

## Chapter 7

# Social Considerations in EU Competition Law

## The Protection of Competition as a Cornerstone of the Social Market Economy

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### 1. Introduction

The new self-identification of the European Union (EU) as a ‘highly competitive social market economy, aiming at full employment and social progress’ is of greatest interest for competition lawyers, given that competition law plays a major role in an economic system conceived as a ‘social market economy’. At the same time, questions have emerged regarding the balance between free competition, on the one hand, and social progress, on the other, and on how these two potentially competing interests can be reconciled.

In addressing this question, the remainder of this chapter is divided into five sections. Section 2 starts with the task of competition law in a social market economy. Section 3 offers a general discussion on the hierarchical objectives of the Union in the context of competition, welfare and society. This discussion draws on the realisation that the term ‘social’ and its variants are virtually absent from EU competition law, not only from primary and secondary legislation, but also with regard to the relevant soft law, i.e. the many communications, notices and guidelines issued by the European Commission in the field of competition law. The adoption of the Lisbon Treaty has done little to alter this fact. However, the ‘social deficit’ within competition law is surprising only at first

glance. There is an important consideration underlying this absence of the ‘social’ within EU competition law which must not be taken for granted: competition law is effective in so far as its application is restricted to economic and, in particular, to competitive arguments. If this was to change, and the assessment of restraints to competition is subject to a comprehensive *bilan économique et social*, the institutions responsible for the control of anti-competitive behaviour would be granted a much wider discretion in this field.<sup>1</sup> Predictability and legal certainty would therefore be jeopardised by the integration of a wide range of social goals within this balancing exercise.<sup>2</sup> A more subjective approach such as this is not up to the task of maintaining a competitive economic system, and falls short of the international standards in the field of competition policy.<sup>3</sup> It is commonly accepted that for competition law systems to be effective, they must not allow competition law to be diluted with other public policy goals. In US antitrust law, for example, it is recognised that the ‘rule of reason’ analysis does not allow for social objectives to be taken into consideration, and must be confined to ‘a consideration of [the] impact on competitive conditions’.<sup>4</sup> It is instead the competence of the legislature to decide if specific industries shall be granted an exemption from these general rules for social

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<sup>1</sup> David J. Gerber, *Law and Competition in Twentieth Century Europe – Protecting Prometheus* (Clarendon Press, 1998) at 328 et seq., who describes, taking the example of Germany after World War II, how law was given preponderance over policy and administrative discretion regarding the application of competition law.

<sup>2</sup> Ariel Ezrachi, ‘Sponge’ (2017) 5 *Journal of Antitrust Enforcement* 49, at 59.

<sup>3</sup> OECD Global Forum on Competition, ‘The Objectives of Competition Law and Policy – Note by the Secretariat’ CCNM/GF/COMP(2003)3.

<sup>4</sup> US Supreme Court, *National Society of Professional Engineers v US*, [1978] 435 U.S. 679, 690 and its interpretation by Lawrence A. Sullivan, Warren S. Grimes and Christopher L. Sagers, *The Law of Antitrust: An Integrated Handbook* (3rd edn, West Publishing, 2016) at 222-223.

purposes. In the EU, the interface between competition law and social policy follows a similar trajectory. According to Art. 9 TFEU, the Union shall take into account the ‘requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection [and] the fight against social exclusion’. This obligation applies to all policies and activities including competition policy,<sup>5</sup> and must also be read in line with Article 7 TEU, which requires that EU ensures ‘consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers’. In the Treaty, there are very few express provisions on conflicts between social policy and competition rules, partially because many social services in the Member States fall outside the scope of EU competition law as they do not have an effect on trade between Member States.<sup>6</sup> One of them is however Article 42 TFEU, which restricts the application of competition law to agriculture for different reasons, including the achievement of specific social objectives.<sup>7</sup> In the absence of written rules, the relationship between competition law and social policy must be determined by the relevant competition authorities and the courts. In several lines of causal precedent, the CJEU has limited the application of competition law due to conflicts with social policy. For this purpose, the Court has expressly emphasised that primary law

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<sup>5</sup> Dagmar Schiek, Liz Oliver, Christopher Forde and Gabriella Alberti, *EU Social and Labour Rights and EU Internal Market Law* (2015) Study for the EMPL Committee of the European Parliament, para 1.3.1.

<sup>6</sup> European Commission, ‘Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty’, [2004] OJ C101/81. However, the cross-border condition is met relatively easy: A direct or indirect, actual or potential influence on the pattern of trade between Member States (which is not only insignificant) is sufficient, for example Case C-475/99, *Ambulanz Glöckner*, EU:C:2001:577, paras 47-49.

<sup>7</sup> Article 39(1)(b) TFEU which reads ‘thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture’.

contains at the same time competition rules and social rules (the latter to be found in Part Three – Title X: Social Policy).<sup>8</sup> As there is no hierarchy between the different policy fields, they must be reconciled with each other within a given context.<sup>9</sup> In some circumstances, social considerations may lead to competition law being wholly unapplicable in a certain field or in respect of certain concerns within that same field. Section 4 discusses these cases, and argues that social policy works as an external limitation to the scope of competition law. On the other hand, social considerations may affect the application of competition law from inside by having an impact on the interpretation of prohibitions and justifications. Section 5 discusses these aspects and examines the way in which social considerations work within competition law. The external and the internal functionality of social goals with respect to competition law will form the central parts of this contribution. Section 6 will conclude.

## **2. The Role of Competition Law in the Social Market Economy**

### *2.1. From ordoliberalism to the social market economy*

As discussed in the Introduction to this volume,<sup>10</sup> the concept of the ‘social market economy’ dates back to German economic policy adopted immediately after the Second World War. It has been made popular by the then minister for economic affairs Ludwig Erhard who borrowed the term from his staff member Alfred Müller-Armack. The concept of the social market economy was primarily based on the post-1930s Ordoliberalism of the Freiburg School, headed and elaborated by the economist Walter

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<sup>8</sup> Case C-67/96, *Albany*, EU:C:1999:430, para 54.

<sup>9</sup> 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, at 465.

<sup>10</sup> See above Delia Ferri and Fulvio Cortese, ‘Introduction’, in this volume.

Eucken and the lawyer Franz Böhm in opposition to the Nazi regime.<sup>11</sup> For them, economic policy must strive towards a system which is at the same time effective and humane (*‘funktionsfähig und menschenwürdig’*). Ordoliberalism advocated for a strong State which must guarantee that markets are protected against distortions due to cartels and monopoly power.<sup>12</sup> The proposals of the Freiburg School are closely linked to social objectives. However, Eucken wanted to solve the ‘social question’ by controlling markets, not by intervening within their processes. Thus, social objectives do not directly impact on the application of competition law, but may take precedence in other policy areas.

Müller-Armack took over the central elements of the Freiburg School, but replaced the notion of *Ordo* (stemming from early medieval philosophy) with the more ‘catchy’ ‘Social Market Economy’.<sup>13</sup> His thinking was influenced by other theories, such as Christian social teaching, in particular by the Catholic Social Doctrine (*‘Katholische Soziallehre’*) as conceived by Oswald von Nell-Breuning with its principles of personality, solidarity and subsidiarity. However, from the very beginning, the term ‘Social Market Economy’ was not precisely defined, and was instead used as a general framework which places the market economy at the centre of economic policy with the

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<sup>11</sup> For an overview of Ordoliberalism, Gerber, *Law and Competition in Twentieth Century Europe – Protecting Prometheus* (n 1), at 232.

<sup>12</sup> Leonhard Miksch (another member of the Freiburg School and advisor to Ludwig Erhard), *Wettbewerb als Aufgabe* (*‘Competition as Task’*) (2nd edn, Helmut Küpper, 1947).

<sup>13</sup> Alfred Müller-Armack, *Wirtschaftslenkung und Marktwirtschaft* (Verlag für Wirtschaft und Sozialpolitik, 1947). However, the term *ordo* has not completely disappeared from the German language, but is used for example in the word *‘Ordnungspolitik’* which describes fundamental market economy policy in an ordoliberal sense.

addition of different social elements. Competition law plays an essential role in the concept of the Social Market Economy.<sup>14</sup> Erhard described this relation quite clearly:

In my conception the social market economy does not recognize the freedom of the entrepreneur to exclude competition through cartel agreements; it imposes far more the obligation to gain the favour of the consumer through one's own efforts in competition against rivals.<sup>15</sup>

For Erhard, competition law has a constitutional dimension.<sup>16</sup> Its goal is to protect consumers.<sup>17</sup> However, the link between competition law and the social function of consumer protection is rather indirect: protecting free and fair competition leads to ‘the best possible quality and quantity and at the proper price’.<sup>18</sup> Consumers will benefit the most if the competitive process is protected against distortions. Hence, social goals are promoted in two ways: on the one hand, the decentralized coordination over markets rewards those who create the biggest value for society, on the other hand, social policy intervenes where market results are not satisfactory. These measures must however be compatible with the market mechanism.

