

## SOCIAL OR HIGHLY COMPETITIVE EUROPE? EU LAW SOLUTION TO CONFLICT OF SOCIAL SECURITY AND COMPETITION LAW<sup>1</sup>

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**Abstract:** Since 1990s when liberalization and deregulation processes first opened the social security field to market forces, the EU competition law has had to cope with the situations of clash between values of social welfare and free competition. In the post-crisis period the European Union wants and needs to be more socially responsive, as the strengthening of social justice and social rights, the fight against poverty and social exclusion has become the key to political legitimacy of the European integration as well as of its Member States. A question hence arises how the call for a more social EU would cohabit with the free and undistorted competition. The paper tries to remedy on the fact that the EU so far has no accepted methodology of how to integrate public policy considerations in competition decisions. After sketching out such a methodology based on the CJEU's pre-Lisbon case law, the present analysis deals with the post-Lisbon developments inquiring whether the CJEU is paying now more consideration to social security measures.

**Keywords:** European Union, competition law, social security, exception

### 1. INTRODUCTION

In the post-crisis period the European Union wants and needs to be more socially responsive, as the strengthening of social justice and social rights, the fight against poverty and social exclusion has become “the key to political legitimacy” of the European integration as well as of its Member States.<sup>2</sup> Besides that the EU Treaty in its Lisbon wording promised (Article 3(3) TEU) to aim the EU at full employment, social progress etc., by directing its internal market towards a highly competitive social-market economy model. A question hence arises how the call for a more social EU would cohabit with the free and undistorted competition. Even though its protection is not mentioned any more among the opening horizontal provisions of the EU Treaty, the EU Court of Justice (CJEU) confirmed in 2011 the “fundamental nature of the Treaty provisions on competition”.<sup>3</sup>

The following paragraphs try to remedy on the fact that the EU so far has no accepted methodology of how to “integrate public policy considerations in competition decisions”.<sup>4</sup> After outlining such a methodology based on the CJEU's pre-Lisbon case law, the present analysis deals with the post-Lisbon developments inquiring whether the CJEU is paying now more consideration to social security measures. The methodological part of the paper

<sup>1</sup> This paper was created within the project GA CR. Project registration number 14-23623S.

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<sup>2</sup> POTŮČEK, M. A New Social Contract: The Key to European Integration's Political Legitimacy. In: ZUDOVA-LEŠKOVÁ, Z. VORÁČEK, E. et al. *Theory and Practice of the Welfare State in Europe in 20<sup>th</sup> Century*. Praha: Historický Ústav, 2014, pp. 133–134.

<sup>3</sup> See the CJEU judgment C-496/09 Commission v. Italy (2011), para 60.

<sup>4</sup> MONTI, G. *EC Competition Law*. Cambridge University Press, 2007, p. 119.

tries to systemise the traditional approach of the CJEU to potential clashes between values of solidarity, social partnership and social peace on the one hand and of the EU internal market free of any anti-competitive cartels and abuses of dominance on the other. The next part then is dedicated to cases of the same nature that the CJEU has had to decide after 2009 and its main purpose is to ascertain whether the outlined methodology would keep its validity even in the current period or would have to be amended in any way. The opening assumption naturally is that given the social accents of the Lisbon Treaty the current case law should not be less sensitive towards social goals than it used to be a decade ago.

## 2. EU COMPETITION LAW AND SOCIAL OBJECTIVES – OUTLINE OF THE METHODOLOGY

Since 1990s when liberalization and deregulation processes first opened the social security field to market forces, the EU competition law has had to cope with situations of clash between values of social welfare and free competition. Facing the situation the CJEU (and the European Commission) has elaborated different approaches to accommodate these diverging goals and interests.

