

interpretation [of the Treaty] which is both effective and consistent..."<sup>35</sup> Where the stipulated conditions are met, the CJEU concluded that the social policy objectives outweigh competition policy's objectives. What the CJEU does not do, however, is explain how it balanced the competing or the weights assigned to the competing objectives. This shall be explored in depth in Chapter 4, section 4. Any discussion shall be left to then.

The CJEU's wording potentially creates a wide exemption, however the exemption can be interpreted in a narrow way. In *Albany*, the CJEU stated that as the agreement in question established a pension fund, which is related to a worker's remuneration, the agreement "directly contributes to improving one of their working conditions."<sup>36</sup> (emphasis added) This can be interpreted to mean that the purpose of the agreement (improving working terms and conditions) should be an agreement's sole or main purpose, or one of many purposes will affect the exemption scope. I shall return to this point in section 3 below. Additionally, it should also be noted that the *Albany* exemption is not subject to a proportionality requirement. The exemption only requires is that the agreement seeks to improve conditions of work and employment.<sup>37</sup>

### 3. Albany challenged?

The decision in *Albany* raises several issues. First, the CJEU assumed that all collective agreements are anti-competitive; the CJEU does not discuss whether they actually are.<sup>38</sup> As Townley argues, "it is questionable whether collective agreements inherently include, by their nature and purpose, restrictions on competition such that trade between Member States is appreciably affected ... [I]t is arguable whether, by their very nature, the social policy objectives and the competition policy objectives actually conflict at all."<sup>39</sup> Van den Bergh and Camesasca take this further, arguing that collective agreements could produce sufficient

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<sup>35</sup> *ibid.*

<sup>36</sup> *ibid.*, [63]. Note that the CJEU has not expanded in later cases on the scope of *Albany*.

<sup>37</sup> c.f. Monica Wirtz, 'The Collision between Collective Agreements and Competition Law' (2006) PhD Thesis 311–3. Wirtz argues that a proportionality approach can be applied, however, it should only apply to tertiary employment conditions, for example, a ban on outsourcing or an exclusive right to mediate childcare for a company.

<sup>38</sup> Note that AG Jacobs in *Albany* does question whether there is an appreciable effect. This is also present in subsequent CJEU jurisprudence. For discussion of how Article 101 applies to a collective agreement, see Chapter 4.

<sup>39</sup> Christopher Townley, *Article 81 EC and Public Policy* (Oxford: Hart, 2009) 61. For discussion of how the CJEU resolved the conflict in *Albany*, see Chapter 4 of this thesis.

efficiency gains that compensate for any significant anti-competitive effects.<sup>40</sup> Therefore, the removal of all collective agreements from EU competition law's jurisdiction is unnecessary: individual agreements could satisfy the Article 101(3) TFEU conditions.<sup>41</sup>

On this basis, Van den Bergh and Camesasca argue that a general *per se* exemption "can only be justified in the presence of substantial economies of scale, surpassing the firm level."<sup>42</sup> This argument, however, does not recognise that the exemption in *Albany* was based on the need to protect the social policy objectives and not a balancing of the agreements anti and pro-competitive benefits. The CJEU, as will be explored in detail in Chapter 4, balanced the harm to the social policy objectives against the need to achieve competition policy's objectives, and vice versa. As such, the CJEU considered that the social policy objectives always outweigh competition policy's objectives where its stipulated conditions are met.

Second, and linked with the above, one must be mindful that *Albany* was pre-modernisation and Regulation 1/2003: the Commission had the sole power to grant an individual exemption under Article 101(3) TFEU.<sup>43</sup> Where the parties, as in *Albany*, had not notified the Commission of the agreement, they could not benefit from Article 101(3) TFEU.<sup>44</sup> That subsequent case law did not address this point is understandable, as from a practical perspective it was not required to do so. I shall return to whether a collective agreement could now benefit from Article 101(3) TFEU in Chapter 7.

Third, the exemption's "purpose" requirement means that its scope is potentially very wide.<sup>45</sup> de Vos argues that the exemption's wording exempts collective agreements which have as their dominant purpose the improvement of working conditions.<sup>46</sup> Collective agreements can pursue other purposes in addition to improving conditions of work. This is

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<sup>40</sup> Roger Van den Bergh and Peter Camesasca, 'Irreconcilable Principles? The Court of Justice Exempts Collective Labour Agreements from the Wrath of Antitrust' (2000) 25 *European Law Review* 492, 506–7.

<sup>41</sup> *ibid* 506.

<sup>42</sup> *ibid*. The authors argue that this is a welfare-maximising analysis, balancing the anti and pro-competitive effects. This approach is "an all-round assessment of collective agreements' diverse consequences". See also Marc de Vos, 'Collective Labour-Agreements and European Competition Law: An Inherent Contradiction', *A decade beyond Maastricht: the European social dialogue revisited* (Kluwer Law International 2003) 73. de Vos argues that

<sup>43</sup> See Regulation No. 17: First Regulation Implementing Article 85 and 86 of the Treaty [1962] O.J. 13, Article 9(1).

<sup>44</sup> Article 4(1), Regulation 17, *ibid*.

<sup>45</sup> Marc de Vos (n 42); Stephen Vousden, 'Albany, Market Law and Social Exclusion - Case C-67/96 *Albany International BV v Stichting Bedrijfsfonds Textielindustrie* Judgment of 21 September 1999' (2000) 29 *Industrial Law Journal* 181; Deakin and Morris (n 25) 786.

<sup>46</sup> *ibid* 80.

correct, however, de Vos' 'dominance' requirement does not necessary follow from the *Albany* exemption. In *Albany*, the CJEU held that the exemption applied as the agreement contributed "directly to improving" working conditions.<sup>47</sup> This, Deakin and Morris argue, could mean that the exemption applies to collective agreements that have a "tangential" relationship to the improvement of conditions of work and employment.<sup>48</sup> However, the requirement for the agreement to "directly" relate to improving working conditions potentially restricts the application of the immunity.<sup>49</sup> It means that the agreement must have as its purpose the improvement of terms and conditions of employment. It does not, as Vousden argues, restrict the application of the exemption to certain types of provision.<sup>50</sup> The CJEU only requires that the agreement is directly related to improving conditions of work and employment.

Arguments such as that of Vousden create uncertainty as to whether an agreement is directly related to improving working conditions. That the CJEU gives no guidance exacerbates this further.<sup>51</sup> For example, the CJEU does not identify whether this is assessed according to a subjective or objectives standard.<sup>52</sup> de Vos argues that the requirement that the agreement be directly related to the improvement of terms and conditions, implies a subjective standard: "[t]he improvement in employment and working conditions must be the preponderant aim of the contracting parties."<sup>53</sup> Furthermore, the exemption's framing implies that the CJEU adopted a "laissez faire" view of industrial relations; the industrial relations partners are free (within limits) to determine the means by which they achieve the legitimate objective. In a similar fashion to the approach adopted by the UK courts to the term "in contemplation or furtherance of" under industrial action legislation,<sup>54</sup> the CJEU potentially allows the parties the freedom to decide if the agreement is the best option to

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<sup>47</sup> *Albany* (n.1) [63]

<sup>48</sup> Deakin and Morris (n 25) 786.

<sup>49</sup> Vousden (n 45) 189.

<sup>50</sup> *ibid.* Vousden argues that the requirement that the agreement directly relate to terms and conditions draws a distinction between issues of remuneration and non-remuneration.

<sup>51</sup> See Vousden, *ibid* 188–9.

<sup>52</sup> See Marc de Vos (n 42) 80–1.

<sup>53</sup> Marc de Vos (n 42). See also Catherine Barnard and Simon Deakin, 'Negative and Positive Harmonization of Labor Law in the European Union' (2002) 8 *Columbia Journal of European Law* 389, 392–3., who argue that the use of a subjective test favours the autonomy of the collective bargaining process. The authors point out that this contrasts with AG Jacob's approach which encourages an objective standard.

<sup>54</sup> See section 219 Trade Union and Labour Relations (Consolidation) Act 1992. Section 219 gives a trade union immunity from liability in tort. The section states that "An act done by a person in contemplation or furtherance of a trade dispute is not actionable in tort..."

achieve its intended outcome.<sup>55</sup> Whether the intended outcome is achieved is irrelevant. By contrast, an objective approach, such as that seen under the free movement provisions,<sup>56</sup> could restrict the exemption to “core topics” of bargaining and allow the courts to probe into the purpose of the parties to a collective agreement.

Fourth, *Albany*'s exemption has been criticised on the basis that the CJEU adopted an incorrect basis. de Vos argues that “[t]he ECJ builds up a labour exemption from the recognition of the ... *European* social dialogue in the TEC.”<sup>57</sup> In basing the exemption on Article 139(1) EC (now Article 151(1) TFEU), an exemption should only cover supra-national collective agreements: “[t]he support and organization of the European social dialogue in the TEC ... cannot per se be extended to the purely national social dialogue, as the ECJ seems to do.”<sup>58</sup> If we consider the wording of the provisions relied upon in *Albany*, de Vos is mistaken in his view. The CJEU pointed towards generic provisions which encouraged the EU and Member States to closely co-operate on the right to association and collective bargaining, whilst also referring to European social dialogue. It can be argued that national and European level social dialogue are correlated. Without strong national level dialogue, it may not be possible to have strong European dialogue.

Two arguments, which support the CJEU's decision and approach, are seemingly missing from the literature. First, the exemption in *Albany* provides a level of certainty for the social parties when engaging in collective bargaining. Such an argument is easier to sustain across all Member States than that made by Vousden in support of a blanket exemption: a blanket exemption for collective agreements could lead to the transformation

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<sup>55</sup> See, in relation to section 219 TULRCA 1992, *Express Newspapers v McShane* [1980] AC 672, 687, per Lord Diplock; *Duport Steel v Sirs* [1980] 1 WLR 142; *NWL Ltd v Nelson* [1979] IRLR 478. The House of Lords held that the effects that such action will have are irrelevant in considering whether the action is in contemplation or furtherance of a trade dispute. It is sufficient that the person taking the action honestly and genuinely believes that the action is. Note, however, that an improper motive may negative any genuine intention to promote or advance the dispute in question; see Lord Salmon in *Nelson*; Millet J in *Associated British Ports v TGWU* [1989] IRLR 291, 300. Note that lower courts had proposed various restrictions. These were the “principle purpose test” (Lord Denning in *McShane v Express Newspapers* [1979] IRLR 79), the “reasonably capable test” (Lawton and Brandon LJ in *McShane*), and the “remoteness test” (see *Beaverbook Newspapers Ltd v Keys* [1978] IRLR 34). For a convenient summary, see *United Brands (UK) Ltd v Fall* [1979] IRLR 110.

<sup>56</sup> For an example of how an objective approach can restrict collective trade union action, see the decision of the CJEU in *International Transport Workers' Federation v Viking Line ABP* (Case C-438/05) [2008] 1 C.M.L.R. 51.

<sup>57</sup> Marc de Vos (n 42) 69.

<sup>58</sup> *ibid.* See also Vousden (n 45) 188. Vousden points out that the Court seemed oblivious to the fact that the provisions cited in support of its exemption refer to the European social partners, whereas the measures in *Albany* were “purely legal measures produced by representative social partners.”

of private collective bargaining into a quasi-public form of governance.<sup>59</sup> *Albany* ensures that trade unions, workers and employers know that where the agreement in question seeks to improve conditions of work and employment, it falls outside the scope of EU competition law and can therefore be relied upon. There is no concern for the social partners that the agreement is vulnerable to ex-post challenge under competition rules. As set out in the thesis' introduction, the social partners may be less inclined to conclude collective agreements if subject to challenge under EU competition law.<sup>60</sup> This is especially the case where an agreement only has a marginal improvement on conditions of work and employment. Parties will not know with any certainty the agreement's effects.<sup>61</sup>

Second, the clash of objectives in *Albany* is constitutional; there is a clash between objectives protected by the EU Treaties (or Treaty in force at time of the CJEU's decision), which require a constitutional methodology to be adopted. This is what the CJEU inevitably reverts to in considering the case (and creating the exemption). Although the CJEU is not explicit in adopting such an approach, the structure it adopts in balancing the competing objectives indicates such an approach. Rather than interpreting the competition provisions in a way which enables the agreement to not fall within their scope, the CJEU balanced the competing objectives through a proportionality assessment.<sup>62</sup> In the CJEU's view, such an approach "follow[ed] from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent..."<sup>63</sup> Viewing *Albany* in this way explains the CJEU's refusal (examined in Section 5 below) to adopt a similar approach in the free movement and public procurement realms (these areas already allow for competing objectives to be reconciled) and why the CJEU adopts such a seemingly wide exemption.<sup>64</sup> The CJEU in *Albany* chose to create an exemption, rather than leave any balancing to Article 101 TFEU. It provided an easy solution to a difficult and intractable question, removing the uncertainty that a case-by-case approach creates. A detailed discussion of how the CJEU balanced the competing objectives will be the focus of Chapter 4, section 4. What the constitutional approach in *Albany* does

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<sup>59</sup> Vousden (n 45) 191.

<sup>60</sup> See page 8

<sup>61</sup> This is potentially exacerbated by the focus on economic approach adopted by the Commission and CJEU to the Treaty competition rules.

<sup>62</sup> See Chapter 4 for detailed discussion of the proportionality principle and the CJEU's balancing exercise in *Albany*.

<sup>63</sup> *Albany* (n.1) [60]

<sup>64</sup> This assumption is that where the two conditions are met, the social policy objectives will always outweigh the competition policy objectives present.

not do, however, is provide an answer for the CJEU's failure to establish that there was a restriction on competition. If there is no restriction on competition, and/or if the agreement benefits from exemption under Article 101(3) TFEU, an exemption may not be necessary. The discussion in Chapters 6 and 7 will examine whether collective agreements fall within Article 101 TFEU. Chapters 4 and 5 will explore the constitutional aspects of *Albany* in further detail.<sup>65</sup>

Moving on, what is clear from the CJEU case law is that subsequent case law applying the exemption does not engage with the arguments set out above. The CJEU has simply applied the exemption to the facts of the case as stated, providing very limited guidance on the exemption's application.<sup>66</sup> Section 4 will examine how the exemption has been applied in subsequent cases, and its treatment by subsequent AG Opinions. Section 5 will follow this by exploring the CJEU's approach to similar arguments within the free movement and public procurement realms. The arguments adopted in later case law, strengthens the view that *Albany* conducted a constitutional methodology.

#### 4. The position post-*Albany*

Subsequent application of the *Albany* exemption by the CJEU has not provide any further discussion of the exemption's underlying basis or scope.<sup>67</sup> In each case, the CJEU simply applied the exemption to the facts of the case. In *Van der Woude*, the CJEU held that a collective agreement establishing a sector-wide healthcare insurance scheme fell within the scope of the exemption as it contributed to improving the working conditions of the employees.<sup>68</sup> The agreement ensured that employees would have the necessary means to meet medical expenses and reduced the costs to be borne by workers.<sup>69</sup> Similarly, in

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<sup>65</sup> Chapter 4 will explore in more detail the constitutional framework and balances under EU law and *Albany*; Chapter 5 the effect of fundamental rights considerations within the EU's constitutional framework and whether this has any effect on the current (and future) application of *Albany*.

<sup>66</sup> See H Nordling, 'State of the Unions: The Applicability of Art 101(1) TFEU to Collective Bargaining Agreements after FNV Kunsten Media' (2015) 14 Competition Law Journal 37, 41.

<sup>67</sup> See, *Maatschappij Drijvende Bokken BV v Stichting Pensioenfondsvoor de Vervoer- en Havenbedrijven* (Case C-219/97) [1999] E.C.R. I-6121; *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfondsvoor de Handel In Bouwmaterialen* (Cases C-115 to 117/97) [1999] E.C.R. I-5751; *Pavlov v Stichting Pensioenfonds Medische Specialisten* (Cases C-180-184/98) [2001] 4 C.M.L.R. 1; *AG2R Prévoyance v Beaudout Père et Fils Sarl* (Case C-437/09) [2011] 4 C.M.L.R. 19; *Van Der Woude v Stichting Beatrixoord* (Case C-222/98) [2001] 4 C.M.L.R. 2. See also the European Free Trade Court in *Landsorganisasjonen I Norge v Kommunes Sentralforbund* (Case E-8/00) [2002] E.F.T.A. Ct. Rep. 114

<sup>68</sup> *Van Der Woude*, *ibid*, [25]

<sup>69</sup> *ibid*.

*Brentjens* and *Drijvende Bokken*, the CJEU held that agreements establishing supplementary pension schemes fell within the *Albany* exemption: the agreements guaranteed a certain level of pension for all workers in the sector, and thus contributed directly to improving the workers' remuneration.<sup>70</sup> Furthermore, in *FNV Kunsten*, the CJEU held that collective agreements covering self-employed workers did not fall within the exemption.<sup>71</sup> In finding that the agreement fell outside the *Albany* exemption, the CJEU's reasoning is clear. Individuals working on a self-employed basis are not employees, and those representing them are not trade unions but associations of undertakings.<sup>72</sup> However, where such individuals are classified as "false self-employed" the *Albany* exemption will apply.<sup>73</sup> Such individuals are, the CJEU stated, "in a situation comparable to that of employees."<sup>74</sup> This approach brings the decision in *Albany* in line with the EU jurisprudence on the definition of a worker.<sup>75</sup>

Discussion within the AGs' Opinions, however, has explored the boundaries of the *Albany* exemption. First, the Advocates-General argued that a restrictive approach should be adopted in relation to the exemption.<sup>76</sup> In *Van der Woude*, AG Fennelly opined that the exemption must be construed narrowly according to the principle of proportionality.<sup>77</sup> AG Fennelly argued that a collective agreement will not be protected from EU competition law where the agreement "does not pursue a genuine social objective because the restrictions resulting from it, or from its application, go beyond what is required by the pursuit of its objective."<sup>78</sup> This would significantly restrict the exemption, allowing courts to adopt an interventionist approach to an agreement's purpose. It allows, as AG Trstenjak in *Commission v Germany* stated, "a substantive examination of the criterion of whether the collective agreements concerned or the individual provisions of such were, in fact, concluded with a

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<sup>70</sup> See *Brentjens*' (n.67) [60]

<sup>71</sup> *FNV Kunsten Informatie en Media v Staat der Nederlanden* (Case C-413/13) [2015] 4 C.M.L.R. 1, [26]-[30]. In *FNV Kunsten*, the collective agreement in question set the minimum fee which orchestras could pay substitute musicians. This included setting the minimum price rates for self-employed musicians. See also *Pavlov* (n.84). For discussion, Nordling (n 66) 46-7.

<sup>72</sup> *FNV Kunsten*, *ibid*, [28]

<sup>73</sup> *ibid.*, [31]-[41]

<sup>74</sup> *ibid.*, [31]

<sup>75</sup> Nordling (n 87) 46-48.

<sup>76</sup> See AG Fennelly in *Van der Woude* (n.67) [AG28]-[AG32]; AG Jacobs in *Pavlov* (n.67) [AG100]; AG Trstenjak in *Commission v Germany* (Case C-271/08) [2010] E.C.R. I-7078, [AG59]-[AG62]

<sup>77</sup> *Van der Woude* (n.67) [AG28]

<sup>78</sup> *ibid.*, [AG32]

view to improving conditions of work and employment.”<sup>79</sup> Such an approach would also mean that the “purpose” test in *Albany* is assessed according to an objective standard.

Second, AG Trstenjak in *Commission v Germany* argued that the *Albany* exemption is nothing more than a limitation on the application of competition law.<sup>80</sup> The non-applicability of the Treaty competition provisions was not automatic and determined on a case-by-case basis, meaning that *Albany* created a limitation and not an exclusion. This argument is unconvincing. If we consider the wording of the CJEU’s decision in *Albany*, whether the CJEU created a “limitation” or an exclusion is irrelevant. Where the two requirements in *Albany* are met, Article 101 TFEU does not apply.

Third, in *FNV Kunsten*, AG Wahl proposed an extension to the *Albany* exemption. AG Wahl argued that a collective agreement covering self-employed workers could be exempt from Article 101 TFEU where there is a risk of social dumping.<sup>81</sup> AG Wahl made two arguments in support of this extension. First, if it is economically viable to replace employees with self-employed workers, then employed workers are at risk of losing their jobs and/or becoming marginalised.<sup>82</sup> Protection is needed to ensure that they are not undercut in terms of wages or working terms and conditions. Implicit in AG Wahl’s statement is that the protection of employed workers should take precedence over competition concerns. Second, to allow this form of social dumping weakens a union’s position within collective bargaining.<sup>83</sup> Social dumping reduces the ability of trade unions to protect their members. A collectively agreed wage increase would be undermined if there was nothing to prevent an employer from replacing those workers with self-employed workers at a lower wage.

AG Wahl suggested that, as such, a two-step test must be satisfied before extending the *Albany* exemption on social dumping grounds. First, there must be a real and serious risk of social dumping.<sup>84</sup> It is insufficient to state that there is the possibility that social dumping may occur. If there is no real and serious risk of social dumping, any improvement in a worker’s status is uncertain and speculative. Second, the provision must not go beyond what is necessary to prevent social dumping.<sup>85</sup> Any provision designed to combat social dumping

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<sup>79</sup> *Commission v Germany* (n.71) [AG60]-[AG61]

<sup>80</sup> *ibid.*, [AG62]

<sup>81</sup> *FNV Kunsten* (n.76) [AG74]-[AG79]

<sup>82</sup> *ibid.*, [AG77]

<sup>83</sup> *ibid.*, [AG78]

<sup>84</sup> *ibid.*, [AG89]-[AG91]

<sup>85</sup> *ibid.*, [AG92]-[AG99]

must be the least restrictive measure. If it can be prevented via other means, the provision is not exempt. To further this, the provision must be concluded on behalf, and in the interests, of those employed. Thus, a collective agreement solely between workers and their employer that sets the amount to be paid to self-employed workers could fall within the *Albany* exemption.

Although the proposals put forward by the AGs are highly persuasive, they have not featured within the CJEU jurisprudence. This does not necessarily infer that the CJEU rejected them, but rather that they were not needed to resolve the case. As Nordling comments, “the application of the [*Albany*] test was limited to case-specific facts and the Court, perhaps intentionally so, provided little guidance on the general application of the test.”<sup>86</sup> In refusing to provide any further guidance, the CJEU gives itself greater freedom in the future application and development of the exemption for collective agreements. This may include the developments identified by the AG’s above, however until that point the CJEU appears set on applying the exemption in line with *Albany*’s decision.

### 5. *Albany* confined

The *Albany* exemption has been strictly confined to EU competition law. The CJEU has refused to exempt collective agreements from the free movement provisions,<sup>87</sup> and to situations where industrial action clashed with the fundamental freedoms.<sup>88</sup> In *Viking Line*, the Court held that the reasoning that applies in relation to competition law cannot be transferred to the free movement realm.<sup>89</sup> Competition law and the “Treaty provisions on the free movement of persons and services ... are to be applied in different circumstances.”<sup>90</sup> The Court held that “it cannot be considered that it is inherent in the very exercise of trade union rights and the right to take collective action that those fundamental freedoms will be prejudiced to a certain degree.”<sup>91</sup>

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<sup>86</sup> Nordling (n 66) 41.

<sup>87</sup> See, for example, *Schöning-Kougebetopoulou v Freie und Hansestadt Hamburg* (Case C-15/96) [1998] 1 C.M.L.R. 931; *Merida v Germany* (Case C-400/02) [2004] 3 C.M.L.R. 52.

<sup>88</sup> *Viking Line* (n. 56); *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* (Case C-341/05) [2008] 2 C.M.L.R. 9

<sup>89</sup> *ibid.*, [51]

<sup>90</sup> *ibid.*, [53]

<sup>91</sup> *ibid.*, [52].

Furthermore, in *Commission v Germany*,<sup>92</sup> the Court held that the *Albany* exemption was not applicable, nor could it be extended, to EU public procurement rules. The CJEU, as in the fundamental freedom cases, held that the existence of an exemption from the competition rules does not automatically mean that collective agreements are exempt from public procurement rules.<sup>93</sup> In the Court's view, the application of the public procurement rules did not "affect the essence of the right to bargain collectively."<sup>94</sup> Thus, there was no need for an exemption: public procurement rules could adequately take account of the social policy objectives expressed through collective bargaining.<sup>95</sup>

What is noticeable about the case law is that the CJEU consistently refers to the need to reconcile the competing objectives through the proportionality assessment,<sup>96</sup> and that the interests present are not prejudiced to the same extent as under the EU competition provisions. The competing objectives can be accommodated, and balanced, within the relevant EU provisions. They can be considered and used to permit otherwise prohibited conduct under EU law. Were such an approach adopted under Article 101 TFEU, the *Albany* exemption may be unnecessary. The competing objectives could be accommodated and balanced within Article 101 TFEU. However, this is not to say that decisions such as *Viking Line* do not have a significant chilling effect on trade union rights when faced with liability under EU law.<sup>97</sup> The BALPA dispute clearly shows this. BALPA, on threat of an injunction and claim for damages for infringing EU free movement provisions, decided against calling industrial action. The potential liability under the EU free movement rules, undermined the union's willingness to exercise its fundamental right to take industrial action.<sup>98</sup> This strengthens the validity of the decision in *Albany* to exempt collective agreements, and questions the decision not to extend the exemption to other fields of EU internal market law. If the detrimental effects are potentially of an equivalent level, why does the CJEU not allow for such a broad exemption in other fields of EU law?

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<sup>92</sup> *Commission v Germany* (n.76)

<sup>93</sup> *ibid.*, [48]

<sup>94</sup> *ibid.*, [49]

<sup>95</sup> *ibid.*

<sup>96</sup> See *Viking Line* (n.56) [46]; *Laval* (n.88) [94]; *Commission v Germany* (n.76) [44]

<sup>97</sup> See KD Ewing and John Hendy, 'The Dramatic Implications of Demir and Baykara' (2010) 39 *Industrial Law Journal* 2, 8. Ewing and Hendy describe *Viking Line* as "disembowelling" the right to strike.

<sup>98</sup> *c.f. Govia GTR Railway Ltd v ASLEF* [2017] I.C.R. 497

The CJEU's case law consistently implies that the proportionality assessment contained within the free movement and public procurement provisions cannot be adopted under the Treaty competition provisions. For example, within the free movement provisions competing objectives can be balanced through either express derogation provisions or the mandatory requirements jurisprudence.<sup>99</sup> The assumption is that the CJEU cannot adopt such an approach within the Treaty competition provisions. For example, although the provisions of Article 101(3) TFEU mirror a proportionality assessment, the provision's balancing exercise is not as broad as that seen under the free movement and public procurement provisions.<sup>100</sup> However, as will be demonstrated in Chapters 6 and 7, the CJEU has developed such an approach within both parts of Article 101 TFEU. In *Wouters*, for example, the CJEU held that restrictions on competition which are necessary to achieve a legitimate aim fall outside the scope of Article 101(1) TFEU.<sup>101</sup> Subsequent application of the *Wouters* test shows similarity with the free movement rules.<sup>102</sup> Therefore, the argument that we cannot reconcile the competition objectives within Article 101 TFEU may be incorrect.

## 6. Summary and Concluding Comments

In *Albany*, the CJEU held that collective agreements are exempt from EU competition law where they are between management and labour, or their representatives, and aim at improving terms of work and employment. To apply competition law to collective agreements would, the Court held, seriously undermine the inherent social policy objectives contained within such agreements. However, the CJEU assumes that there is a conflict between the competing interests and determines that the best solution is to exempt collective agreements from competition law's scope. The CJEU does not explore whether collective agreements fall within Article 101 TFEU; it simply assumes that they are anti-competitive.

As section 2.2 identified, the CJEU in *Albany* balanced the competing objectives present. Where *Albany's* stipulated conditions are met, the social policy objectives outweigh

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<sup>99</sup> See Articles 36 and 45 TFEU, and the decision in *Cassis de Dijon* (Case 120/78) [1979] E.C.R. 649 [10]-[14].

<sup>100</sup> See the discussion in Chapter 7.

<sup>101</sup> See *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* (Case C-309/99) [2002] 4 C.M.L.R. 2 [97]-[109].

<sup>102</sup> See *Meca-Medina v Commission* (Case C-519/04 P) [2006] E.C.R. I-6991; *Ordem dos Technicos Officiais de Contas v Autoridade da Concorrenca* (Case C-1/12) [2013] 4 C.M.L.R. 20.

competition policy's objectives. The CJEU's balance however is very opaque. All we can say for certain is that the CJEU balanced/weighed the competing objectives outside of Article 101 TFEU. It is unclear what values were assigned to the competing objectives and how the CJEU balanced them. Did the CJEU balance of the competing interests according to the proportionality principle? This is important in determining whether the decision of the CJEU is 'correct'. If we do not know how the CJEU weighed the competing objectives, we cannot say whether its decision is 'correct'.

Chapters 4 and 5 will address these questions. Chapter 4 will explore the structure of the EU Treaties and the effect that the EU constitutional legal order has on the competing objectives. It will also show how conflicts between objectives are resolved, and whether this has any impact on the balance within *Albany*. Chapter 5 will develop the constitutional aspect of *Albany* further, examining the impact that EU fundamental rights may have on the *Albany* exemption. The discussion in these chapters will lead into the discussion in Chapters 6 and 7 which will examine whether it is possible to interpret and apply Article 101 TFEU in a way which takes account of the competing objectives present when applying that provision to collective agreements.

## 4. The EU Constitutional Implications of *Albany*: How did (and can) the CJEU resolve the conflict between objectives

### 1. Introduction

In applying Article 101 TFEU to collective agreements, two sets of conflicting rules are present: labour rules and competition rules.<sup>1</sup> A conflict between these rules arises where a collective agreement is shown to be anti-competitive. The treaty provisions presume that collective agreements are lawful, yet anti-competitive agreements are automatically void under Article 101(2) TFEU. This conflict is more evident when viewed through the lens of the policy objectives present: social policy and competition policy. In *Albany*, the CJEU concluded that applying competition law to collective agreements would seriously undermine the social policy objectives sought by such agreements. Implicit in this, is the view that competition and collective agreements seek to achieve different, irreconcilable objectives. As set out in the introduction, trade unions, and labour laws, aim to prevent the exploitation of workers and a “race to the bottom”. In contrast competition is concerned with creating a free market with low costs to achieve allocative and productive efficiency.<sup>2</sup> Trade unions, through collective bargaining and industrial action undermine the low-cost, efficiency model that is vital to the competitive process. Higher wages are passed on to consumers through higher prices; similarly, stoppages of production due to industrial action lead to reduced productivity. Where such actions are not accompanied by a consumer benefit, consumer welfare is reduced.

This was the dilemma faced by the CJEU in *Albany*, treaty objectives pulling in opposite directions. In creating an exemption for collective agreements, the CJEU implied that the differing objectives cannot be reconciled in other ways; the social policy objectives pursued by collective agreements could only be achieved if competition policy’s objectives were excluded.<sup>3</sup> In doing so, the CJEU gives priority to social policy goals. Where the stipulated conditions in *Albany* are met, the social policy objectives outweigh competition policy’s

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<sup>1</sup> See Chapter 1, section 3; *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (Case C-67/96) [2000] 4 C.M.L.R. 446 [AG178]

<sup>2</sup> See Friedrich Hayek, *The Constitution of Liberty* (Routledge and Kegan Paul, London 1960); Richard Posner, ‘Some Economics of Labor Law’ (1984) 51 *The University of Chicago Law Review* 988.

<sup>3</sup> Townley refers to this as a first order conflict; one policy can only be achieved at the expense of the other. Christopher Townley, *Article 81 EC and Public Policy* (Oxford: Hart, 2009) 28–41.

objectives. However, such an approach could, as Townley argues, jeopardise the attainment of competition law's goals.<sup>4</sup> By ignoring the competitive effects of a collective agreement, and focussing solely on the perceived public policy benefits, an exemption prevents the "optimal Community balance" from being achieved.<sup>5</sup> However, this assumes that *Albany* does not achieve the "optimal Community balance". As the CJEU stated, the "social policy objectives pursued by such agreements would be seriously undermined if ... subject to [Article 101] of the Treaty..."<sup>6</sup> The "optimal community balance" could be to protect the social policy objectives. In balancing the competing objectives, the CJEU concluded that the social policy objectives "outweigh" competition policy's objectives.

This chapter will examine the CJEU's decision in *Albany* in the context of the EU's constitutional framework. The Chapter will explore how the CJEU resolves conflicts between objectives, and the effect that this has on the approach within *Albany*. The discussion will explore whether, from a constitutional perspective, the decision in *Albany* is correct. Section 2 will set out the constitutional framework within which Treaty objectives sit. The section will explore the effects of the Treaty integration clauses and the CJEU's teleological approach on the application and interpretation of EU law. The section will show that by requiring that wider objectives/interests are considered in the application of EU Treaty provisions, balancing competing objectives may be required. It will also show that interpreting Article 101 TFEU in a manner which gives adequate weight to the social policy objectives may remove the need for an exemption. Where this is possible under Article 101 TFEU, the social policy objectives are arguably not seriously undermined.

Section 3 will explore how the CJEU generally resolves conflicts between objectives by balancing the competing objectives through the application of the proportionality. Section 3.1 will start the discussion by identifying the differing views of balancing. Section 3.2 will show that the CJEU resolves conflicts between objectives by balancing them through the proportionality assessment. In conducting such an assessment, the CJEU considers whether the measure is (i) suitable or appropriate in order to achieve the objective pursued; (ii) necessary to achieve the desired objective; and, (iii) imposes on the individual a burden that

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<sup>4</sup> Christopher Townley, 'What Goals Count in Article 101 TFEU? Public Policy and Its Discontents' (2011) 9 European Competition Law Review 441.

<sup>5</sup> *ibid.* On this basis, Townley argues that competition policy cannot be reduced to one single goal.

<sup>6</sup> *Albany* (n.1) [59]

is excessive in relation to the objective sought.<sup>7</sup> The aim of section 3.2 is not to add to the existing literature but show how the CJEU balances competing objectives. This will provide the basis to explore whether the CJEU in *Albany* adopted the correct approach in balancing the competing objectives.<sup>8</sup> If the CJEU adopted an incorrect approach, it can be argued that the CJEU's decision is incorrect.

Section 4 will explore how the CJEU in *Albany* balanced the competing objectives present. The section will show that the CJEU in *Albany* applied a proportionality approach *stricto sensu*, balancing the harm to the social policy objectives against the need to achieve competition policy's objectives. The section will argue that the CJEU adopted a symmetrical balancing exercise. This can be seen from the CJEU's formulation of the exemption in that it does not apply to all collective agreements, only those that meet its stipulated conditions. Exempting all collective agreements, we can assume, was considered disproportionate. Section 5 will summarise the chapter.

## 2. The Treaties

The Treaties potentially provide for a hierarchy of objectives. Prior to the Lisbon Treaty amendments, the Treaty's structure enabled a hierarchy of objectives to be easily identified.<sup>9</sup> Article 2 EC provided the main goals of the Community as being a common market, economic and monetary union

and by implementing the common policies or activities referred to in Articles 3 and 4 EC, 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

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<sup>7</sup> See, P Craig and G De Búrca, *EU Law: Text, Cases, and Materials*. (Oxford, United Kingdom: Oxford University Press 2015) 551–8; Takis Tridimas, *The General Principles of EU Law*. (Oxford; New York: Oxford University Press 2006) ch 3.

<sup>8</sup> For detailed discussion see Grainne De Burca, 'The Principle of Proportionality and Its Application in EC Law' (1993) 13 *Yearbook of European Law* 105; Paul Craig, *EU Administrative Law* (Oxford University Press 2018) chs 19–21; Tridimas (n 7) chs 3, 4.

<sup>9</sup> See Christopher Townley, 'Is Anything More Important than Consumer Welfare (in Article 81 EC)? Reflections of a Community Lawyer' in Catherine Barnard (ed), *Cambridge Yearbook of European Legal Studies* (Bloomsbury Publishing 2008) 351. c.f. Marc de Vos, 'Collective Labour-Agreements and European Competition Law: An Inherent Contradiction', *A decade beyond Maastricht: the European social dialogue revisited* (Kluwer Law International 2003) 70–1., who argues that there is no a priori hierarchy in the Treaties.

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.<sup>10</sup>

Articles 3 and 4 set out the means of achieving the objectives listed in Article 2, which included both competition and social policy objectives.<sup>11</sup> For example, Article 3 EC states that the activities of the Community include, amongst others, an agricultural and fisheries policy,<sup>12</sup> a system ensuring that competition in the internal market is not distorted,<sup>13</sup> employment policy,<sup>14</sup> and environmental policy.<sup>15</sup>

Such a structure is also present post-Lisbon. Article 3 TEU sets out EU's objectives, combining the Article 2 and 3 EC objectives within one provision. Article 3(1) TEU sets out the more aspirational objectives contained within Article 2 EC,<sup>16</sup> with Articles 3(2) and 3(3) TEU containing the objectives previously set out in Article 3 EC. As such, implementation provisions in the Treaty aimed at achieving the objectives set out in Articles 3(2) and (3) TEU, are ultimately, in turn, aimed at achieving the aspirational objectives set out in Article 3(1) TEU. For example, the Treaty competition provisions are aimed at achieving the internal market and economic growth (Article 3(3) TEU), which in turn ensures the well-being of the Union's peoples (Article 3(1) TEU).

Article 3(3) TEU provides for a mix of economic and social objectives, with no *a priori* hierarchy between objectives. The social and economic objectives are "a priori on a par."<sup>17</sup> Article 3(3) TEU states that

[t]he Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy,

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<sup>10</sup> Consolidated Version of the Treaty establishing the European Community [2002] OJ C325/33.

<sup>11</sup> See, for example, Articles 3(1)(g), (i), and (k) EC

<sup>12</sup> Article 3(e) EC

<sup>13</sup> Article 3(g) EC

<sup>14</sup> Article 3(i) EC

<sup>15</sup> Article 3(l) EC.

<sup>16</sup> Article 3(1) TEU states that "[t]he Union's aim is to promote peace, its values and the well-being of its peoples."

<sup>17</sup> See Constanze Semmelmann, 'The European Union's Economic Constitution under the Lisbon Treaty: Soul-Searching among Lawyers Shifts the Focus to Procedure' [2010] *European Law Review* 516, 520. Wardhaugh qualifies this, arguing that even if there is a hierarchy between objectives, competition may not be near the top: "[I]t is certainly not *primus inter pares*." Bruce Wardhaugh, 'Crisis Cartels: Non-Economic Values, the Public Interest and Institutional Considerations' [2014] *European Competition Journal* 311, 330.

aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance... (emphasis added)

Article 3(3) TEU also provides for further social and economic objectives, for example, solidarity, social and economic cohesion, non-discrimination, equality, and economic and monetary union. Although Article 3(3) TEU contains no reference to a “system of undistorted competition”, previously found within Article 3(1)(g) EC, such requirement is contained within Protocol 27. Any reference to competition within Article 3(3) TEU is limited to achieving a “highly competitive social market economy”.<sup>18</sup> This raised arguments that competition was no longer a fundamental goal,<sup>19</sup> however, the ECJ quickly remedied this, stating in *TeliaSonera* that the requirement of “undistorted competition” belongs to the fundamental principles of the economic constitution of the EU.<sup>20</sup>

This does not, however, explain how conflicts between objectives of *a priori* equivalence are resolved. The equivalence given to Treaty objectives implies that conflicts between them are resolved through a balancing exercise. This equivalence does not mean that objectives cannot have different weights when weighed against each other, simply that one objective does not automatically outweigh the other: individual situations will further, or seek to achieve, objectives to differing extents. A clear example of this can be seen in *Albany*. In concluding that collective agreements should be exempt from European competition law,

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<sup>18</sup> Protocol 27 states that “...the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted.” Note that Article 3(3) TEU refers to a “highly competitive social market economy...”

<sup>19</sup> Ben van Rompuy ‘Thanks Nicolas Sarkozy, But No Thanks’ Kluwer Competition Law Blog 25<sup>th</sup> November 2011, <http://kluwercompetitionlawblog.com/2011/11/25/thanks-nicolas-sarkozy-but-no-thanks-cjeu-rules-on-status-of-protocol-on-internal-market-and-competition/> [last accessed 30/05/2016, 14.26]. President Sarkozy had stated that such a move had “...obtained a major reorientation of the objectives of the Union. Competition is no longer an objective of the Union, or an end in itself, but a means to serve the internal market.”. See also Anne C Witt, ‘Public Policy Goals Under EU Competition Law—Now Is the Time to Set the House in Order’ (2012) 8 European Competition Journal 443, 465; Ben Van Rompuy, ‘The Impact of the Lisbon Treaty on EU Competition Law: A Review of Recent Case Law of the EU Courts’ December 2011 CPI Antitrust Chronicle 1.

<sup>20</sup> *Konkurrensverket v TeliaSonera Sverige AB* (Case C-52/09) [2011] E.C.R. I-527 [20]. Note that there is a difference between undistorted and unrestricted. See also Neelie Kroes; [http://europa.eu/rapid/press-release\\_MEMO-07-250\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-07-250_en.htm?locale=en) [last accessed 22/06/2017, 12.17]; Michel Petite, Director General of the European Commission’s Legal Service (Letter to the editor of the Financial Times 27 June 2007) who states that the protocol has the same legal value as the Treaty provisions to which it is attached. See also Article 119 TFEU which states that “[f]or the purposes of Article 3 of the Treaty on European Union, the activities of the Union and Member States shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close cooperation of Member States’ economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.”

the CJEU considered that the social policy objectives outweighed competition policy's objectives. What the CJEU did not do is clearly explain why the social policy objectives outweighed competition policy's objectives. This shall be explored in section 4 below. However, it may be that competing objectives can be reconciled through other means. This shall be the focus of sections 2.1 and 2.2.

### 2.1 Integration Clauses and

Integration clauses are prevalent within the Treaties: indeed, they were present in the EC Treaty as well.<sup>21</sup> Integration, or policy-linking clauses, require that their objectives are considered whenever other EU policies and activities are implemented.<sup>22</sup> These clauses attempt to codify the Court's case law on policy linkage.<sup>23</sup> Article 7 TFEU provides for a generic approach, stating that the "Union shall ensure consistency between its principles and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers."<sup>24</sup> The Treaties also include other object-specific clauses, covering objectives such as promoting high levels of employment, combating discrimination and inequality to consumer protection, environmental protection, and animal welfare.<sup>25</sup>

The integration clauses have been well received within the academic literature. Article 7 TFEU has been described as a "super-integration clause",<sup>26</sup> providing the basis for all EU objectives and policies to have relevance in seemingly isolated activities. Townley argues, in the context of the EC Treaty, that such clauses require "that their objectives be considered whenever other Community policies and activities are implemented."<sup>27</sup> Lavrijsen, furthermore, states that in the context of the Treaty competition provisions, "[f]rom a legal perspective, it may be concluded that the TFEU and the policy-linking clauses in particular, as well as the case law of the ECJ, leave some leeway for non-competition interests in the

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<sup>21</sup> See, for example, Articles 6 & 11 TEC

<sup>22</sup> Craig and De Búrca (n 7) 393.

<sup>23</sup> Witt (n 19); Wardhaugh (n 17). See also *Albany* (n.1) [60]; "It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent..."

<sup>24</sup> Article 7 TFEU

<sup>25</sup> See Articles 8-13 TFEU. Note that other integration clauses feature within the Treaties, for example, Article 167 TFEU relating to cultural policy.

<sup>26</sup> Hans Vedder, 'The Treaty of Lisbon and European Environmental Law and Policy' (2010) 22 *Journal of Environmental Law* 285, 289.

<sup>27</sup> Townley, 'Is Anything More Important than Consumer Welfare (in Article 81 EC)? Reflections of a Community Lawyer' (n 9) 352. See also Martin Wasmeier, 'The Integration Environmental Protection as a General Rule for Interpreting Community Law' (2001) 38 *Common Market Law Review* 159, 162.

interpretation of competition law.”<sup>28</sup> Similarly, Boute argues, in the context of Article 11 TFEU (the environmental integration clause) and EU competition law, that “[c]ompetition law ... must take environmental considerations fully into account.”<sup>29</sup>

The use of integration clauses within CJEU case law has, however, been mixed. Although referred to in CJEU judgments, the CJEU has more frequently focused on interpretative techniques, especially its teleological approach.<sup>30</sup> In *Artegodan*, for example, the CJEU, having stated that Article 6 EC (Article 11 TFEU) and Article 152 EC (Article 168 TFEU) expressly integrated a high level of protection of the environment and public health respectively into all Union policies,<sup>31</sup> uses the presence of these clauses to define the precautionary principle “as a general principle of Community law requiring the competent authorities to take appropriate measures to prevent specific risks to public health, safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic interests.”<sup>32</sup> It was through the precautionary principle that the CJEU decided the case, not the integration clauses as such.

This approach is also present in relation to other integration clauses. For example, when faced with cultural and public health issues, the Court has adopted a teleological approach to ensure that such considerations are taken account of. In *Pfizer Animal Health*, for example, the Court relied on the precautionary principle, alongside the integration clause in Article 152 EC, to include public health objectives within their assessment. The Court held that it must assess “whether the institutions correctly applied the relevant provisions of Directive 70/524, as they are to be interpreted in light of the rules of the Treaty and, in particular, of the precautionary principle, as enshrined in Article 130r(2) of the Treaty.”<sup>33</sup> In

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<sup>28</sup> Saskia Lavrijssen, ‘What Role for National Competition Authorities in Protecting Non-Competition Issues after Lisbon?’ [2010] *European Law Review* 636, 646.