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<sup>14</sup> The English title of Erhard's most successful book (*Wohlstand für Alle*, Econ, 1957) underlines this context more clearly than the German one: It reads ‘*Prosperity Through Competition*’ (Frederich A. Praeger, 1958).

<sup>15</sup> Erhard, *Prosperity Through Competition* (n 14), at 126.

<sup>16</sup> Gerber, *Law and Competition in Twentieth Century Europe – Protecting Prometheus* (n 1), 270, at 277.

<sup>17</sup> Erhard, *Prosperity Through Competition* (n 14), at 117 et seq.

<sup>18</sup> *Ibid*, at 129.

## 2.2. *The reception of the social market economy in the EU and competition law*

Prior to the Lisbon Treaty, the term ‘Social Market Economy’ did not exist in EU legal texts. It has however been part of the official discourse within the European institutions for a long time.

For example, a speech of the former Competition Commissioner Mario Monti on the topic ‘Competition in a Social Market Economy’ dates back to 2000.<sup>19</sup> The general context was the preparation of the new enforcement system in European competition law.<sup>20</sup> Monti underlined the importance of the market mechanism and pointed repeatedly to its capacity for creating jobs. Rejecting ‘*Laissez-faire-capitalism*’, he pleaded for a strong framework encompassing on the one hand, social standards, and on the other, a strong body of competition law capable of ensuring ‘that the beneficial workings of the market forces are not blocked, restrained or distorted by short-sighted actions of the market actors themselves’.<sup>21</sup>

This interpretation of European economic law is emblematic of the openness on the part of the EU to the concept of the social market economy. From the very beginning, the European Communities had an effective body of competition law as well as strong institutions, and thus started from the idea that the market economy is not conceived purely as a system of *laissez faire* capitalism. Rather, it has to be protected against

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<sup>19</sup> Mario Monti, ‘Competition in a Social Market Economy’ (2001) 1 Competition Policy Newsletter 2. Since then, the social market economy has become a standard reference for EU competition law, Joaquín Almunia, ‘How competition policy contributes to competitiveness and social cohesion’ (2011) SPEECH/11/17, at 2.

<sup>20</sup> Passage from the centralized notification and authorization system to the system of legal exception, implemented by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1.

<sup>21</sup> *Ibid*, at 3.

restrictions by state *and* market actors. Regarding legal texts, the Communities were initially reticent to make programmatic statements. With the Maastricht Treaty, however, primary law adopted ‘the principle of an open market economy with free competition’ (Art. 3a(1) EC Treaty). As these terms appeared too general in character, the Treaty establishing a Constitution for Europe (TCE) mentioned ‘a highly competitive social market economy, aiming at full employment and social progress’ (Art. I-3(3) TCE). As fifty years earlier in Germany, the irenic expression combining the ‘cold’ market mechanism with ‘warm’ social goals was intended to foster goodwill, in this case in order to ensure the Constitutional Treaty’s passing where ballot measures were utilised at the Member State level, particularly the referendum in France. After this plan failed, an identical wording was transposed within the Lisbon Treaty in Art. 3(3) TEU.

In this context, it is quite significant that the objective is further qualified: the ‘social market economy’ has to be ‘highly competitive’. In fact, as discussed in Section 2.1, the term ‘social market economy’, no matter how difficult it may be to precisely capture its meaning, presupposes the existence of an effective body of competition law. The qualification ‘highly competitive’ makes this link even stronger. On the other hand, the Lisbon Treaty has relegated the aim of undistorted competition to Protocol 27 on the Internal Market and Competition.<sup>22</sup> This relocation was considered by some scholars as a degradation of the principle of competition: competition shall not be regarded as an end in itself, but as a means of achieving other objectives, including social progress.<sup>23</sup> For

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<sup>22</sup> Article 3(1)(g) EC Treaty included among the aims of the treaties ‘a system ensuring that competition in the internal market is not distorted’.

<sup>23</sup> Josef Drexler, ‘Competition Law as Part of the European Constitution’ in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart Publishing and C.H. Beck, 2010) 659, at 660-661; Heike Schweitzer and Kiran Klaus Patel, ‘EU Competition Law in Historical Context’ in



critics of the principle of competition, these ancillary objectives may be likewise achieved through the use of other policy instruments, including but not limited to industrial policy.<sup>24</sup>

However, such a devaluation on the competitive principle has not been successful.<sup>25</sup> On the one hand, according to Art. 51 TEU, protocols have the same legal value as the Treaties themselves. Protocol 27 therefore is a sufficient basis on which to consider ‘a system ensuring that competition is not distorted’ as an essential part of the internal market. On the other hand, the integration function of EU competition law, i.e. the goal of not having state barriers to trade replaced by private restrictions (for example in distribution systems), continues to have great significance. Recently, this has been confirmed by the European Commission's Digital Single Market Strategy which extends the prohibition of excluding passives sales even beyond the scope of competition law.<sup>26</sup> Also the Court of Justice of the European Union (CJEU) has underlined the importance of the principle of competition and of Protocol 27 recalling ‘the vital nature of the Treaty rules on competition’.<sup>27</sup>

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Kiran Klaus Patel and Heike Schweitzer (eds), *The Historical Foundations of EU Competition Law* (OUP, 2013) 207, at 227; Witt, 'Public Policy Goals under EU Competition Law – Now is the Time to Set the House in Order' (n 9), at 465-466.

<sup>24</sup> Schweitzer and Patel (eds), *The Historical Foundations of EU Competition Law* (n 23).

<sup>25</sup> Václav Šmejkal, ‘Competition Law and the Social Market Economy Goal of the EU’ (2015) 1 *International Comparative Jurisprudence* 33, at 35.

<sup>26</sup> Recital 26 and Article 6 of the European Commission's Draft Regulation on ‘Addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market’, COM(2016) 289 final.

<sup>27</sup> Case C-496/09, *Commission v Italy*, EU:C:2011:740, para 60; Case C-52/09, *TeliaSonera Sverige*, EU:C:2011:83, paras 20-22; Case C-610/10, *Commission v Spain*, EU:C:2012:781, para 126.

The crucial significance of competition law in the EU economic system is subsequently supported by the pledge to adopt a ‘social market economy’ since this concept encompasses – as we have seen – a strong competition law preventing market actors from destroying economic freedom.

### **3. Competition, Efficiency and Social Progress**

Competition law is characterized by a fundamental debate on its goals and the way in which these goals shall be pursued. This section aims to show that the search for the social content of competition law touches upon the very essence of the ‘market economy’.

#### *3.1. The impact of the goals of competition law on social considerations*

A market economy is the best system in order to maximize wealth and social welfare. The allocation of scarce production factors is optimized and dynamic efficiency is enhanced because markets allow rapid adaptation to changing circumstances, and market processes yield innovation.<sup>28</sup> In competition law, there is a long-standing controversy surrounding the degree of directness with which these goals are to be pursued.<sup>29</sup> According to the concept of ‘freedom to compete’, competition is an open-ended ‘discovery procedure’,<sup>30</sup> and its results cannot be predicted. Therefore the task of competition law is to protect the freedom to compete, rather than targeting welfare or

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<sup>28</sup> Joshua S. Gans, ‘Economics of Innovation’ in Roger D. Blair and D. Daniel Sokol (eds), *Antitrust, Intellectual Property, and High Tech* (CUP, 2017) 3.

<sup>29</sup> See *inter alia* Daniel Zimmer (ed), *The Goals of Competition Law* (Edward Elgar, 2012).

<sup>30</sup> Friedrich August von Hayek, ‘Competition as a Discovery Procedure’ (2002) 5 *The Quarterly Journal of Austrian Economics* 9.

other objectives.<sup>31</sup> By contrast, the Chicago School has put efficiency at the centre of its reasoning and has – on the basis of neoclassical equilibrium theory – criticised traditional competition law analysis.

With regard to social considerations, these two opposing views have the following consequences: for the proponents of the freedom-to-compete-approach, prosperity and, concomitantly, other social goals must not be pursued directly. The welfare of citizens will be a natural outcome if the freedom to compete is being protected.<sup>32</sup> Therefore, social considerations are excluded from competition law from the outset. For the Chicago School, efficiency, and thus welfare, is the direct goal of competition law. However, Chicago School scholars do not accept objectives other than efficiency, meaning that there is similarly no room for social considerations.