### Social goal, redistributive solidarity and state supervision

First, there is an exemption from the Treaty provisions, enshrined nowadays in Protocol 26 of the Treaty for non-economic services of general interest, that appears to be full scale and unconditional. This category of services includes statutory and complementary social security schemes, as well as customized essential services provided directly to the person.<sup>5</sup> This does not mean, however, that activities whose declared aim is social, whose functioning is non-profit based, and whose clients are individuals requiring support and assistance, are *en masse* excluded from the provisions of the Treaties, including their antitrust articles. The Commission itself notes that part of social services of general interest is subject to competition regulation. This exception to the exception are those services which instead of being the exercising of the state monopoly power and regulatory functions, meet the definition of economic activity and are therefore carried by undertakings within the meaning of competition law. CJEU case law long before the Lisbon Treaty inferred that economic activity means offering such goods or services (i.e. not just purchasing them for the needs of hospitals, nursing homes, etc.) that would at least potentially be provided also by private commercial entities<sup>6</sup>. Neither public status alone nor social purpose is sufficient to exclude the activity from being “economic” and the entities operating them from being “undertakings”.

The dividing line can be traced, according to settled case-law of the CJEU, around activities that are performed without any consideration by the state or on behalf of the state,

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<sup>5</sup> Commission Staff Working Document - Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest. SWD(2013)53 final/2, Brussels, 29. 4. 2013, p. 22.

<sup>6</sup> CJEU cases C-41/90 Höfner and Elser v. Macrotron GmbH (1991); C-205/03 P Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission (2006); or the Commission decision 95/364 Regie des Voies Aériennes (1995).

as part of its duties in the social field. Non-economic social services will therefore be those provided by a compulsory, solidarity-based, system of insurance (health, retirement, social) where contributions as well as benefit payments are fixed by the legislator and distributed benefits thus do not match the size of individual contributions<sup>7</sup>. If these conditions are simultaneously met the CJEU even admits “some competition” and still considers entities involved not having the status of undertakings. It admitted that in its decision of 2004 regarding German sickness funds<sup>8</sup>, where, according to the Court, the competitive bidding of minor benefits in order to attract clients did not convert health insurance companies into subjects of competition law.

### Social partners, collective bargaining and rule of reason

A second type of approach to behaviour with a social meaning or purpose was adopted by the CJEU in the cases of agreements concluded between social partners in the context of their collective bargaining. The EU Court defined this approach at the turn of the millennium in the judgment C-67/96 *Albany International BV* from 1999<sup>9</sup>. In paragraph 59 of its decision CJEU admitted 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 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.*” Social peace, accepted as a goal of primary importance, may thus outweigh the interest of free competition and exclude the application of Article 101(1) TFEU to collective agreements.

In the subsequent case law relating to cases of agreements exceeding the area of collective bargaining, where the CJEU decided that entities involved were undertakings<sup>10</sup>, the situation evolved towards acceptance of a certain “rule of reason”.<sup>11</sup> The “rule of reason” means that a decision is taken not about whether the exception of Article 101(3) TFEU can be granted, but whether the prohibition of Article 101(1) TFEU would be applied to the agreement itself<sup>12</sup>. The rule is thus not that every agreement concluded in the exercise of collective self-government of a particular sector should escape the application of compe-

<sup>7</sup> CJEU cases C-159/91 and 160/91 *Poucet et Pistre* (1993); C-244/94 *Fédération française des sociétés d'assurance (FFSA)* (1995); C-238/94 *José García e.a. contre Mutuelle de prévoyance sociale d'Aquitaine e.a.* (1996); C-218/00 *Cisal di Battistello Venanzio & C.* (2002); C-355/00 *Freskot AE v Elliniko Dimosio Freskot* (2003).

<sup>8</sup> Joined CJEU cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and others* (2004).

<sup>9</sup> CJEU case C-67/96 *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* (1999), and in the same vein the CJEU judgments in the cases C-219/97 *Maatschappij Drijvende Bokken* (1999) and C-115/97 and 117/97 *Brentjens' Handelsonderneming BV* (1999).

<sup>10</sup> CJEU cases C-309/99 *Wouters* (2002) concerning the rules adopted by the Dutch Bar Association and C-519/04 *P Meca-Medina* (2006) about the anti-doping rules adopted by the International Olympic Committee and applied to professional swimmers.

<sup>11</sup> PETR, M. a kol. *Zakázané dohody a zneužívání dominantního postavení v ČR*. Praha: C. H. Beck, 2010, p. 78.

