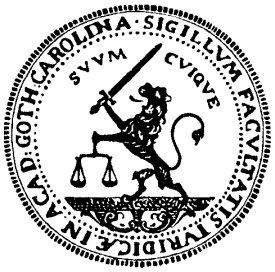

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The Impact of the Competition Rules on Collective Agreements – with special emphasis on group insurance

Graduate Thesis
20 points

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1 Abstract

In the Competition Acts of Sweden and Denmark there is a special exception for salary or other terms of employment. This exception means that this part of a contract of employment is exempted from the application of the competition rules. The purpose of this exception is to let the trade unions perform their industrial relations activities without the interference of the competition rules.

When applying the labour exception two criteria have to be fulfilled. There has to be an agreement between an employer and an employee and the agreement has to concern salary or other terms of employment. This results in that if there is no employer-employee relationship between the parties to the agreement, the exception is not applicable. The same applies when the clauses in the agreement go outside the concept of salary or other terms of employment. It should though, be pointed out that it is possible to apply the exception to, for example, all clauses in an agreement except one. Every clause in the agreement has to be evaluated individually.

If the agreement falls outside the exception the Competition Act can be applicable. The Competition Act is only applicable to undertakings, in accordance to EC-law. Accordingly, the status of trade unions and employers' associations have to be examined. The most accepted opinion is that a trade union is not an undertaking when it performs its industrial relations activities. Employers' associations, on the other hand, are always defined as undertakings. But when they conclude collective agreements in the aforementioned area the labour exception is also applicable to them.

This brings up the definition of a trade unions' industrial relations activities. Normally this includes the concluding of collective agreements concerning salary or other terms of employment and influencing the development of labour law. Because of this it is also important to define the notion 'other terms of employment'. Through the case law of the Swedish and Danish courts and the Competition Authorities it has been established that this should include all regulations of the work situation and benefits which should be supplied by the employer with connection to work and the employer-employee relationship.

My opinion is that agreement of life, health, severance pay, pension and survivors protection insurance is included in the notion other terms of employment. These kinds of insurance have a very close connection to work and the employer-employee relationship. There are four cases pending for the ECJ concerning pension insurance. This is the first time that the ECJ will address the question of the labour exception's existence in EC-law and whether a trade union can be defined as an undertaking or not. The coming

decisions of the ECJ will spread some light in this area, but until then it is only possible to speculate in the present position in EC-law.

The content of a collective agreement has developed during recent years. The most discussed development is the concluding of agreements concerning collective householders' comprehensive insurance. Such agreements have only two parties, the trade union and the insurance company. Accordingly, the labour exception is not applicable to this agreement, because there is no employer-employee relationship. The Swedish courts and the Competition Authority have found other ways of excepting these agreements from the application of the competition rules. It has been argued that the agreements have a social purpose and that the activity of the trade unions relies on the principle of solidarity. Therefore the conclusion of this kind of agreement should also fall within the industrial relations activities of the trade unions. This results in that the trade union is not defined as an undertaking and the competition rules are not applicable.

I believe that the ECJ will not share the opinion of the Swedish courts and Competition Authority. My opinion is that the trade unions are engaged in economic activities when concluding these agreements and should then be defined as undertakings. Therefore the competition rules would be applicable to these kinds of agreements. Again there is no case law from the ECJ in the subject so it is only possible to speculate.

2 Preface

During my law education I have specialised in labour law and competition law. I find it especially interesting to compare national law, for example Swedish law, with European Community law. Therefore it was decided that the subject of this essay would concern all these areas.

I would like to thank my tutor, Hans Henrik Lidgard, for helping me find this subject, putting me on the right track and for encouraging me during the time of writing this essay. Further I would like to thank Per Nordberg (researcher at juridicum), Anne Piculell (law student), Marcus Lindström (SAF) ,Kurt Junesjö (jurist at LO-TCO Rättsskydd) and Anders Magnhagen (LO-office in Malmö) for contributions of material.

I also would like to thank David Adlerstein who has checked the language of the essay. Finally thank you to Cecilia Fabiansson and Henk-Jan Geel who have read the essay and given thoughtful comments on the content.

3 Abbreviations

AD	Arbetsdomstolen
art.	article
CA	Competition Authority
ECJ	European Court of Justice
EC-Treaty	The Treaty Establishing the European Community
KKV	Konkurrensverket
LO	Landsorganisationen
MBL	Lag om medbestämmande i arbetslivet
MD	Marknadsdomstolen
MTB	Monopoltilsynets årsberetning
NJA	Nytt juridiskt arkiv
NO	Näringsfrihetsombudsmannen
par.	paragraph
PKF	Pris och Konkurrens
prop	proposition
SAF	Svenska Arbetsgivare Föreningen
SOU	Statens offentliga utredningar
STUC	The Swedish Trade Union Confederation (LO)
UfR	Ugeskrift for Retsvæsen

4 Introduction

The subject of this essay is the borderline between competition law and labour law, especially collective labour law. These two areas of law have totally different purposes. The purpose of competition law is to make it possible for companies to compete freely without obstacles such as cartels and other kind of co-operation between companies. The purpose of labour law and collective labour law is to protect the employees from the much more powerful employer. The employees work together in trade unions to protect their rights against the employer instead of competing individually. The trade unions are actually restricting competition. These two different purposes collide in one area, the employment contract. The trade union tries to conclude the best possible agreement with the employer for all their members. This results in that the employees are not competing against each other and therefore competition is limited.