The picture gets more complex when it comes to the real application of competition law: a pure freedom-to-compete approach does not give the standards to decide between conflicting freedom positions. And, for Chicago School scholarship, the measurement of efficiencies may become an extremely complex procedure.<sup>33</sup> Therefore, middle ground has to be found between the opposing views. This seems to be also the position of the European institutions. The CJEU has repeatedly underlined that Art. 101 TFEU ‘aims to protect not only the interests of competitors or of consumers, but also the

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<sup>31</sup> Oles Andriychuk, *The Normative Foundations of European Competition Law – Assessing the Goals of Antitrust through the Lens of Legal Philosophy* (Edward Elgar, 2017).

<sup>32</sup> Roger Zäch and Adrian Künzler, 'Freedom to Compete or Consumer Welfare: The Goal of Competition Law according to Constitutional Law' in Roger Zäch, Andreas Heinemann and Andreas Kellerhals (eds), *The Development of Competition Law – Global Perspectives* (Edward Elgar, 2010) 61.

<sup>33</sup> Robert H. Bork, *The Antitrust Paradox – A Policy at War with Itself* (Free Press, 1993) at 117, one of the most prominent proponents of the Chicago School, warns against the direct measurement of efficiencies.

structure of the market and, in so doing, competition as such'.<sup>34</sup> The European Commission, which – because of its ‘more economic approach’ – is suspected to lean towards the efficiency paradigm, has often emphasized the importance and the preponderance of the process aspect over efficiencies.<sup>35</sup>

### 3.2. *Total welfare versus consumer welfare in EU competition law*

Even though competition law must not be weakened by a general balancing with public policy goals, it is not socially neutral. The most fundamental discussion concerns the question of whether competition law (assuming that its application is open to efficiency considerations which is affirmed here to a certain extent) should apply a *total welfare* or a *consumer welfare standard*. Whereas the total welfare standard maximizes total surplus, i.e. the sum of producer and consumer surplus, the consumer welfare

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<sup>34</sup> Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services and others v Commission and others*, EU:C:2009:610, para 63; Case C-286/13 P, *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184, para 125.

<sup>35</sup> European Commission, ‘Guidelines on the Application of Article 81(3) of the Treaty’, [2004] OJ C101/97, para 105: ‘Ultimately the protection of rivalry and the competitive process is given priority over potentially pro-competitive efficiency gains which could result from restrictive agreements’; European Commission, ‘Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings’, [2009] OJ C45/7, para 6: ‘The emphasis of the Commission's enforcement activity in relation to exclusionary conduct is on safeguarding the competitive process in the internal market and ensuring that undertakings which hold a dominant position do not exclude their competitors by other means than competing on the merits of the products or services they provide. In doing so the Commission is mindful that what really matters is protecting an effective competitive process and not simply protecting competitors’.

standard takes into consideration exclusively consumer surplus.<sup>36</sup> Often, an increase in total welfare implies also an increase of consumer surplus. However, this is not necessarily the case. It is very well conceivable that certain measures, including for example price discrimination between customers in different EU Member States on the basis of their willingness to pay, maximizes total surplus but is detrimental at least with respect to certain groups of consumers. The question then is if total or if consumer welfare governs the application of competition law. Whereas many economists exclude distribution issues and plead for a maximization of total welfare,<sup>37</sup> the practice of competition law worldwide pleads for the consumer welfare standard.<sup>38</sup> In the EU, e.g. several communications of the European Commission take this position.<sup>39</sup>

One of the reasons is that Article 101(3) TFEU requires for an exemption to apply that consumers receive a fair share of the resulting benefit. For example, the European Commission states that ‘negative effects on consumers in one geographic market or

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<sup>36</sup> Massimo Motta, *Competition Policy – Theory and Practice* (CUP, 2004) at 17 et seq.

<sup>37</sup> Ibid, at 21-22, who adds, though, that policy recommendations based on the two standards rarely differ. There is no consensus among economists. Damien J. Neven and Lars-Hendrik Röller, ‘Consumer surplus vs. welfare standard in a political economy model of merger control’ (2005) 23 *International Journal of Industrial Organization* 829, argue in a merger control context that the consumer surplus standard is more appropriate if lobbying from large firms is strong or if an important part of mergers fail to yield significant efficiencies.

<sup>38</sup> UNCTAD, ‘The Benefit of Competition Policy for Consumers’ (2014) TD/B/C.I/CLP/27, para 4 et seq; Phil Evans, ‘The consumer and competition policy: welfare, interest and engagement’ in Ariel Ezrachi (ed), *Research Handbook on International Competition Law* (Edward Elgar, 2012) 545 et seq.

<sup>39</sup> European Commission, ‘Guidelines on the Application of Article 81(3) of the Treaty’ and ‘Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings’ (n 35), para 19.

product market cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market'.<sup>40</sup> According to Art. 2(1)(b) of the EU Merger Regulation, the Commission – when appraising concentrations – shall take into account the interests of consumers as well as technical and economic progress 'provided that it is to consumers' advantage and does not form an obstacle to competition'. Moreover, Art. 12 TFEU demands consumer protection requirements be taken into account in defining and implementing other Union policies and activities. The consumer welfare standard is best suited to fulfil this mission in the area of competition law. A deeper reason for preferring the consumer welfare standard is that the ultimate goal of the social market economy is the well-being and the autonomy of consumers. In this perspective, consumer sovereignty is the most fundamental expression of the social content of competition law.<sup>41</sup>

#### **4. Social Considerations as a Limitation to the Scope of Competition Law**

##### *4.1. The concept of undertaking and social considerations*

Competition law only applies to the activities of 'undertakings', and not to the behaviour of entities which do not qualify as such. Therefore, purely social activities are not caught by competition law. An undertaking is defined as 'any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed. [...] any activity consisting in offering goods and services on a given market is an economic

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<sup>40</sup> European Commission, 'Guidelines on the Application of Article 81(3) of the Treaty' (n 35), para 43.

<sup>41</sup> On the position of consumers in competition law, Neil W. Averitt and Robert H. Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law' (1997) 65 *The Antitrust Law Journal* 713.

activity'.<sup>42</sup> An intent to realize a profit is not necessary in this regard.<sup>43</sup> The definition of undertaking and, consequently, of the personal scope of application of competition law is very broad. Not only are commercial and industrial activities in the classical sense covered, but also the liberal professions and the world of commercialized arts and sports. Competition rules apply likewise to private and public undertakings. Public undertakings are – in conformity with the Transparency Directive<sup>44</sup> – any undertakings over which the public authorities may exercise directly or indirectly a dominant influence. A dominant influence is presumed if public authorities hold the major part of the undertaking's subscribed capital.<sup>45</sup> Therefore, for competition law to apply, it is not relevant if a certain economic activity is performed by a private or a public undertaking: both sorts of undertaking shall be treated equally in competition law (Art. 106(1) TFEU). Regarding public undertakings, it is not relevant if the activity is performed by a defined sub-unit of the state or by the state in general.<sup>46</sup> It is only important that there is an economic activity. Legal capacity of the acting entity is not required.<sup>47</sup> Consequently, activities in the social sector can constitute an economic activity as long goods or services are offered on a given

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<sup>42</sup> Case C-185/14, *EasyPay and Finance Engineering*, EU:C:2015:716, para 37.

<sup>43</sup> Case C-209/78, *Van Landewyck v Commission*, EU:C:1980:248, para 88; Case C-244/94, *FFSA and others v Ministère de l'Agriculture et de la Pêche*, EU:C:1995:392, para 21.

<sup>44</sup> Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, [2006] OJ L318/17 (Transparency Directive).

<sup>45</sup> *Ibid*, Article 2.

<sup>46</sup> Case C-118/85, *Commission v Italy*, EU:C:1987:283, para 8; Case C-343/95, *Calì and Figli v Servizi Ecologici Porto di Genova*, EU:C:1997:160, para 17.