<sup>29</sup> Anatole Boute, ‘Environmental Protection and EC Anti-Trust Law: The Commission’s Approach for Packaging Waste Management Systems’ (2006) 15 *Review of European Community & International Environmental Law* 146, 153. See also Suzanne Kingston, ‘Integrating Environmental Protection and EU Competition Law: Why Competition Isn’t Special’ (2010) 16 *European Law Journal* 780, 786.

<sup>30</sup> The CJEU’s teleological approach requires that EU legislative provision are interpreted and applied in light of the EU’s objectives.

<sup>31</sup> *Artegodan GmbH v Commission* (Joined Cases T-74/00 etc.) [2002] E.C.R. II-4945, [183]

<sup>32</sup> *ibid.*, [184]. See also *PreussenElektra* (Case C-379/98) [2001] E.C.R. I-2099, [73]-[78] where the Court makes express mention of the integration clause in Article 6 EC (now Article 11 TFEU) alongside express policy aims contained in the Preamble to Directive 96/92 allowing Member States to give priority to energy from renewable sources.

<sup>33</sup> *Pfizer Animal Health SA v Council* (Case T-13/99) [2002] E.C.R. II-3305, [125]. At [114] the Court states that “[i]t is apparent from Article 130r(1) and (2) of the Treaty that Community policy on the environment is to pursue the objective inter alia of protecting human health, that the policy which aims at a high level of

*Commission v Belgium*, the Court rejected the Belgian State's argument that its system of controls imposed on programmes from other Member States could be justified by reading Directive 89/552 in conformity with Article 128 EC.<sup>34</sup> The Court accepted that Article 128 EC (now Art 167 TFEU) required the Community "to take cultural aspects into account in its actions under other provisions of the Treaty",<sup>35</sup> but held that Article 128 EC does not allow for a derogation from the system established by the Directive.<sup>36</sup>

The CJEU's preferred approach potentially denies the Treaty integration clauses any independent legal effect within the CJEU's analysis, arguably going against the Treaties express intention.<sup>37</sup> For example, the Court has used the Treaty integration clauses alongside the preamble in relevant secondary legislation,<sup>38</sup> the precautionary principle,<sup>39</sup> and the CJEU's teleological approach to interpretation. This implies that the Treaty integration clauses achieve nothing that existing CJEU approaches do not,<sup>40</sup> with such clauses seen as a codification of its existing teleological approach. As such, it is unsurprising that the CJEU adopts a more passive approach. The clauses provide no guidance as to how their objectives are to be taken account of: the clauses simply require that they are considered.<sup>41</sup>

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protection, is based in particular on the precautionary principle and that the *requirements of the policy must be integrated into the definition and implementation of other Community policies*. Furthermore, as the third subparagraph of Article ... [152 EC] ... provides, and in accordance with settled case law ... health protection requirements form a constituent part of the Community's other policies and *must therefore be taken into account when the common agricultural policy is implemented by the Community institutions*." (emphasis added). See also, *Commission v France* (Case C-197/08) [2010] E.C.R. I-1559; *Commission v Austria* (Case C-198/08) [2010] E.C.R. I-1645; *Commission v Ireland* (Case C-221/08) [2010] E.C.R. I-1669, concerning minimum pricing requirements for tobacco products.

<sup>34</sup> *Commission v Belgium* (Case C-11/95) [1996] E.C.R. I-4153. The Belgian State had argued that the its system of control was necessary to secure respect for certain cultural objectives; see [46].

<sup>35</sup> *ibid.*, [49]

<sup>36</sup> *Ibid.*, [50]. At [48], the Court points out that the Directive already pursues cultural objectives in its scheme set out in Articles 4 and 5 of Directive 89/552. See also *CISAC* (Case COM/C2/38.698) [2003] O.J. L 107, [93]-[99] where the Commission directly addressed CISAC's argument under Article 167(4) TFEU that the challenge to the associations licensing scheme would impact on cultural diversity.

<sup>37</sup> Collette Cunningham, 'In Defence of Member State Culture: The Unrealised Potential of Article 151(4) of the EC Treaty and the Consequences for EC Cultural Policy' (2001) 34 *Cornell International Law Journal* 120, 154-5. Cunningham argues that the CJEU has left the strength of the cultural integration clause uncertain. In failing to set the clauses' limits, or explain how such clauses may be used, the CJEU fails to help the Commission integrate wider policy objectives into their activities.

<sup>38</sup> *Commission v Belgium* (n.34)

<sup>39</sup> *Artegodan* (n.31); *PreussenElektra* (n.32)

<sup>40</sup> See AG Lenz in *The Publishers Association v Commission* (Case C-360/92 P) [1995] E.C.R. I-0023, [AG60]. AG Lenz makes this statement in the context of the cultural integration clause contained within Article 167 TFEU (ex-Art 128 EC).

<sup>41</sup> Evangelina Psychogiopoulou, 'The Cultural Mainstreaming Clause of Article 151(4) EC: Protection and Promotion of Cultural Diversity or Hidden Cultural Agenda?' (2006) 12 *European Law Journal* 575, 584. Psychogiopoulou argues that the Treaty integration clauses "merely entrusts Community institutions with such a duty. It is a matter of assessment and evaluation, not of prescribed results to obtain. Hence, although an

## 2.2 The teleological approach

The CJEU has consistently held that EU law is to be “interpreted and applied in light” of the Treaties’ objectives.<sup>42</sup> In *van Gend & Loos*, the CJEU held that the provision in question, Article 12 EEC, had to be interpreted “according to the spirit, the general scheme and the wording of the Treaty.”<sup>43</sup> In *Continental Can*, the CJEU held that in order to answer the question before it, “one has to go back to the spirit, general scheme and wording of Article [102 TFEU], as well as the system and objectives of the Treaty.”<sup>44</sup> Similarly in *CILFIT*, the CJEU stated that in addition to the wording and context of the provision within Community law as a whole, and its objectives, the CJEU should also have regard to “its state of evolution at the date on which the provision in question is to be applied.”<sup>45</sup> This means that, where necessary, the CJEU will interpret, and apply, Treaty provisions in ways which may seem at odds with their wording, adopting a dynamic approach to the development of EU law.<sup>46</sup> In adopting such an approach, Bengoetxea states that the CJEU’s approach goes “*beyond words*, or at the very least beyond the plain, seemingly obvious meaning of a word in one particular language version, and looking for a more autonomous, cross-language or harmonised meaning, taking into account context, system, objectives, effectiveness and consequences.”<sup>47</sup>

Bengoetxea identifies three “first-order criteria” for interpretation relied upon by the CJEU in “hard” cases.<sup>48</sup> These are (i) semiotic or linguistic arguments based on the wording of the provision in question; (ii) systemic and contextual arguments placing the legal provision

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easy precedence of cultural concerns to the detriment of other legitimate EC objectives is not required, the goals identified under the various EC policy fields must be attained in the most culturally friendly way. In the case of seriously conflicting interests, where equilibrium is not possible to find, caution should be exercised via the adoption of measures that refrain from making arrangements which might jeopardise the attainment of cultural goals in the long run.”

<sup>42</sup> See, for example, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission* (Joined Cases 6 and 7/73) [1974] ECR 223, [32]; *Levin* (Case 53/81) [1982] ECR 1035, [15].

<sup>43</sup> *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (Case 26/62) [1963] E.C.R. 1, 13. See also *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* (Case 283/81) [1982] E.C.R. 3415 [19]-[20]; *Procureur de la Republique v Association de defence des bruleurs d’huilage usages* (Case 240/83) [1985] E.C.R. 531, [13], [AG53].

<sup>44</sup> *Continental Can* (Case 6/72) E.C.R. 215, [22]

<sup>45</sup> *CILFIT* (n.43) [20]

<sup>46</sup> Hartley explains that this creates interpretations and decisions which are both “outside” and “contrary” to the wording of the provision being interpreted. Trevor Hartley, ‘The European Court, Judicial Objectivity and the Constitution of the European Union’ (1996) 112 *Law Quarterly Review* 95, 96.

<sup>47</sup> Joxerramon Bengoetxea, ‘Text and Telos in the European Court of Justice - Four Recent Takes on the Legal Reasoning of the ECJ’ (2015) 11 *European Constitutional Law Review* 184, 206–7.

<sup>48</sup> Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Clarendon Press; Oxford University Press 1993) 233.

in a wider context of the Treaties; and (iii) teleological, functional and consequentialist arguments relating to “the dynamic context in which norms operate.”<sup>49</sup> The CJEU, however, does not separate out such considerations within its decisional practice, instead using all three criteria in support of an interpretation. In *Continental Can*, for example, the CJEU held that the wording of Article 102 TFEU (ex-Article 86 EC) along with the underlying Treaty objectives pursued by the provision allowed for the provision to catch practices which were detrimental to consumers due to their effects on the market’s structure.<sup>50</sup>

In adopting an interpretation “in light of the broader context provided by the [EU] legal order and its ‘constitutional telos’”,<sup>51</sup> the CJEU ensures that EU law develops without the need for constant Treaty amendments. In this sense, the CJEU will consider interpretations aimed at achieving and furthering the goals and objectives of the Union as a whole, in line with the goals and objectives contained within Articles 2 and 3 TEU. Such an approach can clearly be seen within the CJEU’s case law. For example, in *Van Gend & Loos*, the CJEU held that the provision in question had direct effect; it could be relied upon by natural and legal persons in courts of the Member States. The CJEU did so through considering the wider underlying objectives of the European Community.<sup>52</sup> In *Defrenne*, the CJEU held that Article 141 EC (now-Article 157 TFEU) was directly effective and could be invoked by private and public bodies.<sup>53</sup> Despite not fulfilling the criteria for direct effect, the CJEU focussed on the need to ensure the provision’s effectiveness.<sup>54</sup> The CJEU’s reasoning emphasised the dual economic and social objectives the provision pursued,<sup>55</sup> and stated that even though the

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<sup>49</sup> *ibid* 233–262. See also Kutscher *Methods of Interpretation as seen by a Judge at the Court of Justice in Judicial and Academic Conference, Luxembourg, 27-28 September 1976*, part 1, sections 5-6. Itzcovich criticises Bengoetxea’s second and third criteria on the basis that in using teleological considerations, the CJEU will consider the systemic considerations and vice versa. Therefore, it is potentially misleading to separate out these more dynamic considerations. See Giulio Itzcovitch, ‘The Interpretation of Community Law by the European Court of Justice’ (2009) 10 *German Law Journal* 537. See also, Miguel Poiars Maduro, ‘Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism’ (2008) 1 *European Journal of Legal Studies* 137, 140.

<sup>50</sup> *Continental Can* (n.44) [23]-[26]

<sup>51</sup> Poiars Maduro (n 49) 140.

<sup>52</sup> *Van Gend en Loos* (n.44) 12. See also *Costa v E.N.E.L. (Case 6/64)* [1964] E.C.R. 585, where the CJEU introduced the concept of supremacy of EU law based on the need to ensure the effectiveness of EU law. The CJEU states that “the executive force of community law cannot vary from one State to another in deference to subsequent national laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5(2) and giving rise to the discrimination prohibited in Article 7.” (emphasis added)

<sup>53</sup> *Defrenne v SABENA (No. 2) (Case 43/75)* [1976] ECR 455

<sup>54</sup> *ibid.*, [31]-[34]. The Court considered that it would be counter-intuitive to not allow individuals to rely on the provision where the provision had not been implemented within the set period, and EU institutions had not acted sufficiently energetically to Member States’ failure to act.

<sup>55</sup> *ibid.*, [8]-[20].

provision was formally addressed to Member States, it did not prevent “rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down.”<sup>56</sup>

The teleological approach allows the CJEU to interpret EU law, and Treaty provisions, in light of the “dynamic and evolving nature of the European Community, which over the years has changed its plans from a purely economic approach to a broader system of values which affects social and environmental issues, and the protection human rights.”<sup>57</sup> It ensures that CJEU jurisprudence develops in line with Treaty amendments, particularly where there is an enlargement or adjustment to the underlying values and objectives of the Union. This includes the Treaty competition provisions. Gerber, for example, has argued that the Treaty competition provisions have developed in line with the teleological approach; the CJEU interpreting the provisions in light of “its own conception of what was necessary to achieve the integrationist goals of the Treaty.”<sup>58</sup> This teleological approach can already be seen within the CJEU’s jurisprudence concerning the Treaty competition provisions, for example, through the wide range of objectives which the CJEU has adopted in its decisional practice. The CJEU has avoided stating *the goal/objective* pursued by the Treaty competition provisions.

### 2.3 Why is this relevant to *Albany*?

The above discussion has shown that the Treaty integration clauses and the CJEU’s teleological approach require that EU law is interpreted in a manner which considers the wider objectives of the EU. In relation to *Albany*, this provides an argument against the need for an exemption for collective agreements. Where Article 101 TFEU can be interpreted and applied in a manner which gives appropriate weight to the social policy objectives pursued by collective agreements, they are not seriously undermined. As such, any restriction on such objectives would be proportionate: the social policy objectives would have been

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<sup>56</sup> *ibid.*, [31].

<sup>57</sup> Oreste Pollicino, ‘Legal Reasoning of the Court of Justice in the Context of Principle of Equality Between Judicial Activism and Self-Restraint’ (2005) 5 *German Law Journal* 283, 289. See also Federico Mancini, *Democracy and Constitutionalism in the European Union: Collected Essays* (Hart Pub 2000) 44. Mancini states that the “primary objective [of the EU] is an ever closer union among the peoples of the Europe.”

<sup>58</sup> David Gerber, ‘The Transformation of European Community Competition Law?’ (1994) 35 *Harvard International Law Review* 97, 109. See also Khoo, who argues that the Treaty competition provisions have to be interpreted in light of the Treaties’ objectives and principles. Sheryl Khoo, ‘Carving out Non-Economic Objectives under Section 9, Chapter I Prohibition of the UK Competition Act 1998: What Money Can’t Buy’ (2018) 39 *European Competition Law Review* 190, 194.

appropriately considered. Any exemption may be unnecessary. Whether such an interpretation of Article 101 TFEU is possible will be explored in Chapters 6 and 7. The chapters will examine how we could apply the provision to a collective agreement.

However, it is not always possible to resolve conflicts between different policy objectives by using the Treaty integration clauses and the CJEU's teleological approach. Where this is the case, the CJEU balances the competing objectives through the proportionality principle. Only by weighing the competing interests can the court determine which objective outweighs the other. This does not mean that the proportionality assessment and teleological approach exist in isolation; the proportionality assessment is influenced by the teleological approach.<sup>59</sup> Furthermore, in balancing the competing objectives, the CJEU (or court in general) should be clear how the balancing exercise is conducted, and what aim the exercise is to achieve. Without doing so, the balance becomes overly subjective and lacks any clear structure. Therefore, it is vital that the CJEU is clear how such objectives are balanced, what considerations it is considering, and what the overarching/ultimate goal of such a balance is.

This is hidden in the CJEU's decision in *Albany*. Whilst the CJEU balanced the competing objectives present, it did not clearly explain how it did so. The CJEU did not clearly articulate the objectives being balanced and how it intended to weigh and balance them. The CJEU simply held that applying EU competition law (and achieving competition policy's objectives) would seriously undermine the social policy objectives pursued by collective agreements. What is important in *Albany* is that the CJEU did not consider that the social policy objectives always outweighed the competition policy objectives, they only did where *Albany's* stipulated conditions were met. This shows that the CJEU considered that the social policy objectives pursued by collective agreements would not always be seriously undermined by the application of EU competition policy to require exemption. I shall return to this point throughout the following discussion.

The remainder of this chapter will focus on how the CJEU balances competing objectives, and discussion of the CJEU's balance in *Albany*. Section 3 will set out how the CJEU balances competing objectives through a proportionality application. It will also provide a basic overview of the theoretical arguments for and against balancing. Section 4 will then

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<sup>59</sup> This can be seen in *Albany* where the CJEU stated that the exemption was following an "interpretation of the provisions of the Treaty which is both effective and consistent."

examine the approach of the CJEU in *Albany* to balancing the competing objectives. It will show that the CJEU balanced the competing objectives through a proportionality approach.

### 3. Balancing and the CJEU's approach to proportionality

The previous sections have demonstrated that the Treaty integration clauses and CJEU's teleological approach require that multiple objectives are considered by the CJEU when interpreting and applying Treaty provisions. As such, conflicts arise where objectives pull in different directions. This means that the CJEU has to balance competing objectives. As Alexy states, if two principles (objectives) compete then "one of the principles must be outweighed."<sup>60</sup> Similarly, Beck argues that in the context of the EU legal order, value pluralism requires that conflicting values/objectives are balanced.<sup>61</sup> Whether we can balance competing objectives, rights, or freedoms has been the subject of significant debate.<sup>62</sup> The purpose of this section is not to engage in a debate of whether we could or should balance rights, objectives or goals, but rather will show, in section 3.2, how the CJEU approaches balancing competing objectives. Section 3.1 will first provide a basic overview of the opposing views of balancing, focussing on Habermas and Alexy, before addressing the CJEU's approach to balancing. The section will not engage with the debate over whether we can balance rights or goals; the purpose is to show that it is disputed whether balancing is the appropriate tool for reconciling competing objectives.

#### 3.1 A "brief" view of balancing

There are fundamentally two views of balancing; one hostile, one favourable. The hostile view of balancing is that it is an irrational and illegitimate renunciation of law in favour of a system of arbitrary judicial discretion.<sup>63</sup> Habermas, for example, argued that balancing reduces all debate about rights, or between rights and the pursuit of conflicting goals, to

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<sup>60</sup> Robert Alexy, *A Theory of Constitutional Rights* (Repr, Oxford Univ Press 2010) 50. Alexy describes a conflict between objectives/principles as being where one principle prohibits something and another permits it.

<sup>61</sup> Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart Publishing 2012) 185–6. Beck states that this greatly extends the judicial discretion of the CJEU as it is required to balance, choose between, or interpret various norms, values, principles and objectives.

<sup>62</sup> See, for example, Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1996); Alexy, *A Theory of Constitutional Rights* (n 60); Ronald Dworkin, *Taking Rights Seriously* (Harvard Univ Press 1978); Steven Greer, "Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate' (2004) 63 *Cambridge Law Journal* 412.

<sup>63</sup> See Greer (n 62) 256–61, 413.

policy arguments, which removes rights' strict priority over other considerations. This, Habermas argued, means that the "firewall" between the pursuit of rights and the pursuit of public policy collapses.<sup>64</sup> Furthermore, as there is no rational standard by which judges can reconcile competing objectives, any decisions based on balancing are irrational. Balancing takes place not within the scope of rule-governed behaviour, but that of judicial discretion. Finally, Habermas argued that the overall balance is therefore not about right or wrong, but rather what is adequate or appropriate in varying degrees.<sup>65</sup>

The opposing view, as argued by Alexy, is that although judicial balancing can be difficult to describe and defend, when properly understood it is not irrational.<sup>66</sup> Balancing, as Alexy argued, is inescapable when faced with conflicting rights, and conflicts between rights and collective interests. Rights should be considered as optimisation principles, meaning that they should be realised to the greatest possible extent given the factual and legal situation.<sup>67</sup> Basing his argument on German constitutional jurisprudence, Alexy proposed that conflicts between rights could be resolved through the proportionality principle, assessing whether a restriction on a competing principle/right is suitable, necessary and proportionate in the narrow sense.<sup>68</sup> In considering whether a restriction is proportionate, Alexy theorised a "Law of Balancing", stating that the importance of achieving one right or principle must outweigh the detriment caused by not achieving the competing one.<sup>69</sup>

Alexy breaks his "Law of Balancing" into three separate steps, which provide a counter to the arguments against balancing. First, the "degree of non-satisfaction of, or detriment to, the first principle" is established; second, the importance of satisfying the competing principle is established; and third, whether the importance of satisfying the competing principle justifies the detriment to, or non-satisfaction of, the first principle.<sup>70</sup> In applying this approach, Alexy provided a triadic scale through which the weights of competing objectives could be determined. These are light, moderate, and serious, with differing levels contained

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<sup>64</sup> Habermas (n 62) 256–61.

<sup>65</sup> *ibid.*

<sup>66</sup> See Alexy, *A Theory of Constitutional Rights* (n 60).

<sup>67</sup> *ibid* 47–8.

<sup>68</sup> *ibid.* This is where the harm to one objective is balanced against the need to achieve another competing objective.

<sup>69</sup> *ibid.*

<sup>70</sup> Robert Alexy, 'Constitutional Rights, Balancing and Rationality' (2003) 16 *Ratio Juris* 131, 136. It must be assumed that this approach is applied in the reverse, considering the importance of achieving the first principle, and the detriment achieved to the second principle, otherwise such an approach would be asymmetrical and potentially flawed.

within the balance.<sup>71</sup> The total weight assigned to an objective, Alexy argued, is the sum of an objective's relative qualitative and quantitative weight. The qualitative aspect concerns each objective's importance; the quantitative, how much each objective is infringed or satisfied. This, however, assumes that we can adequately allocate relative values to the objectives to enable balancing to be carried out, and that we can adequately evaluate how much an objective is infringed. These values can be very difficult to assess/give a definitive value to, despite the broadness of Alexy's categories. They can be (and indeed are) subject to value judgments made by the court as to their relative weights.

### 3.2 The CJEU's approach to proportionality

Proportionality is a general principle of EU law.<sup>72</sup> Article 5 TEU provides that the proportionality principle governs the use of EU competences, and that the content and form of EU action is subject to proportionality. "[T]he content and form of Union action shall not go beyond what is necessary to achieve the objectives of the Treaties."<sup>73</sup> Proportionality, therefore, can be used to challenge all EU and Member State action falling within the scope of EU law.<sup>74</sup> This section will set out how the CJEU uses the proportionality principle to resolve conflicts between objectives pursued by the EU and Member States. It shall leave discussion of the effect of such an approach on *Albany* to section 4.

The CJEU adopts a three-step approach to proportionality, assessing whether the measure implemented under EU law is (i) suitable or appropriate in order to achieve the objective pursued; (ii) does not go beyond what is necessary; and, (iii) does not impose a burden which is excessive in relation to the objective sought.<sup>75</sup> As the proportionality principle applies in many different contexts, the CJEU has adopted varying degrees of intensity

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<sup>71</sup> See *ibid*; Robert Alexy, 'On Balancing and Subsumption. A Structural Comparison' (2003) 16 *Ratio Juris* 433, 440–8. On the criticism see Habermas (n 62) 256–9; Jürgen Habermas, 'Reply to Symposium Participants', *Habermas on Law and Democracy* (University of Chicago Press 1998) 430. Habermas' critique is that balancing is subject to irrational rulings, whereby there are no rational standards by which to weigh, with arbitrary or unreflective weighting taking place. Thus, in Habermas' view although this produces a result, this does not provide a justification due to the value judgments which have occurred.

<sup>72</sup> See *R v Secretary of State for Health, ex p. British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* (Case C-491/01) [2002] ECR I-11453. Note that the proportionality is provided for in Article 5(4) TEU.

<sup>73</sup> Article 5(4) TEU

<sup>74</sup> See *Tridimas* (n 7) 137.

<sup>75</sup> It has been debated whether the third stage forms part of the CJEU's approach, however it may be that the CJEU considers this when determining necessity or disposes of the case through the earlier stages. See Craig (n 8) 19.

in its application.<sup>76</sup> As de Burca stated, “[i]t becomes apparent that the way the proportionality principle is applied by the Court of Justice covers a spectrum ranging from a very deferential approach to a quite rigorous and searching examination of the justification for a measure which has been challenged.”<sup>77</sup> The degree of intensity adopted depends on a number of factors, for example, the conflict in question, the nature of the interests present, and the perceived severity of the imputed breach.<sup>78</sup> This also reflects the distribution of interests between the EU and Member States, ensuring that the balance of competencies is respected.

Although the CJEU does not clearly identify the intensity of review adopted, the CJEU’s approach can be grouped into three broad categories of review. These categories are not hierarchical. First, the CJEU adopts a ‘manifestly inappropriate’ standard of proportionality when reviewing an EU measure or a Member State measure implementing EU law.<sup>79</sup> This standard also applies where an EU institution has exercised “a broad discretion involving political, economic or social choices requiring it to make complex assessment.”<sup>80</sup> In these situations, the CJEU will only interfere with a measure where it is “manifestly inappropriate having regard to the objective” which the measure seeks to achieve.<sup>81</sup> In *Fedessa*, for example, the CJEU held that because the legislature had been given discretionary powers within the Common Agricultural Policy, review of the measure had to be limited to examining whether the measure was the result of either a manifest error or misuse of powers, and whether the authority concerned had not manifestly exceeded the limits of discretion.<sup>82</sup>

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<sup>76</sup> This has led to arguments that the CJEU does not balance competing interest. See TI Harbo, ‘The Function of the Proportionality Principle in EU Law’ (2010) 16 *European Law Journal* 158, 171; Craig (n 8) ch 19.

<sup>77</sup> De Burca (n 8) 111–2. See also Craig (n 8) ch 19; Tridimas (n 7) ch 3.

<sup>78</sup> De Burca (n 8) 111–2; Jan Jans, ‘Proportionality Revisited’ (2000) 27 *Legal Issues in Economic Integration* 239.

<sup>79</sup> When considering Member State measures, the CJEU adjusts its approach depending on the level of discretion left to the Member State and the division of competence when present.

<sup>80</sup> Craig and De Búrca (n 7) 553.

<sup>81</sup> *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex p. Fedessa et al.* (Case C-331/88) [1990] E.C.R. I-4023, [13]-[14]; *British American Tobacco* (n.21) [122]-[123]. See also, *United Kingdom v Commission* (Case C-180/96) [1998] E.C.R. I-2265, [96]; *Jippes v Minister van Landbouw, Natuurbeheer en Visserij* (Case C-189/01) [2001] ECR I-5689, [83]

<sup>82</sup> *Fedessa* *ibid* [8]. See also, *ABNA Ltd v Secretary of State for Health* (Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04) [2005] E.C.R. I-10423, [80]-[84].

Second, the CJEU applies a more rigorous analysis when an individual complains that their rights (including EU fundamental rights) have been unduly restricted.<sup>83</sup> Here, the CJEU engages in a “vigorous scrutiny” of the action in question. Article 52(1) CFREU requires that any limitation on CFREU rights must be provided for in law, respect the essence of the right and/or principle, and “[s]ubject to the principle of proportionality ... [must be] necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”<sup>84</sup> This requires an intense analysis of whether a restriction is proportionate. For example, in *Schmidberger* the CJEU, stating that a fair balance had to be struck between the competing right and freedom, considered

- (i) the overall effect of the protest<sup>85</sup>;
- (ii) the purpose of the protest in that it was not to prevent the exercise of the free movement rights<sup>86</sup>;
- (iii) the measures taken to limit the disruptions caused<sup>87</sup>;
- (iv) the wider effects of the protest<sup>88</sup>;
- (v) the margin of discretion afforded to the Member States<sup>89</sup>;
- (vi) that the imposition of stricter requirements could have been perceived as an excessive restriction on the fundamental rights in question; and
- (vii) that all alternative solutions would have created the risk that the demonstration was difficult to control and would have been liable to cause much more serious disruption to intra-Community trade and public order.<sup>90</sup>

I will return to the CJEU’s approach to balancing fundamental rights and interests in Chapter 5, section 3.

A similarly rigorous approach is also adopted when the CJEU is faced with a Member State measure derogating from EU law.<sup>91</sup> This is different to the approach adopted in relation to

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<sup>83</sup> *Council v Hautala* (Case C 353/99 P) [2001] E.C.R. I-9565; *Hauer v Land Rheinland-Pfalz* (Case 44/79) [1979] E.C.R. 3727; *Schmidberger v Republik Österreich* (Case C-112/00) [2003] E.C.R. I-5659. See also the approach set out in Article 52(1) CFREU.

<sup>84</sup> Article 52(1) CFREU.

<sup>85</sup> *Schmidberger* (n.83) [85]

<sup>86</sup> *ibid.* [86]

<sup>87</sup> *ibid.*, [87]

<sup>88</sup> *ibid.*, [88]

<sup>89</sup> *ibid.*, [90]

<sup>90</sup> *ibid.*, [91]-[93]

<sup>91</sup> See *Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratori di Milano* (Case C-55/94) [1996] E.C.R. I-4165, [37]. “National measures liable to make less attractive the exercise of fundamental freedoms

claims involving individual rights, as the CJEU focusses predominantly on whether the measure in question is the least restrictive means of achieving the objective pursued. For example, in *Danish Bottles*, the CJEU held that a Member State should choose the least restrictive option when derogating from EU law.<sup>92</sup> Similarly, in *Cassis de Dijon*, the CJEU held that a measure prescribing minimum alcohol content was not necessary as it was possible to protect consumers in less restrictive ways, such as through the product's labelling.<sup>93</sup> It can be argued that the rationale for such an approach is the need to ensure/protect the single market and market integration, however, the CJEU will vary the intensity of its analysis according to the facts of the case.<sup>94</sup>

Third, when considering the proportionality of penalties and costs imposed by legislative or administrative acts, the CJEU focusses on whether the burden imposed is excessive. In *Bela-Mühle*, the CJEU held that the requirement on producers of animal feed to use semi-skimmed milk rather than soya milk, was disproportionate as semi-skimmed milk was three times more expensive than soya.<sup>95</sup> Similarly, in *Portugal v Commission*, the CJEU held an export ban on beef to be proportionate as it was impossible in practice to allow exports before arrangements of a kind advocated by the Office of Epizootic Diseases' Animal Health Code had been put in place.<sup>96</sup> In *Man (Sugar)*, the CJEU held that Intervention Boards decision to forfeit the applicant's entire deposit because they were 4 hours late in completing the required paperwork was disproportionate given the function performed by the system of export licences.<sup>97</sup> Any penalty, the CJEU held, "should have been less severe ... than the

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guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it."

<sup>92</sup> *Commission v Denmark* (Case 302/86) [1988] E.C.R. 4607, [6]; See also *Cassis de Dijon* (Case 120/78) [1979] E.C.R. 649, [10]-[14]; *Commission v Luxembourg* (Case C-319/06) [2008] E.C.R. I-4232, [52]-[53]. In the sphere of EU competition law, see *Wouters v Algemene Raad van de Nederlandse Order van Advocaten* (Case C-309/99) [2002] E.C.R. I-1577, [97]-[109].

<sup>93</sup> *Cassis de Dijon*, *ibid*, [14]-[15]

<sup>94</sup> See *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* (case C-36/02) [2004] E.C.R. I-9609. Here the CJEU adjusted their analysis despite the measure pursuing an objective not recognised under EU law but protected under a Member State's Constitution.

<sup>95</sup> *Bela-Mühle Josef Bergmann KG v Grows-Farm GmbH & CO. KG*. (Case 114/76) [1977] E.C.R. I-1211

<sup>96</sup> (Case C-365/99) [2001] E.C.R. I-5645, [55]-[58]

<sup>97</sup> *The Queen, ex parte E. D. & F. Man (Sugar) Ltd v Intervention Board for Agricultural Produce (IBAP)* (Case 181/84) [1985] E.C.R. I-2889, [30].

forfeiture of the entire security and it should have been more consonant with the practical effects of such a failure.”<sup>98</sup>

### 3.3 Summary

The above has shown how the CJEU resolves conflicts by balancing the competing objectives and interests through a proportionality analysis. In doing so, the CJEU considers whether the restriction or limitation is suitable for achieving the objective pursued; does not go beyond what is necessary to achieve the objective pursued; and, does not impose an excessive burden. The CJEU, in applying such an approach, varies its review according to the context of the conflict. Section 3.2 has shown that the CJEU’s approaches can be loosely categorised into three groups. First, the CJEU adopts a manifestly inappropriate standard when reviewing an EU measure or a national measure implementing EU law, granting a wide margin of discretion. Second, where the measure restricts individual rights, or derogates from EU law, the CJEU adopts a more intense application of the proportionality assessment. This approach is also present when considering fundamental rights protected by EU law and the CFREU. Third, when considering the proportionality of a cost or penalty imposed by legislative or administrative acts, the CJEU examines whether the cost or burden imposed is excessive to the objective pursued.

Can we identify a proportionality assessment in *Albany*? As has been already been identified, the CJEU in *Albany* balanced the competing objectives, concluding that the social policy objectives outweigh competition policy’s objectives where the stipulated conditions in *Albany* are met. What is not immediately obvious from the CJEU’s decision is how the CJEU conducted its balancing exercise. Did the CJEU adopt a proportionality approach, and if so, how did it conduct the analysis? These questions shall form the basis of the discussion in section 4. The section will show that the CJEU balanced the competing objectives through a proportionality assessment *stricto sensu*, and that the CJEU’s proportionality assessment differs from those set out above. It will show that the CJEU focussed on balancing the competing objectives, not the necessity of the restriction.

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<sup>98</sup> *ibid.*

#### 4. A Balance – Can we see how the CJEU in *Albany* balanced the competing objectives??

In *Albany*, the CJEU was faced with conflicting objectives pulling in different directions. The social policy objectives permitted (and encouraged) collective bargaining and collective agreements, competition policy's objectives potentially prohibited them. In concluding that collective agreements fall outside the Treaty competition provisions, the CJEU balanced the competing objectives. In the CJEU's view, the social policy objectives outweigh the objectives pursued by EU competition policy where *Albany's* stipulated conditions are met. What is unclear from the CJEU's decision is how it balanced the competing objectives present. This section will examine whether we can identify the approach adopted by the CJEU in balancing the competing objectives.

Applying a proportionality approach to trade union activities has been criticised as inappropriate.<sup>99</sup> Bercusson, for example, has argued that the very nature of collective negotiations, in that they are ongoing, prevents a proportionality assessment: “[a]t what stage of this process and against what criteria is the test of proportionality to be applied?”<sup>100</sup> Additionally, it has been argued that a proportionality assessment gives the CJEU and national courts the opportunity to become “back-seat drivers” importing their own views onto the collective bargaining process and social partners.<sup>101</sup> If we consider the approach to proportionality adopted under the free movement rules,<sup>102</sup> courts may “identify alternatives without considering their effectiveness in the bargaining process.”<sup>103</sup> However, as will be seen below, the CJEU's balancing exercise in *Albany* avoids these issues. In considering the competing objectives as a genus, the CJEU was not concerned with applying proportionality

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<sup>99</sup> See Brian Bercusson, ‘The Trade Union Movement and the European Union: Judgment Day’ (2007) 13 *European Law Journal* 279; Tonia Novitz, ‘A Human Rights Analysis of the Viking and Laval Judgments’ in Catherine Barnard (ed), *Cambridge Yearbook of European Legal Studies*, vol 10 (Oxford: Hart, 2013); AC. Davies, ‘One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ’ [2008] *Industrial Law Journal* 126.

<sup>100</sup> Bercusson (n 99).

<sup>101</sup> This issue has been a significant factor in the UK courts approach to granting injunctions for industrial action and the introduction of the “golden formula” seen in s.219 TULRCA.

<sup>102</sup> The Court's analysis consists of two steps. First, is there evidence of a breach of the economic right caused by the social right? If so, second, can it be justified based on a breach of the social right in order to protect workers' interests and proportionality to be shown by the trade union.

<sup>103</sup> ACL Davies, *Perspectives on Labour Law* (Cambridge: Cambridge University Press, 2009 2nd ed) 143. Although referring to industrial action, Davies' point also applies in the context of collective agreements and collective bargaining. For example, the CJEU could consider the use of a works council to achieve the same result as a less restrictive option.

to an ongoing process, nor did the CJEU assess whether the benefits achieved by collective agreements can be achieved via less restrictive means.

The CJEU's wording implies that the CJEU adopted a proportionality approach *stricto sensu*, considering simply whether the harm to the social policy objectives outweighed the need to achieve the competition policy objectives. This can be seen if we apply Alexy's "Law of Balancing" to the CJEU's reasoning. To recap, Alexy's theory of balancing is that the court considers the degree of non-satisfaction or detriment caused to principle, P<sub>1</sub>, the importance of satisfying the competing objectives, P<sub>2</sub>, and then balances the weights assigned to the competing objectives.<sup>104</sup> In assigning weights to the conflicting objectives, both qualitative and quantitative weights are required, which when combined, give the total weight of the competing objectives. The qualitative aspect concerns the importance of the objective; the quantitative, how much the objective is infringed or satisfied. These weightings can be seen within the CJEU's decision in *Albany*.

If we consider the qualitative weights first; the importance given to an objective, an immediate issue raised is how we assess the importance of an objective in the abstract. In the context of EU objectives, an objective's weight may be assigned according to Treaty statements indicating the importance of an objective.<sup>105</sup> Whilst it can be debated whether the Treaty appellations mean anything,<sup>106</sup> the Treaty does indicate the importance assigned to some objectives. For example, the Treaties state that some objectives are to be given a "high level of protection".<sup>107</sup> However, these statements relate to an objective's abstract weight, and do not provide an indication of an objective's relative (or quantitative) weight.<sup>108</sup> It could be that despite having a high level of importance/protection, an objective is only of marginal importance in a specific situation.

We can identify the relative qualitative weightings given by the CJEU to the competing objectives in *Albany*. If we consider the social policy objectives, the CJEU's reference to

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<sup>104</sup> Alexy, *A Theory of Constitutional Rights* (n 60) 47–8; Alexy, 'Constitutional Rights, Balancing and Rationality' (n 70) 135–7.

<sup>105</sup> Townley, *Article 81 EC and Public Policy* (n 3) 294–5.

<sup>106</sup> See Ludwig Kramer, *EC Environmental Law* (4th edn, Sweet and Maxwell 2000) 6–9; G Monti, 'Article 81 EC and Public Policy' (2002) 39 *Common Market Law Review* 1057, 1075.

<sup>107</sup> See for example, Article 9 TFEU.

<sup>108</sup> Townley, 'Is Anything More Important than Consumer Welfare (in Article 81 EC)? Reflections of a Community Lawyer' (n 9) 296–7. Townley argues that it is unclear what the difference is between a high and "non-high" level of importance, and also that we can split each given level of protection into further subcategories.

numerous provisions encouraging collective bargaining indicates that it had a ‘high’ weighting.<sup>109</sup> For example, the CJEU makes explicit reference to Article 2 EC which provided that a particular task of the Community was to promote a “high level of employment and of social protection.”<sup>110</sup> With regard to the competition policy objectives, the CJEU again makes reference to Treaty provisions.<sup>111</sup> The CJEU stated that, in the context of the competition provisions, “the *importance* of ... [Article 101 TFEU] ... prompted the authors of the Treaty to provide expressly ... that any agreements or decisions prohibited pursuant to that article [Article 101(2)] are to be automatically void.”<sup>112</sup> (emphasis added) This implies that the economic objectives also had a high level of importance, and thus of potentially equal qualitative weight to the social policy objectives being weighed against them. The CJEU appears to assign both objectives a “high” qualitative weighting.

It is in the quantitative weights of the policy objectives that the potential weight disparities in *Albany* can be seen. This is a difficult assessment, which raises questions around how accurately the CJEU can assess such weights. Such weights should be assessed by reference to an overarching, or ultimate, goal that the balancing exercise is trying to achieve. However, the CJEU in *Albany* does not refer to a single overarching goal which its balance is seeking to achieve. It simply stated that the exemption followed from an “interpretation of the provisions of the Treaty as a whole which is both effective and consistent.”<sup>113</sup> This is, though, far too vague to help identify the overarching goal of the balancing exercise. Had the CJEU pointed to a single goal, i.e. the single market imperative, this might have helped in assigning quantitative weights to the competing objectives. Second, can an infringement on an objective be quantifiably assessed where the effects are potentially long-ranging and ongoing? Although such assessments are frequently made when assessing damages and issuing fines, is this possible with objectives? Trying to provide relative weightings in advance is very difficult, and in some cases futile.<sup>114</sup>

In *Albany*, the CJEU does not explore the quantitative weights in detail. The CJEU simply stated that certain restrictions on competition were inherent in collective agreements,

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<sup>109</sup> *ibid.*, [54]-[58]

<sup>110</sup> *ibid.*, [54]

<sup>111</sup> *ibid.*

<sup>112</sup> *ibid.*, [53]

<sup>113</sup> *Albany* (n.1) [60]

<sup>114</sup> For example, if *Albany* were to be applied to a much wider area of trade union activities, the relative weights would differ significantly and trying to identify these in advance would achieve no further aim.

“[h]owever, the social policy objectives pursued would be seriously undermined if ... subject to Article [101 TFEU].”<sup>115</sup> Although not identifying the quantitative weights of the competing objectives present, the CJEU’s decision clearly implies that the importance of achieving the economic objectives were less than the harm caused to social policy objectives. If not, then the CJEU would not have created an exemption. It would have applied Article 101 TFEU.

In concluding that the social policy objectives outweighed the competition policy objectives where the two stipulated conditions are met, the CJEU creates a conditional relation of precedence.<sup>116</sup> In *Albany*, the CJEU held that the social policy objectives (P<sub>1</sub>) outweigh the competition policy objectives (P<sub>2</sub>) where a collective agreement is between management and labour and aimed at improving working terms and conditions. Applying the Treaty competition provisions would void a collective agreement, thus seriously undermining the social policy objectives pursued. Where these conditions are met, the agreement is outside the scope of the Treaty competition provisions: if one of these conditions is missing, the exemption does not apply. A good example of this can be seen in *FNCBV* where the CJEU held that the exemption did not apply as the agreement was not between management and labour (the first condition in *Albany*).<sup>117</sup> As such, the balance between the competing objectives shifted, with the economic objectives taking precedence and Article 101 TFEU applying to the agreement in question.

That the exemption does not apply to all collective agreements, only those satisfying its stipulated criteria, implies that the CJEU symmetrically balanced the competing objectives. The CJEU considered both the harm to the social policy objectives as against the need to achieve competition policy’s objectives, and the harm to competition policy’s objectives as against the need to achieve the social policy objectives pursued by collective agreements, within its balancing exercise. *Albany*’s stipulated conditions imply that exempting all collective agreements would disproportionately harm competition policy’s objectives: the stipulated conditions provide the point at which the balancing exercise is in favour of the social policy objectives. In other words, it was not necessary to exclude all collective

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<sup>115</sup> *ibid.*, [59]

<sup>116</sup> This is where as Principle 1 outweighs/takes precedence over Principle 2, where Principle 1 gives rise to certain legal consequences Q in circumstances C. Alexy writes this formally as “If principle P<sub>1</sub> takes precedence over principle P<sub>2</sub> in circumstance C: (P<sub>1</sub> P P<sub>2</sub>) C, and if P<sub>1</sub> gives rise to legal consequences Q in circumstances C, then a valid rule applies which has C as its protasis and Q as its apodosis: C → Q.” See Alexy, *A Theory of Constitutional Rights* (n 60) 54.

<sup>117</sup> *FNCBV and others v Commission* (Case T-217/03) [2006] E.C.R. II-4987, [100].

agreements to achieve the social policy objectives pursued. This side of the balance, however, is missing from the CJEU's explanation of its decision.

However, it could be argued that *Albany's* stipulated conditions define the CJEU's understanding of a collective agreement. Where an agreement is not between management and labour (and/or their representatives) and/or is not aimed at improving conditions of work and employment, it is not a collective agreement. As such, the exemption covers all collective agreements. This draws parallels with *Viking Line*, where it can be argued that the CJEU considered that an essential element of industrial action was that it was exercised for the protection of workers.<sup>118</sup> In *Viking Line*, the CJEU held that the restriction on the freedom of establishment would be disproportionate where industrial action did not seek to protect workers. This potentially adopts a narrow definition of a collective agreement. I will return to this point in Chapter 5, section 4.2 when discussing the scope of any potential right to negotiate and conclude collective agreements under Article 28 CFREU.

To summarise, the above shows that the CJEU in *Albany* applied a proportionality approach *stricto sensu*, balancing the harm and benefits of the competing objectives/interests. It has shown that the CJEU's balance differed from those generally adopted by the Court. The CJEU focussed on balancing the competing objectives present, rather than focusing on the necessity of the restriction on competition. This difference can be explained through the equivalence of the objectives being balanced; both are Treaty objectives contained within Article 3(3) TEU. In balancing objectives of equivalent value, proportionality *stricto sensu* is arguably more appropriate.

## 5. Conclusion

The discussion in this chapter has shown that, although not entirely transparent, the CJEU in *Albany* followed a structured balancing approach. The CJEU's decision is arguably correct. The CJEU, as shown in section 4, weighed the degree of non-satisfaction of (or harm to) the social policy objectives pursued by collective agreements against the importance of achieving the economic objectives pursued by the Treaty competition provisions. The CJEU concluded that the social policy objectives always outweigh competition policy's objectives where the agreement is between management and labour and aim at improving conditions of work and

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<sup>118</sup> *International Transport Workers Federation v Viking Line ABP* (Case C-438/05) [2008] 1 C.M.L.R. 51, [77].

employment. Where these conditions are not met the balance shifts; the exemption does not apply. That the exemption potentially does not apply to all collective agreements implies that the CJEU conducted a symmetrical balance, balancing the harm to the social policy against the need to achieve competition policy's objectives, and the harm to competition policy's objectives against the need to achieve the social policy objectives pursued by collective agreements. It is arguable that *Albany's* stipulated conditions identify the point at which the balancing exercise falls in favour of the social policy objectives.

The chapter also showed that the Treaty integration clauses and the CJEU's teleological approach provide an alternative to balancing the competing objectives. Section 2 argued that the Treaty integration clauses and the CJEU's teleological approach require that EU law is interpreted in a manner which considers the wider objectives pursued by the EU. In the context of *Albany*, where Article 101 TFEU can be interpreted and applied in a manner which gives adequate weight to the social policy objectives pursued by collective agreements, the exemption may not be necessary. In such a situation, the social policy objectives would not be seriously undermined as they would have been appropriately considered. Whether such an interpretation of Article 101 TFEU is possible will be explored in Chapters 6 and 7 where the thesis will examine how we could apply Article 101 TFEU to a collective agreement.