<sup>12</sup> As AG Comsas pointed out in his Opinion in the case C-51/96 and C-191/97 *Chtistelle Deliege* (1999) para 110: “Article 85(1) does not apply to restrictions on competition which are essential in order to attain the legitimate aims which they pursue. That exception is based on the idea that rules which, at first sight, reduce competition, but are necessary precisely in order to enable market forces to function or to secure some other legitimate aim, should not be regarded as infringing the Community provisions on competition.”

tion law in the same vein as collective agreements between workers' and employers' organizations. It is possible, however, as in the cases of obstacles to the free movement of goods or services on the EU Single market, to apply a test of whether the agreement is pursuing an important public goal (or mandatory requirement), and whether the chosen arrangement is a necessary and a proportionate way to achieve such a valuable objective. The quasi-automatic immunity of collective agreements concluded between social partners can be considered in this context as a special case within the broader "rule of reason" approach<sup>13</sup>.

If an undertaking created under such an agreement is acting e.g. as an administrator of an insurance fund into which the companies and their employees have an obligation to contribute, there is a danger of the abuse of dominant position and therefore the need for review pursuant to Article 102 TFEU. Although some authors argue that the same "rule of reason" test can be applied, the situation seems to be a bit more complicated.<sup>14</sup> In such cases EU competition law does not apply the principle of prohibition as against cartels, but rather the principle of abuse when the sanction targets not the achievement of a dominant position, or the granting of a monopoly, but its concrete manifestations. And because the obligation to contribute to a social scheme cannot be imposed without state approval, there is also the question of the application of Article 106 TFEU, i.e. the question whether entrusting an undertaking with certain exclusivity does not lead to distortions of competition and, if so, whether such interference is necessary for the performance of social services of general interest. This approach has already been adopted by the CJEU in the aforementioned judgments *Albany* (paras 98 et seq.), as well as *Maatschappij Drijvende Bokken* and *Brentjens' Handelonderneming BV* all of them from 1999. Here and now is the most important that the reference to Article 106 (2) TFEU provides a good bridge to another type of socially-motivated exception from the competition rules.

### Socially responsive interpretation of possible exemptions

The third type of approach of the EU competition law to the relationship between social and competition rules consists in a looser interpretation of the criteria for exemption from the prohibition under Article 101(3) or, in the case of services of general interest, pursuant to Article 106(2) TFEU. Under this approach, the benefits of an exemptible agreement do not depend on produced efficiencies and benefits for buyers in the same relevant market, but a wider variety of positive outcomes, including those in the social field, are taken into account. G. Monti specified four different types of such an extension, which can be found in the previous decisions adopted by the Commission and the European Court of Justice<sup>15</sup>:

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<sup>13</sup> The fact that "workers" are not "undertakings" presents another explanation why competition law does not apply to agreements concluded by them.

<sup>14</sup> CHALMERS, D., DAVIES, G., MONTI, G. *European law*. 2<sup>nd</sup> Edition. Cambridge University Press, 2010, p. 971.

<sup>15</sup> The following cases are often quoted as examples of wider application of article 101(3) TFEU criteria: Commission decisions IV/30.810 – Synthetic fibres OJ (1984); IV/34.456 – Stichting Baksteen OJ (1994); IV/33.814 – Ford/Volkswagen OJ (1993); and CJEU decisions in cases 26/76 Metro SB-Grossmarkte v Commission (Metro I) (1977) para 43, 75/84 Metro SB-Grossmarkte v Commission (Metro II) (1986) para 65, 42/84 Remia BV and Others v Commission (1985) para 42 where it stated that "provision of employment fell within the framework of the objectives to which reference could be made under Art (now) 101(3), because it improved general conditions of production, especially where market conditions were unfavourable."

i) redefinition of economic efficiency to include other public policy consideration, ii) use of non-economic benefits as factors to tip the balance in favour of granting an exception, iii) granting of conditional exception and use of remedies to achieve the public policy goal, iv) finding that non-competition consequences of the agreement are of such importance that if an agreement is inefficient but contributes to another Community policy, it is exempted.<sup>16</sup>