Nowadays a collective agreement consists of many different terms of agreements, for example agreements of pension, insurance and other kinds of benefits. Often the trade union concludes agreements with a third party to be able to offer the benefits to the members of the trade union. It is these kinds of agreements that intrude on the market of products and services and therefore might restrict competition. Especially interesting are group insurance, which is concluded between a trade union and an insurance company, without the involvement of the employer.

In the law of Sweden and Denmark, and also in many other countries[1], there is a special exception for the contents of an employment contract, which means that the competition rules are not applicable to the contract. These exceptions have existed in the laws for a long time and maybe the exceptions have not developed as fast as the collective agreements. Therefore a definition has to be made regarding the scope of the exception. Is every term of employment in a contract exempted? As we will see the Competition Acts in Sweden and Denmark both establish some guidelines as to which parts of an agreement that are exempted from the application of the competition rules, but there is still a grey area.

One important factor is that the competition rules are only applicable to undertakings. This brings up the question whether an actor on the labour market, especially a trade union, can be defined as an undertaking or not. There is no general definition of an undertaking in EC-law because the

[1] The labour exception is explicitly written in the law of Finland and Norway. Eva Edwardsson, Konkurrenslagen, kollektiva hemförsäkringar och stuverimonopolet, Juridisk Tidskrift vid Stockholms Universitet, Årgång 9 1997-98 nr.4, p.956 (fotnote 13)
It does also exist by practice in the United Kingdom, France and Germany and by law in the USA. Axel Adlercreutz, Arbetsrätten och konkurrensrätten, Studier I arbetsrätt tillägnade Tore Sigeman utgivna av Arbetsrättsliga föreningen, Iustus Förlag AB 1993, pp. 2f

European Court of Justice (ECJ) evaluates every case individually. But there are a few general guidelines to help evaluate the status of an entity.

I have chosen to name the special exception for contracts of employment the "labour exception". It has not been the subject of many cases and there are also very few thorough comments on the subject in the literature. Therefore the amount of information about the subject is very limited. The ECJ has so far never given a judgement on a case concerning this subject. Therefore, as we will see, there is no clear answer to whether the labour exception exists in EC-law or not. The labour exception does however exist in many of the national orders of law within the community, so maybe this implies that the exception should be present also in EC-law.

I have chosen to specially examine group insurance as a part of a collective agreement. There are two ways of concluding an agreement of group insurance. The difference lays in whether the employer is involved in the agreement or not. The most interesting case for competition law is when the employer is not involved, because then the labour exception is not applicable. The question is if the competition rules are applicable?

The discussion in Sweden about collective group insurance started with a case concerning householders' comprehensive insurance. Two members of a trade union claimed that the charter of the trade union did not give it competence to conclude an agreement of householders' insurance for its members. The court stressed that there had been a development of the tasks of a trade union during recent years. It is also of great importance what the trade union itself believes to be its tasks according to its charter. According to the trade union, the main purpose is to act for a higher economic standard for its members. The court concluded that the householders' comprehensive insurance would be included in the main purpose of the trade union, but that is not sufficient. It also has to have a connection to the activities of the trade union. The court stated that this connection was unclear. Yet the court concluded that this kind of insurance is not "obviously unfamiliar" to the tasks of the trade union. The court also concluded that the trade union was not considered to be anything else than a non-profit organisation, even though it performed some sort of economic activity by concluding this insurance agreement. [2]

[2] NJA 1987 p.394 Svenska Elektrikerförbundet. For futher information about this particular agreement of group insurance see Rolf Jüring, Genombrottet för kollektiv hemförsäkring i Sverige, Folksam 1997

4.1 Method, disposition and legal questions

In this essay I will do a comparative analysis in the aforementioned area between Swedish and Danish law. I have chosen to include Danish law in the essay because there is a labour exception in the Danish law. Denmark has also been a member of the EC for a longer time than Sweden. While I have better access to Swedish law the emphasis will be on this national law system. Since both countries are members of the EC it is also natural to examine the position in the European Community law (EC-law). The material in this subject is, as I mentioned above, rather limited. This will of course bear upon my work. When it comes to the EC-law I can only speculate in the future opinion of the ECJ about the labour exception. While there are so few comments on the subject in literature I have chosen to closely examine the case law in this subject.