<sup>47</sup> *Commission v Italy* (n 46), para 11.

market.<sup>48</sup> For example, employment procurement services,<sup>49</sup> patient transport services<sup>50</sup> as well as specialist medical services<sup>51</sup> and hospital services<sup>52</sup> have been qualified an economic activity, thus triggering the application of the EU competition rules. However, an intensely debated exception has been crafted by the CJEU through the distinction between purchasing and selling activities. In the *FENIN* case, the Court has affirmed that the purchasing activities of the Spanish national health system SNS cannot be separated from the subsequent use of the purchased goods. Therefore, if the provision of medical treatment by SNS is of a purely social nature, the purchasing activities of SNS cannot be qualified as an economic activity.<sup>53</sup> This reasoning is in conformity with the usual definition of ‘economic activity’ according to which the ‘offering’, hence not the ‘purchasing’ of goods and services on a given market is relevant. As a result, public procurement, which is discussed earlier in this volume,<sup>54</sup> is outside the realm of competition law if the subsequent use of the purchased goods or services is not offered over markets. In the *FENIN* case, for example, suppliers complained about systematic payment delays by the national health system averaging 300 days to pay the debts. Under competition law, it would have been possible to examine if these delays amount to an

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<sup>48</sup> See *infra* Delia Ferri and Juan J Poernas Lopez, ‘State Aid Law in a Social Market Economy’, in this volume.

<sup>49</sup> Case C-41/90, *Höfner and Elser v Macrotron*, EU:C:1991:161, paras 21-23.

<sup>50</sup> Case C-475/99, *Ambulanz Glöckner*, EU:C:2001:577, paras 19-20.

<sup>51</sup> Joined Cases C-180/98 to C-184/98, *Pavlow and others*, EU:C:2000:428, paras 76-77.

<sup>52</sup> Commission Decision SG Greffe, Case COMP/M.4010, *Fresenius v Helios*, [2005] D/206710 [2006] OJ C26/9.

<sup>53</sup> Case C-205/03 P, *FENIN v Commission*, EU:C:2006:453, paras 25-27.

<sup>54</sup> Christopher Bovis, ‘The Social Dimension of EU Public Procurement’, in this volume.



abuse of a dominant position (Art. 102 TFEU). As such backlog of payments indicates the exploitation of an uncontrolled scope of action due to the strong position of SNS on health markets, a violation of Art. 102 TFEU appears likely. However, in absence of an economic activity, the way into competition law is barred, and there are no equivalent rules in public procurement law.

The definition of undertaking does not encompass the State when it acts *de iure imperii* (as opposed to *de iure gestionis*). The State, acting in the exercise of official authority and in the core of its public competences, is not an undertaking in the sense of competition law.<sup>55</sup> This is the case if the activities in question are, by their nature, their aim and the rules to which they are subject, connected with the exercise of powers which are typically those of a public authority.<sup>56</sup> Examples are the army and the police, air and maritime navigation control as well as anti-pollution surveillance.<sup>57</sup> The fact that an entity has been given the power to adopt regulations of a public law character is not sufficient to assume the exercise of official authority. The decisive question is if the rule-making power relates to economic activities.<sup>58</sup> Generally, the fact that a certain activity may be

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<sup>55</sup> *Commission v Italy* (n 46), paras 7-8; Case T-462/13, *Comunidad Autónoma del País Vasco and Itelazpi v Commission*, EU:T:2015:902, para 61.

<sup>56</sup> Case C-364/92, *SAT Fluggesellschaft v Eurocontrol*, EU:C:1994:7, para 30.

<sup>57</sup> For references see Communication from the European Commission, 'The application of the European Union State aid rules to compensation granted for the provision of services of general economic interest', [2012] OJ C8/4, para 16.

<sup>58</sup> Case C-41/83, *Italy v Commission*, EU:C:1985:120, paras 18-20; Joined Cases C-180/98 to C-184/98, *Pavlov and others*, EU:C:2000:428, paras 85-88; Case C-1/12, *Ordem dos Técnicos Oficiais de Contas*, EU:C:2013:127, paras 39-56.

exercised by a private undertaking may be used as an argument in order to deny the exercise of official authority and to affirm the applicability of competition law.<sup>59</sup>

An important area where public activity may be exempted from competition law is social security, e.g. statutory accident and health insurance as well as old-age pension schemes. The CJEU has always recognised the competence of the Member States to organise their social security systems as they see fit.<sup>60</sup> It is settled case-law that social security systems do not perform an ‘economic activity’ if certain conditions are fulfilled: the insurance scheme must have an exclusively social function, it must apply the principle of solidarity, so that no direct link between the contributions paid and the risk covered or the benefits granted is realized, for example because the contributions also depend on the earnings of the insured person, and it must be subject to the supervision of the State.<sup>61</sup> If this is the case, the insurance scheme is not an undertaking and Articles 101 and 102 TFEU are not applicable. This means that for example, compulsory affiliation to a scheme cannot be qualified as abuse of a dominant position. However, sometimes it is difficult to assess if a certain social security scheme meets the requirements excluding an economic activity. An economic scheme, as opposed to a solidarity-based scheme, may be characterized by optional membership, the principle of capitalisation (i.e. a direct link between contributions and later earnings), its profit-making nature or by its

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<sup>59</sup> Case C-82/01 P, *Aéroports de Paris v Commission*, EU:C:2002:617, para 82.

<sup>60</sup> Case C-238/82, *Duphar*, EU:C:1983:226, para 16; Case C-158/96, *Kohll v Union des caisses de maladie*, EU:C:1998:171, para 19.

<sup>61</sup> Joined Cases C-159/91 and C-160/91, *Poucet and Pistre v AGF and Cancava*, EU:C:1992:358 paras 8-19; Case C-218/00, *Cisal*, EU:C:2001:448, paras 37-45; Case C-350/07, *Kattner Stahlbau*, EU:C:2008:631, paras 35-68; *EasyPay and Finance Engineering* (n 43), para 38.

supplementary character adding to a basic scheme.<sup>62</sup> If the insurance scheme presents elements of both types, an overall assessment has to be made.<sup>63</sup> The freedom to engage in some competition with other social security funds does not exclude the solidarity-based character.<sup>64</sup>

CJEU case law on the application of competition law to social security entities is diverse and does not provide absolute guidance.<sup>65</sup> There is no general exemption from competition law for the social security sector. Rather EU law adopts a ‘case-by-case’ approach, by examining whether the single social security body under review performs an economic activity. An alternative would be either to withdraw social security systems completely from the application of competition law, or, to the contrary, to subject social security in its entirety to competition law control while assessing the specific aspects of this sector under Art. 106(2) TFEU which provides for exceptions in favour of undertakings entrusted with the operation of services of general economic interest.<sup>66</sup> However, on the one hand, a general social security exemption would put at risk the autonomous term of ‘undertaking’ in EU competition law. On the other hand, a general application of competition law to social security bodies would interfere with the

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<sup>62</sup> See the analysis in the Communication from the European Commission ‘Services of general economic interest’ (n 57), para 19.

<sup>63</sup> *Ibid*, para 20.

<sup>64</sup> Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband and others*, EU:C:2004:150, para 56.

<sup>65</sup> Other cases include, *Kattner Stahlbau* (n 61); Case C-437/09, *AG2R Prévoyance*, EU:C:2011:112. For an analysis of the latter judgment, Christian Kersting, ‘Social Security and Competition Law – ECJ focuses on Art. 106(2) TFEU’ (2011) 2 *Journal of European Competition Law and Practice* 473.

<sup>66</sup> In the latter sense Volker Emmerich in Ulrich Immenga and Ernst-Joachim Mestmäcker (eds), *Wettbewerbsrecht*, Vol. 1 EU/Part 1 (5th edn, C.H. Beck, 2012), Article 101(1) TFEU, para 29.

competence of Member States to organise their social security systems. Therefore, even though it might create legal uncertainty, the individual assessment of the respective social security entities under competition law is best suited to reconcile social and general economic goals.

#### *4.2. Labour markets, workers' rights and competition law*

##### 4.2.1. Preliminary remarks

Workers rights, including the right to collective bargaining, are recognized as human rights, guaranteed by Art. 23(4) of the Universal Declaration of Human Rights, Art. 8 of the International Covenant on Economic, Social and Cultural Rights, Art. 2(a) of the ILO Declaration on Fundamental Principles and Rights at Work,<sup>67</sup> Art. 5 and 6 of the European Social Charter of the Council of Europe and by Articles 12 and 28 of the EU Charter of Fundamental Rights.<sup>68</sup> However, as already discussed by Doherty in this

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<sup>67</sup> ILO Convention No 87 on the Freedom of Association and Protection of the Right to Organise (1948) and ILO Convention No 98 on the Right to Organise and Collective Bargaining (1949).