However, during the so-called modernization of EU competition law, i.e. right after the year 2000, the Commission did not take any decision that would further develop this approach. On the contrary, in its Guidelines on the application of Article 81(3) from 2004<sup>17</sup> it refused to take into account the benefits of an agreement which would not fit the efficiency requirement understood in the economic sense, or the benefits that would be located in another market or addressed to another category of beneficiaries. In the new millennium the Commission confirmed this narrow standard in its negative attitude towards the so-called “crisis cartels”<sup>18</sup>, by which it indicated that “the survival of an industry and employment, it seems, no longer enters into the equation”.<sup>19</sup> Against this view of the Commission stand the decisions of the EU General Court that did not require such rigor and explicitly admitted other benefits<sup>20</sup>. It has to be admitted that the Commission has also mitigated its modernization fervour based on neo-liberal economics after the outbreak of the financial and economic crisis in 2008<sup>21</sup>.

### No appreciable effect on competition or inter-state trade

Although it is not typical for cases where social goals and impacts are taken into account, two other means of escape from EU competition rules cannot be ruled out. Some agreements between undertakings may fall under limits set for the *de minimis* rule or may be set aside as purely local issues with no impact on trade between EU Member States. These cases of negligible impact on competition, respectively, on inter-state trade, would nevertheless be rare in the social field as the effectiveness of social measures usually requires agreements between labour and capital of at least regional scope, or collective decisions of autonomous bodies of the profession or industry, as evidenced by the above-mentioned cases. For the sake of completeness, however, it is also possible to include these two paths in the outlined methodology.

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<sup>16</sup> MONTI, G. op. cit. ref. Note 4, pp. 115–117.

<sup>17</sup> Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty. *Official Journal of the European Union*, C 101, 27. 4. 2004, paras 42–43.

<sup>18</sup> Commission Decision COMP/C.38279/ F3 – French Beef and observations of the Commission in the case C-209/07 Competition authority v. Beef Industry Development Society Ltd. and Barry Brothers Meats Ltd. (2008).

<sup>19</sup> WITT, A. C. Public policy goals under EU competition law – now is the time to set the house in order. In University of Leicester School of Law Research Paper No. 14-09/2013, p. 20.

<sup>20</sup> For instance the decisions T-86/95 *Compagnie Générale maritime and others v. Commission* (2002) para 130, T-213/00 *CMA GCM and Others v Commission* (2003) para 227.

<sup>21</sup> See for instance the analysis of competition Commissioner’s speeches in ŠMEJKAL, V. Impact of the Financial and Economic Crisis on the Paradigm of the European Union’s Antitrust. In *Faculty of International Relations Working Papers*. 2011, Vol. V, No. 12. It became clear that especially under Commissioner J. Almunia, DG Competition returned to a balance between social fairness and market efficiency, openly referring to social-market economy model.

A table summing up the approaches explained above, accommodating EU competition law with social security schemes and outlining the successive steps of analysis, would look as follows (the subsequent step comes into consideration whenever the exemption is not available in the preceding step):

STEP	KEY ARGUMENT	CRITERIA TO FULFILL
1	No economic activity/no undertaking	Only purchasing and no selling activity OR at the same time: 1. Compulsory participation 2. Redistribution based on solidarity principle 3. State control
2	No appreciable effect on competition/ on inter-state trade	Criteria expressed in Commission's <i>De minimis Notice</i> (2014) and <i>Commission's Guidelines on the effect on trade concept</i> (2004)
3	Social goal (of collective agreement/ regulation) would be undermined if competition rules applied	Social partners' collective bargaining OR rule of reason test: 1. Legitimate social goal 2. Necessity 3. Proportionality
4	Benefits of general interest	Criteria set by of Art 101(3) and 106 (2) TFEU, interpreted in socially responsive manner

### 3. POST-LISBON DEVELOPMENTS

The Table presented in the previous section is based on decisions taken by the EU competition authorities before 2009, i.e. before the Treaty of Lisbon came into effect, thus at a time when the EU did not emphasise that much its social objectives. In the post-Lisbon period, especially the CJEU has several times been given the opportunity to ponder social rights and undistorted competition requirements when dealing with references for preliminary rulings from national courts. It is quite symptomatic that these cases were first dealt with at a national level, not by the Commission's decision. In the context of decentralization of EU competition law enforcement, the Commission has been focusing on large-scale international cartels and abuses of dominance by multinational companies. For cases with social elements however, it is quite typical that they originate from local disputes about the consequences of the social partners' agreements in different sectors of a national economy.