The wording of the articles in question in the Swedish and Danish competition acts are not exactly the same. I have consequently used the wording of the different acts when I discuss them, but the difference does not actually have any impact on the exception itself. I think that it can be concluded that the exception have the same meaning in Swedish and Danish law.

In the Swedish and Danish Competition Acts there are explicit written exceptions for employment contracts. I will begin with examining these articles and the historical development of them. Then I will look at the present application of the articles and try to see how far the exceptions reach. After this I will define the concept of an undertaking. I will also forward arguments for whether a trade union should be defined as an undertaking or not. Shortly I will also look at the definition of an employers' association. The next chapter is totally devoted to the discussion of economic activity and group insurance in collective agreements. There I will discuss the cases concerning group insurance as three-party agreements, which were presented in chapter 6, and group insurance as two-party agreements presented in chapter 7.1.

The main legal questions, which I will address in this essay, are:

1. Why does the labour exception exist?
2. How far does the exception reach?
3. Is a trade union an undertaking?
4. Is the system of group insurances in conformity with the EC-law?
5. Are the Swedish and Danish laws and practices in conformity with the EC-law?

5 Historical background

5.1 The Swedish Competition Act

The present Competition Act was adopted in 1993. The wording of the art. 2 reads as follows:

> **This act is not applicable to agreements between employers and employees concerning salary or other terms of employment.[3]**

This article came into the Competition Act in 1953. The wording of the article has on the whole been the same throughout the years.

5.1.1 The Competition Act of 1953[4]

In the preparatory works to the Competition Act of 1953 there was a major discussion on whether or not to include the labour exception in the act. The experts in the subject recommended that the art. should be included primarily because of one reason. They stressed that a collective agreement is concluded between two parties after negotiations. This is different compared to cartel agreements, where normally there is one strong part (the cartel) making a unilateral agreement. The weaker part (the buyers) has no real influence on the agreement. But the experts also pointed out that the exception is limited. If a labour organisation in any way contributes to restraints of competition on the product market, the exception would not be applicable. [5]

The critics of the article claimed that the parties on the labour market often aren't so equal. They also pointed out that to act collectively, like the trade unions do, also restricts competition while it takes away the chance for a person to compete as an individual. Further the critics stressed that everybody should be equal before the law. A special exception for the labour market would lead to a breach of this rule.[6]

The head of the Department of Trade agreed with the experts that there is a higher guarantee for equality between the parties on the labour market, than on the product market. He also pointed out that historically the labour market has been regulated through very few laws, but some customs have

[3] This is my own translation from Swedish to English. Konkurrenslag (1993:20) 2§
[4] Lag (1953:603) om motverkande i vissa fall av konkurrensbegränsning inom näringslivet
[5] prop 1953:103 p.228
[6] ibid. pp.228f

existed. He believed that the best would be to carry on in that tradition and exempt the labour market from the Competition Act. Finally he mentioned a practical reason in favour of an exception. The authority that handled the competition control on the product market would be unable to supervise the labour market. To do so would demand greater resources for that authority while the labour market would be a very big area to control.[7]
The Competition Act of 1953 was applicable to businessmen or an association of businesspeople.[8]

5.1.2 The Competition Act of 1982[9]

In 1982 a new Competition Act was adopted. In the preparatory works of this act it was simply established that the new act also should contain the exception for the labour market.[10]

There were some more comments on how far-reaching the exception should be. There was a reference back to the preparatory works of the 1953-act, which say that the exception is not applicable when organisations on the labour market contribute to a restraint of competition on the product market. The question here is whether the restraint of competition is derived from an agreement concerning terms of employment or not. The exception is only applicable to the terms of employment, so if these result in a restraint on the product market there will be no consequences for the labour organisation.[11]

Accordingly the next question will be to define the notion "terms of employment". To do this one need to find out what is a direct and necessary outflow of the terms of employment or an inevitable result thereof. The head of the Department of Trade stressed that this is of great importance to investigate.[12]

It can be difficult to decide whether a clause in a contract of employment should be defined as a term of employment or not when a third party is involved in supplying a benefit. If an employer shall finance a benefit supplied by a specific third party this might obstruct competition. The question is if the third party is independent from the employer or not. If the third party is part of the same group of companies as the employer, the benefit can be seen as a payment in kind from the employer and thereby escape the competition rules.[13]

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[7] ibid. pp.235f
[8] Lag (1953:603) om motverkande i vissa fall av konkurrensbegränsning inom näringslivet, §26
[9] Konkurrenslag (1982:729)
[10] prop 1981/82:165 p.195
[11] ibid.
[12] ibid. p.196. I will investigate this later in the essay.
[13] ibid.