<sup>68</sup> See above Michael Doherty, 'W(h)ither Social Europe? Labour Rights in a Social Market Economy', in this volume. The right of collective bargaining in Article 28 of the Charter is subject to certain restrictions, i.e. it has to be exercised 'in accordance with Union law and national laws and practices' (Case C-341/05, *Laval un Partneri*, EU:C:2007:809, para 91); Article 156(1) TFEU, as well as the Declaration on Article 156 TFEU. Article 1(7) of the Services Directive (Directive 2006/123/EC of 12 December 2006 of the European Parliament and of the Council on services in the internal market, [2006] OJ L376/36) states that nor does the Directive 'affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law'. Articles 11-14 of the Community Charter of the Fundamental Social Rights of Workers alluded to in the fifth recital of the Preamble to the TEU as well as in Article 151 TFEU.

volume,<sup>69</sup> from a different angle, collective bargaining may – in economic terms – be assessed as a ‘wage cartel’. Terms and conditions of labour contracts are not negotiated individually by the contracting parties, but by groups of employers and employees. In spite of the ‘cartel’ character of collective bargaining, competition law has always shown flexibility when it comes to the exercise of labour rights.<sup>70</sup> In US antitrust law, there are express rules on that aspect. In particular, according to § 6 Clayton Act, ‘the labor of a human being is not a commodity or article of commerce’ so that antitrust law does not interfere on the way of labour organizations to carry out their legitimate objectives. Such organizations cannot be considered illegal combinations or conspiracies under antitrust law.<sup>71</sup> In a similar vein, the CJEU has always refused to apply EU competition law to the legitimate exercise of labour rights. Unlike US law, the argument is not based on the commodity aspect of labour, but on the assumption that the employee is not an undertaking. Employees form an economic unit with the undertakings they are working for and therefore do not themselves constitute ‘undertakings’ within the meaning of

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<sup>69</sup> Doherty, ‘W(h)ither Social Europe? Labour Rights in a Social Market Economy’ (n 68), section 3.

<sup>70</sup> On the structural market failure in labour markets see Schiek, Oliver, Forde and Alberti, ‘EU Social and Labour Rights and EU Internal Market Law’ (n 5), paras 1.3.3, 2.2.4 and 4.3.2.

<sup>71</sup> Section 20 of the Clayton Act granting immunity to collective activities by employees. For more details, including the difference between the “statutory” and the ‘non-statutory’ exemption for labour markets, Herbert Hovenkamp, *Federal Antitrust Policy – The Law of Competition and its Practice* (5th edn, West Publishing, 2016) at 965-969. This author points to the fact that regarding the first thirteen antitrust violations found by American courts after the enactment of the Sherman Act in 1890, twelve regarded labour strikes while only one was directed against a restrictive agreement among manufacturers.

competition law.<sup>72</sup> Even taken collectively, they are not undertakings,<sup>73</sup> so that competition law does not apply.

#### 4.2.2. The *Albany* exception: content and scope

Art. 155 TFEU expressly encourages ‘management and labour’ to undertake a dialogue at the Union level which may lead to ‘contractual relations, including agreements’. As mentioned above by Doherty,<sup>74</sup> in the *Albany* case, the Court has drawn a far-reaching conclusion from this institutional setting, which is fundamental for the general relationship between competition law and social policy. The Court held that it is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, it stated that the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 101(1) TFEU when seeking to adopt measures to improve conditions of work and employment. It therefore follows from an interpretation of the provisions of the Treaty as a whole, which is both effective and consistent, that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article Art. 101(1) TFEU.<sup>75</sup>

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<sup>72</sup> Case C-22/98, *Becu and others*, EU:C:1999:419, para 26.

<sup>73</sup> *Ibid*, para 27.

<sup>74</sup> Doherty, ‘W(h)ither Social Europe? Labour Rights in a Social Market Economy’ (n 68), section 3.

<sup>75</sup> *Albany* (n 8), paras 59 and 60. See also Joined Cases C-115/97, C-116/97 and C-117/97, *Brentjens*, ECLI:EU:C:1999:434 and Case C-219/97, *Drijvende Bokken*, EU:C:1999:437. The EFTA Court takes the same view, Case E-14/15, *Holship Norge AS/Norsk Transportarbeiderforbund*, [2016], para 40.

This reasoning goes much further than the argument in the *Becu* case, which merely stated that employees and trade unions are not ‘undertakings’ in the sense of competition law.<sup>76</sup> The *Albany* decision establishes a general ‘inherency doctrine’ according to which competition law has to step back insofar as its application would undermine the social policy objectives pursued by certain rules and institutions. It has to be underlined, though, that this line of reasoning is reserved to collective bargaining between employers and employees. It cannot be extended, for example, to collective arrangements between members of the liberal professions,<sup>77</sup> to employees’ organisations which also represent the interests of self-employed service providers (since these are not employees but undertakings in the sense of competition law),<sup>78</sup> or to inter-trade agreements between two independent links of the production chain.<sup>79</sup> The inherency approach is not unknown to competition law. In the *Wouters* case, the Court had to assess the prohibition of multi-disciplinary partnerships of lawyers and accountants which the Bar of the Netherlands justified with the goal of guaranteeing the complete independence of lawyers and of avoiding all risk of conflict of interest. The Court was confronted with the question of whether ‘the consequential effects restrictive of competition are inherent

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<sup>76</sup> See (n 72) and (n 73).

<sup>77</sup> Joined Cases C-180/98 to C-184/98, *Pavlov and others*, EU:C:2000:428, paras 68-70.

<sup>78</sup> Case C-413/13, *FNV Kunsten Informatie en Media*, EU:C:2014:2411, paras 24-30; however, this reasoning does not apply to ‘false self-employed’ service providers who have to be treated like employees, *ibid*, paras 31-36.

<sup>79</sup> Joined Cases T-217/03 and T-245/03, *FNCBV and others v Commission*, EU:T:2006:391, para 100; confirmed by Joined Cases C101/07 P and C110/07 P, *Coop de France bétail and viande v Commission*, EU:C:2008:741.

in the pursuit of those objectives’<sup>80</sup> and answered this question in the affirmative since the rules in question were necessary to ensure the proper practice of the legal profession.<sup>81</sup> In later case law, the Court has reiterated the admissibility of such inherency arguments in different contexts.<sup>82</sup> It has emphasized, though, that the inherency argument only works insofar as the restriction of competition in question is necessary to ensure the implementation of legitimate objectives.<sup>83</sup>

There is no uniform interpretation of the relationship between the ‘*Albany* exception’<sup>84</sup> and the *Wouters* jurisprudence. Some observers are of the opinion that *Albany* has brought a general exemption from competition law in favour of collective labour agreements.<sup>85</sup> For others, there is – deviating from *Wouters* – no general immunity of collective agreements from the application of competition law since only such agreements which pursue recognized social aims will profit from the ‘*Albany* exception’.<sup>86</sup> In our view, there is no structural difference between *Wouters* and *Albany*. The inherency doctrine of the CJEU is context-sensitive. On the one hand, the CJEU recognises that social aims are acknowledged by EU law. On the other hand, exceptions

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<sup>80</sup> Case C-309/99, *Wouters and others*, ECLI:EU:C:2002:98, para 97.

<sup>81</sup> *Ibid*, paras 109 and 110.

<sup>82</sup> Case C-519/04 P, *Meca-Medina and Majcen v Commission*, EU:C:2006:492, paras 42 and 45; Joined Cases C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13, *API and others*, EU:C:2014:2147, para 47.

<sup>83</sup> Case C-136/12, *Consiglio nazionale dei geologi and Autorità garante della concorrenza e del mercato*, EU:C:2013:489, para 54.

<sup>84</sup> Opinion of AG Fennelly, Case C-222/98, *van der Woude*, EU:C:2000:226, paras 30 and 31.

<sup>85</sup> Immenga and Mestmäcker (eds), *Wettbewerbsrecht* (n 66), para 26.

<sup>86</sup> Schiek, Oliver, Forde and Alberti, ‘EU Social and Labour Rights and EU Internal Market Law’ (n 5), para 2.2.4.



must be restricted to what is necessary in order to achieve the respective high-ranking goals. In this sense, inherency is not equivalent to immunity, the CJEU examines each case and applies the proportionality principle.

However, it is contested what these general principles mean *in concreto*. In the *Albany* case, Advocate General (AG) Jacobs had proposed some conditions for an exception from competition law to apply. Apart from requiring a formal framework of collective bargaining between management and labour, he pleaded the application of the principle of good faith. He argued that collective agreements do not benefit from an exception if they merely function ‘as a cover’ for restrictive agreements of employers on product markets.<sup>87</sup> Moreover, he ‘tentatively’ suggested to restrict the exception to collective agreements which deal with ‘core subjects of collective bargaining such as wages and working conditions and which [do] not directly affect third parties or markets’, ‘such as clients, suppliers, competing employers, or consumers’.<sup>88</sup> The Court did not take over the latter requirement, but required that the collective agreement must aim at adopting measures to improve conditions of work and employment in order to be exempted from the scope of competition law.<sup>89</sup> In fact, a requirement, such as that envisaged by the AG, excluding effects on third parties or markets seems to go too far. Collectively negotiated employment conditions will very often have an effect beyond the relationship between the parties.<sup>90</sup> It would put the right of collective bargaining at risk if collective agreements were systematically be subject to an obligation of justification under competition law. Therefore, the general proportionality test as to the necessity of

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<sup>87</sup> *Albany* (n 8), paras 191 and 192.