Before examining whether we can interpret Article 101 TFEU in such a way, Chapter 5 will examine the potential effect of EU fundamental rights and the CFREU on the CJEU's approach in *Albany*. The Chapter will explore the effect of adding such considerations to the balance in *Albany*. This is important as including fundamental rights considerations within the balance may alter it such that *Albany's* exemption needs to be either adjusted or removed altogether. Where this is the case, the decision in *Albany* may no longer be correct. The discussion in Chapter 5 will also explore how fundamental rights and the CFREU fit within the EU legal order and expand further on how the CJEU resolves conflicts between fundamental rights and the fundamental freedoms. The discussion will also build on the discussion in section 2 above, providing the basis for the discussion in Chapters 6 and 7.

## 5. The Charter of Fundamental Rights of the European Union

### 1. Introduction

Chapter 4 showed that the CJEU in *Albany* balanced the competing policy objectives present through the proportionality principle. This can be seen through the way in which the CJEU predetermined the balance in favour of the social policy objectives where two conditions are met: the agreement is between management and labour (or their representatives) and aimed at improving conditions of work and employment.<sup>1</sup> As such, it can be argued that the CJEU considered exempting all collective agreements to be disproportionate. Chapter 4 also demonstrated that the Treaty integration clauses and the CJEU's teleological approach require that wider objectives are included in the application and interpretation of EU law. It argued that, when applying EU competition law, the CJEU should take account of wider objectives. Whether the social policy objectives could be included within the application of Article 101 TFEU was not considered by the CJEU in *Albany*. Where Article 101 TFEU can be interpreted in such a manner that does not deprive them of their essence, the social policy objectives may not be seriously undermined. Whether such an interpretation is possible shall be examined in Chapters 6 and 7.

This chapter will examine the potential effects of EU fundamental rights on the *Albany* exemption. Article 28 CFREU provides that workers and employers, or their representatives, have the right "in accordance with Union law and national laws and practices, to negotiate and agree collective agreements..."<sup>2</sup> This potentially impacts the CJEU's approach in *Albany*. As no such right was recognised in 2000, a right to collective bargaining and collective agreements was not considered within the CJEU's decision in *Albany*.<sup>3</sup> Therefore, it is possible that fundamental rights considerations may alter the outcome of the balance in *Albany* such that we may need to reconsider the *Albany* exemption.

The discussion in this chapter will do the following. Section 2 will place fundamental rights and the CFREU within the EU's constitutional order. Section 3 will examine how

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<sup>1</sup> *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (Case C-67/96) [2000] 4 C.M.L.R. 116, [59]-[60]

<sup>2</sup> Article 28 CFREU.

<sup>3</sup> *Albany* (n.1) [AG157]-[AG163]. AG Jacobs argued that even if there was a specific right, it would not have been sufficient to protect collective agreements from the scope of European competition law.

conflicts involving fundamental rights are resolved through balancing. As explained in Chapter 4, section 3, the CJEU balances the competing rights/objectives through a proportionality assessment. This will be followed in section 4 with discussion of how fundamental rights considerations potentially affect the exemption in *Albany*. First, section 4.1 will explore whether Article 28 CFREU is a right or principle. This is important. If Article 28 CFREU is a right it has greater normative weight against competition policy's objectives. Principles contained within the CFREU only have effect where they have been implemented by EU or national law. Second, section 4.2 will examine the scope of the Article 28 CFREU right. Whether Article 28 CFREU contains a positive and/or negative right may affect its weight when balanced against a competing right or objective. Third, section 4.3 will discuss the effect of Article 28 CFREU and the right to collective bargaining on Article 101 TFEU. Section 5 will conclude the chapter.

## 2. The position of fundamental rights within the EU legal order

Fundamental rights initially developed to protect the supremacy and effectiveness of EU law,<sup>4</sup> and assumed a prominent position within the EU legal order. As general principles of EU Law,<sup>5</sup> the protection of fundamental rights is "ensured within the framework of the structure and objectives of the Community."<sup>6</sup> "7 Fundamental rights were not initially contained within the Treaties, with a binding catalogue of rights only being introduced post-Lisbon by the CFREU. Fundamental rights therefore initially developed within the CJEU's jurisprudence

In identifying fundamental rights within EU law, the CJEU drew on a wide range of sources. This included the constitutional provisions of Member States and any relevant

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<sup>4</sup> Jason Coppel and Aidan O'Neill, 'European Court of Justice: Taking Rights Seriously, The' (1992) 12 Legal Studies 227, 228–9. See also Joseph Weiler and Nicholas Lockhart, 'Taking Rights Seriously Seriously - The European Court and Its Jurisprudence - Part 1' (1995) 32 Common Market Law Review 51; Joseph Weiler and Nicholas Lockhart, 'Taking Rights Seriously Seriously - the European Court and Its Jurisprudence 2' (1995) 32 Common Market Law Review 579. This was in response national courts asking whether fundamental rights protected by Member State's Constitutions were also protected by EU law. See, for example, *Internationale Handelsgesellschaft von Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1974] C.M.L.R. 540 (*Solange I*); *Re Wünsche Handelsgesellschaft* [1987] 3 C.M.L.R. 225 (*Solange II*)

<sup>5</sup> *Stauder v City of Ulm* (Case 26/69) [1970] C.M.L.R. 112, [7]; *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* (Case 11/70) [1972] C.M.L.R. 255 [4].

<sup>6</sup> *ibid.*

<sup>7</sup> *ibid.*

international conventions.<sup>8</sup> This approach was confirmed in *Hauer*, where the CJEU gave specific mention to the position of the ECHR within EU law.<sup>9</sup> The CJEU's approach to identifying fundamental rights showed a determination that Union/Community institutions should be bound by fundamental rights, providing further emphasis and support for the social aspects of the Treaties and EU; yet, at the same time an intention to secure the autonomy of Community policy.<sup>10</sup> This enabled the CJEU to give fundamental rights a wide scope, holding that fundamental rights applied where Member States were implementing EU law,<sup>11</sup> derogating from EU law,<sup>12</sup> and acting "within the scope of EU law"<sup>13</sup> This allowed the CJEU to consider EU fundamental rights as autonomous to the rights protected within Member States and international documents.<sup>14</sup>

As general principles of EU law, fundamental rights have primary law status, placing them on an equal footing with Treaty provisions (including the free movement provisions.)<sup>15</sup> This position has been significantly strengthened post-Lisbon, with Article 6(1) TEU and Article 51(1) CFREU codifying the equivalence of fundamental rights to provisions of the Treaties. Article 6(1) TEU states that the "Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union ... which shall have the same legal value as the Treaties"<sup>16</sup>. Article 51(1) CFREU states that EU institutions and Member States "shall respect the rights, observe the principles and promote the application of" the CFREU "in accordance with their respective powers and respecting the limits of the powers of

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<sup>8</sup> *Nold KG v Commission* (Case 4/73) [1974] E.C.R. 491, 507. In *IRCA*, AG Warner stated that "a fundamental right recognised and protected by the constitution of any Member State must be recognised and protected in Community law"; Opinion 2/94 [1996] E.C.R. I-1759, [33]-[34].

<sup>9</sup> *Hauer v Land Rheinland-Pfalz* (Case 44/79) [1980] 3 C.M.L.R. 42, [15]. The CJEU stated that the ECHR can supply guidelines that should be followed within the framework of EU law. See also, *Rutili v Ministre de l'Interior* (Case 36/75) [1975] E.C.R. 1219; *ERT* (Case 260/89) [1991] E.C.R. 2925. Article 52(3) CFREU provides that where a CFREU right corresponds with a right guaranteed by the ECHR, the CFREU right shall have the same meaning and scope as the ECHR right, however the CFREU can provide for more extensive protection.

<sup>10</sup> See Takis Tridimas, *The General Principles of EU Law*. (Oxford; New York: Oxford University Press 2006) 303–7.

<sup>11</sup> *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* (Case 5/88) [1989] E.C.R. I-2609

<sup>12</sup> *Elliniki Radiophonia Tileorassi* (Case C-260/89) [1993] E.C.R. I-2925

<sup>13</sup> *Åkerberg Fransson* (Case C-617/10) ECLI:EU:C:2013:105 [19]; *Annibaldi* (Case C-309/96) [1997] E.C.R. I-7493.

<sup>14</sup> See *Internationale Handesgesellschaft* (n.5) [4].

<sup>15</sup> See, Tridimas (n 10) 51.; *Nold* (n.8); *Hauer* (n.9); *Eugen Schmidberger Internationale Transporte Planzuge v Austria* (Case C-112/00) [2003] 2 C.M.L.R. 34; *Omega Spielhallen- und Automatenaufstellungs GmbH v Bundesstadt Bonn* (Case C-36/02) [2005] 1 C.M.L.R. 5.

<sup>16</sup> Article 6(1) TEU. c.f. Schiek who argues that the purpose of human rights protection is to provide a "meta-layer of rights, which enjoy priority over other law, including Internal Market law." Dagmar Schiek and others, *EU Social and Labour Rights and EU Internal Market Law*. (Directorate General for Internal Policies: Policy Department A - Economic and Scientific Policy 2015) 79.

the Union as conferred on it in the Treaties.”<sup>17</sup> These provisions also strengthen fundamental rights’ normative weight. For example, in *Schmidberger* the CJEU stated that fundamental rights have equivalence with the free movement provisions of the Treaty.<sup>18</sup> As such, a fair balance had to be struck between the competing rights and freedoms.<sup>19</sup>

Fundamental rights, and provisions of the CFREU, have three significant functions within EU law.<sup>20</sup> First, fundamental rights act as an aid to interpretation: “as general principles of EU law, the Charter ... serves as an aid to interpretation, since both EU secondary law and national law falling within the scope of EU law must be interpreted in light of the Charter.”<sup>21</sup> With regard to Treaty provisions, the CJEU will, where possible, interpret the Treaty provisions in a manner compatible with the CFREU right. For example, in the context of the free movement rights, the CJEU has held that fundamental rights constitute a legitimate interest capable of restricting the exercise of a free movement right.<sup>22</sup> In relation to the application of EU competition law to collective agreements, this means that Article 101 TFEU must be interpreted in a manner which takes account of the Article 28 CFREU right to collective bargaining. Second, fundamental rights can be relied upon as providing grounds for judicial review. EU legislative action in breach of the CFREU and/or general principles is void, and national measures must be set aside when in conflict.<sup>23</sup> In *ERT*, for example, the CJEU held that it had a duty to ensure that measures derogating from EU law adequately respected fundamental rights, including where a measure restricts the free movement provisions.<sup>24</sup>

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<sup>17</sup> Article 51(1) CFREU.

<sup>18</sup> *Schmidberger* (n.15) [78]

<sup>19</sup> *ibid.*, [81]. See also, *Tridimas* (n 10) 338. c.f. *Schiek and others* (n 16) 86. Schiek argues that some rights contained in the CFREU are of a higher status than Treaty provisions. Schiek argues that this is due to some rights being guaranteed as free-standing rights, which are not limited or guaranteed, in accordance with EU law; for example, Article 12 CFREU, the right to freedom of association. As such, where mutual maximisation of conflicting interests is not possible, Treaty provisions are required to cede to the fundamental right. Schiek’s argument does not, however, sufficiently consider Article 6 TEU, which gives equivalence, and Article 52(1) CFREU, which allows for all provisions of the CFREU to be restriction according to the proportionality principle.

<sup>20</sup> See *Tridimas* (n 10) 29; Koen Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012) 8 *European Constitutional Law Review* 375, 376.

<sup>21</sup> Lenaerts (n 20) 376. The interpretative obligation required by EU fundamental rights also applied pre-CFREU. See, for example, *Commission v Council* (Case 218/82) [1983] E.C.R. 4063, [15]; *Ruuh v Hauptzollamt Nürnberg-Fürth* (Case C-314/89) [1991] E.C.R. I-1647, [17].

<sup>22</sup> See *Schmidberger* (n.15); *Omega* (n.15).

<sup>23</sup> See, for example, *ERT* (n.11) [43]-[45].

<sup>24</sup> *ibid.* See C. Smith and T Fetzer, ‘The Uncertain Limits of the European Court of Justice’s Authority: Economic Freedom v Human Dignity’ (2004) 10 *Columbia Journal of European Law* 445, 486; Andrea Biondi, ‘Free Trade, a Mountain Road and the Right to Protest: European Economic Freedoms and Fundamental Individual Rights’ (2004) 1 *European Human Rights Law Review* 51.

Third, breach of a fundamental rights, as general principles of EU law, gives rise to tortious liability.

The increasing prominence of fundamental rights within the EU legal order increases the likelihood of conflict between fundamental rights and Treaty provisions and objectives. As shown in Chapter 4, the CJEU resolves conflicts, which cannot be reconciled through interpretative techniques, by balancing them through the proportionality principle. This is also the case where the CJEU is faced with a clash between fundamental rights and the achievement of a Treaty objective: the qualified nature of fundamental rights means that balancing is inevitable.<sup>25</sup> The discussion in section 3 will examine how these competing interests are balanced, identifying how the CJEU has developed its approach to balancing where fundamental right considerations are present. This expands on the discussion in Chapter 4, section 3.

### 3. Balancing the conflicting rights/interests

Fundamental rights have equivalence to Treaty provisions within the EU legal order. This requires that the CJEU should balance conflicting rights and freedoms in a manner which ensures that the competing interests are restricted to the least extent possible.<sup>26</sup> As Trstenjak and Beysen argue, “[t]he resolution of conflicts between different fundamental rights or between fundamental rights and fundamental freedoms should reflect the principle that ... EU fundamental rights and the fundamental freedoms stand on an equal footing” and should “be resolved by determining the right balance between the protected guarantees and interests at issue.”<sup>27</sup> As constitutional ‘rights’ of equal rank, “it is necessary to find a solution which limits each of them as little as possible.”<sup>28</sup> The CJEU must conduct a fair balance

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<sup>25</sup> See Article 52(1) CFREU; *Hauer* (n.8) [18]. See also, *Commission v Germany* (Case C-280/93) [1994] E.C.R. I-4973, [78]. Fundamental rights can be restricted where the restriction corresponds to objectives of general interest pursued by the Community and do not constitute a disproportionate interference impairing the very substance of the right.

<sup>26</sup> This also applies where the conflict is between competing fundamental rights.

<sup>27</sup> Verica Trstenjak and Edwin Beysen, ‘The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case Law of the CJEU’ (2013) 38 *European Law Review* 293, 311–12.

<sup>28</sup> Schiek and others (n 16) 85. This is that rights are balanced in such a way that they are both optimised as far as possible.

between the competing rights and freedoms in question.<sup>29</sup> This is especially so given that both fundamental rights and freedoms are not absolute and can be limited.

Such restriction of fundamental rights is expressly provided for by the CFREU. Article 52(1) CFREU provides that rights and principles of the CFREU can be limited where such limitations are “provided for by law and respect the essence of those rights and freedoms.” This is subject to proportionality. Restrictions on CFREU provisions must be “necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”<sup>30</sup> Article 52(1) CFREU is based on CJEU case law, with the approach of the CJEU in *Kjell Karlsson* cited in support.<sup>31</sup> In *Kjell Karlsson*, the CJEU stated that

... it is well established in the case-law of the Court that restrictions may be imposed on the exercise of fundamental rights, in particular in the context of a common organisation of the market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights.<sup>32</sup> [emphasis added]

Key to such an approach is that the essence of the right or freedom is respected. This is important in considering whether *Albany’s* exemption is necessary for collective agreements. Does the application of Article 101 TFEU respect the essence of the Article 28 CFREU right to collective bargaining? Does the application of Article 101 TFEU give adequate weight to such right? Whether this is the case will be the focus of the discussion in Chapters 6 and 7.

This proportionality approach features within the CJEU’s fundamental rights jurisprudence. The CJEU predominantly considers whether a restriction pursues a legitimate interest in a proportionate manner; specifically, whether the restriction/limitation provided for by law is suitable, necessary and appropriate? as was identified in Chapter 4, section 3, in relation to the CEU’s general application of proportionality, the CJEU applies differing

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<sup>29</sup> Trstenjak and Beysen (n 27) 314.; “Commission Proposal on the exercise of the right to take collective action within the context of freedom of establishment and the freedom to provide services”, COM (2012) 130 final, 12. See also *Schmidberger* (n.15); *Omega* (n.15); *McDonagh v Ryanair Ltd* (Case C-12/11) [2013] 2 C.M.L.R. 32, [62];

<sup>30</sup> Article 52(1) CFREU. The Explanations clarify that the reference to general interests recognised by the Union includes objectives set out in Article 3 TEU, and other interests protected by specific provisions in Article 4(1) TEU and Articles 35(3), 36 and 346 TFEU.

<sup>31</sup> *Kjell Karlsson and others* (Case C-292/97) [2000] E.C.R. I-2737.

<sup>32</sup> *ibid.*, [45].

standards of review where there are conflicts involving fundamental rights. This is clearly demonstrated by the decisions in *Schmidberger* and *Viking Line*. In *Schmidberger*, the CJEU considered whether a fair balance had been struck between the competing fundamental rights and freedoms which maximised the opposing interests/rights.<sup>33</sup> In *Viking Line*, by contrast, the CJEU appeared to subordinate the fundamental rights present to the free movement interest, adopting a one-sided balance considering only whether the fundamental right pursued a further interest which justified restricting the fundamental freedom.<sup>34</sup>

The CJEU's approach in *Schmidberger* has been described as the "correct" approach to balancing involving fundamental rights, with academic literature arguing that the approach in *Schmidberger* adopts a "true" balance of the competing interests.<sup>35</sup> In *Schmidberger*, the owner of a transport company incorporated in Germany, challenged the decision of the Austrian authorities to allow a protest which closed the Brenner autobahn, a major transit route between Austria and Northern Italy, for 30 hours. The claimant argued that the decision to authorise the protest, based on the protesters' freedom of expression and assembly rights, was an unjustified restriction on their right to free movement of goods. On reference to the CJEU, the CJEU concluded that although the protest restricted the claimant's free movement rights, such a restriction was proportionate.<sup>36</sup> In reaching such a conclusion, the CJEU balanced, through the proportionality approach, the competing interests.

In *Schmidberger*, the CJEU held that the protection of fundamental rights was a "legitimate interest which, in principle, justify[d] a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as free movement of goods."<sup>37</sup> In determining "whether a fair balance was struck between those interests",<sup>38</sup> the CJEU considered: (i) the overall effect of the protest<sup>39</sup>; (ii) the purpose of the

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<sup>33</sup> See *Schmidberger* (n.15) [78]-[93]

<sup>34</sup> See *International Transport Workers Federation v Viking Line ABP* (Case C-438/05) [2008] 1 C.M.L.R. 51. See also *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* (Case C-341/05) [2008] 2 C.M.L.R. 9; *Commission v Germany* (Case C-271/08) [2010] E.C.R. I-7078; *Dirk Ruffert v Land Niedersachsen* (Case C-346/06) [2008] E.C.R. I-1989.

<sup>35</sup> See Schiek and others (n 16); Dagmar Schiek, *Economic and Social Integration: The Challenge for EU Constitutional Law*; Trstenjak and Beysen (n 27).

<sup>36</sup> One question specifically raised by the Austrian Court was whether "the principles of the free movement of goods guaranteed by the Treaty prevails over" fundamental rights. *Schmidberger* (n.15) [70]

<sup>37</sup> *ibid.*, [74]

<sup>38</sup> *ibid.*, [81].

<sup>39</sup> *ibid.*, [85]. The restriction was limited to a single route, on a single occasion during the time period in question. The CJEU drew a comparison to the demonstration in *Commission v France* whereby the protest was widespread, on several occasions, and of varying durations.

protest in that it was not to prevent the exercise of the free movement rights<sup>40</sup>; (iii) the measures taken to limit the disruptions caused<sup>41</sup>; (iv) the wider effects of the protest<sup>42</sup>; (v) the margin of discretion afforded to the Member States<sup>43</sup>; (vi) that the imposition of stricter requirements could have been perceived as an excessive restriction on the fundamental rights in question; and, (vii) that all alternative solutions would have created the risk that the demonstration was difficult to control and would have been liable to cause much more serious disruption to intra-Community trade and public order.<sup>44</sup> In considering these factors, the CJEU considered whether the restrictions on the right to free movement and on the freedom of expression and assembly were proportionate to the other; it symmetrically balanced the competing rights and freedoms. In doing so, the CJEU concluded that the relevant authorities had taken account of both interests and had taken extensive steps to ensure that the protest only limited the fundamental freedom as far as was necessary, and that there were no ways of exercising the fundamental rights in question without constituting an unacceptable interference with that freedom.<sup>45</sup>

In contrast, the CJEU in *Viking Line* potentially subordinated the fundamental right to the fundamental freedom present. *Viking Line* concerned a Finnish company wishing to reflag their vessel in Estonia so that it could crew the ship with Estonian sailors on wages at significantly lower levels than the existing Finnish crew. To prevent this, the International Transport Workers Federation (ITWF) called on its affiliates to boycott the vessel. The owners of the vessel brought a claim before the English High Court arguing that the action breached their Article 49 TFEU freedom of establishment right. In answering the questions posed by the referring court, the CJEU considered that the exercise of the fundamental right in question (the right to strike) had to pursue a further legitimate objective to justify a limitation on Article

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<sup>40</sup> *ibid.*, [86]. The purpose of the demonstration was not to restrict trade of particular goods or trade from a particular place. The participants were exercising their fundamental rights by “manifesting in public an opinion which they considered to be of importance to society”

<sup>41</sup> *ibid.*, [87]

<sup>42</sup> *ibid.*, [88]. The demonstration did not “give rise to a general climate of insecurity such as to have a dissuasive effect on intra-Community trade flows as a whole...”

<sup>43</sup> *ibid.*, [90]. The CJEU considered that the authorities were entitled to consider that an outright ban would “have constituted an unacceptable interference with the fundamental rights of the demonstrators to gather and express peacefully their opinion in public”

<sup>44</sup> *ibid.*, [91]-[93]

<sup>45</sup> *ibid.*, [90] The CJEU considered that any further restrictions on the fundamental right would “have constituted an unacceptable interference with the fundamental rights of the demonstrators to gather and express peacefully their opinion in public.”

49 TFEU. The national court was required to ascertain “whether the objectives pursued by the FSU and ITF ... concerned the protection of workers”,<sup>46</sup> and “whether the jobs or conditions of employment of that trade union’s members ... were jeopardised or under serious threat.”<sup>47</sup> This shifted the weight of the fundamental right, potentially undermining the fundamental right’s equivalence to the fundamental freedoms as required under EU law.<sup>48</sup> This arguably created an *a priori* hierarchy not only between fundamental rights and freedoms but potentially within the EU’s fundamental rights catalogue itself, placing civil and political rights on a higher plane than labour/social rights.<sup>49</sup>

In applying a proportionality approach, the CJEU in *Viking Line* focussed on whether the trade union had exhausted all less restrictive means of achieving its objective. The CJEU held that

“it is for the national court to examine, in particular, on the one hand, whether, under the national rules and law applicable to that action, FSU did not have other means at its disposal which were less restrictive of freedom of establishment in order to bring to a successful conclusion the collective negotiations entered into with Viking, and, on the other, whether that trade union had exhausted those means before initiating such action.”<sup>50</sup>

Such a requirement undermines the exercise of the fundamental right, creating significant uncertainty for those engaging in industrial action. As Barnard states, how will trade unions know when they have exhausted all less restrictive options?<sup>51</sup> Will trade unions bargain for longer than they normally would to exhaust all less restrictive measures? This misunderstands the point of industrial action: industrial action is a tool to pressurise the

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<sup>46</sup> *ibid.*, [80]

<sup>47</sup> *Viking Line* (n.34) [84]

<sup>48</sup> See Trstenjak and Beysen (n 27); Catherine Barnard, ‘A Proportionate Response to Proportionality in the Field of Collective Action’ (2012) 37 *Industrial Law Journal* 117. Trstenjak and Beysen argue that requiring collisions be resolved “by determining whether written or unwritten grounds of justification inherent in the fundamental rights can justify the restrictions of the fundamental freedoms, sits uncomfortably alongside the principle of equal ranking for fundamental rights and fundamental freedoms, for the inability of fundamental rights to justify as such, without reference to the written or unwritten grounds of justification a restriction on a fundamental freedom suggests a hierarchical relationship between fundamental freedoms and fundamental rights which does not exist.”

<sup>49</sup> See Vilija Velyvyte, ‘The Right to Strike in the European Union after Accession to the European Convention on Human Rights: Identifying Conflict and Achieving Coherence’ (2015) 15 *Human Rights Law Review* 73, 90–3.

<sup>50</sup> *Viking Line* (n.34) [87]

<sup>51</sup> Barnard (n 48) 123.

employer to concede to the union's demands. The more disproportionate the action, the more successful it is likely to be. This has led to suggestions that the CJEU should adopt a 'procedural' proportionality approach when balancing fundamental rights.<sup>52</sup> Rather than focussing on whether the restriction was proportionate to the fundamental right pursued, the CJEU should focus on whether procedural requirements were complied with, and only where the essence of a fundamental freedom is at stake should the CJEU consider the limitation's substantive proportionality. This, however, is out of step with the use of rights as optimisation principles, and the use of the proportionality principle to maximise the competing rights and freedoms as much as possible. What the CJEU did not do in *Viking Line*, as it did in *Schmidberger*, was consider whether the exercise of a fundamental freedom was appropriate and necessary to achieve its objective in light of its impact on the fundamental rights present<sup>53</sup>: the analysis was one-sided.

The approaches in *Schmidberger* and *Viking Line* can however be reconciled in four ways. First, it can be argued that there is a hierarchy within the EU's fundamental rights catalogue: the CJEU gives greater protection to civil and political rights than labour and social rights.<sup>54</sup> Second, and linked with the above, the difference in approach could be based on the nature of the challenged action. Where the CJEU is faced with a vertical action – a claim that a public authority has restricted an individual (or groups) fundamental rights and/or freedoms– it will grant a wider margin of discretion, more akin to the *Wednesbury unreasonableness* standard, to the Member State in balancing the competing rights and freedoms.<sup>55</sup> Private actors, on the other hand, are required to satisfy a stricter test. This can be supported by the assumption that private actors are unlikely to pursue wider public interest goals.

Third, it may be that the CJEU's approach in *Viking Line* reflected its views as to what it considered to be an integral element of the fundamental right to strike. Legitimate

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<sup>52</sup> *ibid* 131–2.

<sup>53</sup> Velyvyte (n 49) 97.

<sup>54</sup> See TI Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16 *European Law Journal* 158; Phil Syrpis and Tonia Novitz, 'Economic and Social Rights in Conflict: Political and Judicial Approaches to Reconciliation' [2008] *European Law Review*. Harbo offers a more nuanced argument, arguing that the right to strike could be considered an economic right, and that it should only trump another economic right after the application of a strict proportionality approach.

<sup>55</sup> See Biondi (n 24) 60; Stephen Weatherill, 'Viking and Laval: The EU Internal Market Perspective' in Mark Freedland and Jeremias Prassl (eds), *Viking, Laval and Beyond: An Introduction* (Hart Publishing; Oxford 2016) 35. On *Wednesbury unreasonableness*; *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

industrial action could only be taken where it was “for the protection of workers...”<sup>56</sup> Action not aimed at such an objective is not protected under the ‘right to strike’ and cannot restrict a fundamental freedom. This mirrors the approach in the UK (interestingly where *Viking Line* was referred from) where the protection of industrial action is limited to situations where it is taken in “contemplation or furtherance” of a trade dispute.<sup>57</sup>

Finally, the CJEU’s strict application of proportionality in *Viking Line* can potentially be explained through the *Säger* “market access” or “restrictions” approach.<sup>58</sup> In *Viking Line*, the exercise of the fundamental right to strike was aimed at preventing the ship’s owner from exercising their fundamental freedom, except on terms acceptable to the FSU and ITF.<sup>59</sup> As such, it made sense that the CJEU required the trade union to have exhausted all other means at its disposal before exercising its rights: only where all less restrictive ways of exercising the fundamental right were exhausted could the CJEU allow such restriction of a fundamental freedom. If we compare this with *Schmidberger*, there is a significant difference to the restriction. In *Schmidberger*, the restriction on the fundamental freedom was temporary and the exercise of the claimant’s free movement rights was possible via different means. There was no market access restriction as seen in *Viking Line*.

### 3.1 Summary

As demonstrated in Chapter 4, section 3, and shown by the discussion of *Schmidberger* and *Viking Line* above, the CJEU adopts a rigorous assessment when balancing fundamental rights with other rights or objectives. In *Schmidberger*, for example, the CJEU explored in detail the factors considered by the Austrian authorities in allowing the protest to restrict the claimant’s free movement right. The CJEU adopted a symmetrical balancing, balancing the restriction on the free movement right against the exercise of the fundamental right and the harm to the exercise of the fundamental right against the exercise of the fundamental rights. The discussion also demonstrated that the CJEU will alter the focus of its assessment according to the context of the case.

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<sup>56</sup> *Viking Line* (n.34) [77]

<sup>57</sup> See ss.219 and 244 TULRCA.

<sup>58</sup> Barnard (n 48) 118–124. Barnard argues that this approach is similar to that seen under the ECHR, but in that the focus is on the restriction to the fundamental freedom rather than the fundamental right. See *Säger v Dennemeyer & Co Ltd* (Case C-76/90) [1991] E.C.R. I-4221.

<sup>59</sup> See *Laval* (n.34) in relation to the freedom to provide services.

The above discussion parallels with the approach of the CJEU in *Albany*. As demonstrated in Chapter 4, section 4, the CJEU in *Albany* adopted a symmetrical, or “fair”, balance between the competing objectives present. The CJEU balanced the harm to the social policy objectives against the need to achieve competition policy’s objectives, and vice versa. The exemption provides the point at which the social policy objectives always outweigh competition policy’s objectives. However, it may be that including fundamental rights within the CJEU’s balancing exercise in *Albany* does not alter the balance between the competing interests. Whilst fundamental rights considerations would add additional factors into the balance – the Article 28 CFREU right to collective bargaining and, possibly, the Article 16 CFREU freedom to conduct a business – it may be argued that adding these interests would end with the same result. Where the stipulated conditions in *Albany* are met, the social policy objectives and any right to collective bargaining may outweigh the conflicting competition policy objectives and associated fundamental rights. I shall return to this in section 4.3 below, where the chapter will examine the effect of Article 28 CFREU on the exemption in *Albany*.

Before exploring the impact of Article 28 CFREU on *Albany*, section 4 will do two things. First, section 4.1 will explore whether Article 28 CFREU is a right or principle. This is important as categorisation as a right or principle affects the provision’s normative weight. If Article 28 CFREU is a principle, it has limited effect. Second, section 4.2 will explore the scope of Article 28 CFREU. The scope of Article 28 CFREU will affect any reconsideration of the *Albany* exemption (and balancing exercise) and/or argue against the need for an exemption. For example, where Article 28 CFREU provides a positive right for workers or trade unions it has greater normative effect than if an ‘empty provision’.

#### 4. The Impact of Fundamental Rights and the CFREU on Albany

As shown in section 2, fundamental rights have equivalence to the provisions of the Treaties. Where present, fundamental rights must be considered by the CJEU, other EU Institutions, and Member States when acting within the scope of EU law. However, in 2000 the EU did not recognise a right to collective bargaining as a fundamental right. AG Jacobs in *Albany* argued that this was due to a lack of convergence by national legal orders and international treaties to find such a right in EU law.<sup>60</sup> AG Jacobs drew specific attention to the position under Article

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<sup>60</sup> *Albany* (n.1) [AG132]-[AG164].

11 ECHR where the ECtHR had not yet recognised the right to collective bargaining within the scope of the right to join and form trade unions. This immediately creates a problem in attempting to critique the CJEU's approach in *Albany* by reference to fundamental rights. If such considerations were not present when the CJEU balanced the competing objectives, the CJEU was right not to consider them.

However, this is no longer the case. The right to collective bargaining has been specifically included within the CFREU, and CJEU case law refers to the "right to collective bargaining."<sup>61</sup> Article 28 CFREU explicitly states that "[w]orkers and employers, or their respective organisations, have, in accordance with Community law and national laws and practice, *the right to negotiate and conclude collective agreements at appropriate levels, and in cases of conflict of interest, to take collective action to defend their interests, including strike action.*" (emphasis added) This has two effects on the *Albany* exemption. First, Article 28 CFREU requires that Article 101 TFEU is interpreted in a manner compliant with the Article 28 CFREU right. As Chapter 4 argued in relation to the Treaty integration clauses and the CJEU's teleological approach, where the application of Article 101 TFEU gives adequate weight to such considerations they are not seriously undermined. Whether we can interpret Article 101 TFEU in such a manner shall be explored in Chapters 6 and 7. Second, Article 28 CFREU potentially supports the exemption in *Albany*. If the application of Article 101 TFEU disproportionately restricts Article 28 CFREU, Article 101 TFEU should be disapplied. I shall return to these points in section 4.3 below.

These two effects assume that Article 28 CFREU is a right, and not a principle. The distinction between rights and principles derives from the CFREU itself, which provides for different normative effects. This difference is like that of Treaty provisions which have direct effect, and those which do not. This distinction can be seen principally within Article 52 CFREU. Article 52(5) CFREU states that principles may be implemented by legislative and executive acts, and "shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality."<sup>62</sup> They do not give rise to direct claims of positive action against

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<sup>61</sup> See *Commission v Germany* (n.34); *AKT* (Case C-533/13) ECLI:EU:C:2015:173; *UNIS and Beaudout Pere & Fils SARL* (Joined Cases C-25 and 26/14) ECLI:EU:C:2015:821.

<sup>62</sup> Article 52(5) CFREU. The Explanations state that "[p]rinciples may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed."

EU institutions or Member States.<sup>63</sup> Where a principle has not been implemented either by European or national legislation, subject to the requirements of Article 51(1) CFREU, it has little normative weight in a balancing exercise.<sup>64</sup> Rights, on the other hand, have significant normative weight; giving rise to an interpretative obligation, providing grounds for judicial review, and giving rise to tortious liability when breached.

This has implications for the impact that Article 28 CFREU could have on Article 101 TFEU. If Article 28 CFREU is a principle, it would still need to be considered but would not have significant weight. As a principle, EU institutions and Member States would only have to “observe” it.<sup>65</sup> It would not need to be included within the application of the Treaty competition rules as they do not aim at implementing collective bargaining. Thus, for Article 28 CFREU to have any normative effect on Article 101 TFEU, it must be a right. The following subsection will examine whether Article 28 CFREU is a right or principle.

#### 4.1 Is Article 28 a right or principle?

Article 28 CFREU states that

[w]orkers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at appropriate levels, and in cases of conflict of interest, to take collective action to defend their interests, including strike action.

If Article 28 CFREU is a ‘right’, then the right (and its associative social policy objectives) should, as far as is possible, be taken into account when applying Article 101 TFEU. Where this occurs, it may be argued that such considerations are not seriously undermined. Although Article 28 CFREU may be restricted, this is only after balancing the right against the competitive harm caused. Where that harm is disproportionate to the fundamental right (and

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<sup>63</sup> AG Cruz Villalon states that principles contain obligations upon the public authorities, thus contrasting with ‘rights’, whose purpose is the protection of directly defined individual legal situations, though the specific expression of ‘principles’ at lower levels of the legal order is also possible. Public authorities must respect the individual legal situation guaranteed by ‘rights’, but in the case of a ‘principle’ the obligation is much more general: its wording determines not an individual legal situation, but general matters and ones which govern the actions of all public authorities.” See *Association de Mediation Sociale v Union locale des Syndicats CGT* (Case C-176/12) [2014] 2 C.M.L.R. 41.

<sup>64</sup> Lenaerts (n 20) 399–401.

<sup>65</sup> See Article 51(1) CFREU.

social policy objectives) pursued, it would be legitimate to require the parties to adopt a more proportionate means of achieving such considerations. As such, the *Albany* exemption may not be necessary to protect such objectives.

Determining whether a Charter provision is a right or principle has been subject to limited discussion by the CJEU. The CJEU has tended not to distinguish between rights and principles but rather to interpret the challenged legislation in a Charter-friendly manner.<sup>66</sup> Indeed, the CJEU has avoided the issue in recent cases.<sup>67</sup> For example, in *AMS* and *Glatzel*,<sup>68</sup> the CJEU focussed on whether the legislation in question was compliant with the Charter provision. The case law, *Dominguez* and *AMS* specifically,<sup>69</sup> does however allow for a general approach to be identified. In both cases, the CJEU adopted a systematic, teleological approach, focussing on considerations such as where the provision is in the Charter, and its wording. As such, it is possible to predict whether a CFREU provision is a right or principle.<sup>70</sup>

In *Dominguez*, the question was whether Article 31(2) CFREU was a right or principle.<sup>71</sup> Although the CJEU does not address this point, AG Trstenjak is clear that Article 31(2) CFREU is a right.<sup>72</sup> AG Trstenjak argued that as Article 31(2) CFREU's wording is very clear, worded in an individual manner, and its language differs from that used in other provisions of the solidarity chapter; this would be sufficient to establish Article 31(2) CFREU as a right.<sup>73</sup> AG

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<sup>66</sup> Jasper Krommendijk, 'Principled Silence or Mere Silence on Principles? The Role of the EU Charter's Principles in the Case Law of the Court of Justice' (2015) 11 *European Constitutional Law Review* 321, 340–50.. See also AG Bot in *Kamberaj v Instituto per l'Edilizia sociale della Provincia autonoma di Bolzano* (Case C-571/10) [2012] 2 C.M.L.R. 43, who argued that the case provided a good opportunity to develop the scope of conditions and restrictions and the way in which rights and principles could be reconciled.

<sup>67</sup> See, for example, *Monika Kusionová v SMART Capital a.s.* (Case C-34/13) (2014) OJ C409/7; *Pohotovost s.r.o. v Vasuta* (Case C-470/12) (2014) OJ C112/9; *Kamberaj*, *ibid.* Denman argues this suggest that the CJEU sees the distinction as unimportant. D Denman, 'The Charter of Fundamental Rights' (2010) 4 *European Human Rights Law Review* 349, 369–70.

<sup>68</sup> *Glatzel v Freistaat Bayern* (Case C-356/12) [2014] 3 C.M.L.R. 52

<sup>69</sup> *Dominguez v Centre informatique du Centre Ouest Atlantique and Prefet de la region* (Case C-282/10) [2012] 2 C.M.L.R. 14; *AMS* (n.70)

<sup>70</sup> House of Commons European Scrutiny Committee 'The application of the EU Charter of Fundamental Rights in the UK: a state of confusion' Forty-Third Report of Session 2013-2014, HC 979; paras [92]-[93]. See also Steve Peers and Sacha Prechal, 'Article 52 - Scope and Interpretation of Rights and Principles' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing; Oxford 2014)., who argue that given the fact-specific nature of the CFREU's application, "it is highly questionable whether a distinction between rights and principles can or should be drawn for each Charter article in the abstract and for once and for ever." [52.184]

<sup>71</sup> Article 31(2) CFREU holds that "[e]very worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave."

<sup>72</sup> *Dominguez* (n.69) [AG75]. AG Trstenjak cites her opinion in *Criminal Proceedings against Gysbrechts* (Case C-205/07) [2009] 2 C.M.L.R. 2, [AG38], and AG Tizzano in *BECTU* (Case C-173/99) [2001] 3 C.M.L.R. 7, [AG28].

<sup>73</sup> *Dominguez*, *ibid.*, [AG76]-[AG77]

Trstenjak further argues that due to the “proximity ... substantive connections and structural similarities” of Article 31(2) CFREU with Articles 28 and 29 CFREU, which grant subjective rights, Article 31(2) CFREU also contains “a subjective right.”<sup>74</sup> In *AMS*, the same approach led the Court to conclude that Article 27 CFREU was a principle and not a right.<sup>75</sup> The Court held that for Article 27 CFREU “to be fully effective, it must be given more specific expression in European Union or national law.”<sup>76</sup> The Directive did not “concretise” Article 27 CFREU, thus the provision could not be relied upon.<sup>77</sup> It did not “confer on individuals a right which they may invoke.”<sup>78</sup>

In *AMS*, AG Cruz Villalón is more structured in his approach. He states that the first thing to note is that Article 27 CFREU is found in the Chapter labelled “Solidarity”, reflects “Article 21 of the European Social Charter and ... the Community Charter of the Fundamental Social Rights of Workers”, and appeared in EU secondary legislation pre-CFREU.<sup>79</sup> This implied that Article 27 CFREU was a right. However, other factors, AG Cruz Villalón concluded, negated this and meant that Article 27 CFREU was a principle. For structural reasons, AG Cruz Villalón states that Article 27 CFREU implies a principle and not a right.<sup>80</sup> The scope of the provision is “extremely weak ... [t]he content is so indeterminate that it can be interpreted only as an obligation to act.”<sup>81</sup> Article 27 CFREU only requires Member States “to determine the objective content (information and consultation of workers) and certain outcomes...”<sup>82</sup> Furthermore, AG Cruz Villalón adopts a teleological approach arguing that the wording of most provisions in the solidarity chapter have similar forms of wording.<sup>83</sup> “That means that there is a strong presumption that the fundamental rights set out in that title belong to the category of “principles”. Although the position of a provision in the Charter can only be

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<sup>74</sup> *ibid.*, [AG78]; this is on the basis that both provisions state that individual holders of the fundamental right have a “right” thus grant subjective rights.

<sup>75</sup> Article 27 CFREU states that “[w]orkers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.”

<sup>76</sup> *AMS* (n.63) [45].

<sup>77</sup> *ibid.*, [48]

<sup>78</sup> *ibid.*, [49]

<sup>79</sup> *ibid.*, [52]

<sup>80</sup> *ibid.*, [AG53]

<sup>81</sup> *ibid.*, [AG54]

<sup>82</sup> *ibid.*

<sup>83</sup> *ibid.*, [AG55]

presumptive of its categorisation, in the case of art.27 this is a feature additional to the ones listed above.”<sup>84</sup>

The following approach can be distilled from the above discussion. In determining whether a Charter provision is a right or principle, a teleological approach would be adopted. First, the Court will look at the wording of the article. Does the wording define an individual legal situation, or does it require further “concretisation”? The CJEU will also consider wider arguments to determine whether the provision is a right or principle. In both *AMS* and *Dominguez*, the structure of the provision and its position in the CFREU are considered. For example, does the provision match the wording of the other provisions within that section and what is the “title” of the section in which it is found? This is not exhaustive, and other considerations will be relevant in individual cases. This approach is similar to that adopted by the CJEU in determining whether a provision has direct effect.<sup>85</sup> A provision has direct effect where it is sufficiently clear, precise and unconditional. This is key to both assessments; is the provision clearly expressed to protect an individual legal situation. For example, in *AMS*, the CJEU considered that Article 27 CFREU needed further “specific expression” in EU or national law; it was not sufficiently clear, precise or unconditional to be relied upon.<sup>86</sup>

Therefore, is Article 28 CFREU a right or principle? The wording of Article 28 CFREU strongly suggests that it is a right. It states that “[w]orkers and employers ... have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements.”<sup>87</sup> It can be argued that this clearly defines the content of Article 28 CFREU (the negotiation and conclusion of collective agreements) and who is covered by it (employers, workers, and their respective organisations).<sup>88</sup> Adopting wider teleological arguments, the wording of Article 28 CFREU is clearer and more precise than that seen in other provisions found in the “Solidarity” section of the CFREU. This can be seen

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<sup>84</sup> *ibid.*

<sup>85</sup> See *Van Gend en Loos* (Case 26/62) [1963] E.C.R. 1. For a provision to have direct effect, it must be clear, precise and unconditional.

<sup>86</sup> *AMS* (n.63) [44]-[49]

<sup>87</sup> Article 28 CFREU

<sup>88</sup> It may be argued that Article 28 CFREU does not define “collective agreement” in that it does not identify what a “collective agreement”. It may therefore need further concretisation to be clear and precise. However, this is the same for other CFREU provisions which may be rights. For example, Article 11 CFREU provides for the right to freedom of expression, without defining its limits.

clearly if compared, for example, with Article 27 CFREU.<sup>89</sup> These linguistic differences point towards Article 28 CFREU containing a right rather than a principle.<sup>90</sup>

Three further arguments can be made in support of this conclusion. First, AG Trstenjak has consistently opined that Article 28 CFREU creates a right and not a principle.<sup>91</sup> In *Commission v Germany*, AG Trstenjak reached this conclusion by drawing “inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by instruments for the protection of fundamental rights which the Member States have collaborated or which they are signatories.”<sup>92</sup> Thus, as collective bargaining is recognised as a right by various international instruments, “it is beyond question that the right to bargain collective[ly] ... must be recognised also in the Community legal order as fundamental rights which form part of the general principles of Community law.”<sup>93</sup>

This links with the second argument supporting such a conclusion. As the right to collective bargaining is protected under Article 11 ECHR,<sup>94</sup> Article 52(3) CFREU requires that a reciprocal right is found under Article 28 CFREU. Article 52(3) CFREU holds that where a Charter right corresponds with a right guaranteed under the ECHR, the meaning and scope given to the Charter right shall be the same. Although the explanations to the Charter do not list Article 28 CFREU as being of equivalence to the ECHR right, this does not defeat the above argument. To find that Article 28 CFREU does not have equivalence to the right to collective bargaining under Article 11 ECHR would be illogical. It would mean that the right to collective bargaining receives less protection under EU law than the ECHR. It could lead to situations where individuals claim that their Article 11 ECHR right is infringed by the exercise and implementation of EU law. The ECtHR could be asked to assess EU law for compliance with human rights. This would question the effectiveness of EU law.