Finally it was pointed out that the Competition act of 1982 is only applicable to tradesmen or an association of tradesmen. This should then, according to the head of the Department of Trade, result in that an employer, but not a trade union, might fall outside the exception in the act.[14]

5.1.3 The Competition Act of 1993[15]

In the preparatory works of the present Competition Act it is explained that the competition rules of the European Community have served as a prototype for the new act. This leads to a few changes in the act. In the act of 1982 the principle of abuse dominated, but in the 1993-act it changed to the principle of prohibition. This was done so that Swedish law would be in conformity with the European Community-rules.[16] The adaptation to the EC-rules also resulted in that the act now is applicable to undertakings or a group of undertakings. The definition of an undertaking should follow the definition that exists in the EC-law.[17]

Unfortunately there is no comment at all about the labour exception in the preparatory works of the act. The only information about the article in question is that it corresponds to art. 41 in the Competition Act of 1982.[18]

5.2 The Danish Competition Act

The new Danish Competition Act came into use in 1998. The wording of the art. 3, par. 1 reads as follows:

The act is not applicable to salary and working conditions.[19]

This article has existed in different Danish acts concerning competition since 1937.

5.2.1 Preparatory works of the Act

In Denmark there is a long tradition of giving working conditions special treatment according to the competition rules. The Price Agreement Act[20] of 1931 was not applicable to working conditions even though this was not

[14] ibid. p.197
[15] Konkurrenslag (1993:20)
[16] prop. 1992/93:56 pp.18f
[17] ibid. pp.19f. I will comment on the definition of an undertaking in chapter 7.
[18] ibid. p.66
[19] This is my own translation from Danish to English. Konkurrenceloven §3, 1 st.
[20] Lov nr. 139 af 28.4.1931 om prisaftaler

explicitly written in the act. On the other hand the Price Agreement Act[21] of 1937 did have an article that gave an explicit exception for working conditions. This article has been the prototype for the labour exception in all the following acts.[22]

The 1937-act was succeeded by the Monopoly Act[23] in 1955 and in 1974 the Price- and Profit Act came into existence. This act was used parallel with the Monopoly Act and also contained the labour exception. In 1990 a new Competition Act[24] succeeded both the Monopoly Act and the Price- and Profit Act. Again all the rules concerning competition were gathered in one act. Finally in 1998 the present Competition Act[25] was adopted.

There have not been any real changes of the article in question and therefore the preparatory works of the different acts have simply been referring back to the original preparatory works of the 1937-act.[26]

The Price agreement Act of 1937 aimed at controlling price agreements. An agreement of salary can be classified as a price agreement. It is explained that such agreements are concluded between two equal parties through negotiations. There are also special rules on the labour market deciding in which manner these negotiations are to be held. The exception leads to that there will be no conflict of law between the labour rules and the competition rules as far as agreements of salary and working conditions are concerned.[27]

The new Competition Act of 1998 is totally in accord with the competition rules of the European Community. By the changes in the act the one-stop-shop principle[28] is explicitly adopted. This principle was earlier only a part of the Danish court practice. Further the principle of prohibition has succeeded the principle of control.[29] This has lead to that the Danish courts also have competence to supervise the application of the law. Earlier only the CA had this competence.[30]

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[21] Lov nr. 158 af 18.5.1937 om prisaftaler m.v.

[22] Kirsten Levinsen, Konkurrenceloven - med kommentarer af Kirsten Levinsen, Jurist- og Økonomforbundets Forlag, København 1998, pp.56f

[23] Lov nr. 102 af 31.3.1955 om tillsyn med monopoler og konkurrencebegrensninger

[24] Lov 1989-06-07 nr. 370 konkurrencelov

[25] Lov 1997-06-10 nr. 384 konkurrencelov

[26] Kirsten Levinsen, p.58

[27] ibid. pp.58f

[28] The one-stop-shop principle means that an agreement obstructing competition should be handled either by EC-law or national law. Jens Fejø, Konkurrenceloven af 1997 med kommentarer, Jurist- og Økonomforbundets Forlag, København 1997, p.40

[29] ibid. The new law has been criticised for not having totally abandoned the control principle. This is based on that fines sanction only one of the prohibitions in the law. See for example Jens Fejø, Har dansk erhvervsliv fået en ny grundlov?, Lov & Ret 1997, nr 06, p.9-11

[30] Jens Fejø, Konkurrenceloven af 1997 med kommentarer, p.33

6 The present application

6.1 Art. 2 of the Swedish Competition Act

In the Swedish article there are two criteria for its application. The agreement has to be concluded between an employer and an employee and the agreement should concern salary and other terms of employment. The concept employee should have the same interpretation as it has in the labour law.[31] According to the preparatory works of the act this means that the definition of an employee should be the same as in the Act on Employee Participation in Decision-making.[32] Ten criteria should be considered when deciding if the person in question is an employee or not.