The oldest of these CJEU decisions is the case **C-350/07 Kattner Stahlbau GmbH v Maschinenbau- und Metall-Berufsgenossenschaft**, adopted in March 2009<sup>22</sup> (i.e. before the actual effect of the Lisbon Treaty). In substance, it was about the legal obligation of businesses operating in Germany to become members, in respect of insurance against

<sup>22</sup> C-350/07 Kattner Stahlbau GmbH v Maschinenbau- und Metall-Berufsgenossenschaft Judgment of the Court (Third Chamber) of 5 March 2009 ECLI:EU:C:2009:127.

accidents at work and occupational diseases, of *Berufsgenossenschaft* (professional association), to which they materially and territorially belong. They are then obliged to pay the association their insurance contributions calculated on the basis of wages and salaries of the insured persons. The Kattner company intended to take out private insurance against the risks involved, which brought them into conflict with the professional association of engineering and metalworking sector (“MMB”). The CJEU had, among other things, to address the question whether the MMB was an undertaking subject to Articles 101 and 102 TFEU. On the basis of the standard assessment derived from their previous case law, the Court first explored the nature of solidarity, on which the insurance scheme was based and then the question of state supervision over it. It found that:

*“...a body such as the employers’ liability insurance association at issue in the main proceedings, to which undertakings in a particular branch of industry and a particular territory must be affiliated in respect of insurance against accidents at work and occupational diseases, is not an undertaking within the meaning of those provisions, but fulfils an exclusively social function, where such a body operates within the framework of a scheme which applies the principle of solidarity and is subject to State supervision, which it is for the referring court to verify.”* (Decision, part 1)

By this decision the CJEU thus confirmed its earlier established approach towards managing bodies of social insurance systems and repeated the criteria that must be fulfilled to exclude them from the category of undertakings, and therefore from the application of EU competition law. In the spirit of the already cited case law *AOK Bundesverband* the ECJ maintained the stance that: *“the fact that employers’ liability insurance associations such as MMB are given that degree of latitude, within the framework of a system of self-management, in order to lay down the factors that determine the amount of contributions and benefits cannot as such change the nature of those associations’ activity.”* (para 61) In the same vein, the non-undertaking status of MMB was not affected by the fact that providers from other Member States were able to offer similar services.

Another notable decision was taken by the CJEU in the case **C-437/09 AG2R *Prévoyance v. Beaudout Pere et Fils SARL*** in March 2011<sup>23</sup>. Its factual side was quite similar to the *Kattner* case: a local dispute where the plaintiff, the company Beaudout Pere et Fils SARL, refused to participate in the system of compulsory health insurance managed by a non-profit organization AG2R for the whole sector of artisanal bakery in France. The difference, however, laid in the fact that under French law the participation of employers in such schemes may be stipulated in the collective agreement between the representatives of employers and employees. By an act of the Minister of Labour such an agreement could become mandatory for all employees and employers in the given sector. In its decision the CJEU reiterated its approach to collective agreements of the social partners aimed at improving the conditions of work and employment: they do not fall, because of their nature and objectives, within the scope of Article 101 (1) TFEU. This is true regardless of the fact that accession to such an agreement is made compulsory for companies of a particular sector in a particular Member State. As the Article 101(1) TFEU does not apply to such

<sup>23</sup> C-437/09 AG2R *Prévoyance contre Beaudout Père et Fils SARL* Arrêt de la Cour (première chambre) du 3 mars 2011 ECLI:EU:C:2011:112.

an agreement, the EU law (namely Article 4(3) TEU – the duty of loyalty) could not prevent a Member State from decreeing the participation in it mandatory without any exemption from this requirement (paras 29–38). Exclusion of collective agreements from the EU anti-cartel law that the CJEU first found in *Albany* has thus been reaffirmed.