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<sup>89</sup> Note the difference between the words “must ... be guaranteed” in Article 27, with “have ... the right to” in Article 28.

<sup>90</sup> In *AMS*, AG Cruz Villalon argues that the group of provisions contained under the heading “Solidarity” “incorporates rights mainly regarded as *social* rights with respect to their substance, for the content of which a form of wording such as that in Article 27 is preferred. This means that there is a strong presumption that the fundamental rights set out in that title belong to the category of ‘principles.’” See *AMS* (n.63) [AG55]

<sup>91</sup> *Commission v Germany* (n.34); *Dominguez* (n.69)

<sup>92</sup> *Commission v Germany*, *ibid.*, [76].

<sup>93</sup> *ibid.*, [77]-[78]. AG Trstenjak cites the European Social Charter, the Community Charter of the Fundamental Social Rights of Workers, and even the Charter of Fundamental Rights of the European Union itself. Interestingly, AG Trstenjak does not cite the position taken in relation to Article 11 ECHR.

<sup>94</sup> *Demir and Baykara v Turkey* (2009) 48 E.H.R.R. 54, [154].

The CJEU has also held that, in regard to fundamental rights, it will draw “inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States... are signatories.”<sup>95</sup> On this basis, it would be counter-intuitive to argue that Article 28 CFREU is not a right, thus creating a lacuna in protection for the right to collective bargaining under EU law. Indeed, in *Demir* the ECtHR cited Article 28 CFREU as one of the international instruments recognising the right to collective bargaining.<sup>96</sup> As such, it is logical to conclude the right to collective bargaining is a right under the Charter.<sup>97</sup>

This conclusion, that Article 28 CFREU is a right, does not consider its scope within EU law. Therefore, section 4.2 shall briefly explore whether Article 28 CFREU provides any ‘positive’ rights for workers or trade unions, or whether it simply provides a ‘negative’ right against interference. Does Article 28 CFREU provide substantive protection, or is it an ‘empty provision’? The scope of Article 28 CFREU may affect any reconsideration of the *Albany* exemption and/or argue against the need for such an exemption.

#### 4.2 The Scope of Article 28 CFREU

Article 28 CFREU states that “[w]orkers and employers, or their representative organisations, have, *in accordance with Union law and national law and practices*, the right to negotiate and conclude collective agreements.”<sup>98</sup> (emphasis added) Its scope, therefore, is subject to the protection granted by EU and national law. It is “heavily contingent on Community law and national laws being in place to give effect to the right...”<sup>99</sup> and “arguably does not provide any positive duty to guarantee the right to bargain collectively.”<sup>100</sup> This does not mean that Article 28 CFREU does not carry any weight. Article 28 CFREU may carry weight as a negative right

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<sup>95</sup> See *Internationale Handelsgesellschaft* (n.5) [4]; *Nold* (n.7) [13]; *ERT* (n.11) [41].

<sup>96</sup> *ibid.*, [150]

<sup>97</sup> It could be argued that we would have to read the restriction on the right to collective bargaining provided by Article 11(2) ECHR, due to Article 52(3) CFREU, however, this may not be necessary as Article 28 CFREU can be restricted by Article 52(1) CFREU.

<sup>98</sup> The emphasis on the right being in accordance with national laws and standards reaffirms the position in Protocol 30. Protocol 30 states that the Charter only grants justiciable rights within the United Kingdom and Poland as far as they are already provided for in national law. For further discussion in relation to the UK, see *NS v Secretary of State for the Home Department* [2010] EWCA Civ. 990; *NS v Secretary of State for the Home Department* (Joined Cases C-411/10 and 493/10) [2012] 2 C.M.L.R. 9.

<sup>99</sup> Keith Ewing, ‘The Death of Social Europe’ (2015) 26 *Kings Law Journal* 76, 84. See also, *Commission v Germany* (n.51) [38]; and Article 52(6), which states that “[f]ull account shall be taken of the national laws and practices as specified in this Charter.”

<sup>100</sup> *Unite v United Kingdom* [2017] I.R.L.R. 438, [62]

against interference, including against the application of Article 101 TFEU or other Treaty provisions. This section will examine the scope of Article 28 CFREU.

The right contained in Article 28 CFREU potentially has the same meaning and scope as Article 11 ECHR. Under Article 52(3) CFREU, where a Charter right corresponds with a Convention right, “the meaning and scope of those rights shall be the same...”<sup>101</sup> Given the uncertainty as to what the Article 11 ECHR right to collective bargaining provides, it is arguable that similar concerns arise under Article 28 CFREU. It could, as Ewing argues, “not impose any obligation on States to ensure that collective bargaining is conducted or even to promote the exercise by workers or employers of this right.”<sup>102</sup>

This, however, is qualitatively different to protecting existing collective agreements. As can be seen from *Demir*, Article 11 ECHR provides a negative right against interference. In *Demir*, the ECtHR held the right to collective bargaining to be “essential element, in principle,” of the right to join or form a trade union under Article 11.<sup>103</sup> The ECtHR held that States have a wide margin of appreciation in how they regulate the right, however restrictions that affect the “essential elements of trade union freedom” are prohibited.<sup>104</sup> Provided that a restriction which does not leave the right to collective bargaining devoid of any substance, as was the case in *Demir*, it is unlikely to violate Article 11 ECHR. This wide margin also features in the ECtHR’s decision in *Unite*. In *Unite*, the ECtHR held that there was no positive obligation under Article 11 ECHR on the State to enable collective bargaining. The UK Government’s decision to abolish a statutory, compulsory bargaining mechanism, the Agricultural Wages Board, was not an unjustified interference with the right to collective bargaining. Significant in this regard, the ECtHR held, was that the union and its members could still bargain voluntarily, access the statutory recognition procedure and conclude legally enforceable agreements, and use industrial action to ‘force’ an employer to engage in collective bargaining.<sup>105</sup>

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<sup>101</sup> Article 52(3) CFREU. The right under Article 28 CFREU should contain, as a minimum, the same protections as the right to collective bargaining under Article 11 ECHR.

<sup>102</sup> Ewing (n 99) 84. Ewing describes this as meaning that Article 28 CFREU is “empty of substance.” See also, Steve Peers (ed), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) para 28.84.

<sup>103</sup> See *Demir* (n.94) [154]

<sup>104</sup> *ibid.*, [144]. This includes the right to collective bargaining and the right to strike. On the right to strike see *Enerji Yapi-Yol Sen v Turkey* (Application No. 68959/01) judgment delivered 21 April 2009

<sup>105</sup> *Unite* (n.100) [65]

The decisions in *Demir* and *Unite* appear to confirm that Article 11 ECHR only protects a right to voluntary collective bargaining.<sup>106</sup> Both cases argued that a restriction on voluntary bargaining could only be justified by a “pressing social need”. This narrow view of the right to collective bargaining arguably confirms the ECtHR’s position in *Wilson and Palmer*<sup>107</sup>: the right to collective bargaining only allows workers to instruct or permit their union to make representations to their employer. As implied from the concurring decisions in *Demir* and *Unite*, the right to collective bargaining only prevents States from interfering with voluntary collective bargaining and prohibiting the conclusion of collective agreements where the parties want to conclude one.<sup>108</sup>

It is possible that the CJEU would adopt a similar narrow view of Article 28 CFREU; only providing the right for workers and employers (and their representatives) to voluntarily bargain collectively and conclude collective agreements.<sup>109</sup> It is probable that Article 28 CFREU contains no positive duty to enable collective bargaining between the social partners, but only a negative protection against interference with voluntary agreements.<sup>110</sup> In the context of *Albany*, where a voluntary collective agreement is challenged under Article 101 TFEU as anti-competitive, the negative right under Article 28 CFREU is highly significant. Where the competing objectives/interests/rights are balanced, Article 28 CFREU potentially provides significant weight in the balancing exercise. However, this does not necessarily mean that the balance in *Albany* is altered.

The narrow scope of Article 28 CFREU does not affect the interpretative obligation that arises from the CFREU. As already discussed, rights contained in the CFREU (as fundamental rights of the EU) are also general principles. Thus, they can be used to limit the application of Treaty provisions and require that the EU and Member States interpret EU legislation in a manner compatible with Charter Rights. Section 4.3 will examine the potential impact of Article 28 CFREU on Article 101 TFEU.

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<sup>106</sup> See Kalina Arabadjieva, ‘Another Disappointment in Strasbourg: *Unite the Union v United Kingdom*’ (2017) 46 *Industrial Law Journal* 289.

<sup>107</sup> *Wilson and Palmer v United Kingdom* [2002] I.R.L.R. 568

<sup>108</sup> See Judge Spielmann in *Demir* (n.94) [10].

<sup>109</sup> See RJ Harvey, *Harvey on Industrial Relations and Employment Law*. (Butterworths 2001) para N1[903.18].

<sup>110</sup> It should be noted that Article 52(3) CFREU does allow the CJEU to provide greater protection than that provided under the ECHR.

### 4.3 Collective bargaining as a CFREU Right

Article 51(1) CFREU states that the Charter's provisions are "addressed to the institutions and bodies of the Union with due regard to the principle of subsidiarity and to Member States when they are implementing Union law."<sup>111</sup> EU institutions and Member States must "respect the rights [contained in the CFREU] ... in accordance with their respective powers."<sup>112</sup> As such, Article 28 CFREU places an obligation on the CJEU to interpret Article 101 TFEU in a manner "which renders it compatible with the Treaty and the general principles of law."<sup>113</sup> Article 101 TFEU should therefore be interpreted in a manner compatible with the Article 28 CFREU right to collective bargaining. This would ensure that the Article 28 CFREU right is considered within an Article 101 TFEU analysis. This approach fits with the Treaty integration clauses and teleological approach discussed in Chapter 4. They require that a wide interpretation of Article 101 TFEU is adopted which takes account of the social policy objectives pursued by collective agreements. Where this is possible, the application of Article 101 TFEU to a collective agreement may not seriously undermine the policy objectives pursued by such agreement. Whether we can interpret Article 101 TFEU in such a manner shall form the basis of the discussion in Chapters 6 and 7. The chapters will explore whether we can interpret Article 101 TFEU in a manner compatible with Article 28 CFREU (and the social policy objectives pursued by collective agreements).

If such an interpretation is not possible, the CJEU will have to balance the competing objectives: the economic objectives, and any relevant fundamental rights, pursued by Article 101 TFEU with the social policy objectives and Article 28 CFREU right. This would be through a balancing approach as set out in section 3 above, considering whether the application of Article 101 TFEU to the collective agreement in question disproportionately restricts the exercise of the right to collective bargaining.<sup>114</sup> This should include whether the application of Article 101 TFEU considered the fundamental right. As set out in section 3, fundamental rights can be limited where such limitation is (i) provided for by law; (ii) respects the essence of the right and/or freedoms; and (iii) is proportionate: the restriction is necessary and genuinely meet objectives of general interest.<sup>115</sup> This can be by other CFREU rights (Article

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<sup>111</sup> Article 51(1) CFREU

<sup>112</sup> *ibid.*

<sup>113</sup> See *Tridimas* (n.9); *Commission v Council* (n.21); *Ruoh* (n.20).

<sup>114</sup> See also the decisions in *Nold* (n.7); *Hauer* (n.8), [19]-[30].

<sup>115</sup> See Article 52(1) CFREU; *Kjell Karlsson* (n.31) [45]; *Wachauf*, (n.11) [18].

52(1) CFREU), or Treaty objectives (*Hauer*). One can also argue that some rights are limited in that they are only guaranteed in accordance with EU law.<sup>116</sup> For example, Article 28 CFREU states that the right to collective bargaining is in “accordance with Union law and national laws and practices”. This implies that the right to collective bargaining should expect to be subject to the application of Article 101 TFEU. This does not mean that a collective agreement will fall foul of Article 101 TFEU but that Article 101 TFEU should in principle apply. This conclusion can be implied from the decision in *Hennigs and Mai*, where the CJEU held that the right to collective bargaining had to be exercised in conformity with EU secondary law.<sup>117</sup> Article 28 CFREU could not mitigate the application of the Framework Directive.<sup>118</sup>

Key to considering whether any restriction on Article 28 CFREU is proportionate is that the right is not deprived of its essence. In balancing the competing objectives/rights the CJEU must ensure that the essence of the respective right is protected. This is important. Can we conceive of a situation where collective agreements could be subjected to Article 101 TFEU without depriving them of their essence? This is where the symmetrical balancing approach identified in section 3 above, and discussed in Chapter 4, section 4, is vital. Where this approach is adopted, it is possible that neither competing interest(s) is deprived of its essence. This ensures that the interests are maximised as much as possible. The discussion in Chapter 4, section 4, argued that such an approach was adopted by the CJEU in *Albany*. The exemption protects the essence of both the social and competition policy objectives. This is through the qualified, limited nature of the CJEU’s exemption. A collective agreement only falls outside the scope of Article 101 TFEU where it meets *Albany*’s stipulated conditions. This implies that it sees those two criteria as being essential to the attainment of the social policy objectives pursued by such agreements. Furthermore, where the agreement does not fall within the scope of *Albany*’s exemption, Article 101 TFEU applies. This provides some, albeit limited, scope for the application of Article 101 TFEU to collective agreements.

In this regard, including the Article 28 CFREU right to collective bargaining within the CJEU’s balancing exercise in *Albany* may not alter its balance. Whilst this may bolster the balance in favour of exempting collective agreements, it may not extend the scope of the

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<sup>116</sup> See Schiek and others (n 16) 85.

<sup>117</sup> See *Hennigs v Eisenbahn-Bundesamt; Land Berlin v Mai* (Joined Cases C-297/10 and 298/10) [2011] E.C.R. I-7965, [67]-[68].

<sup>118</sup> *ibid.* The CJEU did assess the proportionality of the Directive’s limitation of Article 21 CFREU’s prohibition on discrimination.

exemption. As argued in section 4.2 above, the scope of Article 28 CFREU is potentially restricted to a negative right against interference: Article 28 CFREU may only provide protection against interference in voluntary agreements. Thus, the protection provided by the *Albany* exemption may already ensure that the essence of the Article 28 CFREU right is protected. *Albany* protects collective agreements which are between management and labour (or their representatives) and aim at improving working terms and conditions. Voluntarily agreed collective agreements, protected under Article 28 CFREU, would generally meet these criteria.

However, where Article 101 TFEU can be interpreted in a manner which renders it compatible with the Article 28 CFREU right it is probable that any restriction on collective bargaining and collective agreements would be proportionate. Are such interests seriously undermined where they are given adequate consideration within the application of Article 101 TFEU? This assessment was missing from the CJEU's decision in *Albany*. If the application of Article 101 TFEU sufficiently protected the social policy objectives, an exemption may not have been necessary. Whether this is possible shall be explored in Chapters 6 and 7, which will explore what would happen were Article 101 TFEU to be applied to a collective agreement.

## 5. Summary and concluding comments

The discussion in this Chapter has shown that fundamental rights considerations may affect *Albany's* exemption. First, the discussion has shown that when EU fundamental rights conflict with other fundamental rights and Treaty provisions and objectives, the CJEU resolves the conflict through a proportionality analysis. Section 3 showed that such an approach seeks to achieve a fair balance, applying a 'double or symmetrical balancing'. This ensures that the essence of the competing rights and interests is respected and is consistent with the constitutional approaches identified in Chapter 4, section 3. Under such an approach, neither right is devoid of its essence. This approach, section 4.3 argued, can be seen in the CJEU's balancing in *Albany*. In *Albany*, the CJEU's creation of a limited exemption implies that exempting all collective agreements from EU competition law was disproportionate. Rather than preventing any application of EU competition law, the CJEU retained a limited area of application for Article 101 TFEU. Thus, it was argued, adding fundamental rights considerations to the balance may not alter anything. The *Albany* exemption may already

ensure that the essence of the Article 28 CFREU right is protected. It may, as section 4.3 suggested, be that *Albany*'s stipulated conditions are considered an integral element of the (negative) Article 28 CFREU right. Including such interests would overcomplicate an already complex balancing exercise for little practical benefit.

The chapter has also shown that EU fundamental rights have an interpretative obligation. This stems from the CJEU's development of EU fundamental rights as general principles of EU law. As such, and as shown in sections 2 and 4.3, EU law should be interpreted as far as possible in a manner compatible with EU fundamental rights (and CFREU provisions). In the context of *Albany*, the Chapter argued that this means that Article 101 TFEU should be interpreted in a manner which gives appropriate weight to the Article 28 CFREU right to collective bargaining. This links with the arguments in Chapter 4, section 2, which showed that the Treaty integration clauses and CJEU's teleological approach require that wider objectives are included within the application and interpretation of EU law. This, chapter 4 argued, requires that Article 101 TFEU be interpreted to include the social policy objectives pursued by collective agreements. As such, where Article 101 TFEU can be interpreted in a way which gives appropriate weight to the social policy objectives and the right to collective agreements, such interests are not seriously undermined. As such, the exemption in *Albany* may not be necessary.

The discussion in Chapters 4 and 5 has focussed on how the CJEU has attempted to resolve the conflict present in *Albany* between the competing objectives, and not whether a wider interpretation of Article 101 TFEU makes the *Albany* exemption unnecessary. Chapters 6 and 7 will examine whether Article 101 TFEU can be interpreted in a way which considers both the social policy objectives pursued by collective agreements and the Article 28 CFREU right to negotiate and conclude collective agreements. Chapter 6 will consider Article 101(1) TFEU; Chapter 7, Article 101(3) TFEU. The discussion in these chapters will examine whether we can include such considerations within Article 101 TFEU, giving them appropriate weight in the provision. As such, any restriction on the social policy objectives and Article 28 CFREU right may not be disproportionate and seriously undermine such objectives; the *Albany* exemption potentially may not be needed. Chapters 6 and 7 will also challenge the assumption that inherent restrictions contained in collective agreements infringe Article 101 TFEU. The discussion will examine whether collective agreements fall within the scope of

Article 101 TFEU, without needing to interpret Article 101 TFEU in a manner compatible with the social policy objectives and Article 28 CFREU right.

## Chapter 6 – Do we need an exemption? The application of Article 101 to collective agreements.

### 1. Introduction

Chapters 4 and 5 explored the constitutional aspects of the CJEU's decision in *Albany*, examining the potential impact of the Treaty integration clauses, the CJEU's teleological approach, and EU fundamental rights on the CJEU's decision. The discussion showed two things. First, the chapters explored how the CJEU resolves conflicts between objectives, rights, and interests by balancing through the proportionality principle. It showed that the CJEU in *Albany* balanced the competing objectives present through the proportionality principle, balancing the harm to the social policy objectives against the need to achieve the competition policy objectives present. In doing so, the CJEU concluded that the social policy objectives outweighed competition policy's objectives where its stipulated conditions were met.<sup>1</sup> The Chapters concluded that the CJEU's approach was legally correct. Second, Chapters 4 and 5 showed that the Treaty integration clauses, the CJEU's teleological approach, and EU's approach to fundamental rights, require that EU law show be interpreted in a manner which takes account of wider EU objectives and EU fundamental rights. The chapters proposed that this provides an alternative to the *Albany* exemption. Where the social policy objectives and Article 28 CFREU right to collective bargaining (and agreements) are given adequate weight in the application of Article 101 TFEU, they are not seriously undermined. As such, an exemption may not be necessary.

The purpose of Chapters 6 and 7 is to explore whether we can reconcile the competing interests through the application of Article 101 TFEU. The chapters will examine whether Article 101 TFEU can be interpreted in a manner which gives adequate weight to the social policy objectives pursued by collective agreements and the Article 28 CFREU right to collective bargaining and agreements. Whether this is possible, was not explored by the CJEU in *Albany*. The CJEU simply held that collective agreements contained inherent restrictions on competition, and that applying EU competition law would seriously undermine the social policy objectives pursued by such agreements. It did not assess whether the social policy

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<sup>1</sup> *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (Case C-67/96) [2000] 4 C.M.L.R. 116, [59]-[60].

objectives pursued were seriously undermined, nor whether Article 101 TFEU prohibited the agreement in question. Where a collective agreement does not fall within Article 101 TFEU, or where the application of Article 101 TFEU gives adequate weight to the social policy objectives and Article 28 CFREU right, are such objectives undermined? Only where a collective agreement falls foul of Article 101 TFEU is it possible to assess whether the social policy objectives pursued would be seriously undermined.

This chapter, Chapter 6, will examine whether a collective agreement falls within Article 101(1) TFEU including examining whether social policy objectives and the Article 28 CFREU right can be included within the Article 101(1) analysis. Chapter 7 will focus on Article 101(3) TFEU. The discussion in this Chapter will do the following. First, Section 2 will explore whether a collective agreement could fall outside Article 101(1) TFEU without needing to consider the social policy objectives pursued by it.<sup>2</sup> The discussion will focus on the Vertical Block Exemption Regulations, whether the agreement has an appreciable effect on trade, and whether the agreement appreciably restricts competition. The discussion will show that a collective agreement may fall outside Article 101(1) TFEU without considering its wider policy objectives. This, however, will not be in all cases. As such, the social policy objectives, and fundamental rights interests may need to be included within the Article 101(1) TFEU analysis to ensure that they are not seriously undermined. Section 3 will explore how the social policy objectives and Article 28 CFREU right can be included within Article 101(1) TFEU. The section will also examine the implications that such an approach has for the *Albany* exemption. Section 4 concludes the chapter.

## 2. Article 101(1) TFEU – A Restriction on Competition?

Article 101(1) TFEU prohibits agreements which may affect trade between Member States and have as their “object or effect the prevention, restriction or distortion of competition within the internal market”.<sup>3</sup> Whether an agreement has the object or effect of restricting competition is fact specific. Restrictions are classified as ‘by object’ where an analysis of the purpose of the agreement, taking account of its clauses and economic context, reveals a

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<sup>2</sup> See Christopher Townley, *Article 81 EC and Public Policy* (Oxford: Hart, 2009) 313. Townley points out that there is no point in considering whether Article 101 should include public policy where there is no infringement of Article 101.

<sup>3</sup> Article 101(1) TFEU

sufficiently deleterious impact on competition.<sup>4</sup> The effects of such agreements are irrelevant.<sup>5</sup> Where there is no object restriction, an extensive analysis of the agreement's effects on the market will be conducted to determine whether the agreement restricts competition by effect.<sup>6</sup> This requires a detailed analysis of the agreement in its context,<sup>7</sup> including a clear market definition<sup>8</sup> and the establishment of a counterfactual.<sup>9</sup>

In *Albany*, AG Jacobs stated that a collective agreement on wages and working conditions restricts competition between employees (and employers).<sup>10</sup> They cannot offer to work on terms and conditions below that set by the agreement. For example, an agreement setting wages is potentially an object restriction. Such an agreement sets the price for an 'input' into the production process. The purpose of such an agreement, as identified by AG Jacobs, is to increase the wages that workers are paid and prevent wage competition. In the absence of such an agreement, competition in the labour market would reduce wages below the level set by the collective agreement, to the detriment of workers' terms and conditions, and allow employers to set their own wage levels. A "race to the bottom", or the level set by legislation, would occur.

Collective agreements may also have horizontal impacts. An example of this is where an industry-wide union uses its position to co-ordinate firm behaviour through controlling the conditions upon which its members offer their services. This is like a hub-and-spoke cartel where the supplier of an input uses its conditions of supply to alter employer behaviour. Here the union acts as the "hub" in an employer 'conspiracy'; acting as an enforcer to ensure that employers adhere to the terms of the agreement. This depends on the union's ability to control both its members and employers. For example, can a trade union cause sufficient economic harm through the use of industrial action to force employers to comply with the

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<sup>4</sup> See *Soci te Technique Mini re v Maschinenbau Ulm GmbH* (Case 56/95) [1966] E.C.R. 235, 249; *GlaxoSmithKline Services Unlimited v Commission* (Joined Cases C-501/06, C-513/06, C-515/06, C-519/06 P) [2010] 4 C.M.L.R. 2, [55]-[58].

<sup>5</sup> See *Bureau National Interprofessionnel De Cognac v Guy Clair* (Case 123/83) [1985] E.C.R. 391, [22]. The "object" and "effect" categories are alternative conditions, and although both may simultaneously exist, it is only necessary to prove one. See Okeoghene Odudu, 'Interpreting Article 81(1): Object as Subjective Intent' (2001) 26 *European Law Review* 60.

<sup>6</sup> See *Brasserie de Haecht SA v Consorts Wilkin-Janssen* (Case 23/67) [1968] E.C.R. 407, 415

<sup>7</sup> *Delimitis v Henning Brau AG* (Case C-234/89) [1991] E.C.R. I-935, [14]

<sup>8</sup> *ibid*, [16]-[18]. This allows the effects of an agreement on to be analysed to determine whether it has as its effect the restriction of competition.

<sup>9</sup> In this context, the counterfactual would be the situation absent a collective agreement. See *O2 (Germany) GmbH v Commission* (Case T-328/03) [2006] E.C.R. II-1231, [65]-[117]

<sup>10</sup> *Albany* (n.1) [AG178]

terms of a collective agreement? Furthermore, centralised bargaining also leads to significant employer (and worker) coordination extending beyond the collective bargaining relationship. For centralised bargaining to work, employers, through their federation, and workers, through their union, must coordinate their bargaining position. Where no collective agreement is reached, it is possible that employers (or workers) may agree to adopt such terms and conditions anyway. This stifles competition between employers for employees (and vice versa); competition over terms and conditions of employment would be lessened. This may ultimately harm consumers as a competitive workforce leads to better goods and services.

However, despite such potentially anti-competitive object and/or effects, a collective agreement may not fall within Article 101(1) TFEU. This is regardless of the policy objectives that the agreement pursues. Where a collective agreement falls within the Vertical Block Exemption Regulation (VBER)<sup>11</sup>; does not have an appreciable effect on trade; and/or does not have an appreciable effect on competition, it falls outside the scope of Article 101(1) TFEU. As such, the social policy objectives are not undermined. This means that the *Albany* exemption may not be necessary. The discussion in section 2 will do the following. Section 2.1 will examine whether a collective agreement could benefit from the VBER. Where an agreement satisfies the Regulation's requirements, it is outside of Article 101(1) TFEU. There is no need to consider whether it has an appreciable effect on trade and/or competition. Section 2.2 will examine whether a collective agreement may appreciably affect trade. Where it does not, it does not fall within the scope of Article 101(1) TFEU. Section 2.3 will explore whether a trade union appreciably restricts competition.

### 2.1 The Vertical Block Exemption Regulation

As set out in Chapter 1, a collective agreement is a vertical agreement. It is an agreement between two or more undertakings operating for the purposes of the agreement at different levels of the production chain, which relates to the conditions for the purchase of services.<sup>12</sup> As such, a collective agreement may benefit from the Vertical Block Exemption Regulation

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<sup>11</sup> Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] O.J. L102/1.

<sup>12</sup> Article 1(a) VBER

and thus is outside the scope of Article 101 TFEU. The VBER holds that “Article 101(1) ... shall not apply to vertical agreements”<sup>13</sup> where the market share held by the supplier does not exceed 30% of the market on which it sells the contract services, and the market share of the buyer does not exceed 30% of the relevant market on which it purchases the contract services.<sup>14</sup>

Article 4 of the VBER removes from the scope of the Regulation agreements which constitute “hardcore” restraints as defined within the provision.<sup>15</sup> When considering a collective agreement, Article 4 potentially covers an agreement setting wages. It could be classified as an agreement which has as its objective “the restriction of the buyer’s ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.”<sup>16</sup> Such an agreement would set the “minimum price” at which the employer can hire workers. Collective agreements not setting wages would not fall within the hardcore restraints listed under Article 4 and thus would benefit from the VBER where the market share of the union(s) and employer(s) do not exceed 30% of the relevant market.

## 2.2 Do collective agreements have an appreciable effect on trade?

A collective agreement will also fall outside the scope of Article 101(1) TFEU where it does not have an appreciable effect on trade between Member States. This is a jurisdictional criterion defining the scope of EU competition law that must be assessed separately in each case.<sup>17</sup> The Commission has issued guidance setting out the approach to be taken regarding whether an agreement has an appreciable effect on inter-state trade, drawing on CJEU jurisprudence.<sup>18</sup> Where a collective agreement meets the requirements set out in the

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<sup>13</sup> Article 2(1) VBER

<sup>14</sup> Article 3(1) VBER

<sup>15</sup> These are (i) where there is an RPM controlling the buyer’s ability to determine its sale price; (ii) territorial sale restrictions on the buyer; (iii) the restriction of sales by a member of a selective distribution system (SDS); (iv) the restriction of cross-supplies between appointed distributors of a SDS; and, (v) a restriction on the seller’s ability to sell goods as spare parts to end-users or repairers or other service providers not entrusted by the buyer with repairing or servicing its goods.

<sup>16</sup> Article 4(a) VBER

<sup>17</sup> See *Etablissements Consten S.A. and Grundigverkaufs-GmbH v Commission* (Cases 56/64 and 58/640 [1966] C.M.L.R. 418, 426

<sup>18</sup> Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [2004] O.J. C101/07. See the CJEU in *Soci te Technique Mini re* (n.4)

Guidelines, EU competition law may not apply.<sup>19</sup> Reference shall be made to both the case law and Guidelines.

Trade has been given a wide meaning covering all cross-border economic activity,<sup>20</sup> ensuring consistency with “the fundamental objective of the Treaty to promote free movement of goods, services, persons and capital.”<sup>21</sup> In order for an agreement to “affect” trade, it must be possible to foresee with a sufficient level or degree of probability on the basis of a set of objective factors of law or fact, that the agreement may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.<sup>22</sup> Despite the use of words such as indirect and potential, a person claiming that there is an effect on trade must be able to explain how and why such an effect exists.<sup>23</sup> Hypothetical effects are insufficient.

Whether a collective agreement has an effect on trade depends on the individual circumstances. Where an employer is engaged in cross-border trade, it is arguable that a collective agreement will have an effect on trade.<sup>24</sup> This can be extrapolated from the CJEU’s decisions in *Govia*<sup>25</sup> and *AGET Iraklis*<sup>26</sup> under the free movement provisions. Similarly, if the agreement makes it more difficult for undertakings in other Member States to “penetrate the market”, either the whole market or a significant part of it, then such an agreement is likely to affect trade between States.<sup>27</sup> Therefore, sectoral or national-level agreements are likely to have an effect on trade. Collective agreements restricting competition between workers and employers make it difficult for firms from other Member States to enter the market where they operate with lower labour costs and tighter profit margins. For example, wages above the market equilibrium could have foreclosure effects.

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<sup>19</sup> Guidelines have no binding force under EU law; see Article 288 TFEU.

<sup>20</sup> See, for example, *Gerhard Züchner v Bayerische Vereinsbank AG* (Case 172/80) [1981] ECR 2021, [18]; *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* (Case C-475/99) [2001] ECR I-8089, [49]; Effect on trade Guidelines (n.18) [19]-[22]

<sup>21</sup> Effect on trade Guidelines (n.18) [19]

<sup>22</sup> See *Société Technique Minière* (n.4) 249; *Züchner* (n.20); Effect on trade Guidelines (n.18) [23]. In some cases, the Court has added wording to effect that the agreement was capable of hindering the attainment of the objectives of the single market; see *Volkswagen* (Case T-62/98) [2000] E.C.R. II-2707, [179]

<sup>23</sup> Effect on trade Guidelines (n.18) [25]-[43]

<sup>24</sup> *Albany* (n.1) [AG75]

<sup>25</sup> *Govia Thameslink Railway Ltd v ASLEF* [2016] I.R.L.R. 686

<sup>26</sup> *AGET Iraklis v Ypourgos Ergasias, Koinonikis Asfalis kai Koinonikis Allilengyis* (Case C-201/15) [2016] E.C.R. 00

<sup>27</sup> See Effect on trade Guidelines (n.18) [86]-[92]

Collective agreements which have an effect on trade will only fall within Article 101(1) TFEU where they have an “appreciable” effect on trade.<sup>28</sup> Agreements which affect trade in an insignificant way due to their weak position on the market, fall outside the scope of EU competition law.<sup>29</sup> Thus, the Commission states, where the aggregate market share of the parties does not exceed 5% and the annual Community turnover of the supplier in a vertical agreement does not exceed €40 million, an agreement will not be considered to have an appreciable effect on trade.<sup>30</sup> Where the parties to a collective agreement fall within these thresholds, the collective agreement may, on the basis of the Guidelines, not have an appreciable effect on competition.

### 2.3 Do collective agreements have an appreciable effect on competition?

Agreements which only have an insignificant effect on the market fall outside the scope of Article 101 TFEU.<sup>31</sup> Therefore, a collective agreement that does not have an appreciable effect on competition will fall outside of Article 101(1) TFEU. The Commission has issued a Notice on agreements of minor importance,<sup>32</sup> not binding on Member States, which is intended to provide guidance.<sup>33</sup> The Notice states that where the parties to an agreement fall under certain market share and/or turnover thresholds, an agreement between them may be presumed not to have an appreciable effect and falls outside the scope of Article 101(1) TFEU.<sup>34</sup> Agreements which restrict competition by object are held to have an appreciable effect.<sup>35</sup> Such agreements are “regarded, by their very nature, as being injurious to the proper functioning of normal competition.”<sup>36</sup> The Notice, however, is only binding on the

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<sup>28</sup> Decentralised collective agreements are highly unlikely to have an effect on trade between member states.

<sup>29</sup> Effect on trade Guidelines, (n.18), [44]; *Völk v Etablissements J Vervaecke SPRL* (Case 5/69) [1969] E.C.R. 295, [7]

<sup>30</sup> Effect on trade Guidelines (n.18) [52]. The Commission relies on the decisions in *Miller* (Case 19/77) [1978] E.C.R. 131, [9]-[10] and *Musique Diffusion Française* (Joined Cases 100/80 and ors) [1983] E.C.R. 1825, [86]

<sup>31</sup> *Völk* (n.28) [7]; see also *Beguelin Import Co v GL Import-Export SA* (Case 22/71) [1971] E.C.R. 949

<sup>32</sup> Commission Notice on agreements of minor importance that do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union [2014] O.J. C 291/1.

<sup>33</sup> See the decision in *Expedia Inc v Autorité de la concurrence and Others* (Case C-226/11) [2013] 4 C.M.L.R. 14, [28]-[31]

<sup>34</sup> De Minimis Notice (n.32) [8]-[11]. Where the parties to the agreement have either an aggregate market share of 10% (where they are competitors) and 15% (where they are non-competitors) on the any of the markets affected by the agreement, the Commission considers the agreement not to appreciably restrict competition

<sup>35</sup> *ibid*, [2]; *Expedia* (n.33) [37]

<sup>36</sup> *Expedia*, *ibid*, [36], [AG50]; see also *Competition Authority v Beef Industry Development Society (BIDS)* (Case C-209/07) [2008] E.C.R. I-8637, [17]; Angela Ortega González, ‘Restrictions by Object and the Appreciability

Commission: Member States are “not required to” take the thresholds into account when determining whether an agreement has an appreciable effect.<sup>37</sup>

The decision of the CJEU in *Expedia*, that object restrictions are automatically considered appreciable restrictions, has been criticised. Akman, for example, argues that this diverges from the modern economic approach to competition.<sup>38</sup> In her view, it is “unacceptable in a modern system of competition” that an agreement with a 2% market share can, or will, have an appreciable effect on competition.<sup>39</sup> However, if the agreement only affected 2% of the market it would probably not fall within the effect on trade criterion under Article 101(1) TFEU anyway. Furthermore, in determining whether a restriction is by object or by effect, the Court will assess the restriction in its legal and economic context.<sup>40</sup> Parties concluding an agreement with the object of restricting competition, intend that such restriction has an appreciable effect.<sup>41</sup>

Therefore, collective agreements which have as their object a restriction of competition have an appreciable effect on competition. Whilst this presumption applies, one assumes that this will not be in all cases. Whilst a collective agreement may have as its object a restriction on competition, for example setting wages, other collective agreements may not; for example, an agreement setting working hours. Thus, the following discussion shall assume that the agreement is a potential effect infringement and examine whether there is an appreciable restriction of competition. In doing so, the discussion shall assume that the Notice thresholds are exceeded and focus solely on qualitative criteria such as the conduct in question, the nature of the product, features of the market and the position of the parties and their competitors.<sup>42</sup>

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Test: The Expedia Case, a Surprising Judgment or a Simple Clarification? (2013) 34 European Competition Law Review 457, 462.

<sup>37</sup> *Expedia*, *ibid.*, [31]

<sup>38</sup> Pinar Akman, ‘The New Shape of the de Minimis Defence for Anti-Competitive Agreements’ [2014] Cambridge Law Journal 263. See also Saskia King, ‘The Object Box: Law, Policy or Myth?’ (2011) 7 European Competition Journal 269, 11., who argues that in assessing whether an agreement is an object or effect restriction in its legal and economic context, appreciability will have to be assessed.

<sup>39</sup> *ibid* 267.

<sup>40</sup> See *GlaxoSmithKline* (n.4) [58]; *ASNEQ-EQUIFAX* (Case C-238/05) [2006] E.C.R. I-11125, [49]

<sup>41</sup> *Expedia* (n.32) [AG50]. See AG Kokott’s opinion for further explanation.

<sup>42</sup> See Pablo Ibanez Colomo, ‘Market Failures, Transaction Costs and Article 101(1) TFEU Case Law’ (2012) 5 European Law Review 541. See also *Delimitis* (n.8) where the CJEU asked whether the supplier made an appreciable contribution to market foreclosure; and *Gottrup-Kilm v Dansk Landbrugs Grovvarereselskab AmbA* (Case C-250/92) [1994] E.C.R. I-5641 where the CJEU considered the strong suppliers and rivals, small parties, and varying prices in assessing the appreciability of a restriction.

### 2.3.1 Application to collective agreements

Whether a collective agreement appreciably restricts competition is highly fact-specific. The effect on competition will differ according to the specific agreement under examination. As such, the following discussion will examine at a generalised level whether a collective agreement can appreciably restrict competition in both labour and goods markets. The discussion shall start with labour markets, before addressing the goods market.

In *Albany*, AG Jacobs considered “appreciability”<sup>43</sup> in both the goods and labour markets as a method of supporting the need for an exemption.<sup>44</sup> AG Jacobs concluded that in labour markets collective agreements “probably do not have an appreciable effect on competition between employers.”<sup>45</sup> An employer “normally ... remains free to offer more advantageous conditions to his employees.”<sup>46</sup> Whilst employers are prevented from competing downwards, they are free to offer more advantageous conditions to employees.<sup>47</sup> As such, there is no appreciable effect on competition between employers.<sup>48</sup> This argument can be expanded to contend that there is no restriction on competition between workers. Every worker within the labour market can theoretically access the improved terms and conditions; that they are currently not employed on the collectively agreements terms and conditions is irrelevant. As such, one would expect competition between workers to increase for jobs in the unionised sector as, absent union membership requirements, an employer can cherry-pick the best applicants for any vacancy and any job seeker in the market can apply.

Three arguments, however, restrict the applicability of this argument. First, a union’s power in the labour market derives from its ability to eliminate competition between workers. Although employers may be able to compete upwards, there may be a reduction in competition between workers. Second, a collective agreement will restrict competition in the labour market unless it imposes no additional costs on employers. Where the collective agreement sufficiently raises the costs of production, prices will rise. This means that there

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<sup>43</sup> Appreciability is used as short-hand for appreciable effect.

<sup>44</sup> *Albany* (n.1) [AG180]. Note that the claimants argued before the Court that there was an appreciable restriction as the agreement affected the entire sector. This, the claimants argued, was aggravated by the fact that there was a cumulative effect of making affiliation to pension schemes compulsory in numerous sectors of the economy.

<sup>45</sup> *ibid.*, [AG182]

<sup>46</sup> *ibid.*

<sup>47</sup> *ibid.*, [AG182]

<sup>48</sup> Note that AG Jacobs statements were made pre-*Expedia*.

will be room for fewer firms, fewer workers are employed, and/or the probability of unemployed workers being hired diminishes. Only where demand for goods is inelastic will there be no effect in the labour market; employers will be able to pass the increased costs onto customers and not reduce their workforce. Where a collective agreement only covers part of the labour market, spill-over effects can be seen in non-union firms. Workers unemployed due to union-imposed conditions contained in a collective agreement seek employment in other firms. This potentially creates an oversupply of labour depressing the competitive wage.<sup>49</sup> Third, the argument assumes that the level set by a collective agreement is not high enough to create a fixed level at which firms do not, or are not able to, deviate from. Where a fixed level is created, there is a reduction in the demand elasticity of labour, as horizontal competition between employers and workers is nullified.<sup>50</sup> However, this assumes that an existing employer or new entrant is unable or unwilling to offer terms and conditions above this level to entice new workers. If a firm has efficient capital equipment it may be profitable for the firm to do so.

As with the labour market, whether there is any effect on competition in the goods market, let alone whether it is appreciable or not, is highly fact specific. As previously mentioned, higher costs imposed by better terms and conditions of work may lead to higher prices in the goods market. This is more likely to occur within centralised, rather than decentralised, bargaining systems.<sup>51</sup> This relies on two predominant assumptions. First, it assumes that there is minimal demand elasticity, or there are monopolistic or collusive markets. Where the goods market is competitive, any firm raising prices may lose customers, and increased bargaining power leads solely to a redistribution of rent between employers and workers. This is even where there is a small competitive sector. Second, it assumes that there are no compensating factors for price increases, for example, increased productivity or improved quality. Such considerations may create positive competitive effects.

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<sup>49</sup> George J Borjas, *Labor Economics* (6th Edition, New York: McGraw-Hill/Irwin, 2013) 448.

<sup>50</sup> See, Alan Krueger and Orley Ashenfelter, 'Theory and Evidence on Employer Collusion in the Franchise Sector' [2018] IZA Discussion Paper No. 11672., who show that non-poach agreements in franchise contracts reduces the number of competitors within the market, reduces labour elasticity, and depresses wages relative to the marginal product of labour.

<sup>51</sup> Robert Flanagan, 'Macroeconomic Performance and Collective Bargaining: An International Perspective' (1999) 37 *Journal of Economic Literature* 1150, 1158. More generally, see Ronald G Ehrenberg and Robert Stewart Smith, *Modern Labor Economics: Theory and Public Policy* (10th Edition, Boston, Mass; London: Pearson/Addison-Wesley 2009) 36, 72.

In *Albany*, AG Jacobs argued that collective agreements, at industry and firm level, lead to cost harmonisation.<sup>52</sup> This harmonisation is only for one of many production costs, and does not affect other inputs such as materials or equipment. As such, “the final price of the products or services in question will be influenced by many other factors before they reach the market.”<sup>53</sup> However, where firms substitute away from labour due to increasing costs, demand for those inputs is affected. This can affect the equilibrium in other markets that use the substituted inputs. In addition, AG Jacobs argued that labour costs cannot be said to be homogenous; a distinction can be made between wages and the real cost of labour.<sup>54</sup> One cannot determine cost until one looks at an individual worker’s productivity, determined by reference to professional skill, motivation, output, work organisation and so forth.<sup>55</sup> Whilst there may be higher than equilibrium costs in the general sense, the productivity of a worker may outweigh the cost; higher productivity may be achieved through accepting higher costs.<sup>56</sup> Where productivity is increased to cover the increased costs, there is no increase in final price. If this is true, then one would expect firms to pay higher wages anyway. However, one must accept that this may not always be true. An employer has just as much influence on these factors as the union. It could be argued that efficient labour management may be just as, if not more, important than any collective agreement or trade union membership on productivity. An efficient workforce does not need to be the most highly paid workforce or have the “best” terms and conditions.

AG Jacobs backs up his argument by arguing that in the 40 years that the competition provisions had been in force at the time, *Albany* was the first case to be brought challenging the provisions of a collective agreement as being anti-competitive.<sup>57</sup> AG Jacobs points out that having surveyed national systems, he could not find a single challenge to agreements on wages and working conditions.<sup>58</sup> This indicates a lack of appreciable effect in goods markets: where a collective agreement has a sufficiently appreciable effect on competition, one would expect to see a competition law challenge. However, this assumes that no other

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<sup>52</sup> *Albany* (n.1) [AG182]

<sup>53</sup> *ibid.*

<sup>54</sup> *ibid.*

<sup>55</sup> *ibid.*

<sup>56</sup> See, for example, George J Borjas, *Labor Economics* (6th Edition, New York: McGraw-Hill/Irwin, 2013) 451; Robert Lande and Richard Zerbe, ‘Reducing Unions’ Monopoly Power: Costs and Benefits’ (1985) 28 *Journal of Law and Economics* 297, 302.

<sup>57</sup> *Albany* (n.1) [AG182]

<sup>58</sup> Without realising, AG Jacobs is possibly making several strong assumptions.

considerations were taken. If we consider AG Jacobs' survey of Member States' approaches, policy considerations either expressly exempt collective agreements from competition enforcement or meant that national competition law was not enforced.<sup>59</sup>

To summarise, the above has shown that whether collective agreements appreciably restrict competition is highly fact specific. A collective agreement is more likely than not to exhibit restrictive effects in the labour market; however, this is subject to the prevailing economic and market conditions. For example, an employer with efficient capital equipment may be able to profitably offer terms and conditions above any level fixed by a collective agreement. Similarly, whether a collective agreement has restrictive effects in the goods market is unclear. The discussion showed that where the goods market is competitive it is unlikely that a collective agreement will appreciably restrict competition, and that the setting of terms and conditions harmonises only one of many production costs. Therefore, it is possible that some collective agreements may not have appreciable effects on competition, and thus not fall within Article 101(1) TFEU.