1. The person should perform the work by himself
2. The person has performed the work by himself, or mostly by him self
3. The person has made himself available for work that arises gradually
4. There is a lasting relationship between the parties
5. The person may not, by law or fact, perform the same kind of work for somebody else
6. The person has instructions for his work or he is being controlled
7. The person should use machines, tools or raw materials, which are supplied by the employer
8. The person should get compensation for his expenses
9. Compensation for his work should be paid, at least partly, as a guaranteed salary
10. The person should be economically and socially equal to an employee[33]

To decide whether the person is an employee or not, all the facts have to be evaluated.[34] Furthermore art.1, par. 2 of the Act of Employee Participation in Decision-making points out that a person who is not an employee, but performs work for somebody else is considered an employee anyway if his position is comparable to the one of an employee.[35]

[31] Carl Wetter, Eric Eriksson, Johan Karlsson, Olle Rislund, Konkurrenslagen i praxis, Bokförlaget Juridik & Samhälle, Falun 1995, p.54
[32] prop. 1981/82:165 p.194
[33] SOU 1993:32 "Ny anställningskyddslag" p.227
[34] ibid.
[35] Lag (1976:580) om medbestämmande i arbetslivet (MBL) 1§ 2st.

The concept 'salary or other terms of employment' can be interpreted as the benefits an employee has the right to receive, by law and agreements, from the employer.[36]

The article is applicable to both individual and collective agreements.[37]

6.1.1 Case law

Case law has given some further directions as to the *definition of an employee.*

The Swedish Labour Court has tried the case of a freelance journalist. The facts in the case were that the journalist performed freelance assignments for the paper in question. After a while the journalist considered himself as an employee of the paper because he had been connected to the paper for a long period of time. He also claimed that he was responsible for a specific area of the paper. The paper paid social benefits and holiday payment for him, but still this was not enough evidence of an employer- employee relationship according to the court. The court took into account the common opinion of the business concerning the status of a freelance journalist, which was written in a collective agreement (not binding for the parties). The journalist had performed most of the work in his home, he was only paid for the specific work that he delivered, he was not obliged to perform any work and he was free to work for other papers. These facts were according to the collective agreement evidence of that a person is not an employee. The court concluded that the journalist was not to be defined as an employee.[38]

Four decisions from the CA concern the Swedish Journalist Association. The organisation had been giving recommendations about minimum remuneration for freelance journalists. They had also concluded a collective agreement about the terms of employment for freelance journalists with two employers' associations. In all four decisions the CA came to the conclusion that these agreements could not fall within the exception in art.2, for most freelance journalists work so individually that they can not be considered as employees or somebody equal to an employee. The CA also took notice of the common opinion in the business.[39]
In 1969 the court decided that a person who runs a petrol station should be defined as an employee of the Petroleum Company.[40] Nowadays such a person has a much more independent role, especially because they sell many

[36] Eva Edwaldsson, Konkurrenslagens tillämplighet på avtal och förfaranden på arbetsmarknaden,.p.11. This PM is not published. This is the only note to this work of Edwardsson. All other notes in this essay referres to the article mentioned in note 1.
[37] Axel Adlercreutz, Arbetsrätten och konkurrensrätten, p.13
[38] AD 1987:21 Tidningen Kommunalarbetaren
[39] KKV dnr. 1115/93, 1158/93, 1159/93, 1257/93 (1994-05-19) Svenska Journalistförbundet
[40] AD 1969:31 Petroliumhandlarna

things besides petrol. Therefore the court decided in 1997 that a petrol station should be classified as an undertaking. The person running the petrol station is therefore not considered as an employee anymore. This means that any agreement between petrol stations and trade organisations falls outside the exception in the Competition Act, because there is no employer-employee relationship.[41]

It has been decided that a retailer of a special brand of sewing machines was an employee of the sewing machine company. In this case the retailers were not allowed to sell any other brand of sewing machine, but they could sell other kind of goods. The retailers got instructions from the company about how to sell the machines and they had to follow the company's rules of payment etc. The sewing machine company also paid social insurance for the retailers.[42]

An agreement which is applicable to persons without any employees or to a person who has only one trainee as help can never fall under the exception simply because there is no employer-employee relationship. This was established in a case about painters. In a collective agreement there was a clause prohibiting a painter without employees, or a painter who only had one trainee, to accept work calculated to be worth more than a certain amount of money. The clause prevented small businesses to take on more expensive work and it was obstructing competition. The clause was prohibited under the Competition Act.[43]

Examples of what can fall under the *definitions of salary or other terms of employment* are given in the following cases.