Given that the non-profit entity AG2R was chosen by social partners themselves to manage their insurance from companies offering services on the market of health and social insurance, the CJEU came to the conclusion that although the system was endowed with a high degree of solidarity, AG2R showed a remarkable degree of independence. In such a case it was very likely according to the CJEU, that AG2R was an undertaking engaged in economic activity, albeit in detail it had to be assessed under the particular circumstances by the national court. If AG2R was an undertaking, the question must be raised of application of Articles 102 and 106 TFEU, since this undertaking had been entrusted by the Minister with the exclusive right to collect payments and manage the insurance scheme. The CJEU stayed here with its settled case law from the 1990s and noted that the abuse of a dominant position could occur if the statutory conditions themselves led such an undertaking to abusive conduct, especially if the grant of an exclusive right created a situation in which the monopoly was apparently unable to satisfy the demand for the service<sup>24</sup>. Since the same insurance services, maybe even on better terms, had been offered on the French market by other providers, the creation of such a monopoly for the whole business sector was likely to restrict competition (although it had not been proven that businesses insured with AG2R were dissatisfied with its services). The CJEU therefore decided to examine whether the exemption from competition constraints may be granted pursuant to Article 106(2) TFEU, addressed to undertakings entrusted with the operation of services of general economic interest (paras 70–73).

The Court itself, based on facts known to it, through relatively brief considerations (paras 74–81), referring to its earlier decisions of cases *Albany*, *Maatschappij Drijvende Bokken* and *Brentjens' Handelonderneming BV* from 1999, concluded that the exception of Article 106(2) TFEU was applicable to the insurance monopoly of AG2R. Insurance at an affordable price requires that the system is not left by contributors representing a lesser insurance risk. This requirement can justify the exclusive right of AG2R to manage a system in which participation is made compulsory for everyone in the sector. Without such exclusivity it would not be able to perform the task of general economic interest in “economically acceptable conditions”. Hence the CJEU concluded that: “Articles 102 TFEU and 106 TFEU must be interpreted as not precluding, in circumstances such as those of the case in the main proceedings, public authorities from granting a provident society an exclusive right to manage that scheme, without any possibility for undertakings within the occupational sector concerned to be exempted from affiliation to that scheme.” (Decision, part 2).

The CJEU approach in this case answers the question of whether admitting more commerce and competition into the provision of social security must lead to a conflict with EU competition rules. A Member State by supporting the decision made by social partners that choose their exclusive administrator or social insurance scheme from commercial entities, empowered the undertaking with a service of general interest. There would be no

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<sup>24</sup> See for instance the CJEU ruling in the case C-41/90 *Höfner and Elser v Macroton* (1991), part 1 of the decision.



complete exemption from the EU rules of competition for such a monopoly, as there would have been in the case where the system were managed by a body established under a specific law and subject to regulation and control by the State. Yet the conflict with competition rules still may not occur. The CJEU, undoubtedly aware of “the inevitable tension between social security law and competition law” offered a very friendly interpretation of exception pursuant to Article 106(2) TFEU.<sup>25</sup> Should a solidarity-based mechanism ensuring the attainment of the social objective become unsustainable “under economically acceptable conditions” for a company in charge when it is subject to competitive pressures, then EU competition law grants an exception. This is the conclusion reached by the CJEU in favour of AG2R, without referring to the need to assess specific conditions by the national judge, as the Court did in earlier decisions.

This positive approach by the CJEU to the social partners’ collective agreements securing workers’ rights was recently confirmed by the judgment in case **C-413/13 *Kunsten en Informatie Media v. Staat der Nederlanden*** adopted in December 2014<sup>26</sup>. In this case, a trade union representing musicians, both employed and self-employed ones, negotiated a collective agreement with an organisation representing orchestras in the Netherlands. Because the self-employed musicians were also included in the agreement, the Dutch competition authority (in accordance with the European Commission) found that the CJEU jurisprudence exempting collective agreements between representatives of labour and capital was not applicable to the case. The CJEU in response to a preliminary question from the Dutch court confirmed that the self-employed should normally be treated as undertakings and agreements with their participation were therefore potential cartels not falling under the exception created by the decision by *Albany* case law and confirmed by e.g. the recent decision *AG2R Prévoyance* (para 30).