<sup>88</sup> *Ibid*, para 193.

<sup>89</sup> *Ibid*, paras 59 and 60.

<sup>90</sup> *van der Woude* (n 86) para 22 et seq; *AG2R Prévoyance* (n 65), paras 28 et seq.

the restriction of competition for recognized social aims should be sufficient in order to renounce on the application of competition law.

The limits of the *Albany* exception have become relevant for the EFTA Court in the *Holship Norge* case. In a collective agreement, a fixed pay scheme for dockworkers in the largest ports of Norway had been adopted. The agreement contained a priority clause: Unloading or loading cargo from or to incoming ships was reserved to dockworkers of the Administration Office of the home port. The trade union participated in the management of this entity and therefore had a business objective going beyond its core tasks. As a company used its own employees for unloading and loading instead of the incumbent's one, a boycott was initiated. The EFTA Court decided that the *Albany* exception did not apply, because the trade union was engaged in the management of the home port's firm, therefore did not limit itself to the improvement of working conditions of the workers and thus went beyond the objective of collective bargaining.<sup>91</sup> The case makes clear that social goals justify exceptions from competition law, but that they cannot be used for as an excuse to unduly restrict competition in the pursuit of objectives which are different from social ones.

It is important to note that the *Albany* exception is relevant only in the context of competition law. In the *Viking* case, the CJEU has held that inherency arguments cannot be invoked when applying fundamental freedoms.<sup>92</sup> Moreover, in the context of labour

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<sup>91</sup> *Holship Norge AS v Norsk Transportarbeiderforbund*, (n 75), paras 48-53. See also para 51: The priority clause 'protects only a limited group of workers to the detriment of other workers, independently of the level of protection granted to those other workers. In particular, boycotts, such as the one at issue, detrimentally affect their situation'.

<sup>92</sup> Case C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union v Viking*, EU:C:2007:772, paras 52-55: According to the Court, 'it cannot be considered that it is inherent in

markets, the extension of the fundamental freedoms to associations or organisations with legal autonomy is relevant and contributes to limit the scope of the *Albany* exception. While normally the fundamental freedoms are addressed to the Member States and not to private entities, associations or organisations may be included in the group of addressees if otherwise the abolition of State barriers could be neutralised by obstacles erected collectively by these autonomous entities. As a result, the fundamental freedoms may be relied upon also against trade unions.<sup>93</sup>

#### *4.3. Some concluding remarks on social policy and the scope of application of competition law*

Social security organisms and labour markets are the most prominent examples for exceptions to the application of competition law. However, these fields exhibit specific characteristics and do not allow for a general assumption that competition law will never apply in the field of social policy.<sup>94</sup> In reality, the opposite can be said to be true. As soon as an entity performs an economic activity (as to be distinguished from a social activity), it qualifies as an undertaking and has to respect competition law. EU competition law has been applied frequently within social policy contexts. The most prominent example is the *Höfner* case where the CJEU found the German public employment agency in violation of Arts. 106 and 102 TFEU because it was incapable of

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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>93</sup> *Ibid*, paras 56-61.

<sup>94</sup> *Albany* (n 8), para 183: ‘This conclusion in favour of a limited antitrust immunity for collective agreements between management and labour is not incompatible with the arguments developed above to the effect that there is no exception for the social field as a whole’.

satisfying the demand prevailing on the market for executive recruitment activities. As it is further discussed in Chapter 12, the fact that the statutory monopoly of this agency (dating back to the Great Depression of 1929) was based on social policy considerations did not prevent this finding. For the Court, it is crucial that placement services are an economic activity, and that the agency abused its dominant position by not satisfying the demand.<sup>95</sup> From that, the general lesson can be learned that the competition rules apply to the field of social policy except if its conditions of application are not met. The most important arguments for an exception ensue from the concept of undertaking and from the inherency doctrine.

## **5. Social Considerations within EU Competition Law**

EU competition law has its own categories which focus on the competitive assessment of relevant markets, but, at the same time, it is only one of the very many policy fields in the EU domain. As mentioned in the Introduction to this volume and discussed further in other chapters, according to the horizontal social clause in Article 9 TFEU, social values have to be respected in all policy fields of the EU. The CJEU in its own case law has expressly stated that European economic law has to be reconciled with social goals.<sup>96</sup>

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<sup>95</sup> Case C-41/90, *Höfner and Elser v Macrotron*, EU:C:1991:161.

<sup>96</sup> Case C-341/05, *Laval un Partneri*, EU:C:2007:809, para 105: ‘Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the EC Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy’.

Against this background, the following analysis aims to establish the current status of social considerations within the prohibitions and exemptions of EU competition law. As discussed in Section 4, tensions between competition law and social policy have been reconciled by restricting in limited instances the application of competition law. The following section however shows that there are additional ‘mechanisms’ which provide a degree of flexibility in reconciling social policy and competition law. The analysis focuses on substantive law, in particular Articles 101 and 102, and merger control. Article 106 TFEU is not discussed in this chapter as it is examined at length in Chapter 12. It should not however be overlooked, that social considerations may play a role in procedural law including sanctions. If a fine jeopardises the economic viability of an undertaking, the European Commission will take account ‘of the undertaking’s inability to pay in a specific social and economic context’.<sup>97</sup> The basic goal of allowing the Commission with flexibility in such a case is to prevent assets from losing all their value and to weaken competition, however the reference to the social context makes clear that the safeguarding of employment is at least an additional factor to be considered.<sup>98</sup>

### *5.1. Article 101(1) TFEU: prohibition of cartels*

Agreements between undertakings, decisions by associations of undertakings and concerted practices having as their object or effect a restriction of competition and affecting trade between Member States are prohibited. The core phrase in the prohibition laid out in Article 101(1) TFEU is that of a ‘restriction of competition’. This is linked to

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<sup>97</sup> European Commission, ‘Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003’, [2006] OJ C210/2, para 35.

<sup>98</sup> Commission Decision, Case C.38.359, *Electrical and mechanical carbon and graphite products*, 2004/420/EC [2004] OJ L125/45, paras 350 and 357.

the ‘requirement of independence’,<sup>99</sup> according to which each undertaking must determine its behaviour autonomously. This does not mean, however, that any restriction of autonomy amounts to a restriction of competition. The entire factual, legal and economic context has to be taken into account.<sup>100</sup> However, outside the inherency doctrine, social considerations have not gained importance in the realm of application of Art. 101(1) TFEU. Cooperation between undertakings in order to promote social goals has to comply with EU competition law. This has been criticized insofar as the cartel prohibition ‘also restricts economic entities mainly motivated by aims other than profit maximisation in any endeavour to civilise or even socialise markets’.<sup>101</sup> This objection is – subject to the possibility of justifications, for example based on Art. 101(3) TFEU – true since the cartel prohibition applies to all restrictions of competition once the activity is qualified as ‘economic’.

However, in applying Article 101(1) TFEU the Commission has a wide leeway. It is recognized that competition law is not violated if undertakings renounce on behaving illegally.<sup>102</sup> Therefore, there is no restrictive agreement if, for example, firms agree with each other not to infringe tax laws, money laundering provisions or social policy rules.

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<sup>99</sup> This principle has been recognised since Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, *Suiker Unie and others v Commission*, EU:C:1975:174, paras 173-174. From recent case law, see for example Case C-74/14, *Eturas and others*, EU:C:2016:42, para 27 (‘requirement of autonomy’).

<sup>100</sup> On the distinction between object and effect see *inter alia* Richard Whish and David Bailey, *Competition Law* (8th edn, OUP, 2015) at 120 et seq.

<sup>101</sup> Schiek, Oliver, Forde and Alberti, ‘EU Social and Labour Rights and EU Internal Market Law’ (n 5), section 1.5.1.

<sup>102</sup> Ernst-Joachim Mestmäcker and Heike Schweitzer, *Europäisches Wettbewerbsrecht* (3rd edn, C.H. Beck, 2014) Article 11 n 100.