The personnel of a hospital were offered to use a gym, which was financed by tax revenue. This privilege was considered as part of the agreement of salary or other terms of employment.[44]

A list of performing times for different kinds of work had been agreed upon in a collective agreement. The list was also used for deciding prices for products, based on the time it should take to make the product. The list in itself was part of the salary or other terms of employment in the agreement, but the use of it went outside the exception in the act because it was used for determining prices of products.[45]

It has been established that when the parties to a collective agreement decides that the interest of a sum of money should be divided between the

[41] MD 1997:8 Petroliumhandlarnas Riksförbund
[42] PKF 1977:1 p.98 Husqvarna
[43] MD 1989:13 Målarmästarförbundet. See also KKV dnr. 221/92 (1993-06-30) Svenska Målareförbundet and dnr. 447/92 (1993-06-30) Måleribranschen.
[44] KKV dnr. 664/94 (1994-11-10) Huddinge Sjukhus Idrottsförening
[45] KKV dnr. 1183/93 (1994-12-30) Glasbranschföreningen

employers' association and the trade union, this can not fall under the labour exception. The case concerned the interest on holiday payment.[46]

All the stocks in an undertaking were sold and the former owners continued to work in the undertaking. In the deed was a non-compete clause, according to which the two employees were not allowed to work in a competing company etc. within a specific period of time after they left the undertaking. The CA concluded that the clause could not fall under the labour exception while it was to be seen as a part of the sales agreement between the undertakings and not as an agreement of salary or other terms of employment.[47]

A collective agreement contained a clause, which prohibited the delivering of newspapers to be put up for tender. A dispute between the trade union and the employers' association occurred, and the employers' association claimed that the clause was contrary to the Competition Act and should therefore not be applicable. The trade union claimed that the clause should be exempted from the application of the Competition Act as falling under the labour exception. The Labour Court came to the conclusion that the clause could not be seen as a term of employment.[48]

The following cases are examples of the application of art.2 and the rest of the Competition Act concerning *three-party group insurance agreements*.

Three employers' associations and three trade unions concluded an agreement of group life insurance, which would be supplied by Kommunernas försäkringsaktiebolag (KFA). KFA was owned by two of the three employers' associations and it was founded exclusively to supply the insurance in question. The parties applied for a negative clearance concerning the agreement.

The issue was whether the agreements restricted competition on the market. The preparatory works of the Competition Act say that when a trade union insists that a specific company should supply the benefit in question, this might result in a restriction of competition. But when the specific company is a part of the same group of companies as the employer this can lead to another conclusion. The benefit can then be classified as a payment in kind from the employer.

Accordingly the Competition Act could not be applicable to the two employers' associations which owned the insurance company KFA, because the agreement was classified as as agreements concerning salary or other working conditions. The CA also concluded that the same should apply to the third employers' association. Since it was active in the same sector as the

[46] KKV dnr. 219/92 (1993-06-30) Måleribranschens semesterkassa
[47] KKV dnr. 1813/93 (1994-01-24) Stena Miljö AB
[48] AD 1998:112 Tidningsdistributörerna

other two, it was party to the same collective agreement and the insurance company was established with the sole purpose of supplying this insurance. It was also important that it would have been impossible for a normal competing insurance company to offer this insurance while there is no actual market for it. Consequently the agreement was granted negative clearance. [49]

Agreements of life, health, pension and severance pay insurance were concluded between a trade union and an employers' association. The insurance was offered as a package deal and was supplied by insurance companies jointly owned by the trade union and the employers' association. Employers who were not parties to the collective agreement could also buy the insurance but only as a package deal.

The CA classified the agreements between the trade union and the employers' association as falling under art.2 of the Competition Act. Concerning the agreements of insurance between the collective parties and the insurance companies the CA came to the same conclusions as in the case above. Further, the CA concluded that an agreement where an employer, who is not a party to the collective agreement, decides to buy the package deal of insurance, could not be exempted from the application of the Competition Act by the 2nd art. Even though the employer has to buy the whole package deal or nothing at all, the agreement can not be classified as a restriction of competition or result in an abuse of dominant position. The reason for this conclusion was, according to the CA, that the insurance was financed jointly by everybody who bought it and that this insurance was very special and could not be obtained elsewhere. Finally, the CA stated that the insurance had a social purpose, not a purpose of profit and was based on the principle of solidarity. The agreements were granted negative clearance.[50]

A trade union and an employers' association concluded an agreement of survivors protection insurance with four insurance companies which normally competed with each other on the market and all were independent from the parties to the collective agreement. The agreement between the trade union and the employers' association were exempted by art.2 of the Competition Act. The same article could not exempt the part of the agreement, which named the four insurance companies. But the CA exempted the agreement from the application of the Competition Act by concluding that the insurance had a social function and was solidary financed. [51]

[49] KKV dnr. 1416/93 (1994-03-15) Svenska Kommunförbundet
[50] KKV dnr. 1459/93 ITP-planen and 1344/93 SAF&LO-AMF (1996-12-20)
[51] KKV dnr. 1472/93 (1997-04-29) ITPK-familjeskydd