At the same time, however, the CJEU distinguished the self-employed and the false self-employed, using the functional approach: those engaged in paid work, without being able to independently determine their own conduct and without bearing financial and economic risks of their entrepreneurship, fit far more into the category of “worker”, as defined by EU law. Based on this reasoning the CJEU concluded that the principle of the *Albany* decision could also be applied when dealing with an agreement involving the false self-employed. Article 101(1) TFEU therefore would not be applicable to their agreement. The CJEU even stressed (para 40) the beneficial social effects of such an approach: false self-employed as service providers covered by the agreement will be guaranteed higher basic pay; they will pay higher contributions to pension insurance schemes and will be eligible for a higher level of pension in the future.

The CJEU obviously left it to the national court to determine whether participants in collective agreements were actually false self-employed in the sense as defined in its judgment. It is essential, however, that this judgment responds to another trend of contemporary society, which is the replacing of traditional employment jobs by self-employed

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<sup>25</sup> KERSTING, C. Social Security and Competition Law – ECJ focuses on Art 106(2) TFEU. *Journal of European Competition & Law Practice*. 2011, Vol. 2, No. 5.

<sup>26</sup> C-413/13 *Kunsten Informatie en Media v Staat der Nederlanden*. Judgment of the Court (First Chamber) of 4 December 2014 ECLI:EU:C:2014:2411.

persons hired for the same type of work performed in the same conditions as if they were employees. By rejecting the negative opinion of competition authorities the CJEU took a significantly more accommodating position to the social security of all market participants in the factual position of “workers”. In the words of the judgment: “*Service providers in a situation comparable to that of those workers, that a provision of a collective labour agreement, such as that at issue in the main proceedings, which sets minimum fees for those self-employed service providers, does not fall within the scope of Article 101(1) TFEU.*”

#### 4. CONCLUSION

It can be concluded that in the post-Lisbon period the CJEU remains faithful to its case law from the 1990s, on which the analytical methodology of this study has been built. *Albany, Berntjens' Poucet et Pistre, AOK Bundesverband and others* case law has not been overcome. The exemption from EU competition rules has neither been rejected nor narrowed. Moreover, the CJEU in its present judgments constantly refers to this case law as the basis of the EU competition law approach to agreements and entities with predominantly social objectives. On top of this, the CJEU has extended the scope of the exceptions established by the older judgments to new situations occurring in the field of labour relations and social security. Even if the state itself was not the provider or a strict supervisor of social insurance schemes, it may not bring them into conflict with the rules of competition, as was shown by the CJEU in the *AG2R Prévoyance* judgment where a generous application of exemption pursuant to Article 106(2) TFEU was made, without requiring any detailed evidence from the Member State and its national court. Similarly, the transition of dependent workers from regular employment relationships to self-employed status does not mean their exclusion from collective bargaining, which enjoys exemption from the provisions of Article 101(1) TFEU.

All in all, EU competition law in the current interpretation and application standard of the CJEU does not appear to be a stumbling block barring the way towards a more social Europe. It is thus interesting to remind at the end that while the free competition epitomizes, alongside the freedoms of movement, a key component of the EU internal market, the CJEU quite wisely accepts that a competition-driven solution is not the best one for absolutely every situation that may involve market actors. It is not a trivial finding as to the CJEU's position in the matter of conflict between freedoms of movement and a country specific protection of workers' rights remains far less generous. In such cases the CJEU still refuses to depart from the rule of reason test and social rights could exceptionally prevail over market freedoms only if their protection is proportionate and also justified by overriding public interest. Thanks to a much less controversial stance of the CJEU the protection of competition presents today that part of the internal market, which no longer has to seek its way to a social market economy as the sought-after model of the EU market regulation.