As a consequence, it must be possible for undertakings to cooperate in order to advance social goals. The efforts to establish and to strengthen Corporate Social Responsibility (CSR) are an example. There is no restriction of competition if a firm adheres to recognized CSR initiatives (such as the UN Global Compact) insofar as existing obligations are confirmed.<sup>103</sup> For voluntary commitments going beyond statutory requirements, coordination may lead to a restriction of competition which would require a justification.<sup>104</sup> Competition law should be open in this respect, since, by accepting its corporate social responsibility, the firm qualifies for the ‘social licence to operate’ in addition to the legal licence.<sup>105</sup> However, CSR must not be used as a cover for hardcore cartels. An example is the ‘washing powder’ cartel fined by the European Commission in 2011.<sup>106</sup> The starting point of this cartel was an environment-friendly initiative of the trade association *Association Internationale de la savonnerie, de la détergence et des produits d'entretien* (AISE) representing the manufacturers of laundry detergents. AISE launched a code of conduct in order to reduce the consumption of detergents, their packaging, poorly biodegradable ingredients and washing temperatures thus decreasing

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<sup>103</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Guiding Principles on Business and Human Rights* (2011) UN Document A/HRC/17/31. The ‘responsibility to respect’ refers to internationally recognised human rights. Firms should not infringe human rights themselves, and they should address adverse human rights impacts with which they are involved.

<sup>104</sup> For a detailed analysis, Thomas Ackermann, ‘Corporate Social Responsibility und Kartellrecht’ in Reto M. Hilty and Frauke Henning-Bodewig (eds), *Corporate Social Responsibility* (Springer, 2014) 147 et seq.

<sup>105</sup> John Ruggie, *Business and human rights: Towards operationalizing the ‘protect, respect and remedy’ framework* (2009) UN Doc A/HRC/11/13, para 46.

<sup>106</sup> Commission Decision, Case COMP/39579, *Consumer Detergents*, [2011] OJ C193/14.

CO2 emissions.<sup>107</sup> On this basis, detailed discussions between AISE members on the reduction of detergents' weight and volume took place. Major manufacturers used this framework in order to agree on prices, for example not to decrease prices when the weight or volume of the product was reduced, but also by increasing prices directly. Moreover, they agreed to restrict their promotional activity and they exchanged sensitive information on prices and trading conditions. A justification was not possible since the environmental objectives of the cooperation do not require price fixing. This case shows that, while the coordinated pursuit of social objectives may fall outside the application of competition law, deeds aimed at the pursuit of social goals cannot be used as a smokescreen for anti-competitive behaviour.

## *5.2. Article 101(3) TFEU: justification of restrictive agreements*

If a restrictive agreement is caught by Art. 101(1) TFEU, it might still be compatible with EU rules. For example, the restriction may be covered by a block exemption regulation (BER); however, BERs do not concern social rights or environmental reasons. There are no Commission Guidelines in the field of social policy either. The Guidelines on horizontal co-operation agreements<sup>108</sup> address some forms of coordination including production and commercialization agreements, but they do not touch upon the field of codes of conduct and CSR. Therefore, individual exemptions based directly on Art. 101(3) TFEU are of special importance in this context.

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<sup>107</sup> AISE, *Code of Good Environmental Practice for Household Laundry Detergents* (16 January 1997). This Code was endorsed by the European Commission, Recommendation 98/480/EC of 22 July 1998 concerning good environmental practice for household laundry detergents, [1998] OJ L215/73.

<sup>108</sup> European Commission, 'Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements', [2011] OJ C11/1.



The central condition for an exemption under Art. 101(3) TFEU is the improvement of the production or distribution of goods or the promotion of technical or economic progress. Social progress is not mentioned. In some cases, the European institutions have interpreted Art. 101(3) TFEU broadly so that, e.g. concerns for employment were accepted as an efficiency ground.<sup>109</sup> Also the protection of the environment, public health and cultural policy has been taken into account by the European Commission.<sup>110</sup> However, Art. 101(3) is not a gateway to general policy reflections (which should be reserved to the legislator<sup>111</sup>) and is instead a legal norm listing four conditions for an exemption to apply. In this sense, the European Commission has stated in its Guidelines on the interpretation of Art. 101(3) TFEU: ‘Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of [Art. 101(3)]’.<sup>112</sup> Therefore, social considerations are

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<sup>109</sup> Case 42/84, *Remia v Commission*, EU:C:1985:327, para 42. For an analysis of the case law, Witt, 'Public Policy Goals under EU Competition Law – Now is the Time to Set the House in Order' (n 9).

<sup>110</sup> Ioannis Lianos, ‘Some Reflections on the Question of the Goals of EU Competition Law’ in Ioannis Lianos and Damien Geradin (eds), *Handbook on European Competition Law – Substantive Aspects* (Edward Elgar, 2013) 1, at 58-59; Christopher Townley, *Article 81 EC and Public Policy* (Hart, 2009); Giorgio Monti, 'Article 81 EC and Public Policy' (2002) 39 *Common Market Law Review* 1057 who proposes a new Article 81(4) (now Article 101(4) TFEU) providing for exemptions in favour of public policy goals subject to an authorisation by the European Commission, at 1097.

<sup>111</sup> US antitrust law is comparable to EU law in this respect. In *Topco* (US Supreme Court, *United States v Topco Associates, Inc.* [1972] 406 U.S. 596, 611-612), the US Supreme Court has refused a general balancing of social values and has reserved this right to the parliament.

<sup>112</sup> European Commission, ‘Guidelines on the application of Article 81(3) of the Treaty’ (n 35), para 42. In this sense also Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93, *Métropole Télévision v Commission*, EU:T:1996:99, paras 118 and 123.

relevant only insofar as they have an impact on (static or dynamic) efficiency or on the other conditions laid down in that provision, such as the fair participation of consumers at the resulting benefits.<sup>113</sup> It is not possible to refer to public policy interests which are in contradiction to the system of undistorted competition.<sup>114</sup>

### 5.3. Article 102 TFEU

Art. 102 TFEU prohibits the abuse of dominant positions within the internal market or in a substantial part of it insofar as trade between Member States is affected. Normally, competitive markets ensure that the other market side gets the best and most innovative products at an appropriate price. If, however, an undertaking has the power to behave independently of other market actors like competitors, suppliers, customers and consumers,<sup>115</sup> fair and efficient results are not guaranteed any longer. The control by competition then is replaced – at least in part – by a special competition law control aiming at preventing any abuse which is made of the dominant position. Art. 102 TFEU protects consumers already by guaranteeing competition as such: dominant firms are

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<sup>113</sup> The focus on efficiency has been strengthened by the more economic approach of the European Commission and by the transition to the system of legal exception (supra II.1.c), Giorgio Monti, *EC Competition Law* (CUP, 2007) at 113-123; Witt, ‘Public Policy Goals under EU Competition Law – Now is the Time to Set the House in Order’ (n 9).

<sup>114</sup> Heike Schweitzer, ‘Competition law and public policy: reconsidering an uneasy relationship’ in Josef Drexler, Laurence Idot and Joël Monéger (eds), *Economic Theory and Competition Law* (Edward Elgar, 2009) at 149-150. Šmejkal, ‘Competition Law and the Social Market Economy Goal of the EU’ (n 25), at 39, who evokes the possibility of an extended interpretation of Articles 101(3) and 106(2) TFEU because of the social objectives in the Lisbon Treaty.

<sup>115</sup> This is the definition of market dominance given by the CJEU (Case C-27/76, *United Brands v Commission*, EU:C:1978:22, para 65).

barred from foreclosing competitors in an anti-competitive way; they have to compete on the merits.<sup>116</sup> However, Art. 102 TFEU has also a more direct impact on consumers and therefore a social component which is more visible than the protection of economic freedom under Art. 101 TFEU. Art. 102 TFEU not only prohibits exclusionary conduct but also exploitative abuses, for example the imposition of unfair purchase or selling prices or of other unfair trading conditions.

Traditionally, it is inferred from Art. 102(a) TFEU that exploitative abuse constitutes a category which is distinct from exclusionary behaviour. Under the more economic approach and under the influence of US law, which does not allow direct price control through antitrust law,<sup>117</sup> the category of exploitative abuse has been criticized.<sup>118</sup> It has been proposed to restrict price control to regulated markets insofar as they are not able to self-correct in the short to medium term.<sup>119</sup> This position appears problematic: Art. 102 TFEU does not contain a limitation to regulated markets.<sup>120</sup> Moreover, the self-correcting forces of the market mechanism may be absent for other reasons than regulation, for example because of network effects in the digital world. Many other

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<sup>116</sup> European Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings', [2009] OJ C45/7, paras 1 and 6. Schiek, Oliver, Forde and Alberti, 'EU Social and Labour Rights and EU Internal Market Law' (n 5), at 25, affirm that '[t]he prohibition on abusing a dominant market position aims at hindering large corporate actors from crushing smaller entrepreneurs'.