6.2 Art. 3 of the Danish Competition Act

The article actually only establishes one criteria for its application; it has to be an agreement about salary and working conditions. From this though it is inferred that it has to be an employer-employee relationship.[52] Agreements in both the labour sector and the service sector are included. Further, it does not matter whether it is a collective agreement or an individual agreement.[53] It has to be established that the employee is paid for his work, that the employer is giving instructions for the work and pays pension fees, health insurance and accident insurance etc. In other words, when determining that there really is an employer-employee relationship every factor has to be taken into consideration. Travelling salesmen are also included even though they have a commission based salary. The way in which payment is made is of minor importance.[54]

When defining agreements of salary and other working conditions it is important to realise that it is only the relationship between the employer and the employee itself that is exempted. If the agreement goes outside this border the Competition Act can be applicable.[55]

6.2.1 Case law[56]

A case from 1981 concerns the Danish Pools Company. The question was whether the persons who administrate the pooling in different shops were considered to be employed by the Pools Company or not. These persons were supervised, they could be fired and they got a salary from the Pools Company. But the company did not pay health insurance, pension etc. for them and therefore they could not be defined as employees.[57]

The Central Organisation of the Academics had made a list of minimum royalties and recommendations concerning salary for different kinds of work. This list was included in a collective agreement. The question was if the contents of the list could be considered as being within the employer-employee relationship. The CA concluded that the rules about minimum

[52] Peter Fosdal, Konkurrenceloven,G.E.C Gads Forlag 1990, p.49
[53] Evan Solvkjaer, Monopolloven med kommmentarer ved Evan Solvkjaer, Jurist- og Økonomforbundets Forlag, Denmark, 1984, p.82
[54] Peter Fosdal, p.49
[55] ibid. pp.50f
[56] I have not been able to find any decisions or cases concerning group insurance. The use of group insurance is more moderate in Denmark than in Sweden. In Denmark life insurance, accident insurance, householders' comprehensive insurance and pension insurance does exist in the form of group insurance. Filip Bladini, Gruppskadeförsäkring, Norstedts Förlag, Stockholm 1990, pp.90f and Kurt Junesjö (jurist at LO-TCO-rättsskydd), LO-52385-KJ 1998-08-26, petition to the Ministry of Industry, p.2
[57] MTB 1981 p.42 Dansk Tipstjenste A/S

salary for teaching, assisting work, and consulting would fall within the employer-employee relationship. So would minimum remuneration for guided tours at museums and collections. On the other hand, rules for minimum remuneration for lectures, translations and minimum royalties for contributions to scientific books and journals would fall within the area of the Competition Act. These kinds of work were considered so independent that they could not fall within the employer-employee relationship.[58]

The Copenhagen Musician and Orchestra Association had decided that an orchestra had to consist of a minimum number of persons when performing at dancing arrangements in certain buildings in Copenhagen. There were objections raised from different organisers. The association claimed that the intention of the rule was to protect the musicians' salary and social interests. The CA took account of this argument and also stressed that the musicians were members of an unemployment fund acknowledged by the state. The CA concluded that the rule was part of the salary and working conditions that are exempted from the Competition Act.[59]

Three trade unions in the clothing industry had decided that the sewing of uniforms for the public sector would be more expensive than it would have been for other customers. The CA decided that the trade unions should abolish the rule within a certain period of time or else pay a fine. Later the court, in two instances, confirmed the decision. The court pointed out that the agreement resulted in that a certain group of customers were charged a higher price than other customers for identical work. This rule could not be exempted from the application of the act as falling under salary and working conditions.[60]

An employers association for bakers had, through an exclusive agreement with the trade union of bakery workers, decided that an unorganised baker could not employ organised staff. To do this the baker had to become a member of the employers association and then follow the rules in their charter. One rule was that the bakery had to be closed one day each week. Unorganised bakers raised objections to the exclusive agreement, because it limited their freedom to employ organised staff and to have the bakery open as much as the law allows. The CA decided that the employers association had to abolish the rule concerning opening times. Later the court confirmed the decision.[61]

Further, the CA decided in 1996 that rules about salary administration should fall within the exception in the Competition Act. It should be stressed, though, that the salary administration in that particular case could

[58] MTB 1962 p.125 Akademikernes Centralorganisation
[59] MTB 1960 p.31Københavns Musiker- og Orkesterforening
[60] UfR 1965 p.634 H Foreningen af danske Fabrikanter af Herreklæder
[61] UfR 1959 p.813 ØLD Bageri- og Konditorarbejderforbundet

not practically be done in any other way than according to the rules in the collective agreement.[62]

Finally it has been established that a sympathy strike to a legal union blockade can not involve any economic interests according to the competition rules. Such a strike is totally regulated through the rules on the labour market.[63]

[62] Kirsten Levinsen, pp.61f
[63] ibid. pp.62f

7 The concept of an undertaking

As pointed out earlier in this essay there has to be an employer-employee relationship for the labour exception to be applicable. This means that if both parties are undertakings the labour exception can not be used. Therefore it is essential to clarify the concept of an undertaking.