#### 2.4 Summary

The above has shown that a collective agreement may fall outside the scope of Article 101(1) TFEU without having to consider the social public policy objectives and fundamental rights interests such agreements pursue. Section 2.1 showed that a collective agreement can benefit from exemption under the VBER. Where an agreement does not fall within the hardcore restraints listed under Article 4, and the market shares of the union(s) and employer(s) do not exceed 30% of the relevant market, it does not fall within Article 101(1) TFEU. Sections 2.2 and 2.3 demonstrated that an agreement may not have an appreciable effect on trade and/or competition respectively. Where an agreement does not, it does not fall within Article 101(1) TFEU. In such a situation, the social policy objectives and Article 28 CFREU right would not arguably be undermined as Article 101 TFEU would not apply. Therefore, do we need to exempt collective agreements from Article 101 TFEU if they may not constitute an appreciable restriction on competition?

However, such arguments are highly fact-sensitive, and there will inevitably be collective agreements that do not benefit from the above. A good example is centralised

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<sup>59</sup> *Albany* (n.1) [AG80]-[AG112]

agreements setting wage rates, or where a collective agreement constitutes an object restriction. The application of Article 101(1) TFEU to such agreements may, therefore, seriously undermine the social policy objectives and fundamental rights interests present. As such, and as was argued in Chapters 4 and 5, Article 101(1) TFEU should be interpreted in a way which considers the social policy objectives and fundamental rights interests pursued. Where such interests are given adequate weight within Article 101 TFEU, they may not be seriously undermined. This shall be the focus of section 3. Section 3 will show how we can include wider public policy objectives within Article 101(1) TFEU and discuss its implications for the exemption in *Albany*. It will question whether, given the ability to balance the competing interests within Article 101(1) TFEU, the exemption in *Albany* is necessary.

### 3. Social policy objectives and Article 101(1) TFEU

Section 2 showed that there are routes by which a collective agreement may not fall within the scope of Article 101(1) TFEU. A collective agreement may fall within the VBER, and/or not have either an appreciable effect on competition and/or trade. The discussion pointed out that this is highly fact-sensitive, and that not all collective agreements would benefit from such arguments. It is necessary, therefore, to consider whether we can include the wider social policy objectives and Article 28 CFREU right within Article 101(1) TFEU. Where such considerations are given adequate weight in the application of Article 101(1) TFEU, they are not undermined and the exemption in *Albany* may be unnecessary.

This section will do the following. Section 3.1 will show how we can include wider policy objectives and fundamental rights considerations within Article 101(1) TFEU. It will show that a restriction on competition falls outside the scope of Article 101(1) TFEU where it is necessary to achieve a legitimate aim. This, section 3.2 will demonstrate, challenges the exemption in *Albany*. Where we can balance the competing objectives within Article 101(1) TFEU, an exemption is not needed. The section concludes that, despite being differentiated, *Albany's* exemption and the approach identified in section 3.1 potentially achieve the same formal outcome. Section 3.3 will therefore explore which approach is best. It will conclude that the greater certainty and predictability achieved by *Albany* potentially overshadows the benefits of the individual balancing approach identified in section 3.1. Section 3.4 summarises the section.

### 3.1 How can we include public policy objectives in Article 101(1)?

In *Brasserie du Haetch*, the CJEU held that an agreement “cannot be examined in isolation from [its] context ... from the factual or legal circumstances causing it to prevent, restrict or distort competition.”<sup>60</sup> Although it has been argued that such an examination is restricted to the economic effects of an agreement,<sup>61</sup> CJEU case law has adopted an expansive approach. In considering the wider context of an agreement, the CJEU should consider the social policy objectives and Article 28 CFREU right to collective bargaining (and agreements) within Article 101(1) TFEU. This questions the need for the *Albany* exemption. Where such interests are given adequate weight within Article 101(1) TFEU, they are not seriously undermined.

In considering whether a restriction on competition falls within Article 101(1) TFEU, the CJEU has introduced a proportionality assessment within Article 101(1) TFEU.<sup>62</sup> In *Wouters* and *Pierre Fabre*, the CJEU held that a restriction on competition does not fall within Article 101(1) TFEU where the restriction is necessary to achieve the legitimate aim pursued.<sup>63</sup> This allows balancing to take place within Article 101(1) TFEU, removing agreements, decisions or concerted practices from Article 101(1) TFEU where a restriction on competition is proportionate.<sup>64</sup> This incorporates the *Cassis de Dijon* analytical framework into Article 101(1) TFEU.<sup>65</sup> First the Court weighs the restriction against its pro-competitive effects. If the restriction outweighs the pro-competitive effects, then the Court balances the negative effects against both the pro-competitive effects and non-competition objectives.<sup>66</sup> As such, a

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<sup>60</sup> *Brasserie de Haecht SA v Consorts Wilkin-Janssen* (Case 23/67) [1968] E.C.R. 407, [41]

<sup>61</sup> See Guidelines on the application of Article 81(3) [2004] O.J. C101/97, [24]; *Littikhuis v Verenigde Cooperatieve Melkindustrie Coberco* (Case C-399/93) [1995] E.C.R. I-45415; Renato Nazzini, ‘Article 81 EC between Time Present and Time Past: A Normative Critique of “Restriction of Competition” in EU Law’ [2006] *Common Market Law Review* 497, 516.

<sup>62</sup> *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* (Case C-309/99) [2002] E.C.R. I-1577 [97]-[109]; *Pierre Fabre Dermo-Cosmétique v Président de l'Économie, de l'Industrie et de l'Emploi* (Case C-439/09) [2011] E.C.R. I-9419 [41]-[43].

<sup>63</sup> *Wouters*, *ibid.* See also, *Meca Medina and Majcen v Commission of the European Communities* (Case C-519/04 P) [2006] E.C.R. I-6991 [42]; *Ordem dos Technicos Officiais de Contas v Autoridade da Concorrença* (Case C-1/12) [2013] 4 C.M.L.R. 20, [93]; *Consiglio Nazionale dei Geologi v Autorita Garante della Concorrenza e Del Mercato* (Case C-136/12) [2013] 5 C.M.L.R. 40, [53].

<sup>64</sup> Nazzini (n 61) 526.

<sup>65</sup> *ibid* 522. The *Cassis de Dijon* approach is that a restriction is not prohibited if it pursues a mandatory requirement of public policy of a Member State, and the restriction is inherent in the pursuit of that obligation. See *Cassis de Dijon* (Case 120/78) [1979] E.C.R. 649; Ian Forrester, ‘Where Law Meets Competition: Is *Wouters* Like a *Cassis de Dijon*?’ in Claus-Dieter Ehlermann and I Atanasiu (eds), *European Competition Law Annual 2004: The Relationship between Competition Law and (liberal) Professions* (Bloomsbury Publishing 2006).

<sup>66</sup> Note that this is only where the potential restriction is an effect not object restriction. Where there is an object restriction, no *Cassis*-type balancing can occur in Article 101(1) TFEU, i.e. of the pro- and anti-competitive effects.

restriction on competition contained in a collective agreement would fall outside the scope Article 101(1) TFEU, where it is necessary to achieve its social policy objectives and/or the Article 28 CFREU right. This questions to the need for an exemption, to which I shall return to in sections 3.2 and 3.3 below. Although the discussion below refers to *Wouters*, the same arguments apply to *Pierre Fabre*.

The extent to which *Wouters* is a “European rule of reason” is unclear.<sup>67</sup> The CJEU did not initially clarify *Wouters*’ scope,<sup>68</sup> with initial academic discussion arguing that *Wouters* was restricted to public interest considerations, like the *Cassis de Dijon* doctrine,<sup>69</sup> or even to regulatory acts.<sup>70</sup> Odudu, for example, argued that *Wouters* was misclassified as a competition issue; the case should have been heard under the free movement rules.<sup>71</sup> He argued that a distinction must be drawn between public and private acts; competition regulates private acts whereas free movement regulates public acts.<sup>72</sup> If this argument is accepted, *Wouters* should be restricted to public, regulatory acts.<sup>73</sup> However, the approach in *Wouters* extends beyond regulatory acts and public interest considerations, and considers

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<sup>67</sup> The rule of reason is an approach under US antitrust, where the court analyses the pro- and anti-competitive effects of an agreement to determine whether it should be prohibited or not. For discussion in the EU context, see Craig Callery, ‘Should the European Union Embrace or Exorcise Leegin’s “Rule of Reason”?’ (2010) 32 *European Competition Law Review* 42; Richard Whish and Brenda Sufrin, ‘Article 85 and the Rule of Reason’ (1987) 7 *Yearbook of European Law* 1. See more generally, the US Supreme Court decisions in *Leegin Creative Leather Products Inc v PSKS Inc* 551 U.S. 877 (2007)

<sup>68</sup> See *Montecatini SpA v Commission* (Case C-235/92 P) [2001] 4 C.M.L.R. 18, where the CJEU, although not reaching a conclusion on the facts, at [133] does not rule out that approach completely. See *Meca-Medina* (n.64), [42]–[46] where the CJEU applies *Wouters* to the IOC’s doping rules.

<sup>69</sup> Nazzini (n 61) 535; Edith Loozen, ‘Professional Ethics and Restraints of Competition’ (2006) 31 *European Law Review* 28, 47.

<sup>70</sup> Peter Lanchidi, ‘The CISAC Case under the Wouters Exception’ (2012) 33 *European Competition Law Review* 109, 113–4; Richard Whish and David Bailey, *Competition Law* (7th edn, Oxford University Press 2012) 127.

<sup>71</sup> Okeoghene Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford; New York: Oxford University Press 2006) 53. See also G Monti, ‘Article 81 EC and Public Policy’ (2002) 39 *Common Market Law Review* 1057, 1088–9. Monti argues that the cases adopting such an approach also were challenged on free movement grounds.

<sup>72</sup> Odudu (n 71) 53.

<sup>73</sup> This argument follows Whish’s description of *Wouters* as being a case of regulatory ancillarity, and not a general balancing approach under Article 101(1); see Whish and Sufrin (n 67) 130–4. See also Komninos who describes *Wouters* as being a pure conflict case, whereby the CJEU retreats to using a constitutional methodology. See A Komninos, ‘Non-Competition Concerns: Resolution of Conflicts in the Integrated Article 81 EC’ in Claus-Dieter Ehlermann and I Atanasiu (eds), *European Competition Law Annual 2004: The Relationship between Competition Law and (liberal) Professions* (Oxford, Hart Publishing 2006); Loozen (n 69). Loozen argues that *Wouters* introduces a marginal review of non-competition considerations within Article 101(1) and contradicts the Treaties’ basic assumption that the state safeguards the public interest.

quality concerns within Article 101(1) TFEU.<sup>74</sup> In *OTO* and *CNG*, the CJEU extended this to national level considerations.

The approach in *Wouters* has also been criticised on the basis that it renders Article 101(3) TFEU redundant.<sup>75</sup> In considering the pro- and anti-competitive effects under Article 101(1) TFEU, there is no need for Article 101(3) TFEU to balance them again.<sup>76</sup> As the Commission states, were Article 101(1) TFEU to include an analysis of an agreement's harmful and beneficial effects, Article 101(3) TFEU would be restricted "to those cases in which the need to ensure consistency between competition policy and other Community policies took precedence over the results of the competition analysis."<sup>77</sup> In this regard, it would be easy to adopt a CFREU-compliant interpretation of Article 101 TFEU and consider wider social policy objectives within EU competition law: reconciling such interests with competition policy would occur under Article 101(3) TFEU. However, the Commission expresses the view that this approach would undermine the purpose of Article 101(3) TFEU. It would "run the risk of diverting Article [101(3)] from its purpose, which is to provide a legal framework for the economic assessment of restrictive practices and not to allow application of the competition rules to be set aside because of political considerations."<sup>78</sup> I will return to Article 101(3) TFEU in Chapter 7.

The approach in *Wouters* questions the need for the *Albany* exemption. Where a restriction contained in a collective agreement is proportionate to the legitimate aim(s) pursued (the social policy objectives and Article 28 CFREU right) it would fall outside the scope of Article 101(1) TFEU. As such, the social policy objectives and Article 28 CFREU right would

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<sup>74</sup> *OTO* (n.63) [97]. In *OTO*, the CJEU does link this to "the sound administration of undertakings' accounting and taxation matters..." See also *CNG* (n.63); Julian Nowag, 'Wouters, When the Condemned Live Longer: A Comment on *OTO* and *CNG*' (2015) 36 *European Competition Law Review* 39, 42; R O'Loughlin, 'EC Competition Rules and Free Movement Rules: An Examination of the Parallels and Their Furtherance by the ECJ *Wouters* Decision' (2003) 24 *European Competition Law Review* 62, 68.

<sup>75</sup> Whish and Sufrin (n 67); P Manzini, 'The European Rule of Reason - Crossing the Sea of Doubt.' (2002) 23 *European Competition Law Review* 392; Beverly Robertson, 'What Is a Restriction of Competition? The Implications of the CFI's Judgment in *O2 Germany* and the Rule of Reason' (2007) 28 *European Competition Law Review* 252. Note that *Wouters* was decided pre-Regulation 1/2003 and could not benefit from Article 101(3).

<sup>76</sup> See P Nicolaidis, 'The Balancing Myth: The Economics of Article 81(1) and (3)' (2005) 35 *Legal Issues in Economic Integration* 123. Nicolaidis argues that an economics-based approach means that balancing is inevitable under Article 101(1).

<sup>77</sup> White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty [1999] O.J. C132/1, [56]-[57]. See also, *Nungesser v Commission* (Case 258/78) [1982] E.C.R. 2015, affirming this approach.

<sup>78</sup> *ibid.*, [57].

not be seriously undermined by the application of Article 101 TFEU. A broad exemption for collective agreements may not be necessary to protect such considerations.

### 3.2 The Implications for *Albany*

The CJEU's approach in *Wouters* and *Pierre Fabre* shows that it is possible to consider a collective agreement's wider policy considerations under Article 101(1) TFEU. Where a collective agreement restricts competition, either by object or effect, it will fall outside the scope of Article 101(1) TFEU where such restriction is necessary to achieve the agreement's social policy objectives and Article 28 CFREU right. Such approach adequately protects both the fundamental right interest and social policy objectives present. Only where the restriction imposed on competition by the agreement is disproportionate to its objective, will Article 101(1) TFEU apply.

Such an approach is consistent with the discussion in Chapters 4 and 5, allowing the CJEU to balance the competing objectives/interests present. It allows for a more nuanced approach than that taken by the CJEU in *Albany*. Individual balancing through a proportionality assessment would allow for the "true" values of the competing objectives to be considered. This could remedy any lack of flexibility in the CJEU's approach in *Albany*. In *Albany*, the CJEU predetermines the balance in favour of the social policy objectives where its stipulated conditions are met. The nature of balancing (and policy objectives), however, means that the weights of the competing interests/objectives will differ according to the case in question. However, a key question that arises is why the approach in *Albany* is different to that in *Wouters*. Why does *Albany* remove most collective agreements from the scope of Article 101 TFEU, rather than require individual balancing as seen in *Wouters*? Are there deep-rooted differences between the approaches adopted, or are they the same outcome but a different process? This is important given that the CJEU in *Wouters* makes no mention of the CJEU's approach in *Albany*.

We can differentiate *Albany* and *Wouters* in three ways. First, we can argue that the CJEU in *Wouters* sought to reconcile the Treaty competition and free movement provisions. Monti argues that the CJEU in *Wouters* sought to ensure that the Treaty competition provisions could not be used to secure a result different to that achieved through the free

movement provisions; here the freedom to provide services.<sup>79</sup> Had *Wouters* been considered within the free movement provisions, the regulation would have benefited from the mandatory requirements derogation in *Cassis de Dijon*.<sup>80</sup> This is missing from *Albany*; the agreement in question only fell within the Treaty competition rules: the CJEU was not concerned with ensuring consistency between different parts of the Treaties. It is logical, therefore, for the CJEU to have adopted different approaches.

Second, *Albany* and *Wouters* differ in that although both adopt proportionality approaches, the interests balanced and the way the balance was conducted differ. As set out in Chapter 4, section 3.2, the CJEU adjusts its proportionality assessments according to the interests being balanced. In *Wouters*, the CJEU adopts a strict approach to proportionality, requiring that the restriction is the least restrictive means available. This can be explained in that the CJEU was balancing European objectives (competition policy) with a national interest. Additionally, as the CJEU was arguably attempting to reconcile the Treaty competition and free movement provisions it is probable that the same rigorous approach would be adopted.<sup>81</sup> By contrast, the CJEU in *Albany* adopted a simple balancing exercise assessing whether the importance of achieving one objective outweighed the restriction on the other. The CJEU was not concerned with whether the restriction on competition was necessary. This, as suggested in Chapter 4, section 4, is because the CJEU in *Albany* was balancing competing EU Treaty objectives.<sup>82</sup>

Third, the approaches in *Albany* and *Wouters* differ in that the regulatory acts in *Wouters*, and subsequent cases, pursued both competition and non-competition related interests.<sup>83</sup> In *Wouters*, for example, the CJEU considered how the Regulation in question ensured both the sound administration of justice (the non-competition interest) and the proper functioning of the profession for the benefit of the consumer (the competition

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<sup>79</sup> Monti (n 71) 1087–9.

<sup>80</sup> *ibid.* Monti uses *Bosman* to demonstrate his point. In *Bosman*, the CJEU held that it did not have to consider the competition grounds as the rules breached the free movement provisions. Monti implies that this ensures consistency between the case-law, especially where the measure in question can equally fall within the free movement and competition realm.

<sup>81</sup> See Wolf Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) 15 Cambridge Yearbook of European Legal Studies 439.

<sup>82</sup> See, for example, the approach of the CJEU in *Schmidberger* where the competing free movement and

<sup>83</sup> Constanze Semmelmann, 'The Future Role of the Non-Competition Goals in the Interpretation of Article 81 EC' (2008) 1 Global Antitrust Review 15, 30.

interest).<sup>84</sup> The weight given to these interests will vary significantly according to the specific facts of the case, making individual balancing in such cases more appropriate. These dual interests were not present within *Albany*: there were no competition interests pursued by collective agreements.

However, despite the above arguments justifying the different approaches in *Wouters* and *Albany*, *Wouters* and *Albany* achieve the same outcome in a formal sense. Both approaches would allow for collective agreements to fall outside the scope of Article 101(1) TFEU following a balancing of the competing objective and interests present. The approach in *Wouters* ensures that the social policy objectives and CFREU interests are adequately protected and that the true weights are assigned to the competing objectives. However, adopting *Wouters'* approach would reduce the number of collective agreements falling outside of Article 101(1) TFEU. This is through considering whether the restriction on competition is necessary to achieve the legitimate aim pursued; something not required under *Albany*. A collective agreement which only incidentally improves working terms and conditions, for example, would satisfy the requirements under *Albany*, yet would probably not meet the requirements under *Wouters*. Whether *Albany's* one-off balancing is preferable to *Wouters'* case-by-case approach will be explored in section 3.3. The section will argue that the approach in *Albany* is preferable.

### 3.3 Is the *Albany* approach better than *Wouters'* individual balancing?

*Albany's* one-off balance is more efficient than the approach in *Wouters*. It allows the social partners to collectively bargain free in the knowledge that Article 101 TFEU will not apply where they stay within its boundaries. Here, we can draw a comparison to Easterbrook and Fischel's description of US corporate laws as efficient.<sup>85</sup> Corporate rules, Easterbrook and Fischel argued, provide "off-the-rack" rules enabling corporate ventures to save on the cost of contracting. This is what *Albany* provides, a clear rule that reduces the cost of competition enforcement against a collective agreement; *Wouters* does not. The social partners know when Article 101 TFEU will apply to collective agreements. There is no need to re-litigate the

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<sup>84</sup> *Wouters* (n.62) [100]-[105]. See similar arguments in *CNG* (n.63) [55], "providing guarantees to consumers"; *OTOC* (n.63) [68], "guarantee the quality of the services offered by chartered accountants".

<sup>85</sup> Frank H Easterbrook and Daniel R Fischel, *The Economic Structure of Corporate Law* (Repr, Harvard Univ Press 1998).

same question each time a collective agreement is challenged as anti-competitive. This creates legal certainty which benefits both workers and employers.

These benefits are significantly reduced by the approach in *Wouters*. Although the CJEU's approach allows for competing interests to be considered/balanced, it does not provide the level of efficiency, predictability and certainty that *Albany* achieves. The social partners will still need to be mindful of whether the restriction created by a collective agreement is proportionate to the legitimate aim pursued. This can only be assessed by the CJEU on the facts of the case and does not always provide a clear indication in advance. Although there will be situations where the social partners are able to predict in advance the outcome, there are more grey areas in its application. Considering whether an agreement concerning non-core areas of collective bargaining proportionately restricts competition is difficult. The subjective values placed on these benefits may differ considerably from those objectively given by the CJEU.

However, *Wouters* provides flexibility in how the balance between the competing objectives is struck, potentially achieving a 'true' balance of the competing objectives. In ensuring that any restriction is necessary, the varying strengths of the competing interests are considered according to the facts of the case. It avoids situations possible under *Albany* where the restriction on competition goes beyond what is necessary to achieve the social policy objectives and Article 28 CFREU right; for example, an agreement which has significant anti-competitive effects yet only aims at a minor improvement of conditions of work and employment. Applying *Wouters'* approach would ensure that any restriction is necessary, and that the efficacy of collective agreements is protected in a proportionate manner, achieving a better optimisation of the competing objectives. Considering the necessity of any restriction would, as noted above, reduce the number of collective agreements falling outside of Article 101(1) TFEU. Such an assessment is not required under *Albany*, thus widening *Albany's* scope.

This creates a trade-off between the efficiency and certainty achieved by *Albany's* single balance and the more dynamic, flexible approach seen in *Wouters*. My view is that the certainty and predictability of *Albany* is better than, and preferable to, the flexible, more nuanced balance under *Wouters*. This is for two reasons. First, the certainty achieved by *Albany* ensures that the parties to a collective agreement can rely on its terms. *Albany* gives the social partners a bright line by which they can assess the likelihood of falling within Article

101 TFEU: *Wouters* less so. The ability of the social partners to on the terms of the agreement is especially important where they are incorporated into individual employment contracts. Second, *Albany* reduces the possibility of EU competition law being used to undermine collective bargaining and trade union membership. Where a collective agreement can be (and is consistently) challenged as being anti-competitive, unions are less likely to conclude collective agreements, rendering collective bargaining illusory. This could (would) be accompanied by a reduction in union density. The detrimental effects identified in the thesis' Introduction are still possible; even where the social policy objectives are given adequate weight. Additionally, as highlighted in Chapter 4, section 4, the individual approach seen in *Wouters* gives courts the opportunity to import their views into collective bargaining. For example, in assessing whether the restriction is necessary to pursue a legitimate objective, courts could identify alternative means "without considering their effectiveness" is collective bargaining.<sup>86</sup> Although a case-by-case balance, as in *Wouters*, maximises the objectives present, these concerns overshadow this. I shall return to this in the conclusion of this thesis.

### 3.4 Summary

The above has shown that social policy objectives and Article 28 CFREU right can be included within Article 101(1) TFEU. In considering whether an agreement restricts competition by effect or object, the CJEU in *Wouters* and *Pierre Fabre* considered whether a restriction was necessary to achieve its legitimate objective. This provides an alternative to the approach adopted in *Albany*, allowing for a more nuanced balance to be had in each individual case. It allows for the 'true' weight of individual objectives/interests to be included within the balance.

Section 3.2 demonstrated three ways in which we can explain the differences between *Albany* and *Wouters*. First, the CJEU in *Wouters* sought to reconcile the competition and free movement provisions to prevent a conflict between those provisions arising on the facts of the case; something not present in *Albany*. Second, the different interests present required the CJEU to adopt different approaches. *Albany* concerned only EU objectives; *Wouters* concerned EU and national level interests. Third, the CJEU in *Wouters* was faced with both competition and non-competition interests, and not two competing objectives. As such,

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<sup>86</sup> ACL Davies, *Perspectives on Labour Law* (Cambridge: Cambridge University Press, 2009 2nd ed) 143.

individual balancing was more appropriate. The arguments in section 3.2, however, do not negate the argument that applying *Wouters* to collective agreements may achieve a similar outcome to that in *Albany*, albeit on an individualised level. Section 3.3, however, argued that the exemption in *Albany* is preferable than adopting the approach in *Wouters*. *Albany* is an example of an efficient rule which reduces the cost of litigating collective agreements under EU competition law and creates a clearly defined rule giving certainty to social partners when concluding collective agreements. Why conduct an individual balance when *Albany* has already predetermined the balance? The approach in *Albany* also prevents EU competition law from being used to undermine collective bargaining and trade union membership. Even where an agreement is exempt through *Wouters*, the possibility of such litigation could have a chilling effect.

#### 4. Concluding Comments

This chapter has shown that it cannot be assumed that a collective agreement will automatically fall within the scope of Article 101(1) TFEU. Section 2 showed that a collective agreement may fall outside the scope of Article 101(1) TFEU without recourse to the social policy objectives and Article 28 CFREU right. The discussion showed that a collective agreement may fall outside of Article 101(1) TFEU because it either falls within the VBER, and/or does not have an appreciable effect on trade and/or competition. Section 2.1 argued that a collective agreement may benefit from exemption under the VBER, where the market shares of the parties to the agreement do not exceed 30% on the respective markets. Section 2.1 argued, however, that an agreement on wages may not be exempt by the VBER. Such an agreement is a price fixing agreement, potentially removed from the scope of the VBER by Article 4. Section 2.2 showed that where market turnover thresholds are not exceeded, a collective agreement may not have an appreciable restriction on trade. Section 2.3 demonstrated that collective agreements are likely to appreciably restrict competition. A collective agreement restricting competition by object always appreciably restricts competition following *Expedia*; and a collective agreement restricting competition by effect has probable appreciable restrictive effects. For example, where the level set by a sectoral collective agreement is sufficiently high enough, this could create a fixed level. The discussion in section 2 is, however, highly fact specific and subject to detail economic analysis. Although

section 2 demonstrates how a collective agreement could fall outside Article 101(1) TFEU, the arguments made are largely theoretical.

Given the fact-sensitive nature of the discussion in section 2, section 3 showed that the social policy objectives and right to collective bargaining can be considered in determining whether there is a restriction on competition. In *Wouters*, the CJEU held that a restriction on competition falls outside of Article 101(1) TFEU, where it is necessary to achieve a legitimate aim. This allows for competing objectives and interests to be balanced within Article 101(1) TFEU itself. This, sections 3.1 and 3.2 argued, has implications for the *Albany* exemption; specifically, whether *Albany's* exemption is needed. The approach in *Wouters* allows for the social policy objectives and CFREU interests to be considered. It allows for the competing objectives to be balanced, providing an alternative to the approach in *Albany*.

Section 3.2 argued that we can explain the difference of approach in *Albany* and *Wouters* in three ways. First, the approach in *Wouters* was necessary to reconcile the Treaty competition and free movement rules. In *Wouters* the challenged regulation could equally have infringed the free movement provisions. Had *Wouters* been argued under the free movement provisions, the regulation in question would have benefited from the mandatory requirements justification. Second, the approaches differ due to the interests being balanced. *Wouters* concerned national interests; *Albany*, EU policy objectives. Thus, the balancing exercises adopted would inevitably be different. Third, the section argued that *Wouters* concerned restrictions pursuing both competition and non-competition interests. The dual interests pursued require individual balancing to be adopted.

Section 3 concluded by considering whether the approach in *Albany* or *Wouters* is preferable. Section 3.3 argued that *Albany* is an efficient rule. Why balance the competing objectives on a case-by-case basis when *Albany* has predetermined the balance in advance where its stipulated conditions are met? It reduces the cost of defending (or challenging) a collective agreement under the Treaty competition provisions. The section also argued that the one-off balance in *Albany* also creates certainty and predictability for the social partners when concluding collective agreements, something reduced through the approach in *Wouters*. *Wouters*, however, allows for a more flexible, nuanced balance, seeking to achieve a 'true' balance of the competing interests. This enables the CJEU to maximise achieving the competing objectives where possible. Section 3.3 concluded that the certainty provided under *Albany* is better for the social partners than the flexible, nuanced balancing under

*Wouters*. It reached this view based on two considerations. First, it argued that the certainty provided by *Albany* enables the social partners to bargain safe in the knowledge that a resulting collective agreement meeting *Albany's* stipulated conditions will fall outside of Article 101 TFEU. They can rely on the terms of the agreement. This is especially important where they are incorporated into individual employment contracts. Second, adopting the *Wouters* approach increases the opportunity for EU competition law to be used to undermine collective bargaining and trade unions more widely. Constant challenges to collective bargaining (and trade unions) would lead to fewer collective agreements and lower union density.

The discussion in this chapter has shown that a collective agreement may not constitute a restriction on competition. However, this is highly fact specific, and a collective agreement may infringe Article 101(1) TFEU. In this situation, it must be considered whether a collective agreement benefits from exemption under Article 101(3) TFEU. As such, Chapter 7 will consider whether, and how, we can include wider public policy considerations within Article 101(3) TFEU. It may be argued, however, that there is no need to consider public policy objectives within Article 101(3) TFEU as they have already been considered within Article 101(1) TFEU. Chapter 7 will explore this, seeking to answer the *OTOOC* confusion: namely, where balancing should best take place. Chapter 7 will conclude by drawing together the discussion in the two chapters.

## Chapter 7 - Article 101(3) TFEU

### 1. Introduction

In *Albany*, the CJEU assumed that collective agreements restrict competition, thus infringing Article 101 TFEU (ex-Article 85 EC).<sup>1</sup> It did not consider whether the collective agreement in question infringed EU competition law. Where a collective agreement does not infringe Article 101 TFEU, or where the social policy objectives and Article 28 CFREU right are given adequate weight within Article 101 TFEU, there is potentially no need to exclude collective agreements from EU competition law. The social policy objectives would not be seriously undermined. This is the purpose of Chapters 6 and 7; to examine whether the application of Article 101 TFEU to a collective agreement seriously undermines the social policy objectives pursued. Where it can be concluded that it does not, there is no need for the *Albany* exemption.

Chapter 6 examined whether collective agreements would fall within Article 101(1) TFEU. It showed that collective agreements may fall outside the scope of Article 101(1) TFEU in two ways. First, Chapter 6 demonstrated that a collective agreement may fall outside the scope of Article 101(1) TFEU regardless of its wider policy objectives. It argued that a collective agreement may: (i) benefit from the Vertical Block Exemption Regulation<sup>2</sup>; (ii) not appreciably affect trade; and/or (iii) not have an appreciable restriction on competition. These arguments are highly fact specific and only apply to agreements not restricting competition by object. Second, Chapter 6 showed that a collective agreement may fall outside of Article 101(1) TFEU, where the restriction on competition caused by such agreement was necessary to achieve its social policy objectives.<sup>3</sup> This, Chapter 6 argued, allows the CJEU to give adequate weight to the social policy objectives and Article 28 CFREU right.

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<sup>1</sup> *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (Case C-67/96) [2000] 4 C.M.L.R. 116, [59]-[60].

<sup>2</sup> See Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] O.J. L102/1.

<sup>3</sup> See *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* (Case C-309/99) [2002] E.C.R. I-1577 [97]-[109];

This chapter will examine whether a collective agreement that infringes Article 101(1) TFEU, can benefit from exemption under Article 101(3) TFEU. Article 101(3) TFEU exempts agreements falling within Article 101(1) TFEU where four cumulative conditions are met.<sup>4</sup> The chapter will explore whether it is possible to interpret Article 101(3) TFEU so that the social policy objectives and Article 28 CFREU right can be included within its purview. If such considerations are given adequate weight within Article 101(3) TFEU's analysis, they are not seriously undermined. As such, *Albany's* exemption may not be needed.

Section 2 will examine whether, and how, the social policy objectives pursued by collective agreements and Article 28 CFREU right could be considered under Article 101(3) TFEU. In section 2.1, the chapter will explore whether we can include non-economic considerations more generally within Article 101(3) TFEU. Section 2.2 will build on this, examining how we can include the social policy objectives and Article 28 CFREU right to collective bargaining within Article 101(3) TFEU. The section will identify two approaches; first, by balancing the competing objectives through the approach identified in *Metro*<sup>5</sup>; and second, by interpreting Article 101(3) TFEU in a manner which takes account of the social policy objectives and fundamental rights interests present. Whether Article 101(3) TFEU can be interpreted in such a way will be explored in section 2.3. Section 3 seeks to answer the question posed in the conclusion of Chapter 6: where should we balance non-competition factors within Article 101 TFEU? It will seek to answer the *OTOC* confusion.<sup>6</sup> In *OTOC* the CJEU conducted the same balancing exercise within in Articles 101(1) and (3) TFEU. Section 4 will conclude the chapter and summarise the contribution of Chapters 6 and 7 to the thesis.

## 2. Can we consider social policy objectives within Article 101(3)?

Article 101(3) TFEU exempts anti-competitive agreements where the agreement's pro-competitive benefits outweigh its anti-competitive effects.<sup>7</sup> The conditions set out in Article

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<sup>4</sup> Article 101(3) TFEU exempts agreements which (1) contribute to improving the production or distribution of goods, or to promoting technical or economic progress; (2) allow consumers a fair share of the resulting benefit; (3) is not indispensable for obtaining those objectives; and (4) does not allow undertakings to eliminate competition in respect of a substantial part of the products in question.

<sup>5</sup> *Metro SB-Grossmarkte v Commission* (Case 26/76) [1977] E.C.R. 1875; *Remia BV v Commission* (Case 42/84) [1985] E.C.R. 2545

<sup>6</sup> *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência* (Case C-1/12) [2013] 4 C.M.L.R. 20, [98]-[103]

<sup>7</sup> Guidelines on the application of Article 81(3) [2004] O.J. C101/97 [11].

101(3) TFEU are cumulative<sup>8</sup> and apply all restrictions of competition falling under Article 101(1) TFEU.<sup>9</sup> Article 101(3) TFEU states that the provisions of Article 101(1) TFEU may be declared inapplicable where an agreement:

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 for 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.

In applying Article 101(3) TFEU, the Commission adopts a “pure economic” approach. The Commission states that under Article 101(3) TFEU the pro-competitive effects of an agreement are to be balanced against its anti-competitive effects.<sup>10</sup> “When the pro-competitive effects of an agreement outweigh its anti-competitive effects the agreement is on balance pro-competitive and compatible with the objectives of the Community competition rules.”<sup>11</sup> The purpose of Article 101(3) TFEU, the Commission states, is “to provide a legal framework for the economic assessment of restrictive practices and not to allow the application of competition rules to be set aside because of political considerations.”<sup>12</sup>

This focus on economic efficiency features heavily within the academic literature, which argues that non-economic factors should not be included within the economic analysis.<sup>13</sup> Odudu, for example, states that public policy goals should not be included within

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<sup>8</sup> See *VBVB and VVVB v Commission* (Case 43/82) [1984] E.C.R. 19, [61]

<sup>9</sup> *Matra Hachette v Commission* (Case T-17/93) [1994] E.C.R. II-595, [85]; *GlaxoSmithKline Services Unlimited v Commission* (Joined Cases C-501/06, C-513/06, C-515/06, C-519/06 P) [2010] 4 C.M.L.R. 2 [247]-[252].

<sup>10</sup> Article 81(3) Guidelines (n.7) [33]. The heading of the discussion of the first criterion under Article 101(3) is labelled “Efficiency gains.”

<sup>11</sup> *ibid.*

<sup>12</sup> White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty [1999] O.J. C132/1 [56]

<sup>13</sup> See Okeoghene Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford; New York: Oxford University Press 2006) chs 6, 7; Lars Kjolbie, ‘The New Commission Guidelines on the Application of Article 81(3): An Economic Approach to Article 81’ [2004] *European Competition Law Review*; A Maziarz, ‘Do Non-Economic Goals Count in Interpreting Article 101(3) TFEU?’ (2014) 10 *European Competition Journal* 341; A Komninos, ‘Non-Competition Concerns: Resolution of Conflicts in the Integrated Article 81 EC’ in Claus-Dieter Ehlermann and I Atanasiu (eds), *European Competition Law Annual 2004: The Relationship between Competition Law and (liberal) Professions* (Oxford, Hart Publishing 2006).

a competition analysis because they prevent economic efficiency from being achieved: anti-competitive practices should only benefit from exemption under Article 101(3) TFEU where there are pro-competitive economic benefits.<sup>14</sup> The focus of Article 101(3) TFEU is, Odudu states, productive efficiency<sup>15</sup>; including non-economic considerations is illegitimate and undermines the effectiveness of the provision.<sup>16</sup> If we consider this in view of competition law's consumer welfare and economic efficiency objectives, it is the improvement of economic and technical factors that achieves these objectives.

The "pure economic" approach also featured within AG Jacobs' opinion in *Albany*. AG Jacobs opined that, on the basis of the Commission's written submissions, collective agreements are unlikely to be exempt under Article 101(3) TFEU because "it is said, that [that] provision does not allow social objectives to be taken into account."<sup>17</sup> Although AG Jacobs stated that Article 101(3) TFEU allows special characteristics of the market on which the restrictions exist to be taken into account,<sup>18</sup> this is only to the extent that those market characteristics affect the economic considerations put forward by the parties seeking an exemption.<sup>19</sup> AG Jacobs, however, did not consider that the social policy objectives pursued by collective agreements can be considered in this way.

It is possible that the social policy objectives present can be "economised" through focussing on the "voice" function of trade unions.<sup>20</sup> Such an approach is proposed by Van den Bergh and Camesasca, who argue that collective agreements should only be exempt where there are substantial economies of scale surpassing the firm level.<sup>21</sup> Thus, a reduction in transaction costs, and the stabilisation of employment caused by a reduced resignation rate

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<sup>14</sup>Odudu (n 13) 170–2.

<sup>15</sup> *ibid* 137–8.

<sup>16</sup> *ibid* 164–74.

<sup>17</sup> *Albany* (n.1) [AG175]. Note also that the case was pre-Regulation 1/2003 and in order to benefit from Article 101(3), the parties had to have complied with the prior-notification requirements.

<sup>18</sup> *ibid.*, [AG165]

<sup>19</sup> In support, AG Jacobs cites *Verband der Sachversicherer e.V. v Commission of the European Communities* (Case 45/85) [1987] ECR 405, [58], where the Court accepted that the Commission could consider market characteristics in determining whether "the recommendation was a proper means of dealing with that situation, but also to assess whether the measure put into effect by the recommendation went beyond what was necessary to that end."

<sup>20</sup> See Richard Freeman and James Medoff, *What Do Unions Do?* (Basic Books Inc, New York 1984); Richard Freeman and James Medoff, 'The Two Faces of Unionism' (1979) Working Paper No. 364 NBER Working Paper Series 1.

<sup>21</sup> Roger Van den Bergh and Peter Camesasca, 'Irreconcilable Principles? The Court of Justice Exempts Collective Labour Agreements from the Wrath of Antitrust' (2000) 25 *European Law Review* 492, 506.

which improves production,<sup>22</sup> could form the basis of an exemption under Article 101(3) TFEU. Furthermore, where collective bargaining leads to improvements in productivity they can benefit from exemption under Article 101(3) TFEU. However, it is unclear whether such economic benefits would outweigh the anti-competitive effects of collective agreements. Freeman and Medoff, for example, accept that they are ‘probably’ insufficient to outweigh the anti-competitive effects present.<sup>23</sup> Similarly, if we consider the decisions in *Metro*,<sup>24</sup> *Remia*,<sup>25</sup> and *Matra Hachette*,<sup>26</sup> discussed in the next section, the employment considerations accepted by the CJEU and Commission were part of a matrix of different pro-competitive benefits. In *Matra Hachette*, for example, there were significant improvements in the product and the manufacturing process operating alongside the employment considerations.<sup>27</sup> Can non-economic factors be considered within Article 101(3) TFEU? Can we balance non-economic factors against the anti-competitive effects under Article 101(3) TFEU? These questions will be explored in the following sections. Section 2.1 will first show that we can consider such considerations within Article 101(3) TFEU.

### 2.1 Can we consider non-economic factors under Article 101(3) TFEU?

The Commission’s “pure economic” approach departs from existing CJEU jurisprudence.<sup>28</sup> The CJEU – and indeed the Commission – have included non-economic factors within Article 101(3) TFEU. This creates uncertainty as to whether non-economic factors may be included within Article 101(3) TFEU.<sup>29</sup> In *Albany*, AG Jacobs stated that “[b]oth the Court and ...

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<sup>22</sup> See Robert Lande and Richard Zerbe, ‘Reducing Unions’ Monopoly Power: Costs and Benefits’ (1985) 28 *Journal of Law and Economics* 297, 302; George J Borjas, *Labor Economics* (6th Edition, New York: McGraw-Hill/Irwin, 2013) 451; Steve Allen, ‘Unionized Construction Workers Are More Productive’ (1984) 99 *Quarterly Journal of Economics* 251; Charles Brown and James Medoff, ‘Trade Unions in the Production Process’ (1978) 86 *Journal of Political Economy* 355.

<sup>23</sup> See Freeman and Medoff, *What Do Unions Do?* (n 20) 109–10; Richard Posner, ‘Some Economics of Labor Law’ (1984) 51 *The University of Chicago Law Review* 988, 1000–2. Any benefits would need to be supported by a “detailed, robust and compelling analysis that relies in its assumptions and deductions on empirical data and facts.” See *MasterCard* (Case COMP/34.579) [2009] O.J. C264/8, [690]; affirmed in *MasterCard v Commission* (Case T-111/08) [2012] 5 C.M.L.R. 5, [200]-[202]. See also *Metro* (n.4) where the Court was also concerned with technical and product improvements.

<sup>24</sup> *Metro* (n.5)

<sup>25</sup> *Remia* (n.5)

<sup>26</sup> *Matra Hachette* (n.8)

<sup>27</sup> *ibid.*, [109]-[111]

<sup>28</sup> See Nicolas Petit, ‘The Guidelines on the Application of Article 81(3) EC: A Critical Review’ Working Paper Institut D’études Juridique Europeenes No 4/2009; Christopher Townley, *Article 81 EC and Public Policy* (Oxford: Hart, 2009) ch 7.

<sup>29</sup> See Paul Lugard and Leigh Hancher, ‘Honey, I Shrunk the Article! A Critical Assessment of the Commission’s Notice on Article 81(3) of the EC Treaty’ (2004) 25 *European Competition Law Review* 410, 418.

Commission have on occasion recognised the possibility of taking account of social grounds in that contract, in particular by interpreting the conditions of Article [101(3)] broadly so as to include concerns for employment.”<sup>30</sup> Similarly in *BIDS*, the Court held that “[i]t is only in connection with Article [101(3)] that ... [legitimate objectives] ... such as those relied on by BIDS may, if appropriate be taken into consideration for the purposes of obtaining an exemption from the prohibition laid down in Article [101(1)].”<sup>31</sup>

The Article 101(3) Guidelines allow public and social policy considerations a limited role within Article 101(3) TFEU. In the Commission’s view, public/social policy considerations can only be included within Article 101(3) TFEU where they can be subsumed within the provision’s criteria; that is, produce quantifiable economic efficiency benefits.<sup>32</sup> In reaching this conclusion, the Commission relies on the CJEU’s decisions in *Matra Hachette*<sup>33</sup> and *Metro*.<sup>34</sup> In *Metro*, the Court held that “the establishment of supply forecasts for a reasonable period constitutes ... stabilizing factors with regard to the provisions of employment which, since it improves the general conditions of production, especially when market conditions are unfavourable, comes within the framework of the objectives which reference may be had pursuant to Article 85(3).”<sup>35</sup>

In *Metro*, the CJEU also introduced a *Wouters*-type analysis under Article 101(3) TFEU. The CJEU held “that the requirements for the maintenance of workable competition may be reconciled with the safeguarding of objectives of a different nature and to this end certain restrictions of competition are permissible, provided they are *essential to the attainment of those objectives and do not result in the elimination of competition for a substantial part of the common market*.”<sup>36</sup> (emphasis added) Such an approach is near identical to the approach in *Wouters*, explored in depth in Chapter 6.<sup>37</sup> Therefore, where a collective agreement satisfies the approach set out in *Wouters*, it will probably satisfy the approach in *Metro*,

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<sup>30</sup> *Albany* (n.1) [AG193]

<sup>31</sup> *Competition Authority v Beef Industry Development Society (BIDS)* (Case C-209/07) [2008] E.C.R. I-8637, [21]. BIDS argued that the agreement structuring the market was not an object restriction because it pursued other legitimate objectives, namely to rationalise the beef industry to make it more competitive by reducing overcapacity in the market structure.

<sup>32</sup> Article 81(3) Guidance (n.7) [42].

<sup>33</sup> *Matra Hachette* (n.8), [139]. The Guidance at footnote 54 states that this is implicit in paragraph 139.

<sup>34</sup> *Metro* (n.5) [43]

<sup>35</sup> *ibid*.

<sup>36</sup> *Metro* (n.5) [21]. See also *Metropole Television v Commission* (Case T-112/99) [2002] E.C.R. II-2459, [118]; *OTOC* (n.6) [98]-[103].

<sup>37</sup> See *Wouters* (n.3)

provided that the restriction does not eliminate competition in a substantial part of the common market. Where *Wouters'* necessity requirement is not met, the restriction will not be "essential" under *Metro*. This creates the danger, shown by the CJEU's decision in *OTO*, where the same balance is conducted under Articles 101(1) and (3) TFEU. This creates confusions as to what is balanced where. I shall return to this in section 4 below which examines where public policy objectives should be considered and balanced.