<sup>117</sup> US Supreme Court, *Verizon Communications Inc. v Law Offices of Curtis v Trinko* [2004] 540 U.S. 398, III: Monopoly prices are tolerated as an incentive for risk-taking in the free market system.

<sup>118</sup> Whish and Bailey, *Competition Law* (n 100), at 759-761.

<sup>119</sup> Opinion of AG Wahl, Case C-177/16, *Biedrība 'Autortiesību un komunikēšanās konsultāciju aģentūra – Latvijas Autoru apvienība' v Konkurences padome*, EU:C:2017:286, para 48.

<sup>120</sup> René Joliet, *Monopolization and Abuse of Dominant Position* (Martinus Nijhoff, 1970) at 250-251.

barriers to entry exist. Price control against dominant firms is expressly provided for in Art. 102(a) TFEU, and insofar as consumers are the victims, it directly prevents welfare transfers from consumers to dominant firms and thus has a social dimension.

#### *5.4. Merger control*

The Merger Regulation <sup>121</sup> posits that concentrations which would not significantly impede effective competition in the internal market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, are considered compatible with the internal market. According to Art. 2(2) and (3) of this Regulation the compatibility of concentrations is linked on whether or not there is a ‘Significant Impediment to Effective Competition’ (SIEC). The SIEC test requires a competition-related examination.<sup>122</sup> Nevertheless, the Merger Regulation opens some space to extra-competitive aspects. According to Recital 23 of that Regulation, ‘the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to’ in the articles which correspond today to Art. 3 TEU. As these ‘fundamental objectives’ include social goals, the third pillar of European competition law seems the most open one to social considerations. In the *Vittel* case, the General Court has held that ‘the primacy given to the establishment of a system of free competition may in certain cases be reconciled, in the context of the assessment of whether a concentration is compatible with the [internal] market, with the taking into

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<sup>121</sup> Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1.

<sup>122</sup> According to Article 21(4) ECMR, this does not prevent Member States from taking measures to protect legitimate interests in other fields than competition law, for example regarding public security, plurality of the media and prudential rules.

consideration of the social effects of that operation'.<sup>123</sup> As a result, the Court has confirmed that the Commission has to examine the impact of the concentration on the collective interests of the employees.<sup>124</sup> However, in the European Commission's practice, such reflections have been rare and never decisive.<sup>125</sup> General social considerations cannot be found in the list of aspects regarding the appraisal of concentrations in Art. 2(1) Merger Regulation or in the accompanying merger guidelines. Moreover, it is hard to conceive how such criteria could be operationalised. The commitment to the social market economy within the Lisbon Treaty does not alleviate these concerns. Therefore, only exceptionally, there will be room for general social considerations going beyond consumer interest, which is expressly underlined in Art. 2(1)(b) Merger Regulation.<sup>126</sup>

The question to be asked is whether it would be desirable to introduce a system in which social consideration have greater weight in merger control at the EU level. In some Member States, a two-tiered system is in place where the competition authority makes a strictly competitive analysis of mergers whereas the government has the possibility – after

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<sup>123</sup> Case T-12/93, *CCE Vittel v Commission*, EU:T:1995:78, para 38.

<sup>124</sup> Article 18(4) EC Merger Regulation according to which the recognised representatives of the employees may be entitled to be heard in the procedure.

<sup>125</sup> This seems to be a general insight from all jurisdictions having the possibility to refer to general policy arguments, OECD, 'Executive Summary of the Roundtable on Public Interest Considerations in Merger Control' (2006) DAF/COMP/WP3/M(2016)1/ANN5/FINAL, at 3: 'The discussion showed that OECD Member country competition authorities that are empowered to assess public interest considerations rarely rely on them, and, when they do, they usually interpret and apply them narrowly'.

<sup>126</sup> Scepticism towards public interest arguments in merger control has been expressed by Torsten Körber in Immenga and Mestmäcker (eds), *Wettbewerbsrecht*, Vol. 1 EU/Part 2 (5th edn, C.H. Beck 2012), Art. 2 FKVO (ECMR) para 212 et seq. and 400; Whish and Bailey, *Competition Law* (n 100), at 868-870.

the prohibition of a merger – to grant an exceptional authorization for public interest reasons.<sup>127</sup> Transposing such a system at the EU level would mean that a political body would be granted the competence to overturn merger prohibitions for public policy considerations including social aspects like for example the preservation of jobs. The advantage would be that the first examination of the merger made by the European Commission would be completely relieved from general political pressure and could rely on a mere competitive analysis. Of course, the existing law prevents the European Commission from proceeding to general weighing exercises. But critics argue that the Commission is *de facto* influenced by political constraints. In a two-tiered system, the separation between competition authority and a political body would clearly restrain the Commission to a competitive analysis. Then, at a later stage, it would be the task of a political body to assess the general consequences of the merger. However, this system would trigger a reflection on which institution would be more suitable to carry out these tasks, and whether the competence of applying competition law should be transferred from the European Commission to a newly set up, independent EU competition authority.<sup>128</sup>

## **6. EU Competition Law: A Cornerstone of the ‘Social Market Economy’**

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<sup>127</sup> See Article L430-7-1 of the French *Code de commerce*, which mentions general interest, such as industrial development, international competitiveness, employment, and the German *Gesetz gegen Wettbewerbsbeschränkungen*, which mentions overriding public interest, for example international competitiveness.

<sup>128</sup> This question has been raised regularly, so far without success; Giuliano Amato, ‘A European Cartel Office?’ in *EUI Collected Courses of the Academy of European Law*, Vol. VIII Book 1 (Kluwer Law International, 2001) 143.

Competition law is crucial for economic success: well-functioning markets protected against formation of cartels, the abuse of dominant positions and anti-competitive mergers are the basis of wealth, growth and innovation. In competitive markets consumers are provided with the most advanced products of highest quality and at best prices, and they have the possibility to choose. By protecting consumer sovereignty and by preventing value transfers in form of cartel and monopoly rents, competition law is social in itself.

Nevertheless, the relationship of competition law with other policy fields including social policy is still problematic and requires further reflection.<sup>129</sup> The analysis has shown that public interests of a non-economic or non-competitive nature should be primarily addressed by the respective policy fields. Competition law does not stand in the way of such measures: if the legislature excludes the competition principle with respect to certain subject matters<sup>130</sup> there is no economic activity and hence no undertaking to which competition law could be applied. In this sense, there is an ‘exception sociale’ to competition law, for example regarding collective bargaining by social partners or social security systems subject to the principle of solidarity. If there is an economic activity which has not been dispensed from the market mechanism, competition law applies. This does not mean, however, that social considerations are completely excluded. Due to the symbiotic relationship between competition law and the social market economy, preference should be given to the consumer welfare standard over the total welfare standard when it comes to efficiency analysis. If social considerations overlap with

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<sup>129</sup> See the Rome Declaration of 25.3.2017 which pleads at the same time for a ‘prosperous and sustainable Europe’ based on the single market and for a ‘social Europe’ promoting the shared values.

<sup>130</sup> See the reflections of Michael J. Sandel, *What Money Can't Buy – The Moral Limits of Markets* (Farrar, Straus and Giroux, 2012).

efficiency considerations, they may lead to the justification of restrictive agreements. Cooperation in the field of CSR, for example, benefits to a large extent from the applicable justifications. The prohibition against abuse of dominant positions has a strong relationship to social goals given that it not only promotes effective competition with its welfare-enhancing effects, it also protects customers, particularly against abusive prices and conditions. For EU merger control, a two-tiered system might lead to a sharper distinction between a purely competitive analysis, reserved to the competition authority, and a public policy assessment, attributed to a political instance.

The entry into force of the Lisbon Treaty has not altered the central tenets of EU competition law. Although the principle of undistorted competition has been relegated from the Treaty to a mere Protocol, the autonomy of competition law has not been affected by this change. With regard to the strengthening of social objectives within the Lisbon Treaty, competition law had always to define its relationship to other policy areas. The case law and the discussion post-Lisbon regarding the intersection between competition law and social goals follow the same lines as before. On the other hand, and unintended by those who wanted to weaken the competition principle, the Lisbon Treaty has confirmed a fundamental insight: even though, as this volume demonstrates, the meaning of ‘social market economy’ is still subject to debate and largely undefined, it is not disputed that competition law is one of its cornerstones since it is essential for the creation of wealth, which the State can avail for the pursuit of social goals.