If we consider the cases which have considered employment as a factor under Article 101(3) TFEU, this was only to the extent to which it contributed to improving productivity. In *Metro*, the Court held that the stabilising effect on employment, caused by the obligation on suppliers to conclude 6-month supply contracts, improved the general conditions of production. In *Remia*,<sup>38</sup> the Court held that the provision of employment comes within the "framework of objectives to which reference may be had pursuant to Article [101(3)] because it improves the general conditions of production, especially when market conditions are unfavourable."<sup>39</sup> Similarly, the Commission in *Matra Hachette* held that the direct creation of 5000 jobs and the indirect creation of another 10,000 "would not be enough to make an exemption possible unless the conditions of Article [101(3)] were fulfilled, but it is an element which the Commission has taken account of."<sup>40</sup> Although contributing to the harmonious development of the Community, and market integration, such considerations were not decisive in exempting the agreement under Article 101(3) TFEU: the agreement produced economic efficiencies. On appeal, the CJEU arguably accepted the Commission's approach, holding that the creation of jobs "would not be enough to make an exemption possible unless the conditions of Article [101(3)] were fulfilled, but it is an element which the Commission has taken account of."<sup>41</sup>

What these cases show is that the employment considerations were not themselves considered economic benefits under Article 101(3) TFEU.<sup>42</sup> This has led to confusion as to the approach adopted under the provision. Jones and Sufrin, for example, state that the decisions

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<sup>38</sup> *Remia* (n.5)

<sup>39</sup> *ibid.*, [42]; see also *Synthetic Fibres* (Case IV/30.810) [1984] O.J. L207, [37]; *Stichting Baksteen* (Case IV/34.456) [1994] O.J. L131.

<sup>40</sup> *Ford/Volkswagen* (Case IV/33.814) [1993] O.J. L20, [36]. The case concerned a joint venture between Ford/Volkswagen for the creation of a new MPV.

<sup>41</sup> *Matra Hachette* (n.8) [139]. The General Court simply repeats that the Commission had considered the employment considerations "were taken into consideration by the Commission only supererogatorily."

<sup>42</sup> Kjolbie (n 13) 571.

in *Matra Hachette* and *Ford/Volkswagen* are difficult to reconcile with a pure efficiency approach.<sup>43</sup> They symbolise the “infiltrations of other policy objectives into EU competition law.”<sup>44</sup> Similarly, Faull and Nikpay argue that job creation was a relevant consideration in the Commission’s decision to grant an exemption under Article 101(3) TFEU.<sup>45</sup> However, if non-economic considerations have been included in Article 101(3) TFEU, it should be possible to see the CJEU and Commission in each case considering them when applying Article 101(3) TFEU. As set out above, this is not so. The employment considerations were only present due to their productivity-enhancing aspects. For example, in *Ford/Volkswagen* the Commission is clear that job creation alone would not have been enough to warrant an exemption.<sup>46</sup> Although the Commission argued on appeal that the first condition of Article 101(3) TFEU, economic and/or technical progress, could be interpreted to include the maintenance of employment, the CJEU did not explore this further.<sup>47</sup> I shall return to the application of Article 101(3) TFEU to a collective agreement in section 2.3 below.

The approach seen in the above cases is also present where other policy considerations are considered within Article 101(3) TFEU. In *CECED*,<sup>48</sup> *Exxon/Shell*,<sup>49</sup> and *DSD*,<sup>50</sup> the Commission quantified the relevant environmental policy concerns in terms of economic efficiency. In *CECED*, for example, the Commission focussed on the clear technological improvements the practice in question encouraged: the development of more technically efficient machines and focusing future R&D on furthering energy efficiency.<sup>51</sup> Similarly in *Stichting Baksteen* and *Synthetic Fibres*, the Commission considered industrial

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<sup>43</sup> Alison Jones and BE Sufrin, *EU Competition Law: Text, Cases, and Materials* (Sixth edition, Oxford University Press 2016) 256.

<sup>44</sup> *ibid.*

<sup>45</sup> Jonathan Faull and Ali Nikpay, *Faull and Nikpay: The EC Law of Competition* (Oxford: Oxford University Press, 2nd ed 2007) para 2.131. c.f. Giuliano Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (Oxford: Hart Publishing 1997) 61. Amato argues that employment policy was of “ambiguous relevan[ce]/irrelevan[ce] ... to the social profile of the affair.”

<sup>46</sup> *Ford/Volkswagen* (n.40) [36]

<sup>47</sup> *Matra Hachette* (n.8) [96].

<sup>48</sup> *CECED* (Case IV.F.1/36.718) [2000] O.J. L 187

<sup>49</sup> *Exxon/Shell* (Case IV/33.640) [1994] O.J. L 144. The Commission held that a reduction in pollution would lead to a technical improvement.

<sup>50</sup> *Duales System Deutschland* (Cases COMP/34493 and others) [2001] O.J. L 319. The Commission exempt under Article 101(3) on the basis that the agreement contributed to improving the production of goods and promoting technical or economic progress.; see also *ARA, ARGEV, ARO* (Case D3/35473) [2004] O.J. L 75; *Philips/Osram* (Case IV/34.252) [1994] O.J. L 378,

<sup>51</sup> *CECED* (n.48) [47]-[50]

policy within their Article 101(3) TFEU analysis. Both environmental policy and industrial policy can more easily be quantified and subsumed within the Article 101(3) TFEU criteria.<sup>52</sup>

However, in *VBVB/VBBB*<sup>53</sup> and *CISAC*,<sup>54</sup> the Commission and Court framed their Article 101(3) TFEU analysis by reference to cultural policy. In *VBBB*, the Article 101(3) TFEU analysis was framed around the cultural argument that the retail price maintenance agreement was necessary for the protection of Dutch language books; in *CISAC*, the Article 101(3) TFEU analysis was based on the integration clause in Article 167(4) TFEU.<sup>55</sup> How these approaches affect whether the social policy objectives and fundamental rights interests pursued by collective agreements is unclear and shall be discussed in the next section.

Sufrin and Schweitzer both agree that the Commission's position in the Article 101(3) Guidance allows national courts and NCAs to apply Article 101(3) TFEU in a consistent manner.<sup>56</sup> This remedies the criticism that including non-economic factors within Article 101(3) TFEU could lead to a divergence in decisional practice.<sup>57</sup> Requiring that non-economic interests are subsumed within Article 101(3) TFEU's criteria ensures consistency in how interests are mapped onto Article 101(3) TFEU's balance. As Schweitzer states, the direct applicability of Article 101(3) TFEU requires that it applies clearly and unconditionally: "[t]he application of directly applicable EU law may not be transformed into the exercise of political

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<sup>52</sup> On environmental policy and competition, see Hans Vedder, 'The Treaty of Lisbon and European Environmental Law and Policy' (2010) 22 *Journal of Environmental Law* 285; Jan Jans, 'Stop the Integration Principle' (2011) 33 *Fordham International Law Journal* 1533; Anatole Boute, 'Environmental Protection and EC Anti-Trust Law: The Commission's Approach for Packaging Waste Management Systems' (2006) 15 *Review of European Community & International Environmental Law* 146. On industrial policy, Wolf Sauter, *Competition Law and Industrial Policy in the EU* (Clarendon Press 1997); Rosita Bouterse, *Competition and Integration: What Goals Count?* (Kluwer Law International, 1994); Nicolas Petit and Norman Neverinck, 'Industrial Policy and Competition Enforcement: Is There, Could There and Should There Be a Nexus?' <http://ssrn.com/abstract=2225903>.

<sup>53</sup> *VBVB/VBBB* (n.8)

<sup>54</sup> *CISAC* (Case COM/C2/38.698) [2003] O.J. L 107 (Overturned on appeal – (Case T-442/08) [2013] E.C.R. 00.); *STEF v Commission* (Case T-428/08) [2013] 5 C.M.L.R. 13; *STIM v Commission* (Case T-451/08) [2013] 5 C.M.L.R. 16. *CISAC* concerned a challenge by the refusal of a member of the International Confederation of Societies of Authors and Composers (CISAC), to grant a Community wide license for its broadcasting activities.

<sup>55</sup> *ibid.*, [93]-[95]

<sup>56</sup> Brenda Sufrin, 'The Evolution of Article 81(3) of the EC Treaty' (2006) 51 *Antitrust Bulletin* 915, 964. Sufrin argues that this is a practical decision, in that the application of Article 101(3) becomes easier if only competition concerns are considered. "Whereas the Commission ... may be in a position to balance Community policies against each other, or consider national policies in the Community context, it is a different matter as regards national bodies in Member States." For the Commission's position see the Article 81(3) Guidance (n.7), [42]

<sup>57</sup> See Claus-Dieter Ehlermann, 'The Modernisation of EC Antitrust Policy: A Legal and Cultural Revolution' (2000) 37 *Common Market Law Review* 537; Sufrin (n 56).

discretion and choice.”<sup>58</sup> The Commission’s position prevents national courts and NCAs from using Article 101(3) TFEU to pursue public policy objectives at the expense of competition policy.

Such an approach also protects against the use of non-economic objectives to undermine competition law’s objectives.<sup>59</sup> This has been a criticism of including non-economic objectives within Article 101(3) TFEU; including such considerations potentially undermines competition law’s objectives in that it prevents the achievement of consumer welfare, economic efficiency, and the single market. The use of public policy objectives to exempt anti-competitive conduct could lead to market partitioning, higher-priced goods and services, and inefficiency. This argument goes to the heart of what EU competition law aims at achieving.<sup>60</sup> If we accept that the aims of EU competition law are consumer welfare, economic efficiency and market integration, exempting an agreement under Article 101(3) TFEU based on other considerations may prevent these objectives from being fully realised. By requiring that such considerations are subsumed within Article 101(3) TFEU’s criteria ensures that competition policy’s objectives are maximised.<sup>61</sup> For example, Article 101(3) TFEU’s requirement that consumers receive a fair share, ensures that consumer welfare is enhanced. As shown in Chapters 4 and 5, in balancing competing objectives the CJEU will seek to maximise both. Such an approach is, however, also possible through the CJEU’s approach in *Metro* identified above.

However, the approaches seen in the CJEU jurisprudence and Article 101(3) Guidance potentially ‘overcomplicate’ the decision-making process. Courts and NCAs still have to try and subsume non-competition considerations within Article 101(3) TFEU’s criteria. This lends support to the argument that the balancing of objectives should be conducted outside of Article 101(3) TFEU (or outside of Article 101 TFEU completely).<sup>62</sup> As discussed in Chapter 6, balancing under Article 101(1) TFEU through the approach set out in *Wouters* allows for a

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<sup>58</sup> Heike Schweitzer, ‘Competition Law and Public Policy: Reconsidering an Uneasy Relationship. The Example of Article 81’ EU Working Papers LAW 2007/30 5.

<sup>59</sup> Townley (n 28) 5.

<sup>60</sup> Komninos (n 13) 13–7., argues that it is better to balance other interests against Article 101 TFEU itself than to blur the independence and purity of competition analysis.

<sup>61</sup> Petit argues that this criticism can be overcome using the Modernisation Regulation itself, specifically Articles 5(1) and 10. These provisions prevent NCAs from adopting non-infringement provisions and allow the Commission to intervene where necessary. Thus, where public policy considerations are relied upon, the Commission can step in and reconsider the application of Article 101(3). See Petit (n 28).

<sup>62</sup> See Odudu (n 13).

constitutional balancing of competing objectives, without ignoring the provision's wording. Section 3 below will examine where we should balance competing interests in Article 101 TFEU. Where and how we balance competing objectives has implications for legal certainty and predictability. In the context of the *Albany* exemption, if it is unclear how the CJEU balances competing objectives within Article 101 TFEU an exemption may be necessary despite the inclusion of wider policy objectives.

To summarise, the CJEU and Commission have included non-competition factors within the Article 101(3) TFEU analysis in three ways. First, wider objectives and fundamental rights interests can be considered under Article 101(3) TFEU where they have efficiency-enhancing effects. As such, where collective bargaining (and agreements) creates stable employment rates through better working conditions and higher wages, knowledge and experience remain within the workforce. This may lead to increased productivity which reduces overall costs and consumer prices, and a reduction in transaction costs may reduce the cost of labour such that consumer prices are lowered.<sup>63</sup> This, however, adopts an efficiency approach that does not consider the non-economic considerations in and of themselves. This means that *Albany's* exemption may be necessary to protect the wider objectives and right present in collective agreements. An agreement which has no, or insufficient, efficiency benefits, would not benefit from exemption under Article 101(3). The wider policy interests pursued would be seriously undermined.

Second, wider policy objectives and fundamental rights interests can be included through the approach set out in *Metro*. In *Metro*, the CJEU held that wider public policy objectives can restrict competition where such restriction is essential to achieve those objectives and do not result in an elimination of competition in a substantial part of the common market.<sup>64</sup> This allows for the competing objectives and interests to be balanced similar to that seen in *Wouters*. Third, social and public policy considerations may be used to frame Article 101(3)'s TFEU analysis. As demonstrated in Chapters 4 and 5, the Treaty integration clauses, the teleological approach, and the CFREU require that Treaty provisions are interpreted in a manner which includes wider objectives. For example, this would include the wider social policy objectives and Article 28 CFREU right present in collective agreements. These two approaches have implications for the exemption in *Albany*. Where these factors

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<sup>63</sup> See Chapter 1, section 4.1.2.2, and the references therein.

<sup>64</sup> *Metro* (n.5) [21]

are given adequate within Article 101(3) TFEU, they are not seriously undermined. As such, an exemption may not be necessary. Section 2.2 will focus on this, examining how Article 101(3) TFEU could include the social policy objectives and Article 28 CFREU right pursued by collective agreements.

## 2.2 How can we include social policy objectives and the Article 28 CFREU right within Article 101(3)?

As set out above, non-economic factors can be included within Article 101(3) TFEU. As such, the social policy objectives and fundamental rights interests pursued by collective agreements can be included within an Article 101(3) TFEU analysis. This section will identify the two alternative options available, and their impact on *Albany*'s exemption.

The first approach is that set out in *Metro*. In *Metro*, the CJEU held “that the requirements for the maintenance of workable competition may be reconciled with the *safeguarding of objectives of a different nature and to this end certain restrictions of competition are permissible, provided they are essential to the attainment of those objectives and do not result in the elimination of competition for a substantial part of the common market.*”<sup>65</sup> (emphasis added) The focus of such an assessment is identical to that in *Wouters*,<sup>66</sup> discussed at length in Chapter 6, and the approach set out in *Schmidberger*.<sup>67</sup> Where a restriction on competition is proportionate and necessary to achieve the social policy considerations and/or Article 28 CFREU right present in collective agreements, it would not fall under Article 101(1) TFEU and thus not require exemption under Article 101(3) TFEU.<sup>68</sup> Including this approach under Article 101(3) TFEU would be pointless; indeed, it could be that the same balance is carried out twice. The only difference is the additional requirement that the agreement does not eliminate competition for a substantial part of the common market.

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<sup>65</sup> *Metro* (n.5) [21]. See also *Metropole* (n.36) [118]. In *Metropole*, the CFI held that Commission can use public policy considerations to exempt an agreement under Article 101(3). Note also the statement of Commissioner Monti following the Commission’s decision in *CECED*; “Commission approves an agreement to improve energy efficient washing machines.” IP/00/148, 11 February 2000.

<sup>66</sup> *Wouters* (n.3) [97]-[109]

<sup>67</sup> *Eugen Schmidberger v Republik Österreich* (Case C-112/00) [2003] E.C.R. I-5659. See the discussion in Chapter 5, section 3.

<sup>68</sup> As argued in Chapter 6, section 2.2, it is not always a forgone conclusion that an agreement exempt under *Albany* would also be exempt under *Wouters*.

An example of this problem can be seen in the CJEU's decision in *OTO*.<sup>69</sup> I shall return to this in section 3, which explores where balancing within Article 101 TFEU should best take place.

The second approach is to interpret Article 101(3) TFEU in a way that takes account of the social policy objectives and fundamental rights interests present.<sup>70</sup> This would use the interpretative obligations of the CFREU, the teleological approach, and the Treaty integration clauses.<sup>71</sup> The CFREU requires that Article 101 TFEU is interpreted in a manner which, as far as possible, renders it compatible with Charter rights.<sup>72</sup> Similarly, the teleological approach and Treaty integration clauses require that EU law is interpreted in light of the Treaties' objectives to ensure consistency between its policies and activities. This includes the application and interpretation of Article 101(3) TFEU. Both the Commission and the Court in applying and interpreting Article 101(3) TFEU must take "all [EU] objectives into account" when they are relevant.

Whether we can interpret Article 101(3) TFEU in a way which includes the social policy objectives and Article 28 CFREU right pursued by collective agreements shall be explored in section 2.3. Section 2.3 will examine whether Article 101(3) TFEU can be interpreted in a manner, which exempts collective agreements solely because of their non-economic interests/objectives, absent any economic efficiency benefits. The discussion will not refer to economic efficiency benefits because, although such considerations could be used to support an Article 101(3) TFEU exemption, they are generally considered insufficient to outweigh a collective agreement's anti-competitive effects.<sup>73</sup> It should be noted, however, that there might be situations where an agreement creates sufficient efficiency benefits to sustain a consumer welfare justification through a traditional application of Article 101(3) TFEU.

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<sup>69</sup> *OTO* (n.6)

<sup>70</sup> See Christopher Townley, 'The Goals of Chapter I of the UK's Competition Act 1998' (2010) 29 Yearbook of European Law 307, 322. Townley argues that history shows that the CJEU has adopted an expansive interpretation of the first condition in Article 101(3) TFEU to include wider social policy considerations.

<sup>71</sup> For general discussion see Chapter 4, Section 2 and Chapter 5 respectively.

<sup>72</sup> See the discussion in Chapter 5, section 2

<sup>73</sup> See Freeman and Medoff, *What Do Unions Do?* (n 20). See also the discussion in the Introduction, section 4.1.2.

### 2.3 How can we interpret Article 101(3) to include the social policy objectives in collective agreements?

Article 101(3) TFEU requires that four conditions are met for an agreement to be exempt from Article 101 TFEU. First, the agreement must improve production or distribution, or promote technical or economic progress; second, consumers must receive a fair share of the resulting benefits; third, the restriction must be indispensable for the attainment of those objectives; and, fourth the restriction must not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. This section will explore whether we can interpret Article 101(3) TFEU in a way that takes account of the social policy objectives and Article 28 CFREU right. Can we use such considerations to exempt a collective agreement under Article 101(3) TFEU where there are no economic efficiency benefits? Where this is possible, it provides an argument against the need for the *Albany* exemption. If we can exempt an agreement through the application of Article 101(3) TFEU, which gives adequate weight to the social policy objectives and Article 28 CFREU right, an exemption based on the need to protect such objectives may be unnecessary.

It is possible to include the wider benefits of collective agreements within the first condition of Article 101(3) TFEU; that the agreement contributes to “economic progress”. From a social policy viewpoint, collective agreements achieving higher wages, greater employment protection and stability, ensure economic progress. Those paid higher wages will spend more, pay more in tax and not be reliant on benefits. In terms of economic progress, a collective agreement raising wages and/or improving working terms and conditions benefits both workers and society. This would include the situation in *Albany*; compulsory membership of the sectoral pension scheme, with exemption allowed only where the pension scheme in question is more beneficial to workers than the sectoral one. These economic benefits are predominantly possible through achieving other social benefits, i.e. solidarity, social peace, and social cohesion,<sup>74</sup> and the Article 28 CFREU right. Through these interests, workers can collectively bargain and achieve such benefits.

Can these benefits be passed onto consumers? The second criterion of Article 101(3) TFEU requires that consumers receive a fair share of the benefits created by the agreement,

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<sup>74</sup> *FNV Kunsten Informatie en Media v Staat der Nederlanden* (Case C-413/13) [2015] 4 C.M.L.R. 1, per AG Wahl at footnote 14.

compensating for the agreement's anti-competitive effects.<sup>75</sup> How narrowly or widely we interpret the term "consumer" will affect whether the benefits identified above can be passed on. Where labour costs increase due to a collective agreement (i.e. through a wage increase), the employer may be driven to recoup this through higher prices. If the definition of consumer is restricted to those who purchase the products affected by the higher prices, no benefit is passed on.<sup>76</sup> The social benefits, i.e. solidarity and social cohesion, and the wider benefits to workers of collective agreements and collective bargaining, are not passed onto consumers of the employer's products. Where the definition of consumer includes workers, the social benefits of a collective agreement may be passed on. Only where workers fall within the definition of a consumer, can we balance the anti-competitive harm caused against the social benefits present.

The term 'consumer' has been given several differing interpretations. The Commission, for example, defines a consumer as "encompassing all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers..."<sup>77</sup> Akman proposes a different definition, stating that 'consumer' has been equated with customer, including intermediate as well as final consumers.<sup>78</sup> Other definitions have included "individual consumers",<sup>79</sup> "professional end users and final consumers",<sup>80</sup> "individual undertakings and consumers",<sup>81</sup> and "the parties' direct customers."<sup>82</sup> Can we include workers within such definitions?

Workers do not fall within the definition of an end-user, purchaser, or consumer in the context of a collective agreement concerning conditions of work and employment. They are not the "customers of the parties to the agreement ... [or] ... subsequent purchasers."<sup>83</sup>

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<sup>75</sup> See *SPO and Others v Commission* (Case T-29/92) [1995] E.C.R. II-289, [294]; *Metro* (n.5) [46]-[48]; Article 81(3) Guidelines (n.7) [85]

<sup>76</sup> This assumes that quality has not increased, and that consumers do not receive a better product.

<sup>77</sup> Article 101(3) Guidelines (n.18) [84]

<sup>78</sup> Pinar Akman, "'Consumer' versus 'Customer': The Devil in the Detail" (2010) 37 *Journal of Law and Society* 315. See also Alison Jones and Albertina Albhors-Llorens, 'The Images of "Consumer" in EU Competition Law', *The Image(s) of the 'Consumer' in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing; Oxford 2016).

<sup>79</sup> See Article 107(2)(a) TFEU on state aid

<sup>80</sup> Guidelines on Vertical Restraints [2010] O.J. C130/1, [56]

<sup>81</sup> *Konkurrensverket v TeliaSonera Sverige AB* (Case C-52/09) [2011] E.C.R. I-527, [22]. Note also that in *GlaxoSmithKline* (n.8) the Court consider the term consumer to include competitors, consumers and final consumers.

<sup>82</sup> See Townley, *Article 81 EC and Public Policy* (n 5) 263–272.

<sup>83</sup> Article 81(3) Guidance (n.7) [84]

Workers may be “subsequent purchasers” in that they may buy the goods and/or services affected by the collective agreement, and associated competitive restraints, however, they are not consumers in labour markets. To consider workers in this way misrepresents the employment relationship. Whilst there are significant power imbalances that trade unions seek to rectify, workers are not consumers. They do not buy the terms and conditions offered by employers or achieved through collective bargaining. Workers provide their services, labour, in return for a set of terms and conditions. Any benefits produced by a collective agreement for workers is more appropriately considered as producer surplus, not consumer surplus.

Furthermore, including workers within the definition of ‘consumer’ raises the same arguments as those raised against firms in a cartel (and their shareholders) benefiting from Article 101(3) TFEU’s exemption.<sup>84</sup> For example, if we consider the collective agreement in *Albany*, compulsory affiliation to the supplementary pension scheme of all employers, except those employer schemes exempt by the scheme itself, could lead to improved pensions, benefiting the workers covered by the agreement. As with shareholders, workers automatically benefit from such cartel behaviour through improved profitability and reduced competition in the market: that they are not necessarily a party to the agreement is irrelevant. To include them within the definition of a ‘consumer’ would mean that any anti-competitive effects would be offset by benefits gained by those ostensibly placed to profit from the anti-competitive conduct. Collective agreements are concluded for the benefit of workers (and employers); any benefits received by workers are achieved through a reduction in competition between them. For example, a restriction on wage competition benefits workers by increasing wages above the market-clearing level: employers are unable to use competition between workers to keep wages at equilibrium.

It is highly unlikely, therefore, that a collective agreement can benefit from exemption through Article 101(3) TFEU’s conditions based only on the agreement’s wider social policy objectives and the Article 28 CFREU right. To include workers within the definition of ‘consumer’ misrepresents their position within the labour market. They are the supplier of an input, not a consumer. Furthermore, if we could conceive of a worker as consuming the

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<sup>84</sup> See *Mastercard v Commission* (Case C-382/12 P) [2014] 5 C.M.L.R. 23, where the MIF agreement did not benefit from Article 101(3) as the primary beneficiaries of the agreement were the MasterCard organisation and participating banks.

benefits of a collective agreement, similar arguments to those against shareholders of firms in a cartel benefiting from Article 101(3) TFEU apply.

Whilst it may be possible to interpret Article 101(3) TFEU's remaining criteria in a manner which includes the wider benefits of collective agreements within Article 101(3) TFEU, the above conclusion makes such an examination unnecessary. This means that collective agreements can only benefit from exemption under Article 101(3) TFEU based on its social policy objectives and Article 28 CFREU right through the application of the approach in *Metro*. As already mentioned in section 2.2, such approach is consistent with the discussion in Chapters 4 and 5. The social policy objectives and relevant CFREU right are included and balanced within Article 101 TFEU. However, as section 2.3 highlighted, this creates the danger that the same balancing exercise is carried out in Article 101(1) and (3) TFEU. Section 3 below will explore where we should balance wider objectives and rights within Article 101 TFEU.

#### 2.4 Summary

In summary, the above has shown that we can include non-economic considerations within Article 101(3) TFEU. It has demonstrated that the Commission and CJEU have included such considerations within Article 101(3) TFEU in two ways. First, non-economic interests have been included within Article 101(3) TFEU where they have created economic efficiency benefits (and thus subsumed within Article 101(3) TFEU's criteria). For example, in *Metro*, *Remia* and *Matra Hachette* employment considerations were included within Article 101(3) TFEU because they created productive efficiency benefits. Second, the CJEU has held that anti-competitive conduct could benefit from exemption under Article 101(3) TFEU where the restriction was essential to the attainment of non-competition objectives and did not result in the elimination of competition in a substantial part of the common market. These options provide an argument that we may not need the *Albany* exemption, provided that the social policy objectives and Article 28 CFREU right are given adequate weight within either analysis.

Section 2.3, however, argued that we cannot interpret Article 101(3) TFEU in a way which enables the wider social policy objectives and CFREU rights to form the basis of an exemption under that provision. The discussion demonstrated that the term 'consumer' cannot be interpreted to include workers. To consider workers as 'consumers' in the context of a collective agreement, the section argued, misrepresents and misunderstands their position within labour markets. Workers provide their services in return for a set of terms

and conditions offered by the employer. They are parties to, or subject of, a collective agreement, not a consumer of them.

The conclusion in section 2.3 does not mean that a collective agreement does not benefit from exemption under Article 101(3) TFEU through the approach in *Metro*. *Metro* provides that a restriction is exempt under Article 101(3) TFEU where it is essential to achieve the objectives pursued and does not eliminate competition in a substantial part of the common market. This approach is near identical to that in *Wouters*, such that where the conditions in *Metro* are met, the restriction would also fall outside of Article 101(1) TFEU. This creates the problem seen in *OTO* where the CJEU appears to adopt the same balance in Articles 101(1) and (3) TFEU. In *OTO*, the CJEU held that because the restriction on competition was not necessary to guarantee the quality of services provided under Article 101(1) TFEU following *Wouters*,<sup>85</sup> it was not essential under Article 101(3) TFEU.<sup>86</sup> This makes such balancing in Article 101(3) TFEU redundant; an agreement not passing Article 101(1)'s TFEU balance would also not pass Article 101(3) TFEU's balance?

Where public policy objectives should be balanced and considered within Article 101 TFEU will be examined in section 3 below. Section 3 will argue that public policy factors should be considered, and balanced, in Article 101(1) TFEU and not Article 101(3) TFEU. The reason being that Article 101(1) TFEU provides a more appropriate, easier approach to balancing public policy objectives. Section 3 will also set out why such an approach is consistent with the Treaty integration clauses, the teleological approach, and the CFREU (and fundamental rights considerations).

### 3. Where should the balance be conducted? Where should public policy consideration be included within Article 101 TFEU?

The discussion above, and in Chapter 6, shows that public policy factors (non-competition considerations), here social policy objectives and the Article 28 CFREU right to collective bargaining, can be considered within the application of Article 101 TFEU.<sup>87</sup> The discussion shows that they can be included and balanced within both Articles 101(1) and (3) TFEU. This, however, raises the issue that the same balance is conducted in each part of Articles 101

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<sup>85</sup> *OTO* (n.6) [98]

<sup>86</sup> *ibid.*, [103]

<sup>87</sup> This section will not address whether we should include public policy factors within Article 101 TFEU.

TFEU. This possibility is more certain where the CJEU adopts the approach set out in *Wouters* under Article 101(1) TFEU and that in *Metro* under Article 101(3) TFEU.

This 'double' balance can be seen in the CJEU's decision in *OTO*. In *OTO*, the CJEU was asked whether the system of compulsory training for accountants implemented by *OTO* was compatible with the Treaty competition provisions. Specifically, the CJEU was concerned with the requirement that training providers had to register with *OTO* in order to provide professional training. In holding that such a requirement unjustifiably restricted competition, the CJEU applied the same balance within both parts of Article 101 TFEU. The CJEU held that as the elimination of competition was not necessary to guarantee the quality of services provided under Article 101(1) TFEU following the approach in *Wouters*,<sup>88</sup> it could not be considered as essential under Article 101(3) TFEU.<sup>89</sup> The CJEU conducted the same balancing exercise under Articles 101(1) and (3) TFEU. Such an approach defeats the purpose of Article 101(3) TFEU, and equally the purpose of Article 101(1) TFEU, and the argument that any agreement prohibited under Article 101(1) TFEU can, in theory, benefit from exemption under Article 101(3) TFEU.<sup>90</sup> This section will propose where public policy considerations should be balanced within Article 101 TFEU. Before doing so, I shall briefly explain why a clear delineation is important.

A clear delineation of where we should consider public policy factors within Article 101 TFEU is important for three main reasons. First, where the delineation is unclear there is a reduction in legal certainty and predictability; those subject to Article 101 TFEU do not know what is required under each part of Article 101 TFEU. This could lead to different balances and standards being adopted in different Member States. This would undermine the *effet utile* of EU competition law as Member States balance objectives in different ways. Second an unclear delineation potentially renders Article 101(3) TFEU redundant. What is the point of Article 101(3) TFEU where all the considerations can be, and are, balanced in Article 101(1) TFEU? Having a clear delineation avoids such issues. Third, where public policy factors are considered has implications on the incentives for undertakings when engaging in collusive conduct aimed at achieving a public policy objective. For example, where we include public

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<sup>88</sup> *OTO* (n.6) [98]

<sup>89</sup> *ibid.*, [103]

<sup>90</sup> See *Consten and Grundig v Commission* (Case 56 and 58/64) [1966] E.C.R. 299, 342-3; *Matra Hachette* (n.8) [85]

policy objectives in Article 101(3) TFEU only, the burden is on the party seeking an exemption to prove that, on a balance of probabilities, the public policy considerations outweighed the restrictions anti-competitive object or effect.<sup>91</sup> This could disincentivise undertakings from pursuing such objectives.

Where should we consider public policy factors/objectives within Article 101 TFEU? In my view, public policy objectives should be included within Article 101(1) TFEU and not Article 101(3) TFEU. Although Article 101(3) TFEU provides an obvious structured balance within which public policy objectives can be included, Article 101(1) TFEU allows for a much simpler, clearer balance of the public policy interests with the restriction on competition. Any balancing in Article 101(1) TFEU should use the approach in *Wouters*: is the restriction necessary to achieve the legitimate objective pursued? The reason for this is primarily that any balancing of policy objectives is a normative balancing exercise. Balancing within Article 101(1) TFEU allows for a much simpler constitutional balance, enabling the competing interests/objectives to be maximised when in conflict as the balance is subject to the principle of proportionality. As shown by the discussion in Chapter 4, the restriction must be outweighed by the necessity of achieving the competing objective. This ensures that equivalence is given to competing objectives and allows flexibility in the application of the test according to the restriction caused and the interest in question.<sup>92</sup>

However, it can be argued that balancing the competing objectives under Article 101(3) TFEU allows for a much more complete, complex balance. For example, Article 101(3) TFEU requires that any restriction is indispensable to achieving the objective pursued and does not allow undertakings to eliminate competition “in respect of a substantial part of the products in question.”<sup>93</sup> However, as can be seen from the discussion in section 2.3, interpreting Article 101(3) TFEU to include public policy objectives is not a simple or straightforward exercise. For example, how widely can we interpret the term ‘consumer’ to allow for a wider consideration of public policy objectives? A good example is section 2.3’s discussion of whether workers, the prime beneficiaries of the non-competition objectives

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<sup>91</sup> Sufrin (n 56) 969 ff.

<sup>92</sup> See the discussion in Chapter 3, Section 3.2 which shows how the CJEU has applied the proportionality assessment differently according to the interest being pursued and the entity acting.

<sup>93</sup> Article 101(3)(b) TFEU.

pursued by collective agreements, can be considered as consumers.<sup>94</sup> This potentially restricts the public policy objectives that can be considered within Article 101(3) TFEU, arguably creating a hierarchy between objectives that can be included and those which cannot.<sup>95</sup> As argued in Chapters 4 and 5, such an *a priori* hierarchy is contrary to the Treaties and CFREU: any *ex post* hierarchy is the result of a balancing exercise. In the context of national interests, this also raises issues of competence and subsidiarity. Where the public policy objectives in question fall within the exclusive competence of Member States, failing to include them within the balance implies that such interests are not present and that EU interests trump national interests expressly reserved by the Treaties to Member States. This could lead to complaints that the CJEU has engaged in “competence creep”.<sup>96</sup>

Adopting the approach in *Metro* under Article 101(3) TFEU would ensure that no a priori hierarchy of objectives is present; all objectives, where relevant, can and are included within the balance in Article 101(3) TFEU. All the assessment requires is that the restriction is essential to the attainment of its objective(s) and does not result in the elimination of competition for a substantial part of the common market. This, however, collapses the requirements set out in Article 101(3) TFEU, potentially ignoring a key aspect of the provision: whether consumers receive a fair share of the agreement’s benefits. Although one assumes that consumer interests would be included within the assessment, this is not entirely clear. If it does not, this may lead to two different tests to be applied under Article 101(3) TFEU: one for public policy interests, one for economic interests. However, where both public policy and economic efficiencies are present, are these two tests combined or kept separate? Although Monti provides one solution to this question through his proposed Article 101(4), Monti’s proposal still requires the agreement to produce economic efficiencies.<sup>97</sup> Monti proposes that an agreement would be exempt where it either “contributes, to increasing economic efficiency, and to the promotion of other Community objectives, or is designed to

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<sup>94</sup> Section 3.3 above showed that including the social policy objectives pursued by collective agreements may not be passed on as workers cannot easily be considered as consumers within the meaning of Article 101(3).

<sup>95</sup> This is between those which can be included within Article 101(3) and those which cannot.

<sup>96</sup> This criticism has been made of the CJEU’s decision in *Viking Line* and *Laval*, in that the CJEU should not have considered the cases as Article 153(5) TFEU specifically states that the EU has no competence in regard to pay, the right of association, the right to strike, or the right to impose a lock out. See AC. Davies, ‘One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ’ [2008] *Industrial Law Journal* 126.

<sup>97</sup> G Monti, ‘Article 81 EC and Public Policy’ (2002) 39 *Common Market Law Review* 1057, 1097–8.

ensure that a specific sector continues to operate effectively.”<sup>98</sup> As pointed out above in relation to Article 101(3) TFEU, Monti’s approach also potentially creates a distinction between objectives that can be included within the assessment, and those which cannot.

Such issues are not present where balancing occurs within Article 101(1) TFEU. The application of *Wouters* does not ignore Article 101(1) TFEU’s provisions. A restriction on competition would still be established before considering whether the restriction is necessary to achieve the legitimate aim pursued. Additionally, such approach would not collapse the requirements of Article 101(1) TFEU. In establishing that there is a restriction, the court should consider whether there is an appreciable restriction on competition or appreciable effect on trade. If it does not, there is no need to consider the wider non-competition issues. However, it should be noted that the court may ignore issues of appreciability and simply consider the necessity of the restriction.

One further issue that arises with balancing under Article 101(3) TFEU, is the requirement that an element of competition is retained after balancing the competing objectives. Whilst this would allow for a residual element of competition to be retained, and maximise the competing objectives, it ignores situations where competition must be disapplied to achieve the competing objective(s). In such situations, exemption under Article 101(3) TFEU would not be possible as no residual element of competition would be retained. In contrast, balancing under Article 101(1) TFEU though the approach in *Wouters* does not have this problem: the CJEU simply considers whether the restriction is necessary to achieve its aim.<sup>99</sup> This does not require that an element of competition is retained, and allows the CJEU to adjust its proportionality assessment according to the facts of the case.<sup>100</sup> It allows for Article 101 TFEU to be disapplied where the importance of achieving the competing objective is at least equal to the detriment caused by restricting EU competition law, including where no element of competition remains.<sup>101</sup> This fits with the discussion in Chapters 4 and 5. In balancing competing objectives and fundamental rights all that is required is that the

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<sup>98</sup> *ibid.* Monti also requires that a fair share is passed to consumers, the restriction is indispensable, and does not eliminate competition for a substantial part of the products in question.

<sup>99</sup> See *Wouters* (n.3) [109]; *OTOC* (n.6) [98]-[99]. In *OTOC*, the CJEU considered whether the objective pursued could be achieved by a less restrictive means.

<sup>100</sup> See the discussion in Chapter 4, section 3.

<sup>101</sup> See the discussion in Chapter 4.

importance of achieving one objective is at least equal to the detrimental caused by restricting the other.

To summarise, the above argues that public policy interests should be considered within Article 101(1) TFEU and not Article 101(3) TFEU. It argues that Article 101(1) TFEU provides for a much simpler, clearer balance of the public policy interests and the restriction on competition. Once it has been established that an agreement restricts competition, a court or competition authority should consider whether the restriction is necessary to achieve the legitimate objective pursued. For example, there is no wider consideration of whether, as under Article 101(3) TFEU, a fair share is passed onto consumers or that competition is not eliminated in a substantial part of the common market. These requirements, it has been argued, potentially restricts what public policy objectives can be included within any balance. This does not mean that consumer welfare is ignored when balancing under Article 101(1) TFEU. In applying a proportionality assessment, consumer interests will be considered. For example, if we consider the decisions in *Wouters* and *Meca-Medina* consumer interests can be seen within the Article 101(1) TFEU balance.<sup>102</sup> This allows Article 101(3) TFEU to focus on economic, consumer welfare considerations.

#### 4. Conclusion

The discussion in Chapters 6 and 7 has argued that social policy objectives and fundamental rights considerations can be included within Article 101 TFEU. CJEU case law shows that such objectives can be and are considered within Article 101 TFEU. Applying Article 101 TFEU to collective agreements would not seriously undermine the social policy objectives pursued, where they are given adequate weight within any balancing under the provision and would potentially render the exemption in *Albany* unnecessary. For example, if following the proportionality approaches set out in *Wouters* or *Metro*, the competition policy objectives outweigh the social policy objectives, the social policy objectives should not be seriously undermined. This is consistent with the constitutional discussion in Chapters 4 and 5. The social policy objectives are considered and included within the relevant balancing exercise.

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<sup>102</sup> *Wouters* (n.3) [97], [105] *Meca Medina and Majcen v Commission of the European Communities* (Case C-519/04 P) [2006] E.C.R. I-6991, [43]

Chapter 6 showed how Article 101(1) TFEU can be applied to take account of the social policy objectives pursued by collective agreements, and how a collective agreement may not be found to infringe Article 101(1) TFEU without considering the social policy objectives. The chapter argued that a constitutional balancing is possible through the approach in *Wouters*. In *Wouters*, the CJEU held that agreements that restrict competition fall outside the scope of Article 101 TFEU where the restriction is proportionate to the legitimate objective pursued by the agreement in question. This negates the need to balance the competing objectives outside of Article 101 TFEU, via *Albany's* one-off balancing exercise. However, as Chapter 6, section 3.3 showed, *Albany* provides for a wider and more certain approach than adopting the approach in *Wouters*. A collective agreement which only incidentally improves working terms and conditions, for example, would satisfy the requirements under *Albany*, yet may not meet the requirements under *Wouters*.

Chapter 7 has examined whether a collective agreement infringing Article 101(1) TFEU may benefit from exemption under Article 101(3) TFEU. The discussion has shown that Article 101(3) TFEU would only exempt a collective agreement based on its social policy objectives through the approach in *Metro*. In *Metro*, the CJEU held that an agreement benefits from exemption under Article 101(3) TFEU where the restriction on competition is necessary to achieve a legitimate aim and does not result in the elimination of competition in a substantial part of the common market. This approach is very similar to that seen under *Wouters*. Chapter 7 also demonstrated that it is difficult to interpret Article 101(3) TFEU in a manner which takes account of the social policy objectives pursued by collective agreements. Section 2.3 argued that it is not possible to interpret the term “consumer” within Article 101(3) TFEU’s second criterion to include workers. The section showed that in the context of a collective agreement, it is not possible to include workers within the definition of a consumer. Workers do not ‘consume’ the goods/services covered by the agreement. Only where a collective agreement creates economic efficiency benefits, or social policy benefits created by collective agreements go beyond workers, will it benefit from exemption under Article 101(3) TFEU express terms.

Chapter 7 also explored where we should balance non-competition factors within Article 101, seeking to resolve the confusion created in *OTOOC*. Section 3 argued that public policy objectives should be weighed against a restriction on competition within Article 101(1) TFEU, and not Article 101(3) TFEU. This conclusion was reached on the basis that a much

clearer, easier balancing exercise could be undertaken under Article 101(1) TFEU. Balancing within Article 101(3) TFEU arguably has the opposite effect. Balancing under Article 101(3) TFEU requires that either all four conditions are met or, as required by *Metro*, that the restriction is necessary to achieve the legitimate objective pursued and does not eliminate in a substantial part of the common market. This restricts the scope of any balancing exercise under Article 101 TFEU. First, requiring that a fair share be passed onto consumers restricts the objectives which can be included within Article 101(3) TFEU. A good example of this is the argument in section 2.3 that workers cannot be considered as consumers in the context of a collective agreement. This prevents the social policy benefits of collective agreements (and bargaining) from being considered within Article 101(3) TFEU's balance. Second, requiring under *Metro*, that competition must not be eliminated in a substantial part of the market, prevents situations where competition must be disapplied to achieve the competing objective(s). This creates tensions with the discussion in Chapters 4 and 5.

However, two linked issues with the above discussion still exist. First, the criticisms highlighted throughout the Chapters are still present. Including non-economic considerations within Article 101 TFEU will further complicate an already difficult analysis and potentially lead to a divergence in the application of Article 101 TFEU. Although this is partially remedied by the discussion in section 3 that any non-competition factors should be balanced only within Article 101(1) TFEU, through *Wouters'* approach, it still allows for national courts to include a very broad range of national interests within Article 101 TFEU. This could lead to reduced legal certainty. Second, applying competition law to collective agreements, regardless of whether Article 101 TFEU can include the social policy objectives present, creates significant uncertainty and unpredictability for trade unions, workers and employers.<sup>103</sup> Were collective agreements to be subject to EU competition law, the certainty with which collective agreements could be relied upon to set terms and conditions of employment would be significantly reduced. This could create a "chilling effect" on collective bargaining as trade unions and employers become reluctant to conclude collective agreements aimed at improving conditions of work and employment.

In this regard, it may be that the exemption in *Albany* is better than the approaches identified in Chapters 6 and 7, and that the CJEU in *Albany* was right in balancing the

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<sup>103</sup> For further expansion, see Chapter 1.

conflicting objectives outside of Article 101 TFEU. Such an approach does not infuse any balancing exercise with the requirements of Article 101 and provides a level of certainty and predictability for trade unions, employers and workers. That the outcome of the balancing exercise is predetermined does not, as shown in Chapter 4, conflict with the underlying Treaty requirements. Predetermining the balance where the twin conditions in *Albany* are met is consistent from a constitutional basis. Furthermore, *Albany's* balancing exercise arguably ensures that the Article 101 TFEU decision-making process is not overcomplicated and is consistently applied. Where the exemption does not apply, analysis under Article 101 TFEU is solely of the agreement's restrictive economic effects. The social policy objectives have already been balanced against competition policy's objectives and are not seriously undermined by any subsequent application of Article 101 TFEU.

This chapter concludes the discussion of the application of EU competition law to collective agreements. Chapter 8 will adopt a comparative approach, exploring the approach adopted in the United States of America (US) to applying antitrust to collective agreements. The application of antitrust to collective agreements, and trade union activities more generally, has been of great interest to both unions and academics, with significant literature discussing the topic. The purpose of the chapter, therefore, is to analyse the approaches adopted in the US, examining whether the EU can draw anything from the discussion and approaches taken.

## Chapter 8 – How has the US Supreme Court approached trade union activities under US antitrust law?

### 1. Introduction

The previous chapters explored the relationship between collective bargaining and collective agreements and EU competition law, examining whether the *Albany* exemption is ‘correct’ and necessary. In Chapters 4 and 5, the thesis placed Albany’s exemption with the EU’s constitutional framework. The chapters showed that the CJEU in *Albany* correctly balanced the competing objectives through a proportionality assessment. The chapters also demonstrated that the Treaty integration clauses, the CJEU’s teleological approach, and the interpretative obligation under the CFREU require that, where present, wider EU objectives should be considered when applying EU law. This imposes an interpretative obligation on the CJEU, which was explored in greater depth in Chapters 6 and 7. Chapters 6 and 7 explored what would happen were Article 101 TFEU to be applied to collective agreements. The discussion showed how the social policy objectives pursued by collective agreements could be included within an Article 101 TFEU analysis, such that they were not seriously undermined.

This chapter will examine the approaches adopted in the United States of America (US) to applying competition law – antitrust – to trade union activities. The application of antitrust to trade unions has been of keen interest to both unions and academics in the US, with a significant amount of literature addressed to this topic. The aim of this chapter is to analyse the approaches taken with a view to examining what can be learnt from the discussion and approaches taken. It will examine whether the approaches taken in the EU and US are different, or whether it is the same approach expressed in different ways.

This chapter will examine the US approaches to applying antitrust laws to trade union activities more broadly and not focus solely on collective bargaining. Congress and the US Supreme Court have created two exemptions: one the creation of statute and the other implied from Congressional intent as a corollary to the statutory exemption. The development of the statutory exemption is important to the development of the non-statutory exemption. The discussion of the statutory exemption for industrial action is important for critiquing in *Albany* approach as arguments developed under the statutory

exemption have consistently be used to critique and develop the non-statutory immunity. Such considerations add to the critique of *Albany* provided by this chapter. The chapter, in section 2, will set out US antitrust law and the current exemptions. Sections 3 and 4 will examine how the statutory and non-statutory exemptions have developed respectively. The sections will identify the factors that have been relied upon in the Supreme Court’s jurisprudence to develop the exemptions. Section 5 examines what can learnt from the US approaches set out in sections 3 and 4, exploring whether the approach in *Albany* could, or should, be adapted. Section 6 concludes the chapter.

## 2. The Antitrust Laws of the United States

Section 1 of the Sherman Act states that

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.<sup>1</sup>

A breach of the Sherman Act attracts significant liability. Breach of the Act can result in treble damages being awarded, and criminal punishment of a fine not exceeding \$100 million, if a corporation, or \$1 million, if an individual, and/or imprisonment of up to 10 years.

Trade unions fall within the scope of the Sherman Act.<sup>2</sup> This has led to both Congress and the US Supreme Court creating two exemptions for trade unions from section 1’s scope. The exemptions as currently constituted are:

- The statutory exemption – s.1 of the Sherman Act does not apply where the conduct in question is lawful under the Norris-La Guardia Act and ss.6 and 20 Clayton Act, does not substantially affect commercial competition, and is pursued by the union in its own self-interest.
- The non-statutory exemption – conduct is exempt from the antitrust laws where it “[grows] out of and [is] directly related to, the lawful operation of the bargaining process.”<sup>3</sup>

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<sup>1</sup> Sherman Act, 26 Stat. 209, 15 U.S.C. §§ 1–7

<sup>2</sup> *Loewe v Lawlor* 208 U.S. 274 (1908). See sections 3 and 4 below for further discussion.

<sup>3</sup> See *Brown v Pro Football Inc.* 518 U.S. 231 (1996), 243-5.

These exemptions have developed over time and have relied on a wide number of factors. However, there is a single “taproot ... [W]hether the challenged activities are seen as “legitimate” labor activities directed at the wages, hours, and working conditions of the employees. This principle generally serves to define the proper scope of immunity for both the statutory and non-statutory exemption.”<sup>4</sup> The applicability of an exemption “turn[s] on the courts’ judgments, gross or refined, about antitrust and labour policy.”<sup>5</sup>

### 3. The Statutory Exemption

As set out above, the statutory exemption applies where the conduct in question

- (i) falls within the Norris-LaGuardia Act and sections 6 and 20 of the Clayton Act;
- (ii) does not substantially affect commercial competition; and
- (iii) is carried out unilaterally in the unions’ interest.

The statutory exemption only applies to employees and bona-fide labour organisations.<sup>6</sup> In defining such an exemption, Congressional intent and statutory interpretation have played an important role. This section will set out how these two “tools” have framed the exemption.

#### 3.1 Early Congressional Intent?

Early Congressional debates raised the concern that the Sherman Act as initially drafted could be used to prohibit unions.<sup>7</sup> The bill prohibited conduct designed to raise consumer prices.<sup>8</sup> However, many legitimate union activities resulted in higher consumer prices, and thus

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<sup>4</sup> Phillip Areeda, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (Aspen 1978) para 225c.  
<sup>5</sup> *ibid.*

<sup>6</sup> See *Columbia River Packers Association Inc. v Hinton* 315 U.S. 143 (1942)

<sup>7</sup> Senators Hoar, Hiscock, Stewart, Teller and George all raised concerns as to the potential interference with trade union’s legitimate actions. See 21 Cong. Rec. 2561 (1890).

<sup>8</sup> The initial bill stated that “[t]hat all arrangements, contracts, agreements, trusts or combinations between two or more citizens or corporations ... of different States, or ... of the United States and foreign states ... made with a view or which tend to prevent full and free competition in the importation, transportation, or sale of articles imported into the United States or with a view or which tend to prevent full and free competition in articles of growth, production or manufacture of any State or Territory ... or in the transportation or sale of like articles ... and all arrangements, trusts, or combinations between such citizens or corporations, made with a view or which tend to advance the cost to the consumer of any such articles...” (emphasis added), 21 Cong. Rec. 2457 (1890).

caught by the Act.<sup>9</sup> Although Senator Sherman stated that the Bill would not affect trade unions,<sup>10</sup> several amendments were proposed that explicitly removed trade unions from the scope of the Sherman Act.<sup>11</sup> These proposals were not included within the final version as passed by the US Senate. Two interpretations of this are possible. Either the Committee thought that an express exemption was unnecessary, or they did not wish to exempt trade unions from the Sherman Act. All the Committee states is that the Sherman Act was an affirmation of “the old doctrine of the common law in regard to all interstate and international commercial transactions, and have clothed the United States courts with authority to enforce that doctrine by injunction.”<sup>12</sup> If the common law restraint of trade doctrine did not apply to trade unions, then neither would the Sherman Act.<sup>13</sup>

Greenslade states that the view that the Sherman Act did not apply to trade unions is correct when viewed in light of its legislative history.<sup>14</sup> The Sherman Act was enacted to confront the anticompetitive practices of “giant trusts and combinations of capital ... organized in an effort to control the commercial market by suppression of competition.”<sup>15</sup> That the final version of the Sherman Act did not contain any exemption clause does not detract from such a view.<sup>16</sup> This uncertainty over the Sherman Act’s applicability to trade unions continued in the academic literature.<sup>17</sup>

The Courts, however, placed little weight on this view of Congressional intent, with the Supreme Court in *Loewe* holding that the Sherman Act applied to trade unions and their

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<sup>9</sup> See Joseph Greenslade, ‘Labor Unions and the Sherman Act: Rethinking Labor’s Nonstatutory Exemption’ (1988) 22 *Loyola of Los Angeles Law Review* 151.

<sup>10</sup> 21 Cong. Rec. 2562 (1890)

<sup>11</sup> Senator Sherman, for example, proposed “Provided, that this act shall not be construed to apply to any arrangements, agreements, or combinations between laborers, made with the view of lessening the number or hours of their labor or of increasing their wages...” 21 Cong. Rec. 2611-12.

<sup>12</sup> 21 Cong. Rec. 3146 (1890). See also Louis B Boudin, ‘The Sherman Act and Labor Disputes: I’ (1939) 39 *Columbia Law Review* 1283; Louis B Boudin, ‘The Sherman Act and Labor Disputes: Part II’ (1940) 40 *Columbia Law Review* 14.

<sup>13</sup> See Edward Berman, *Labor and the Sherman Act* (Russell and Russell 1969) 50. Note that in the UK context the common law restraint of trade doctrine did apply to trade unions. Legislation was required to prevent the common law doctrine from applying; see Trade Union Act 1871

<sup>14</sup> Greenslade (n 9) 156–7. See also James Emery, ‘Labor Organizations and The Sherman Act’ (1912) 20 *Journal of Political Economy* 599, 612.; the purpose of the Sherman Act was to “protect trade and transportation between the states and the persons engaged therein...”

<sup>15</sup> Greenslade (n 9) 161.

<sup>16</sup> See Sanjukta Paul, ‘The Roots of the Sherman Act: Farmer-Labor Republicanism and Cooperation Among Workers’ [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2996853](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2996853)..

<sup>17</sup> See, for example, Emery (n 14); Boudin, ‘The Sherman Act and Labor Disputes: Part II’ (n 12); Alpheus Mason, *Organized Labor and the Law* (Duke University Press 1925).

activities.<sup>18</sup> In *Loewe*, the trade union engaged in a series of strikes and boycotts of the wholesalers of manufacturers of fur hats in other States in order to organise within those manufacturers. To exert more pressure on the manufacturers, the union and the American Federation of Labour (hereafter AFL) initiated a general boycott of all products made by the wholesalers. The manufacturers brought a claim under the Sherman Act to combat the damage to their businesses.

In finding that the Sherman Act was applicable to trade unions, the Court was explicitly clear: a union “is a combination ‘in restraint of trade or commerce among the several States’ in the sense in which those words are used in the act...”<sup>19</sup> In reaching this decision, the Court considered Congressional intent, stating that “several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the Act and that these efforts failed, so that the Act remained as we have it before us.”<sup>20</sup> Although labelled a weak argument,<sup>21</sup> if Congressional intent was to exempt trade unions the final Act would have reflected this. As the Sherman Act did not, implies that there was no universal, discernible Congressional intent. This did not mean that all trade union restrictions would breach antitrust rules, only that they were subject to antitrust examination.

### 3.3 A clearer statement of intent?

Following the decision in *Loewe*, Congress sought to remedy the situation and expressly provide an exemption for trade union activities from the Sherman Act. As Berman argues, Congress shared the blame for the Supreme Court’s decision in *Loewe*.<sup>22</sup> Congress had chosen imprecise language. Had Congress explicitly stated their intention, they would not have had to remedy what they saw as an unacceptable decision.<sup>23</sup> To remedy this, Congress enacted the Clayton Act, which provided an exemption for trade unions from antitrust legislation.<sup>24</sup>

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<sup>18</sup> *Loewe* (n.2)

<sup>19</sup> *ibid.*, 292-3

<sup>20</sup> *ibid.*, 301

<sup>21</sup> Wayne Leslie McNaughten and Joseph Lazar, *Industrial Relations and the Government* (McGraw Hill 1954) 51.

<sup>22</sup> Berman (n 13).

<sup>23</sup> For discussion of the Congressional debates surrounding the enactment of the Clayton Act, see Gary Roberts, ‘Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints’ (1986) 75 *The Georgetown Law Journal* 19; Felix Frankfurter and Nathan Greene, *The Labor Injunction* (The MacMillan Company, New York 1930).

<sup>24</sup> 38 Stat. 731 (1914) and 38 Stat. 738 (1914) respectively

### 3.3.1 The Clayton Act – The Statutory Immunity

Sections 6 and 20 of the Clayton Act provided the basis for which trade unions could be exempt from the application of the Sherman Act and an express statement of Congressional intent. The sections read together could lead to the conclusion that the Sherman Act no longer applied to trade unions.<sup>25</sup> This led to the provisions being hailed as an industrial Magna Carta.<sup>26</sup> The purpose of the Act was to “correct an error, and make it plain and specific, by clear-cut and direct language, that the antitrust laws ... shall not be applied to labor organizations and farmers’ unions.”<sup>27</sup> Section 6 states that the

*labor of a human being is not a commodity or article of commerce.* Nothing in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having stock or conducted for profit, or to forbid or restrain individual members from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, *under the antitrust laws.* (emphasis added)

#### Section 20 prohibits the granting of an injunction

“in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms and conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application which must be in writing and sworn to by the applicant or his agent or attorney.”

Section 20 also prohibits the granting of an injunction to prevent a person, either individually or collectively, from the

“peaceful purpose of peacefully obtaining or communicating information, or from peacefully persuading any person from work or abstain from working; or from ceasing to patronize or to employ any party to

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<sup>25</sup> Berman (n 13) 101.

<sup>26</sup> See Edwin Witte, *The Government in Labor Disputes* (McGraw Hill 1932) 62.

<sup>27</sup> Representative Henry, 51 Cong. Rec. 9540-1, (1914). See also, Senator Pittman 51 Cong. Rec. 14588. Note that other members of Congress argued that the Act would be futile if it was only legalising that which already legal but dangerous if it accomplished the immunization of labor from the anti-trust laws; see, for example, 51 Cong. Rec. 9249 (MacDonald), 16283 (Volstead), 14021 (Thomas)

such dispute, or from recommending, advising or persuading others by peaceful and lawful means to do so; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.”

These sections appeared to be clear expressions of Congressional intent. Trade unions, and their ‘legitimate’ objectives, are not combinations in restraint of trade under the Sherman Act. Thus, it appeared that future judicial application of the Sherman Act would be restricted to situations where a trade union’s objectives were not legitimate; future challenges should concern the legitimacy of a union’s objective. When combined with the Sherman Act and its underlying policy, it is arguable that “Congress never intended that the Sherman Act restrain legitimate labor union activities.”<sup>28</sup>

The Supreme Court initially accepted this Congressional view, focusing its analysis on whether the purpose or intent of the union was to restrain interstate trade. In the *Coronado Coal* cases, the Supreme Court held that there is only antitrust liability where the purpose of the union is an act falling within the Sherman Act prohibitions. In the *Coronado* cases, the United Mine Workers had used violence to shut down a coalmine in response to a management lock out and the attempt to run a non-union operation instead. In *Coronado I*, the Supreme Court held that there was no evidence upon which to find that there was a conspiracy to restrain or monopolise interstate commerce.<sup>29</sup> The intent of the union was to organise the coalmine: the action as a means of lessening interstate competition for union operators was an ancillary motive, insufficient to impose antitrust liability.<sup>30</sup> In *Coronado II*, evidence indicated that the union saw non-union coal production as a serious threat to unionised firms and, by extension, union organisation and union-imposed working conditions. The Supreme Court held that there had to be a purpose or intent on the part of those preventing the manufacture of production “to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets for trade union

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<sup>28</sup> Greenslade (n 9) 161.

<sup>29</sup> *Coronado Coal Co. v United Mine Workers (Coronado I)* 259 U.S 344 (1922), 413.

<sup>30</sup> *ibid*, 408-9.

activities to be a direct violation of the” Sherman Act.<sup>31</sup> The mere reduction “in the supply of an article to be shipped in interstate commerce by illegal or tortious prevention of its manufacture or production is ordinarily an indirect or remote obstruction.”<sup>32</sup> Thus, union liability under the Sherman Act only attached where the union intended to restrain or monopolise interstate trade.

The “purpose test” remained in subsequent cases, however judicial attention started to shift to the provisions of the Clayton Act itself. This shift appeared to frustrate Congressional intent to provide protection for trade unions against antitrust. In *Duplex Printing*,<sup>33</sup> the Supreme Court stated that section 6 does not provide a blanket exemption for trade unions from antitrust law. The Court stated that nothing in section 6 exempts “such an organisation or its members from accountability where it or they *depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade. And by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade as defined by the antitrust laws.*”<sup>34</sup> (emphasis added) Thus, where the union’s objectives are not “legitimate” they are not exempt from antitrust laws.

*Duplex* concerned an attempt by the Machinists Union to unionise and establish standardised terms of employment across the industry for producing printing presses. There were only four manufacturers in the industry, three of which had reached agreement with the union. Duplex, however, did not agree to the union’s request and operated with lower costs than the other manufacturers in the industry. The other manufacturers, suffering a loss in business, threatened to withdraw from the agreement unless the union imposed greater burdens on Duplex. To do so, the union called a strike of Duplex, and ordered its members and affiliated unions to not work on the installation of presses delivered by Duplex in New York. In finding that the union pursued an illegitimate objective, the Supreme Court focussed on the applicability of s.20 of the Clayton Act.

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<sup>31</sup> *Coronado Coal Co v United Mine Workers (Coronado II)* 268 U.S. 295 (1925), 310.

<sup>32</sup> *ibid.*

<sup>33</sup> *Duplex Printing Press Co. v Deering* 254 U.S. 443 (1921)

<sup>34</sup> *ibid.*, 468-9

Section 20, as set out above, prevents the Court from granting an injunction where the union has engaged in certain type of activity. In *Duplex*, the Supreme Court adopted a restrictive interpretation, holding that section 20 only extended to employer-employee disputes related to terms and conditions of employment.<sup>35</sup> Activities outside such disputes were not protected from injunctive relief by section 20. Section 20, in the Court's view, must be narrowly read, and cannot be "regarded as bringing in all members of a labor organisation as parties to a "dispute concerning terms and conditions of employment" which "affects only a few of them..."<sup>36</sup> To do so would enlarge the provisions of section 20 and render it inconsistent with section 6 which "deals specifically with the subject and must be deemed to express the measure and limit of the immunity intended by Congress to be incident to mere membership in such an organisation."<sup>37</sup> This argument is similar to the distinction between primary and secondary action under TULRCA<sup>38</sup>: where does primary action end and secondary begin? The difficulty in making such distinctions argues strongly in favour of a blanket exemption.

The decision in *Duplex* was subsequently confirmed in *Bedford Stone*.<sup>39</sup> In *Bedford Stone*, Bedford's refusal to renew their union contract led to industrial action and a lock out. This was escalated by the union calling on their members to refuse to work on, or finish working on, stone produced by the company. In finding that the acts complained of fell within the scope of the Sherman Act, the Supreme Court further narrowed the application of the Clayton Act. The Court differentiated between the objectives sought, and the means used to achieve those objectives. Where the means adopted by the union were unlawful, "the innocent general character of the organizations adopting them or the lawfulness of the ultimate end sought to be attained, cannot serve as a justification."<sup>40</sup> As the means used by the union had the sole object of preventing the use and installation of Bedford's product in other states, "threaten[ing] to destroy or narrow petitioners' interstate trade", they attracted Sherman Act liability.<sup>41</sup>

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<sup>35</sup> *ibid.*, 472

<sup>36</sup> *ibid.*

<sup>37</sup> *ibid.*

<sup>38</sup> Trade Union and Labour Relations (Consolidation) Act 1992

<sup>39</sup> *Bedford Cut Stone Co. v Journeymen Stone Cutters' Association of North America* 274 U.S. 37 (1927)

<sup>40</sup> *ibid.*, 55

<sup>41</sup> *ibid.*

In both *Duplex* and *Bedford Stone*, Justice Brandeis dissented from the Courts' decision. However, Justice Brandeis did not adopt a consistent approach. In *Duplex*, Justice Brandeis argued that if the conduct in question was lawful under Federal labour law, or common law, then it was protected by the Clayton Act. Section 20 of the Clayton Act was wider in its application than the interpretation given by the decision of the Court.<sup>42</sup> In *Bedford Stone*, Brandeis adopted a more rounded approach, arguing that even if the Sherman Act was applicable, the restraints in question would not attract liability as they were entirely reasonable.<sup>43</sup> On the facts of *Bedford Stone*, Brandeis argued that the union's conduct was lawful. The combination complained of contained no "outsider[s]"; there was no attempt to boycott the plaintiffs; the dispute was between particular employers and particular employees; and, the action was related to the "fundamental matters of union policy of general application through the country."<sup>44</sup> Brandeis argued that if a strike could be enjoined, Congress created an instrument

for imposing restraints upon labour which reminds one of involuntary servitude ... It would indeed be strange if Congress had by the same Act willed to deny to members of a small craft of workmen the right to cooperate in simply refraining to work when that course was the only means of self-protection against a combination of militant and powerful employers.<sup>45</sup>

It has been argued that the above cases effectively nullified the protections provided by the Clayton Act to trade union activities.<sup>46</sup> For example, Boudin argued that the cases diverged from clear Congressional intent to exempt trade unions from antitrust through section 6 – labour is not a commodity or article of commerce.<sup>47</sup> Had the Congressional debates been put before the Court, with argument presented from a labour point of view, trade unions might

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<sup>42</sup> *Duplex* (n.33) 486-8. In Brandeis' view, s.20 is wider than the employee-employer relationship and where the act complained of falls within those set out in section 20 itself, they are not "considered of held to be violations of any law of the United States."

<sup>43</sup> *Bedford Stone* (n.39) 58; citing the rule of reason test set out in *Standard Oil Co v United States* 221 U.S. 1 (1921)

<sup>44</sup> *ibid.*, 60

<sup>45</sup> *ibid.*, 64-5

<sup>46</sup> See David Cavers, 'Labor v the Sherman Act' (1941) 8 *University of Chicago Law Review*; Louis B Boudin, 'Organized Labor and the Clayton Act: Part I' (1942) 29 *Virginia Law Review* 272; Louis B Boudin, 'Organized Labor and the Clayton Act: Part II' (1943) 29 *Virginia Law Review* 395.

<sup>47</sup> Boudin, 'Organized Labor and the Clayton Act: Part I' (n 46) 310.

have attracted an immunity similar to that enjoyed by professional baseball.<sup>48</sup> However, neither *Duplex* nor *Bedford Stone* concerned primary action directed at the employer's business. For example, in *Bedford Stone* the action harmed not only the employer's interests, a legitimate target during industrial conflict, but targeted direct harm at third parties. The union's intention to prevent non-union made goods entering into the market was what made the acts a violation of the Sherman Act.<sup>49</sup> There were significant restrictions in the goods markets, such that did not follow from the elimination of wage competition in the labour market. If we consider this in light of *Coronado Coal's* "purpose test", it is consistent with Congressional intent. Congress, we can assume, did not intend to exempt unions directly restricting or monopolising interstate trade from antitrust law. Allowing unions to pursue illegitimate objectives via unlawful means was not the purpose of any exemption.<sup>50</sup>

The discussion above identifies the emphasis placed on the union's purpose. Where the union did not have the subjective intent of restraining or controlling interstate trade, it fell outside the scope of the Sherman Act. Only where such intention is present will sections 6 and 20 be relevant. Any such immunity, as shown by *Duplex* and *Bedford Stone*, would be narrowly construed. However, the Supreme Court revisited this jurisprudence two decades later.

### 3.4 A new interpretation?

In 1932, Congress passed the Norris-LaGuardia Act<sup>51</sup> (hereafter NLGA) to rectify the interpretation of the Clayton Act provided by the Court in *Duplex* and *Bedford Stone*.<sup>52</sup> Sections 2 and 4 were key in this regard.<sup>53</sup> Section 2 provided a policy declaration that

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<sup>48</sup> *ibid* 309–10. Professional baseball was exempt from the Sherman Act on the basis that baseball did not constitute interstate trade; see *Federal Baseball Club v National League* 295 U.S. 200 (1922); *Toolson v New York Yankees* 346 U.S. 356 (1953); *Flood v Kuhn* 407 U.S. 258 (1972).

<sup>49</sup> Charles Gregory, 'The Sherman Act v Labor' (1941) 8 *University of Chicago Law Review* 222, 222–3.

<sup>50</sup> See *Truax v Corrigan* 257 U.S. 312 (1921), where the Supreme Court invalidated an Arizona statute of very similar wording.

<sup>51</sup> Currently codified at 29 U.S.C. §§101-115 (1982)

<sup>52</sup> See Allen Siegel, Walter Connolly, Jr. and Richard Walker, 'The Antitrust Exemption for Labor - Magna Carta or Carte Blanche' (1975) 13 *Duquesne Law Review* 411, 436–9; Greenslade (n 9) 168–9. For discussion of the legislative purpose of the Norris-LaGuardia Act see, *Milk Wagon Drivers Union v Lake Valley Farm Products Inc.*, 311 U.S. 91 (1940), 100-3

<sup>53</sup> Now 29 US Code §§101 and 104 respectively.

...the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are enacted. (emphasis added)

Section 4 prevented an injunction from being granted “in any case growing out of a labour dispute” (emphasis added) in certain circumstances; the main being strikes, workers becoming a member of a trade union and assisting, and/or publicising, a labour dispute.

In 1939, the Supreme Court had the opportunity to remedy the interpretation provided by earlier cases. In *Apex Hosiery*, the Court was asked whether a sit-in strike at Apex’s factory breached the Sherman Act.<sup>54</sup> In the factory was 130,000 pairs of finished hosiery destined for out-of-state purchasers, which the strikers prevented from being removed and dispatched. Apex thereby filed a suit under the Sherman Act for treble damages; the value of the restrained products being estimated at \$800,000. The union argued that they were protected under the Clayton Act from antitrust liability. The Supreme Court held that the conduct complained of did not breach the Sherman Act. Justice Stone, delivering the judgment of the Court, held that Sherman Act liability only arose where the aim of the union was “some form of restraint of commercial competition in the marketing of goods or services.”<sup>55</sup> On the facts of *Apex*, “the combination or conspiracy did not have as its *purpose restraint upon competition in the market for petitioner’s product.*”<sup>56</sup> Its object was to compel the employer to accede to its demands; the delay was “not intended to have and had no effect on prices of hosiery in the market, and so was in that respect no more a restraint forbidden by the Sherman Act.”<sup>57</sup>

Justice Stone’s approach is no different to that identified in section 3.3 above. Where a trade union does not intend to restrain competition in the commercial market, the Sherman

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<sup>54</sup> *Apex Hosiery Co v Leader* 310 U.S. 469 (1940)

<sup>55</sup> *ibid.*, 495

<sup>56</sup> *ibid.*, 501-2

<sup>57</sup> *ibid.*

Act does not apply. Only where the aim of the union was a “suppression of competition in the market by methods ... analogous to those found to be violations in the non-labor cases”<sup>58</sup> would trade union activities be subject to the Sherman Act. As Justice Stone argued, section 6 of the Clayton Act was such that “restraints on the sale of the employee’s services to the employer, however much they curtail competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act.”<sup>59</sup> As Handler states, “antitrust laws should not be applied to nor should their application turn upon, a finding of an unfair labor practice. The criterion under antitrust is the effect on market competition as explicated in *Apex*.”<sup>60</sup> *Apex* simply confirms previous Supreme Court jurisprudence: only where the purpose is to restrain commercial competition will antitrust law apply, and the immunity under the Clayton Act become relevant.

However, Chief Justice Hughes robustly dissented, arguing that if trade unions were not exempt from the Sherman Act and acted outside the legitimate boundaries established by section 20 Clayton Act, then labour market restraints should fall under the Sherman Act. The purpose of promoting the interests of a labour organisation did not justify a direct and intentional restraint on interstate commerce. The Clayton Act provided an exemption where the union engages in “lawful measures ... to attain the legitimate objects of labor organizations”, not when engaged in “a conspiracy directly and intentionally to prevent the shipment of goods in interstate commerce.”<sup>61</sup> Such an approach, however, is circular: the exemption only applies when a measure is lawful and not a restraint of trade. Although drawing similarities with that of Stone J, Hughes’ approach restricts any exemption for union activities to those enumerated under section 20. It echoes that of Brandeis’ decision in *Bedford Stone*: unlawful union conduct that indirectly restrains interstate trade falls under the Sherman Act.

*Apex* has been labelled the “commercial competition” test; Sherman Act liability only attached where the union has the purpose or intent of restraining market competition. Purpose is identified by a “close and objective scrutiny of particular conditions and purposes” in each case.<sup>62</sup> The ‘*Apex* approach’ has been favourably received in academic literature:

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<sup>58</sup> *ibid.*, 506

<sup>59</sup> *ibid.*, 471-2

<sup>60</sup> Milton Handler, ‘Reforming the Antitrust Laws’ (1982) 82 *Columbia Law Review* 1287, 1346.

<sup>61</sup> *Apex* (n.54) 529

<sup>62</sup> *Appalachian Coals Inc. v United States* 288 U.S. 344 (1933), 360.

academic literature predominantly proposes returning to it for assessing whether union conduct attracts Sherman Act liability.<sup>63</sup> Such an approach, however, would require changing Supreme Court jurisprudence holding that antitrust applies to competitive restraints in the labour market;<sup>64</sup> for example, the *Superior Court Trial Lawyers Association* decision.<sup>65</sup>

The approach in *Apex* was followed by the decisions in *Hutcheson*<sup>66</sup> and *Allen Bradley*.<sup>67</sup> However, *Apex*'s clarity and consistency was not strictly followed. *Hutcheson* concerned a jurisdictional dispute over whether machinists or carpenters were to erect and dismantle machinery in Anheuser-Busch. An agreement between the company and the two unions, the United Brotherhood of Carpenters and the International Association of Machinists, assigned machinists the role, with the Carpenters' union agreeing to submit all disputes to arbitration. Following a dispute, the Carpenters' union picketed both Anheuser and a company located adjacent to Anheuser's factory with leaflets and official publications requesting that members and their friends refrain from buying Anheuser beer. The question before the Supreme Court was whether such action was an infringement of section 1 of the Sherman Act.

In the Court's view, whether trade union conduct constituted a violation of the Sherman Act was determined by reading together the Sherman Act, section 20 of the Clayton Act, and the Norris-LaGuardia Act.<sup>68</sup> According to the majority in *Hutcheson*, union conduct that was lawful under the Norris-LaGuardia Act fell within section 20 of the Clayton Act and did not attract liability under the Sherman Act. Such an approach has very strong elements of Brandeis' decision in *Duplex*: where an act is lawful under labour law, it is lawful under antitrust. Justice Frankfurter in delivering the opinion of the Court held that

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<sup>63</sup> See Elinor Hoffman, 'Labor and Antitrust Policy: Drawing a Line of Demarcation' (1983) 50 Brooklyn Law Review 1, 47–50; Douglas Leslie, 'Principles of Labor Antitrust' (1980) 66 Virginia Law Review 1183, 1233–4; Handler (n 60) 1346; Ralph Winter Jr and Michael Jacobs, 'Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage' (1971) 81 The Yale Law Journal 1; Gabriel Feldman, 'Antitrust versus Labor Law in Professional Sports: Balancing the Scales after Brady v. NFL and Anthony v. NBA' (2011) 45 UC Davis Law Review 1221; Greenslade (n 9) 214–6. Greenslade argues that the focus on the union's purpose explains the decisions in *Allen Bradley* and *Hutcheson*. The union's purpose was to restrict competition in the commercial market.

<sup>64</sup> Feldman (n 63) 1274.

<sup>65</sup> *FTC v Superior Court Trial Lawyers Association* 493 U.S. 411 (1990), 428, where the Court held that the Sherman Act prohibited a boycott by lawyers in a labour market for indigent counsel services. See also, *Apex* (n.58) 488, where the Court holds that the Sherman Act does "embrace to some extent and in some circumstances labor unions and their activities."

<sup>66</sup> *United States v Hutcheson* 312 U.S. 219 (1941)

<sup>67</sup> *Allen Bradley Co v Local No. 3, International Brotherhood of Electrical Workers* 310 U.S. 469 (1940)

<sup>68</sup> *Hutcheson* (n.66) 232

[s]o long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under section 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness of wrongness, the selfishness or unselfishness of the end of which the particular activities are the means.<sup>69</sup>

Thus, the statutory exemption does not apply where a union acts in concert with an employer. Under *Hutcheson*, collective agreements may attract liability under the Sherman Act. However, by linking the statutory immunity provided for under the Clayton Act with the lawfulness of conduct under the Norris-LaGuardia Act, the Court allowed any future changes to the NLGA to automatically adjust the scope of the statutory exemption. Although Justice Roberts' dissenting opinion questions whether such use of the Norris-LaGuardia Act was correct, it ignored the point that the Act was intended to remedy and reverse the decisions in *Duplex* and *Bedford Stone*.<sup>70</sup>

The decision in *Allen Bradley* reaffirmed the approach in *Hutcheson*. In *Allen Bradley*, the union sought closed-shop agreements with all electrical equipment manufacturers and contractors to expand its membership, obtain shorter hours and higher wages, and increase the employment opportunities of its members. The agreements required contractors to purchase equipment from union-only suppliers, and manufacturers to confine their New York City sales to contractors employing union members. To police this agreement, agencies were set up which boycotted recalcitrant parties and prevented the use of materials manufactured outside their area. Such enforcement was highly successful, with some manufacturers selling their goods outside New York at substantially lower prices. When asked whether such market foreclosure was an antitrust infringement the Court held that had the union acted alone, any anti-competitive effects would have been the natural consequence of trade union activities protected by the Clayton Act.<sup>71</sup> However,

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<sup>69</sup> *ibid.*, 233

<sup>70</sup> See the House Committee on the Judiciary Reports which state that the purpose of the Norris-LaGuardia Act was to remedy the unduly restrictive judicial interpretation of the Clayton Act and restore the broad purpose of the Act; see H. Rep. No. 669, 72d Cong., 1<sup>st</sup> Sess., 3, at 6-8 (1931). See also, Siegel, Connolly, Jr. and Walker (n 52); Lee Goldman, 'The Labor Exemption to the Antitrust Laws: A Radical Proposal' (1987) 66 *Oregon Law Review* 153, 157.

<sup>71</sup> *Allen Bradley* (n.67) 809

when the unions participated with a combination of businessmen who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts.<sup>72</sup>

In the Court's view, combination was critical: "the same union activities may or may not be a violation of the Sherman Act, *dependent upon whether the union acts alone or in combination with business groups* ... [There was] no purpose of Congress to immunize labor unions who aid and abet manufacturers and traders in violating the Sherman Act."<sup>73</sup>

The Court moves away from solely considering the purpose of the union's conduct: the union's purposes, increasing its members' wages and shortening hours of work, was not sufficient to exempt the conduct in question. This shift can be seen more clearly in the accompanying opinions. Justice Roberts, concurring, held that the purpose of the union was to "completely monopolize the manufacture and sale of all electronic equipment and devices within New York..."<sup>74</sup> Justice Murphy, dissenting, argued that combining with non-labour groups should not be decisive: the purpose of the union should determine the applicability of the Sherman Act.<sup>75</sup>

### 3.5 Two strands or interlinking decisions?

Post-*Hutcheson* and *Apex* two strands of reasoning are present: two approaches to the same question.<sup>76</sup> The *Apex* strand adopts an interpretation of the Sherman Act that negates the need for an exemption. The Sherman Act is only applicable to actions and agreements that have the purpose of directly restraining goods in the product market. This approach does not require using the Clayton or Norris-LaGuardia Acts to create an exemption: trade union activities aimed at improving the position of its members fall outside the scope of the Sherman Act. The *Hutcheson* strand adopts an exemption based on interlinking statutes. Unilateral union conduct falling within the Norris-LaGuardia Act and s.20 of the Clayton Act is

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<sup>72</sup> *ibid.*

<sup>73</sup> *ibid.*, 810

<sup>74</sup> *ibid.*

<sup>75</sup> *Ibid.*, 820. Justice Murphey states that "[w]hat is legal if done alone should not become illegal if done with the assistance of others and with the same purpose in mind."

<sup>76</sup> See Milton Handler and William Zifchak, 'Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption' (1981) 81 *Columbia Law Review* 459, 483.

exempt from the Sherman Act. The Courts have adopted this strand of reasoning.<sup>77</sup> In considering whether the statutory exemption applies, the Court avoids examining the more difficult question of determining a union's purpose.

The 'interlinking statute' approach has been criticised in the academic literature, which strongly favours the approach taken in *Apex*.<sup>78</sup> Adopting *Apex's* approach would remove the need for any statutory exemption, and include collective bargaining and agreements.<sup>79</sup> As Handler and Zifchak point out, *Hutchinson's* approach means that antitrust liability is not premised on the finding of an unfair labour practice: "[t]he criterion under antitrust is the effect on market competition as explicated in *Apex* ... whether or not union conduct violates ... labor law should be irrelevant."<sup>80</sup> However, an exemption may still be necessary where trade union conduct has both labour and product market effects, especially where the conduct in question is lawful under labour law. Where this is the case, an exemption could, as seen from the discussion of the non-statutory exemption below, be the result of a balance between antitrust and labour policy.<sup>81</sup>

Steffen argues that *Hutcheson* should be read in conjunction with *Apex*<sup>82</sup>; Greenslade, with *Apex* and *Allen Bradley*.<sup>83</sup> Steffen provides no clear explanation as to why this should be. However, one can assume that even where there is an intent to restrict interstate commerce in the product market, where the union seeks a lawful objective by lawful labour market means; it is exempt from antitrust liability.<sup>84</sup> Greenslade commends reading *Apex-Hutcheson-Allen Bradley* together as "establishing the foundation for a very sensible approach to the labor-antitrust problem."<sup>85</sup> According to Greenslade, the cases establish that the Sherman Act only prohibits activities aimed at eliminating competition within the commercial market. *Hutcheson*, read with *Allen Bradley*, conditions the statutory exemption on two factors: the

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<sup>77</sup> See, for example, *Local Union No. 189, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO v Jewel Tea* 381 U.S. 676 (1965)

<sup>78</sup> See Winter and Jacobs (n 63); Hoffman (n 63); Handler and Zifchak (n 76).

<sup>79</sup> Handler and Zifchak (n 76) 498.

<sup>80</sup> *ibid.*

<sup>81</sup> Areeda (n 4) para 255e3., suggests that the requirement of "intimacy" under the implied exemption is to ask whether there was a least restrictive way of achieving the union's legitimate objective.

<sup>82</sup> Roscoe Steffen, 'Labor Activities in Restraint of Trade: The *Hutcheson* Case' (1941) 36 *Illinois Law Review* 1, 26.

<sup>83</sup> Greenslade (n 9) 187.

<sup>84</sup> This is based on reading of Steffen's detailed assessment of the Court's decision and the Congressional intent behind both the Clayton Act and the NLGA.

<sup>85</sup> Greenslade (n 9) 187.

existence of a labour dispute (*Hutcheson*), and a finding that the union acted alone and, in its self-interest (*Hutcheson* and *Allen Bradley*).<sup>86</sup> Conduct, which may not fall within the exemption as defined by *Hutcheson* and *Allen Bradley*, still, may not fall under the Sherman Act under *Apex*'s purpose requirement.<sup>87</sup>

Leslie points out that *Allen Bradley* can be read as imposing a restraint on the decision in *Hutcheson*. *Allen Bradley* restricts the *Hutcheson* immunity to situations where the union engages in truly unilateral conduct such as a strike.<sup>88</sup> Where the union reaches an agreement with an employer, the *Apex* commercial competition test applies. This approach immediately removes the need for a further "non-statutory" exemption. Unilateral conduct is protected under *Hutcheson* and *Allen Bradley*, agreements under *Apex*. *Apex* and *Hutcheson*, when read in conjunction with one another, provide protection from antitrust for most trade union activities. However, *Hutcheson* closes off a wider reading of the statutory immunity. The Supreme Court held that the immunity is lost when the union joins with outsiders or does not act in its self-interest.<sup>89</sup> Having held that "outsiders" means "non-labor groups", collective bargaining and agreements automatically fall outside the scope of the statutory exemption. This is how *Hutcheson* has been interpreted.<sup>90</sup>

### 3.6 Summary

Handler provides a summary of the statutory exemption as it applies today.<sup>91</sup>

If union conduct was embraced by Norris-LaGuardia ... [*Hutcheson*] ... if it restrains ... competition based on differences in labor and not on commercial price competition ... [*Apex*] ... and if it was pursued by the union solely in its self-interest [*Hutcheson; Allen Bradley*] ... it [is] free of liability.<sup>92</sup> (emphasis added)

This shares similarities with the exemption in *Albany*. It adopts set conditions that must be met for union conduct to fall outside the scope of the Sherman Act. It provides certainty and predictability for trade unions. This contrasts with the Supreme Court's earlier approach to

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<sup>86</sup> *ibid* 188.

<sup>87</sup> *ibid*.

<sup>88</sup> Leslie (n 63) 1204.

<sup>89</sup> See Areeda (n 4) para 256e.

<sup>90</sup> See Handler (n 60); Handler and Zifchak (n 76).

<sup>91</sup> Handler (n 60) 1341.

<sup>92</sup> *ibid*.

the statutory exemption, which provided a significant element of confusion. The lack of consensus between Congress and the Supreme Court as to the proper treatment of trade union activities by antitrust allowed the exemption's boundaries to be probed to the detriment of trade unions and workers. This shows the benefit (and importance) of a clear, certain and predictable exemption. I shall return to this in section 5 below, when exploring what we can learn from the US approaches.

The statutory exemption, however, does not protect collective agreements. This is through the requirement that the conduct in question is protected by the Norris-LaGuardia Act. The NLGA prevents an injunction from being granted in a specific number of circumstances, all arising from a labour dispute. Despite the wider interpretation of a labour dispute,<sup>93</sup> it prevents the inclusion of collective bargaining within the statutory exemption. How collective agreements are protected from antitrust is the focus of section 4.

#### 4. The Non-Statutory Immunity

*Allen Bradley* heralds the creation of the non-statutory exemption. There, the Supreme Court assumed that the collective agreement between the union and employers was unobjectionable to antitrust.<sup>94</sup> However, it remained unclear whether collective agreements were exempt from antitrust liability or fell within the scope of the Sherman Act.<sup>95</sup> The Supreme Court's decision restricted the statutory immunity to union and worker conduct only. To resolve this problem, and effectuate congressional policy of encouraging collective bargaining, the Supreme Court developed a "non-statutory" exemption to cover both employers and trade unions when engaged in collective bargaining.<sup>96</sup> "The union benefit from the ... [collective agreement] ... is direct and concrete and the effect on the product market, though clearly present, results from the elimination of competition based on wages among the employers in the bargaining unit, *which is not the kind of restraint Congress intended the Sherman Act to proscribe.*"<sup>97</sup>

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<sup>93</sup> 29 US Code Chapter 6, s.113 defines a labor dispute as "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms and conditions of employment, whether or not the disputants stand in the proximate relation to the employer or employee."

<sup>94</sup> *Allen Bradley* (n.67) 689-90. See also, Herbert Bernhardt, 'The Allen Bradley Doctrine: An Accommodation of Conflicting Policies' (1962) 110 University of Pennsylvania Law Review 1094; Areeda (n 4) paras 255e2, 256c.

<sup>95</sup> See Greenslade (n 9); Steffen (n 82).

<sup>96</sup> See *Jewel Tea* (n.77) 369-70; Roberts (n 27) 58.

<sup>97</sup> *United Mine Workers v Pennington* 381 U.S. 657, 664 (1965), citing *Apex* (n.54)

The non-statutory exemption gained prominence in the Supreme Court's decisions in *Pennington* and *Jewel Tea*. However, neither decision provides a clear enunciation of the exemption. In *Pennington*, Justice White appeared to conclude that a collective agreement concerning a mandatory subject of bargaining is exempt from antitrust laws, unless "it is clearly shown that [the union] has agreed with one set of employers to impose a certain wage scale on other bargaining units."<sup>98</sup> Where the union participated in a conspiracy to eliminate competitors from industry, the labour exemption does not apply<sup>99</sup>: "the policy of the antitrust laws is clearly set against employer-union agreements seeking to prescribe labor standards outside the bargaining unit."<sup>100</sup> Such an agreement was challenged in *Pennington* itself. In *Pennington*, the union and employers sought to impose collectively agreed terms on all other companies in the industry regardless of a firm's ability to pay. The union and employers also took steps to exclude the marketing, production and sale of non-union coal, refused to lease land to non-union operators, and refused to buy or sell coal mined by those operators. In the Court's opinion, the conspiracy to impose the agreed conditions on other employers removed the exemption. Demanding equal wages from all employers was a legitimate demand, the Court held, and not grounds for denying the exemption. However, where there was an explicit agreement between the union and one or more employers to impose the same wages on all employers regardless of the firm's ability to pay, the union's self-interest, and for the purpose of destroying competition, the exemption would be withheld.<sup>101</sup> One can see the decision as following *Hutcheson's* self-interest test and being closely based on that in *Allen Bradley*.<sup>102</sup> However, is it not in the self-interest of the union to prescribe standards outside of its bargaining unit in order to protect wage rates within the bargaining unit?

In *Jewel Tea*, the agreement in question was exempt from the Sherman Act. The agreement, restricting the marketing hours for the sale of fresh meat to protect the working hours of butchers, was challenged as a conspiracy to restrict competition in retail meat markets. The Supreme Court found that there was no union-employer conspiracy; it was "not

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<sup>98</sup> *ibid.*, 664-5

<sup>99</sup> *ibid.*

<sup>100</sup> *Ibid.*, 668

<sup>101</sup> This has subsequently been applied by lower courts. See for example, *Continental Maritime Inc v Pacific Coast Metal*, AFL-CIO 817 F.2d 1391 (9<sup>th</sup> Cir. 1987); *Smitty Baker Coal Co. Inc. v United Mine Workers* 620 F.2d 416 (4<sup>th</sup> Cir. 1980).

<sup>102</sup> In the separate concurring opinion of Mr Justice Douglas, with Mr Justices Black and Clark, references is made continually to the Court's decision in *Allen Bradley*. See *Jewel Tea* (n.77) 672-5.

as a result of a bargain between the unions and some employers directed against other employers ... [but was] ... *pursuant to what the unions deemed to be in their best interest.*"<sup>103</sup> (emphasis added) However, the Court was split – with those dissenting not commenting on the exemption. Mr Justice White, with the Chief Justice and Brennan J, argued that an agreement was exempt from the Sherman Act where it was “so intimately related to wages, hours and working conditions ... [and obtained] through *bona-fide*, arms-length bargaining in pursuit of their own labor policies, and not at the behest of or in combination with non labor groups.”<sup>104</sup> Mr Justice Goldberg, with Harlan and Stewart JJ, argued that the Court should draw on the approach taken in *Hutcheson*, and exempt collective agreements (and bargaining) “concerning mandatory subjects of bargaining under the Labor Act”.<sup>105</sup> Such approach “would effectuate the congressional policies of encouraging free collective bargaining, subject only to specific restrictions contained in the labor laws, and of limiting judicial intervention in labor matters via the antitrust route...”<sup>106</sup>

Putting Justice White’s decisions in *Pennington and Jewel Tea* together, the following approach takes shape. A collective agreement will enjoy immunity where the union pursues the agreement in its own self-interest; is intimately related to matters of immediate and direct union concern; and does not impair the freedom of contract of the parties to the collective agreement in their relations with third parties.<sup>107</sup> This third aspect has been criticised as finding no support in “traditional antitrust doctrine ... [subverting] the very essence of contractual obligation.”<sup>108</sup> It implies that a contractual restriction on a party’s freedom to bargain represents a *per se* infringement of the Sherman Act.<sup>109</sup>

In *Connell*,<sup>110</sup> the Supreme Court had the opportunity to resolve any uncertainty and provide an authoritative statement of the non-statutory exemption. Connell alleged that a collective agreement requiring it not to subcontract work to firms who did not have a current union agreement violated the Sherman Act. In holding that the agreement in question did not benefit from the exemption, Justice Powell, delivering the Court’s opinion, adopted a

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<sup>103</sup> *Jewel Tea* (n.77) 688

<sup>104</sup> *ibid.*, 689-90

<sup>105</sup> *ibid.*, 710

<sup>106</sup> *ibid.*

<sup>107</sup> See *Jewel Tea* *ibid* 689-90; *Pennington* (n.97) 663-6; *Handler and Zifchak* (n 76) 486.

<sup>108</sup> *ibid* 508–11.

<sup>109</sup> *ibid.*

<sup>110</sup> *Connell Construction Company Inc. v Plumbers and Steamfitters, Local Union No. 100* 421 U.S. 616 (1975)

slightly different approach to that in *Jewel Tea* and *Pennington*. Having reaffirmed the need to exempt collective agreements from the Sherman Act, Justice Powell held that although the goal of the union, organising as many contractors as possible, was legal, the methods used were “not immune from antitrust sanction simply because the goal is legal.”<sup>111</sup> In order to fall within the antitrust immunity, any restrictions in the business market should “follow naturally from the elimination of competition over wages and working conditions.”<sup>112</sup>

The decisions in *Jewel Tea*, *Pennington* and *Connell* have been the subject of much criticism. Hoffman, for example, states that although the cases do not change the approach taken in *Apex*,<sup>113</sup> the Supreme Court did not “clarify the significance of the nonstatutory exemption: it is simply an application of the *Apex* rule to a particular set of facts.”<sup>114</sup> Along similar lines, Goldman advocates a return to the test set out in *Allen Bradley*<sup>115</sup>: the non-statutory exemption applies unless the union has “joined or instigated a conspiracy to create a monopoly among conspiring business interests.”<sup>116</sup> This would recognise that the labour exemption was designed to protect union activity furthering its own self-interests.<sup>117</sup> However, in situations such as *Allen Bradley*, is the union not furthering its own self-interest by combining with an employer? Through price fixing, unions could ensure that wages are simultaneously increased. Using standards such as “follows naturally”<sup>118</sup> could lead to such activities being exempt.<sup>119</sup> Such a standard also creates uncertainty; it has the potential to “intensif[y] the uncertainty in this area.”<sup>120</sup> Were this standard to be applied post-*Connell*, Congress should step in and “state whether conduct which violates national labor laws can also be attacked as violative of antitrust laws. Pending such Congressional clarification, we will continue to witness the judiciary applying its own views on how to strike the balance

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<sup>111</sup> *ibid.*, 625

<sup>112</sup> *ibid.*,

<sup>113</sup> Hoffman (n 63) 48.

<sup>114</sup> *ibid.* 50. c.f. Leslie (n 63)., who argues that the approach taken does not follow the approaches in *Apex*, *Hutcheson* and *Allen Bradley*.

<sup>115</sup> Goldman (n 70) 185.

<sup>116</sup> *ibid.* c.f. Handler and Zifchak (n 76) 485., who argues that *Pennington* reaffirms *Allen Bradley*. See also *Ramsay v United Mine Workers* 401 U.S. 302 (1971), 314.

<sup>117</sup> Goldman (n 70) 185.

<sup>118</sup> *Connell* (n.110)

<sup>119</sup> See, for further discussion, Leslie (n 63) 1216–21.

<sup>120</sup> Jacob Sheinkman, ‘Secondary Boycotts and the Labor Antitrust Exemption - A Labor Union’s View’ (1978) 47 *Antitrust Law Journal* 1315, 1317.

between labor law and antitrust.”<sup>121</sup> However, is such a fixed rule possible? Adopting a self-interest standard, without either tethering it to labour or antitrust laws, would be too broad. It could immunise conduct that is solely anti-competitive.

Criticism has also focussed on the suggestion that the exemption derives from a balancing between labour and antitrust policy,<sup>122</sup> including the three factors set out in *Jewel Tea* and *Pennington*. Roberts criticises the Courts for introducing such a reconciliation without defining the scope or limits of such an approach.<sup>123</sup> The Courts’ focus in each case was limited to the specific circumstances of the case rather than the broader implications.<sup>124</sup> However, *Jewel Tea*, *Pennington* and *Connell* do provide guidance. *Jewel Tea* suggests that where there are strong labour policy interests and weak competition ramifications the exemption will apply; *Pennington* and *Connell* the opposite.<sup>125</sup> The cases establish that where the restraint “follows naturally”<sup>126</sup> from, and directly relates to a mandatory subject of bargaining, the strong labour policy interest in upholding the collective agreement would override any antitrust ramifications.<sup>127</sup> Any dispute should be resolved through contract or labour law. Only direct product market restraints lose the exemption’s protection.<sup>128</sup>

Handler and Zifchak concur; pointing out that the basic understanding of these cases is that no collective agreement is automatically exempt from antitrust, even where limited to mandatory subjects.<sup>129</sup> There is no congruence between the boundaries of compulsory collective bargaining and the labour exemption. In their view, Justice White stopped short of following *Hutcheson*, creating an automatic immunity for all agreements concerning mandatory subjects.<sup>130</sup> Such an approach, they argue, creates a clash between two conflicting

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<sup>121</sup> Ronald Greenberg, ‘Secondary Activity and the Labor Antitrust Exemption: A Historical Presentation’ (1978) 47 *Antitrust Law Journal* 1301, 1313.

<sup>122</sup> See Richard Mann, Brian Powers and Barry Roberts, ‘The Accommodation between Antitrust and Labor Law: The Antitrust Labor Exemption’ (1978) 9 *Seton Hall Law Review* 744, 754; Handler and Zifchak (n 76) 484; Susan Schwochau, ‘The Labor Exemptions to Antitrust Law: An Overview’ (2000) 21 *Journal of Labor Research*. See also *Jewel Tea* (n.77) 689-691, where Justice White refers to “[w]eighing the respective interests involved” and factors “weighing heavily in favour” of the exemption.

<sup>123</sup> Roberts (n 23) 59–61.

<sup>124</sup> *ibid.* See also Mann, Powers and Roberts (n 122) 755.

<sup>125</sup> See Mann, Powers and Roberts (n 122) 754; Handler and Zifchak (n 76). Mann, Powers and Roberts (n 128) 754; Handler and Zifchak (n 78).

<sup>126</sup> *Connell* (n.110)

<sup>127</sup> See *Jewel Tea* (n.77). *Allen Bradley* can provide a situation where the antitrust ramifications would outweigh the federal labour policy, however without guidance it is not as clear as could be.

<sup>128</sup> See *Consolidated Express Inc., v New York Shipping Association* 602 F.2d 494 (3<sup>rd</sup> Cir. 1979).

<sup>129</sup> Handler and Zifchak (n 76) 506.

<sup>130</sup> *ibid* 484.

economic goals, placing the review of collective agreements in the hands of the courts and not a specialised body such as the NLRB.<sup>131</sup>

*Jewel Tea, Pennington and Connell*, however, all concerned product market restraints. *Jewel Tea* restricted an employer's hours of operation; *Connell*, from subcontracting with certain subcontractors. No restraint was consigned solely to the labour market. Where an agreement simply specifies how much the employer will "pay for labor, as well as working conditions and hours", such agreement requires no antitrust immunity.<sup>132</sup> It should be classified as a simple vertical agreement between sellers and purchasers describing the terms of the purchase.<sup>133</sup>

#### 4.1 A wider application

Despite the criticism of *Jewel Tea, Pennington and Connell*, the Court's balancing approach was confirmed by the Supreme Court in *Brown*.<sup>134</sup> In *Brown*, "squad" players challenged the imposition of new rules establishing a development squad in each NFL team. Following a breakdown in bargaining, the NFL imposed the rules unilaterally, with sanctions imposed where a team failed to comply. The players challenged the requirement that development squad players be paid \$1000 per week as a restraint of trade under the Sherman Act. The NFL defended the rules on the basis that they were protected by the non-statutory exemption.

Although not contained in a collective agreement, the Court found that the non-statutory exemption applied. Justice Breyer, delivering the opinion of the Court, held that the non-statutory exemption applied to conduct that "grew out of, and was directly related to, the lawful operation of the bargaining process."<sup>135</sup> Thus, the exemption was broad enough to shield the entire collective bargaining process "established by federal law."<sup>136</sup> In the Court's view, for there to be an effective exemption, including for employer conduct, the exemption must apply to the whole bargaining process, not just the bargain itself.<sup>137</sup> On the facts of the

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<sup>131</sup> *ibid* 500. This breaks from the predominant view that labour conduct was to be exclusively regulated under labour law. See *American Federation of Musicians v Carroll* 391 U.S. 99 (1968).

<sup>132</sup> *Areeda* (n 4) para 256a.

<sup>133</sup> *ibid*.

<sup>134</sup> *Brown* (n.3)

<sup>135</sup> *ibid.*, 250

<sup>136</sup> *ibid.*, 237. The "implicit exemption recognizes that, to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions."

<sup>137</sup> *ibid.*, 243-5

case, the conduct complained of took place during and immediately after collective bargaining; was part of and directly related to the lawful operation of collective bargaining; was a mandatory subject of bargaining; and, concerned only the specific parties involved in bargaining.<sup>138</sup> Furthermore, in Justice Breyer's view, absent the protection of the exemption, the NFL would have been faced with dual liability. If they imposed their last joint offer, they would invite antitrust liability as the NFL's conduct demonstrated "a common understanding or agreement".<sup>139</sup> If each individual employer imposed different terms, they would "invite an unfair labor practice charge."<sup>140</sup> Therefore, to facilitate collective bargaining, antitrust liability should be removed: to allow it would "introduce instability and uncertainty into the collective bargaining process."<sup>141</sup>

In balancing the competing interests, the Court relied on the factors identified in *Jewel Tea, Pennington* and *Connell*. As already stated, the conduct

- (i) took place during and immediately after a collective bargaining relationship;
- (ii) was directly related to the lawful operation of the bargaining process;
- (iii) involved a topic that the parties were required to bargain over; and
- (iv) concerned only the parties to the bargaining relationship.<sup>142</sup>

In his dissent, Justice Stevens argued that the majority decision imported their own policy considerations into the balance, instead of the policy considerations contained within the labour statutes. Justice Stevens saw the majority opinion as upsetting the balance of power in collective bargaining: the exemption being a pro-labour tool.<sup>143</sup> In his view, the non-statutory exemption had its roots in strong labour policy favouring the elimination of competition over wages and working conditions, preventing "collective action initiated by employers to depress wages below the level that would be produced in a free market."<sup>144</sup> As Justice Stevens pointed out, the majority ignored the facts of the case and the way in which collective bargaining operates within the NFL. The Court, by protecting the imposition of

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<sup>138</sup> *ibid.*

<sup>139</sup> *ibid.*, 241-2

<sup>140</sup> *ibid.*

<sup>141</sup> *ibid.*

<sup>142</sup> *ibid.*, 250

<sup>143</sup> *ibid.*, 257

<sup>144</sup> *ibid.*, 254

terms not previously agreed by the union, “would not only infringe on the union’s freedom of contract ... but would also contradict the very purpose of the antitrust exemption by not promoting execution of a collective bargaining agreement with terms mutually acceptable to employer and trade union alike.”<sup>145</sup> Thus, Justice Stevens would have refused to exempt an agreement where it was contrary to the interests of employees.<sup>146</sup>

The majority decision in *Brown* has been heavily criticised. A consistent criticism is the proposition that the exemption can only be avoided through either decertifying the union and/or repudiating its role as bargaining agent.<sup>147</sup> As long as the bargaining relationship continues, the exemption applies to union and employer conduct. Decertification is the only way in which a union can show a clear end to the bargaining relationship. Such conduct is not uncommon and has been used in disputes involving the NFLPA and NBPA in recent years.<sup>148</sup> Although these cases concerned the professional sports environment, the Courts’ decisions extend beyond this highly unusual context.<sup>149</sup>

Extending the exemption beyond a bargaining impasse, it has been argued, is inconsistent with the policy objectives sought by the exemption: the protection of congressional policy favouring collective bargaining. Bryant argues that this gives too much power to employers, using the non-statutory exemption to exempt unilateral employer conduct.<sup>150</sup> As the purpose of the exemption is to enable collective bargaining, once bargaining reaches impasse there is no further need for the exemption.<sup>151</sup> Post-impasse there is no bargaining relationship. Furthermore, Yu argues that *Brown* is overbroad and will have an adverse effect on collective bargaining.<sup>152</sup> It gives insufficient regard to labour law and the

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<sup>145</sup> *Brown v Pro Football Inc.*, 782 F. Supp. 125 (D.C. 1991), 139

<sup>146</sup> *Brown* (n.3) 255

<sup>147</sup> Nathaniel Grow, ‘Decertifying Players Unions: Lessons from the NFL and NBA Lockouts of 2011’ (2013) 15 *Vanderbilt Journal of Entertainment and Technology Law* 473, 485–6; Feldman (n 63) 1247. Decertification is the same as derecognition within the UK context.

<sup>148</sup> See *Anthony v NBA* No. 11-5525 (N.D.Cal. Nov. 15, 2011); *McNeil v National Football League* 764 F. Supp. 1351 (D. Minn. 1991). In *McNeil*, the CJEU accepted that termination of the collective bargaining relationship was a matter of whether a majority of employees in a bargaining unit support a particular union as their bargaining agent.

<sup>149</sup> In US sports, wage bargaining is conducted individually and collectively.

<sup>150</sup> Denise Bryant, ‘Brown v Pro Football, Inc.: You Make the Call’ (1997) 4 *Jeffrey S Moorad Sports Law Journal* 87.

<sup>151</sup> *ibid* 115–8. See also Jonathan Shapiro, ‘Warming the Bench: The Nonstatutory Labor Exemption in the National Football League’ (1993) 61 *Fordham Law Review* 1203, 1226–33. Shapiro argues that extending the exemption until impasse achieves the effectuation of federal labour policy.

<sup>152</sup> Derek Yu, ‘The Reconciliation of Antitrust Laws and Labour Law in Professional Sport’ (1999) 6 *Sports Law Journal* 155.

jurisprudence of the National Labor Relations Board (NLRB), which states that courts cannot compel a party to accept contractual terms, which it has never agreed to. As such, Yu argues that the exemption should expire when it “becomes clearly unreasonable for either party to believe that a particular provision will be incorporated into a subsequent agreement.”<sup>153</sup> Such a standard, Yu argues, would encourage collective bargaining, as the union would be willing to accept anticompetitive provisions.<sup>154</sup>

However, the ruling in *Brown* is not as wide as it appears.<sup>155</sup> Lower courts have restricted the exemption’s application to multi-employer agreements and conduct. For example, the lower courts have held that multi-employer conduct will only be allowed where it falls within the exemption’s rationale<sup>156</sup> or, in the case of multi-employer agreements, where it is intimately related to the collective agreement.<sup>157</sup> In *Safeway*, for example, the Court held that the exemption did not apply to a profit-sharing scheme used to protect members of the multi-employer bargaining unit against targeted industrial action. Other options were available to make the collective bargaining process work, “without the need to engage in such basic violations of the antitrust system.”<sup>158</sup> As such, conduct not “historically authorised for use as part of the collective bargaining process” is not exempt from antitrust’s scope.<sup>159</sup>

#### 4.2 Summary

To summarise, the non-statutory exemption applies to union and employer conduct that “[grows] out of, and [is] directly related to, the lawful operation of the bargaining process.”<sup>160</sup> Although the Supreme Court implies that the exemption applies where the conduct

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<sup>153</sup> *ibid* 160.

<sup>154</sup> *ibid* 182.; see also Kieran Corcoran, ‘When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports’ (1994) 94 *Columbia Law Review* 1045.

<sup>155</sup> See Laura Kaplan, ‘An Implicit Exemption, Implicitly Applied: Blurring the Line of Accommodation Between Labor Policy and Antitrust Law in *Harris v Safeway*’ (2012) 53 *Boston College Law Review* 181.

<sup>156</sup> *Plumbers & Steamfitters Local 598 v Morris* 511 F. Supp 1298 (E.D. Wash. 1981); *Amalgamated Meat Cutters & Butchers Workmen v Wetterau Foods Inc.* 597 F.2d 133 (8<sup>th</sup> Cir. 1979).

<sup>157</sup> *California ex rel. Harris v Safeway Inc.* 651 F.3d 1118 (9<sup>th</sup> Cir. 2011). Here the Court exempt an employer-only agreement implementing a mutual strike assistance scheme to share profit made during industrial action following the expiration of a collective agreement.

<sup>158</sup> *ibid.*, 1196-7

<sup>159</sup> *ibid.*

<sup>160</sup> *Brown* (n.3) 250

- (i) took place during and immediately after a collective bargaining relationship;
- (ii) was directly related to the lawful operation of the bargaining process;
- (iii) involved a topic that the parties were required to bargain over; and
- (iv) concerned only the parties to the bargaining relationship,

the court will still balance the competing objectives. Conduct meeting these factors may still not benefit from the non-statutory exemption.

This individual balancing approach appears more flexible and nuanced than the approach in *Albany*. This is unsurprising given that the non-statutory exemption applies to a wider range of activities than *Albany*: the weights of the competing objectives will differ significantly depending on the conduct challenged. However, the application of the non-statutory exemption has created a level of confusion and uncertainty not seen within the EU. This is particularly due to differently constituted Supreme Courts altering the 'structure' of the balancing exercise. This confusion and uncertainty has allowed employers to explore the boundaries of the exemption to the detriment of collective bargaining and workers.

The remainder of this chapter will explore what the EU can learn from the statutory and non-statutory exemption. Section 5 will examine whether the exemption created in *Albany* should be altered in line with the discussion set out above. The section shall also consider whether the approach in *Albany* is better than the approaches adopted by the US Supreme Court.

## 5. What can be learnt from the US approaches?

Sections 3 and 4 have set out the current exemptions in the US for both collective agreements and unilateral union conduct. The statutory exemption applies to conduct which is lawful under the Norris-La Guardia Act and ss.6 and 20 Clayton Act, does not substantially affect commercial competition, and is pursued by the union in its own self-interest: the non-statutory to conduct which "[grows] out of and [is] directly related to, the lawful operation of the bargaining process."<sup>161</sup> This section will examine whether it is possible to develop *Albany's* exemption in line with the approaches and literature in the US.

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<sup>161</sup> See *Brown* (n.3)

There is no comparable approach under EU competition law to the US statutory exemption, nor has the CJEU been faced with applying EU competition law to industrial action. Any restraints on interstate trade caused by industrial action have been challenged under EU free movement rules, particularly freedom of establishment and free movement of goods and services.<sup>162</sup> Industrial action aimed at preventing the transportation of goods or preventing businesses operating between the Member States concerned, breaches the free movement provisions more obviously than it does the Treaty competition provisions. For EU competition law to apply, industrial action would need to be conceptualised as either collusive or joint conduct on behalf of two or more undertakings, or the abuse of a dominant position. The free movement provisions are closer to the prohibition in Section 1 of the Sherman Act: contracts, combinations or conspiracies in restraint of trade or commerce.

There are two issues with adopting a 'European' version of section 6 of the Clayton Act, that labour is not a commodity or article of commerce. First, the definition of trade is wide, extending beyond traditional goods and services to encompass all cross-border economic activities.<sup>163</sup> The purpose of such a wide definition is to ensure consistency with the free movement objective of the EU: to promote free movement of goods, services, persons and capital.<sup>164</sup> Thus, the Court has held that the concept of trade extends to the provision of labour market services. Labour is considered a commodity and/or article of commerce/trade.<sup>165</sup> Although legislation overruling these decisions is possible, this could undermine the ability of employees to exercise their free movement rights unless such a rule were confined to the competition rules.<sup>166</sup> For example, a new Treaty provision or Court ruling could simply state that the competition rules do not apply to the labour market. Such an approach would potentially achieve the same result as *Albany*: collective agreements are exempt from EU competition law but are still subject to the free movement and public procurement rules. This could drive potential competition claims into the free movement

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<sup>162</sup> See Title II on Free Movement of Goods; Title IV on Free Movement of Persons, Services and Capital, Treaty on Functioning of European Union. For case law, see *International Transport Workers Federation v Viking Line* (Case C-438/05) [2007] E.C.R. I-10779.

<sup>163</sup> See *Züchner v Bayerische Vereinsbank AG* (Case 172/80) [1981] E.C.R. 2021, [18]

<sup>164</sup> Commission guidelines on the effect on trade concept contained in Article 81 and 82 of the Treaty [2004] O.J. C101/1, [21]

<sup>165</sup> *Höfner and Elser v Macrotron GmbH* (Case C-41/90) [1991] E.C.R. I-1979, [33]; *Job Centre* (Case C-55/96) [1997] E.C.R. I-7119 [37]

<sup>166</sup> Note that the CJEU has expressly refused to adopt an *Albany*-type exemption in the free movement and public procurement fields. See Chapter 3, section 5 for discussion.

realm, creating the danger that free movement rules are used to undermine any express exemption from competition rules. As seen in *Viking Line*, the CJEU takes a less labour-friendly approach under the free movement provisions than it has under *Albany*.

Second, a broad statutory exemption, as seen within s.6 Clayton Act, would also exempt employer conduct in the labour market. As seen in the US, recent debate has focussed on the extent to which joint employer conduct should be exempt from antitrust liability.<sup>167</sup> Employer collusion within the labour market could exacerbate unequal bargaining power. Employers could engage in collusive conduct setting wages at low levels, conclude non-poaching agreements,<sup>168</sup> and engage in significant anti-competitive behaviour. Such conduct would skew the balance of power towards employers. Rather than furthering EU labour policy, labour policy encouraging collective bargaining could be undermined. Again, any statutory exemption would potentially be no different to that adopted by the CJEU in *Albany*.

The exemptions adopted in the US and EU do adopt similar bases. The exemptions result from balancing the competing objectives. As Chapter 4 demonstrated, *Albany's* exemption results from balancing the social policy objectives pursued by collective agreements and the policy objectives behind EU competition law. In a similar vein, both approaches in the US stem from a balance between the Congressional policies encouraging both antitrust and trade unions. As the discussion in sections 3 and 4 above demonstrates, both the statutory and non-statutory exemptions stem from Congress' decision to promote labour policy at the expense of antitrust. For example, section 3 showed that the statutory exemption arose from Congressional intent to exempt certain trade union activities from antitrust. Congress considered that the benefits of trade union activities outweighed the antitrust harm caused. As such, it is arguably only the outcome of the balancing exercise and how the balancing exercises are carried out that differ.

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<sup>167</sup> Employer conduct is only exempt where it either falls within the exemptions rationale or is intimately related to the collective bargaining process.

<sup>168</sup> This has been a recent concern in the United States, especially within high-tech industries. See *In re High-Tech Employee Antitrust Litigation* (Case No.: 11-CV-02509-LHK) (2010) US District Court for the Northern District of California. See also, US Department of Justice Press Release 10-1076, 'Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements.' <https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee> [last accessed 15.09.17, 15.37]

However, the US Supreme Court arguably takes a much more nuanced and flexible approach to exempting trade union activities (balancing the competing objectives/interests) than the CJEU in *Albany*: specifically, the non-statutory exemption. The US Supreme Court base their exemptions on federal labour policy and law, with the exemption generally applying where the conduct in question is lawful under either the Norris-LaGuardia Act or the National Labor Relations Act. Although a balancing approach determines whether the non-statutory exemption applies, lawfulness under labour law raises a strong, rebuttable presumption that the exemption applies.<sup>169</sup> This leads to a potentially more flexible approach, which is not present within the EU. However, this is at the expense of the clarity and predictability that the *Albany* exemption provides. Within the EU, there is no significant confusion as to what the exemption protects. *Albany's* exemption applies where a collective agreement is between management and labour, or their representatives, and aims at improving working term and conditions. There is no subsequent balancing, as required under *Brown* in the US, between the labour and antitrust considerations present in the case. Thus, where there are significant anticompetitive effects in either labour or product markets, for example, a most-favoured 'employer' clause or promise to extract the same concessions from each employer in the industry, such an agreement would be exempt under *Albany* yet subject to US antitrust law.

As shown in Chapter 4, section 4, it is incorrect to state that the *Albany* exemption is blunt, or static, when compared with the US exemptions. The CJEU's decision is more nuanced than it appears. Although it is not possible to point to a definitive body of EU labour law as one could with a fully federated state such as the US, it is possible to point to a form of labour policy. There are legislative provisions on labour law,<sup>170</sup> and the Treaties provide for, and protect, collective bargaining. Title X of the TFEU provides for collective bargaining and collective agreements,<sup>171</sup> and Article 28 CFREU states that "[w]orkers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements..."<sup>172</sup> It is through this,

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<sup>169</sup> See the decision in *Brown* (n.3).

<sup>170</sup> See, for example, Council Directive 98/69/EC on the approximation of the laws of Member States relating to collective redundancies [1998] O.J. L225/16; Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] O.J. L82/16

<sup>171</sup> See Articles 152-154 TFEU

<sup>172</sup> Article 28 CFREU also includes the right to take industrial action.

when combined with the policy linking clauses in the Treaties, that balancing labour and competition policy to determine whether first, there should be an exemption for collective agreements (and by extension other trade union activities) and second, whether such an exemption should apply in that specific circumstance, becomes possible. As shown in Chapter 4, the CJEU in *Albany* balanced the competing objectives, concluding that the balance fell in favour of encouraging collective bargaining and the accompanying social policy objectives where *Albany's* stipulated conditions are met.<sup>173</sup> It is not that there is no balancing exercise, but that rather than requiring individual courts to balance the interests present, the CJEU decided the outcome of the balance in advance, thereby providing certainty and clarity.

Such pre-determination can be seen to a limited extent within the US approaches. Guidance provided for the application of both the statutory and non-statutory exemptions gives some certainty and predictability. For example, the US Supreme Court is clear that the statutory exemption applies where three criteria are met.<sup>174</sup> Similarly, the Supreme Court has concluded that where the considerations mentioned in *Brown*, and *Jewel Tea* and *Pennington*, are present, there is a strong presumption in favour of the non-statutory exemption applying. Compliance with federal labour law generally leads to a finding that the exemption applies, implying that federal labour policy outweighs antitrust policy interests. However, the non-statutory exemption still requires that the competing policy objectives be balanced.

Furthermore, the US Supreme Court and the CJEU in *Albany* balance the same social/labour policy considerations. Collective bargaining is necessary in a democratic society for the protection and improvement of worker interests, the redistribution of power to provide an equality of bargaining strength, and the promotion of workplace democracy. In his opinion in *Kunsten*, AG Wahl states that collective bargaining

not only helps workers and employers in reaching a balanced and mutually acceptable outcome, but also produces positive effects for society as a whole .... [They] prevent costly labour conflicts, reduce transaction costs through a collective and rule-based negotiation process and promote predictability and transparency ... I also believe that the promotion of social peace and the establishment of a system of

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<sup>173</sup> These being that the agreement is between labour and management, or their representatives, and is aimed at improving working terms and conditions.

<sup>174</sup> These being (i) where the conduct is lawful under the NLGA and Clayton Acts; (ii) does not substantially affect commercial competition; and (iii) is carried out unilaterally in the union's interest.

social protection which is equitable for all citizens are aims of the greatest significance in any modern society.<sup>175</sup>

Such policy objectives are also present within individual Member States, although how they are protected, and the prominence given to them, differs. Thus, in contrast with the US approaches, it may not be possible to balance the different policy considerations in each case. In Germany, for example, collective bargaining and collective agreements are given precedence due to their constitutional status under the *Grundgesetz* (Basic Law). In contrast, the United Kingdom adopts a lower level of protection of collective bargaining and agreements.<sup>176</sup> Both Member States accept the importance of collective bargaining and promote the policy behind such activities yet differ in the level of protection given. Thus, whether the exemption applies will differ according to the Member State in question. By adopting a more static approach, the Court in *Albany* sidestep such issues, accommodating differing levels of protection in individual Member States.

This problem is not present within the US. As set out above, the policy reasons behind the exemption are given the same level of protection within each US State. Given that balancing is of federal labour policy with federal antitrust policy, individual balancing can take place absent competence or subsidiarity issues. Where the US Courts have premised their exemptions on balancing competing objectives, with a strong presumption in favour of the exemption applying where there is no breach of federal labour law, the EU simply requires that the agreement is between labour and management, or their representatives, and aims at improving working terms and conditions.

Individual balancing is also more appropriate as the US exemptions cover a much wider area of labour law. Although, as has been argued above, the Supreme Court provides some guidance, this is not as precise or clear a rule as that seen in *Albany*. For example, the non-statutory exemption applies not only to collective agreements, but also to any union and employer conduct growing out of, and directly related to, the bargaining process. This means that individually balancing the competing objectives is more appropriate as the weights to be

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<sup>175</sup> See AG Wahl in Case C-413/13 *FNV Kunsten Informatie en Media v Netherlands* [2014] E.C.R. 00, footnote 14.

<sup>176</sup> Within the UK there is no automatic incorporation of collectively agreed terms into individual employment contracts, and collective agreements are assumed to be legally unenforceable. On incorporation, see *National Coal Board v Galley* [1958] 1 All E.R. 91. On legal unenforceability, see s.179 Trade Union and Labour Relations (Consolidation) Act 1992; *Ford v Amalgamated Union of Engineering and Foundry Workers* [1969] 2 All E.R. 481

applied to the competing objectives will differ significantly depending on the conduct challenged. For example, as seen in section 4.1 above, the US courts have restricted the application of the exemption to multi-employer agreements where other options are available to make the collective bargaining process work.<sup>177</sup> In contrast, the *Albany* exemption only applies to collective agreements between management and labour aimed at improving conditions of work and employment. As such, it is easier for the CJEU to pronounce the balance in advance.

This does not mean that the CJEU insufficiently considered the competing objectives. As highlighted in the previous paragraphs, and discussed in Chapter 4, the CJEU considered and balanced the competing objectives present. This is similar to the approaches adopted by the US Supreme Court. It is not that there is no balance in *Albany*, but that rather than requiring individual courts to balance the interests present, the CJEU decided the outcome of the balance in advance. The CJEU provided a level certainty and clarity for the social partners. As the discussion in Chapter 4 showed, the CJEU balanced the conflicting objectives as a genus, and did not require later courts to individually balance those objectives. What was missing from the CJEU's analysis, however, was how it assigned the values it did to the competing objectives.

This arguably means that the approach in *Albany* potentially better protects employee interests. As already stated, collective agreements aimed at improving working terms and conditions are exempt from EU competition law. Trade unions, employers and workers have certainty and predictability. Whilst the US exemptions have wide applicability, that there is an overall, individual balancing creates a level of uncertainty for the social partners. This is, however, the cost of ensuring that the competing principles are applied sensitively and appropriately across a wide range of situations. The CJEU, in contrast, has had limited exposure to such issues; it has not had to answer questions around industrial action, "traditional" collective agreements such as in *Jewel Tea*, nor whether the exemption applies to conduct during bargaining or post-expiry of a collective agreement (*Brown*). In adopting such a static approach, it is possible that *Albany* has avoided the confusion and uncertainty in the US as set out in sections 3 and 4 above. Could the US courts learn from the approach in *Albany*?

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<sup>177</sup> *Safeway* (n.157)

## 6. Conclusion

The aim of this chapter has been to explore the approaches adopted in the US in order to explore whether the EU can draw anything from the discussion and approaches taken. The chapter has shown, in sections 3 and 4, how the statutory and non-statutory exemptions have developed. Section 3 showed that the statutory exemption applies where the conduct in question falls within the NLGA; restrains competition based on differences in labour; and, is pursued by the union in their sole interest. Section 4 showed that the non-statutory exemption applies where the conduct grows out of and is directly related to, the lawful operation of the bargaining process. This, section 4 showed, requires an individual balancing approach which creates significant uncertainty, with differently constituted Supreme Courts altering the 'structure' of the balancing process. This allows employers to probe the exemption's boundaries to the detriment of collective bargaining and workers.

The discussion of the exemptions showed that such approaches have been heavily criticised within the academic literature. The main concerns are that that the approaches taken by the Courts are inconsistent with Congressional intent and subject to uncertainty. For example, examination of Congressional debates on the Sherman, Clayton, and Norris-LaGuardia Acts shows that Congress did not intend trade unions to be subject to the Sherman Act. This is most visible in section 6 of the Clayton Act: labour of a human being is not a commodity or article of commerce. This has led to calls to return to the approach in *Apex*: only where a trade union's purpose is to restrain market competition will antitrust law apply. However, the Courts have not adopted such an approach, continuing to apply the standards briefly set out in the previous paragraph.

The chapter has demonstrated that *Albany* provides a more certain and predictable exemption than those seen in the US. *Albany's* predetermined balance provides certainty and predictability for the social partners (and workers). The discussion in section 5 has shown that the CJEU's decision in *Albany* avoids the confusion that the individual approaches to balancing have created in the US. As demonstrated above, it is not entirely clear when the US exemptions do and do not apply. Although the Supreme Court has given some guidance for courts in balancing the competing interests, the Court is unable to predetermine the balance in advance due to the larger area of labour law to which it applies. This, to an extent, places industrial relations at the whim of the Court. This concern can be seen in the discussion

in sections 3 and 4 discussing the development of the statutory and non-statutory exemptions. That *Albany* restricts the exemption to very specific circumstances avoids these issues and potentially strikes a better balance between the competing objectives.

## Chapter 9 – Conclusion

Trade unions are combinations of workers, which “could be construed as a labour cartel, fettering the operation of free market forces between union members over the terms on which they offer their services in the market for their services.”<sup>1</sup> Through collective agreements (and collective bargaining), trade unions restrict competition, undermining the low-cost, efficiency model that is vital to the competitive process. As such, Article 101 TFEU should “step in” and prevent such anti-competitive behaviour from occurring. Collective agreements which reduce consumer welfare should be void, unless accompanied by compensating productivity or quality benefits. The application of Article 101 TFEU, however, creates a problem. Trade unions, in restricting competition, seek to achieve social policy objectives and exercise human rights. They seek to protect their members’ interests through increasing wages and providing greater employment protection. As such, applying Article 101 TFEU to collective agreements may seriously undermine the social policy objectives and fundamental human rights interests present. In *Albany*, the CJEU held that collective agreements fall outside the scope of EU competition law where they are (i) between management and labour, or their representatives, and (ii) aim at improving working terms and conditions. To subject competition law to collective agreements would seriously undermine the social policy objectives pursued by such agreements.

The thesis has explored whether we need to exempt collective agreements from EU competition law to protect the social policy objectives present. It has explored whether the *Albany* exemption is the most appropriate approach for resolving the conflict between the competing objectives present. It has sought to show

- (i) whether the approach in *Albany* is correct;
- (ii) whether we need an exemption; and
- (iii) whether the social policy objectives would be seriously undermined were collective agreements to be subject to EU competition law?

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<sup>1</sup> Shae McCrystal and Phil Syrpis, ‘Competition Law and Worker Voice: Competition Law Impediments to Collective Bargaining in Australia and the European Union’, *Voices at Work* (Oxford: Oxford University Press 2014) 421.

In addressing these questions, the thesis has argued the following.

Chapter 2 argued that a trade union is an undertaking under EU competition law when engaged in collective bargaining. It showed that, trade unions offer a service (collective bargaining) on a given market (the labour market). Collective bargaining can be carried out with a view to making a profit, with the trade union bearing financial risk associated with collective bargaining. Collective bargaining, Chapter 2 argued, is not a public function, nor does it constitute a solidarity function as understood by CJEU case law. This means that Article 101 TFEU may apply to a collective agreement. Where the application of Article 101 TFEU seriously undermines the social policy objectives, the *Albany* exemption may be necessary. Chapter 2 also concluded that a trade union does not, contrary to existing understanding, act as its members' agent when engaged in collective bargaining. A trade union bears sufficient financial risk to negate the agent-principal relationship. The discussion also showed that a trade union is not an association of undertakings when engaged in collective bargaining. When bargaining over terms and conditions of employment, the chapter demonstrated that a worker, although not subsumed within their employer's undertaking, is not an undertaking when bargaining as it is highly unlikely that a worker bears sufficient financial risk.

Chapter 3 examined the decision of the CJEU in *Albany*. It showed that the CJEU resolved the conflict between the social policy objectives and competition policy's objectives by exempting collective agreements from EU competition law. In *Albany*, the CJEU balanced the competing objectives, concluding that the social policy objectives always outweigh competition policy's objectives where its stipulated conditions are present. The discussion in Chapter 3 showed that there are several issues with the CJEU's approach. Key amongst these are: (i) that the CJEU did not examine whether collective agreements would fall within EU competition law; and, (ii) that the CJEU's approach to balancing is opaque. These two points challenge the basis for the exemption in *Albany* and go to the heart of whether (and how) we should resolve the conflict present. First, where a collective agreement does not infringe Article 101 TFEU there is no conflict between the relevant objectives, nor are the social policy objectives seriously undermined. Second, identifying the CJEU's balancing approach allows us to establish whether the exemption is correct. If the CJEU incorrectly balanced the competing objectives, its conclusion—the exemption—needs reassessing. These two points formed the basis of the discussion in Chapters 4-7.

Chapters 4 and 5 focussed on the wider EU constitutional aspects of the *Albany* exemption. The chapters demonstrated that conflicts between objectives, interests and rights are resolved in two ways. First, the chapters showed that the CJEU resolves conflicts by balancing the competing objectives through the proportionality principle. The discussion showed that the CJEU in *Albany* adopted a constitutional approach to resolving the conflict between the competing objectives present. It demonstrated that the CJEU adopted a proportionality approach *stricto sensu*, symmetrically balancing the competing objectives. The CJEU balanced the harm to the social policy objectives against the importance of achieving competition policy's objectives, and vice versa. This is visible in the CJEU's predetermination of the balance in favour of the social policy objectives where its two conditions are met. This implies that the CJEU considered that exempting all collective agreements would be disproportionate to the harm caused to competition policy's objectives. It can be concluded from this that the approach adopted by the CJEU in *Albany* is correct.

Second, chapters 4 and 5 showed that conflicts can be resolved through interpreting and applying EU law in a manner which takes account of the wider objectives pursued by a measure or action. This, the chapters argued, is required by the Treaty integration clause, the CJEU's teleological approach, and the EU's approach to fundamental rights. In the context of the questions posed by this thesis, where EU competition law can be interpreted in such a way as to give the social policy objectives adequate weight, the *Albany* exemption may not be necessary. In such a situation, the social policy objectives would not be seriously undermined; they would have been appropriately considered. Thus, the exemption in *Albany*, although correctly reached, may be unnecessary.

Chapters 6 and 7 showed that Article 101 TFEU can be interpreted in a manner that gives adequate protection to the social policy objectives pursued by collective agreements. In relation to Article 101(1) TFEU, Chapter 6 showed that a constitutional balancing is possible through the application of the approach in *Wouters*. In *Wouters*, the CJEU held that agreements that restrict competition fall outside the scope of Article 101 TFEU where the restriction on competition is proportionate to the legitimate objective pursued by the agreement in question. Similarly, Chapter 7 demonstrated that the same approach is possible under Article 101(3) TFEU through the CJEU's decision in *Metro*. In *Metro*, the CJEU held that an agreement benefits from exemption under Article 101(3) TFEU where a restriction on competition is necessary to achieve a legitimate aim and does not result in the elimination of

competition in a substantial part of the common market. The chapters argued that in applying these tests, a restriction on competition caused by a collective agreement aimed at improving conditions of work and employment would often be a proportionate restriction on competition. This negates the need to balance the competing objectives outside of Article 101 TFEU.

Chapter 8 argued that the exemption in *Albany* achieves a more satisfactory balance between the competing objectives and interests than the approaches present within the US. Within the US, collective agreements are protected from the application of the Sherman Act by an implied exemption, which applies where the conduct in question grows out of and is directly related to the bargaining process. In applying the exemption, the US courts balance the competing factors present in the conduct in question: do the labour policy considerations outweigh the antitrust interests? Under the US approach, where conduct is lawful under federal labour law, it appears to be presumed that the exemption will apply. In exempting collective agreements aimed at improving working terms and conditions, the CJEU sidesteps the issues that have arisen under US antitrust rules. By not adopting an individual balancing approach in each case, the CJEU provides a bright-line preventing individual value judgments being made in difficult cases.

### The Conclusion...

The thesis has shown that the CJEU's decision in *Albany* was 'correct' in how it balanced the competing social and competition policy objectives. However, the thesis has also demonstrated that the conflict could be resolved via individual balancing. Chapters 4 and 5 showed that the Treaty integration clauses, the CJEU's teleological approach, and EU's approach to fundamental rights require that wider objectives are considered when applying and interpreting EU law. Thus, it was argued, the CJEU should have considered whether Article 101 TFEU could have been interpreted in a manner, which gave adequate weight to the social policy objectives pursued by, and fundamental rights present in, collective agreements without resorting to an agreement. Where this is possible, the social policy objectives are not undermined. This is so even where the application of Article 101 TFEU voids a collective agreement. Chapters 6 and 7 demonstrated that such an interpretation of Article 101 TFEU is possible. Therefore, there may have been no need for the CJEU in *Albany*

to balance the competing objectives outside of Article 101 TFEU and predetermine the balance in advance. The exemption in *Albany* may be unnecessary.

There are, however, significant drawbacks to adopting such an approach. These considerations necessitate the conclusion that the *Albany* exemption is retained. First, individually balancing the competing objectives removes the bright-line certainty provided by the *Albany* exemption. Such certainty allows trade unions, workers and employers to rely on the terms of a collective agreement, setting the bounds within which they can bargain free from the enforcement of EU competition law. As concluded in Chapter 7, the approaches identified in Chapters 6 and 7 create uncertainty and unpredictability for the social partners. Were collective agreements subject to EU competition law, the certainty with which collective agreements could be relied upon to set terms and conditions of employment would be substantially reduced. This uncertainty is exacerbated by including wider policy objectives within Article 101 TFEU. Including such objectives within Article 101 TFEU's analysis further complicates an already difficult analysis. Although the application of the approach in *Wouters*, for example, would provide some structure to the balance, it still allows courts significant leeway in how they apply it. The discussion in Chapter 8 of the US approaches showed that individual challenges to collective agreements have created confusion as to how the balance operates, with differently constituted US Supreme Courts altering the 'structure' of both exemptions. This has allowed employers to probe the boundaries of the exemptions to the detriment of both collective bargaining and workers.

Second, individual balancing potentially has a 'chilling effect' on collective bargaining, like that seen by the CJEU's decision in *Viking Line*. As Chapters 3 and 5 explained, the CJEU in *Viking Line* significantly restricted the ability of trade unions to justifiably restrict the fundamental freedoms in the exercise of the right to strike. Were such an approach adopted within Article 101 TFEU, the scope allowed for collective agreements would be significantly restricted. As such, trade unions (and employers) may become reluctant to conclude collective agreements aimed at improving conditions of work and employment. This would make collective representation less attractive and render the social institution of collective bargaining illusory. This has a detrimental impact on the right to join and form trade unions, and the right to collective bargaining protected under both the CFREU and ECHR. Whilst, as was argued in Chapters 5, 6 and 7, an application of Article 101 TFEU which gives adequate

weight to the relevant fundamental rights protected under EU law may be proportionate, any potential ‘chilling effect’ may void the right and objectives of their essence.

Similarly, imposing fines on trade unions (and employers’ federations) alters the conclusion in Chapter 7; that where adequate weight is given to fundamental rights considerations (and the social policy objectives) any restriction would be proportionate. In the context of the ECHR, the ECtHR in *Demir* held that the voiding of a collective agreement and the subsequent requirement to repay all gains from the agreement was a breach of the right to collective bargaining under Article 11 ECHR. As Chapter 5 showed, the potential equivalence of protection given to trade union rights means that a similar conclusion would be reached under Article 28 CFREU. Where trade unions, and or individual members, are required to pay damages for their anti-competitive conduct, the restriction on the right to collective bargaining under Article 28 CFREU may be disproportionate.

The *Albany* exemption avoids these issues. It avoids the uncertainty and unpredictability of interpreting and applying EU competition law in a manner, which gives adequate weight to the competing objectives. These concerns can also be seen were we to adopt the approaches set out in *Wouters* and *Metro*. Although, the approaches in *Wouters* and *Metro* achieve the same formal outcome – collective agreements falling outside of Article 101 TFEU following a balancing of the competing objectives and rights – the substantive outcome of the balancing exercise will differ on the same facts. Additionally, adopting a case-by-case balancing approach does not provide the same level of certainty and predictability provided by *Albany*. Chapter 4’s discussion of the balancing exercise in *Albany* established this very point. *Albany*’s exemption provides a level of certainty and predictability, which enables collective bargaining to occur, and provides an adequate level of protection for collective bargaining. The approach in *Albany* also avoids individual value judgments being introduced to the balancing exercise, protecting both collective bargaining (and agreements) and EU competition law.

Fundamentally, removing or altering the *Albany* exemption would have significant detrimental effects, which will undermine any “true” balance achieved by adopting a more individualistic approach. Although the discussion in this thesis has shown that the social policy objectives would not be undermined by the application of EU competition law, the uncertainty that the application of Article 101 TFEU would create necessitates the need for the general exemption *Albany* created.

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