In art.3 of the Swedish Competition Act this definition of an undertaking is given; "an undertaking is a natural or a legal person who is engaged in activities of economic or commercial nature". In art.2 of the Danish Competition Act, we find a very short definition of an undertaking. It simply says that the act is applicable to every kind of economic activity.

Both the Swedish and the Danish act stress that when a local or central authority is exercising its public powers it can not be defined as an undertaking.[64]

In the Swedish and in the Danish law the definition of an undertaking has been adapted to comply with the one in EC-law. This leads to, of course, that all case law of the ECJ in the subject is relevant. The court considers every case on its individual merits and the definition of an undertaking is therefore very wide. In the Höfner and Elser-case it was established that ".... an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed...."[65] This case concerned the German employment agency, which was a public authority. In Germany only public authorities were allowed to engage in the employment agency business. The question was if this authority was to be defined as an undertaking or not. The court concluded that the authority was as undertaking according to the competition rules. The decision was based on that the authority was engaged in economic activities. According to the court it was irrelevant that the services of the authority were free of charge and that the authority had no goal of profit.[66]

An entity does not have to be considered as an undertaking at every time. The definition depends on what kind of activity the entity is performing at a given time, and this can change. In the case Commission v Italy it was established that a public authority is an undertaking when it is economically and commercially active in the market of products and services. The Commission claimed that a body within the Italian State was to be defined as a public undertaking and Italy claimed that it was a public authority. The court concluded that either the body exercises its public powers or it is

[64] Konkurrenslagen 3§ 1 st 2 satsen, Konkurrenceloven 2§ 2 st
[65] C-41/90 Höfner and Elser v Macrotron GmbH, par. 21
[66] ibid., par. 21-23

involved in economic activities and is defined as an undertaking.[67] Consequently it is also important to draw a line between an undertaking and a public authority.

In the Pouçet and Pistre-case two persons claimed that an organisation involved in the management of the public social security system held a dominant position on the market. The membership in this social security system was mandatory for certain groups. The two complainants wanted to be able to choose in which company they should have their social insurance. They claimed that the mandatory membership in this specific organisation resulted in a breach of the competition rules. The question was if this organisation was to be classified as an undertaking. The ECJ concluded that the organisation fulfilled an exclusive social function, the activity of the organisation was based on the principle of national solidarity and the activity was not economic and therefore it was not an undertaking.[68] In the later Job Centre-case[69], it was pointed out that the question to be answered is always whether the organisation is engaged in economic activity or not. An organisation can have a social purpose and the activity can be based on the principle of solidarity and still be classified as an undertaking because it is involved in economic activity. In the Pouçet and Pistre-case the administration of that social security system could not be seen as constituting economic activity based on the arguments of social purpose and solidarity. When there is another activity involved, those arguments might not prevent the conclusion that the entity is involved in economic activity and therefore is defined as an undertaking.[70] This was the fact in the Job Centre-case were a public placement office was defined as an undertaking, just as in the Höfner and Elser-case.[71] In the Fédération Française des Société d'Assurance-case the court defined an organisation, which managed an old-age insurance as an undertaking. The difference from this case and the Pouçet and Pistre-case was that this insurance was optional and that the organisation worked in accordance with the principle of capitalisation.[72]

The court has held that it is not up to the states themselves to decide what is a public authority and what are public powers. This can result in that what is defined by the national state as a public authority exercising its public powers can be defined as an undertaking engaged in economic or

[67] C-118/85 Commission v Italy, par.7
[68] C-159/91 and C-160/91 Christian Pouçet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Rousillon and Daniel Pistre v Caisse autonome nationale de compensation de l'assurance vieillessse des artisans, par. 18
[69] C-55/96 Job Centre Coop. Arl.
[70] Ibid.,par.23-25
[71] C-41/90 Höfner and Elser v Macrotron GmbH
[72] [72] C-244/94 Fédération Française des Sociétés d'Assurance and Others v Ministère de l'Agriculture et de la Pêche, par.17

commercial activities by the court.[73] The court has also promoted a very strict interpretation of the notion of public powers.[74]

According to the provisions in the Swedish and Danish Competition Acts mentioned above, a public authority is not an undertaking when acting under its public powers. But it is important to notice that the ECJ can make the final judgement of what is to be defined as public powers.

The case law of the ECJ shows that when several entities supply the same goods or services as the public authority, it is presumed that the activities are commercial. One example of this is recruitment agencies, which in most countries have origin as state monopolies, but now have moved into the commercial sector. Further, if there is no possibility for other entities to supply the product or service, or if there would be no demand for the product or service if it would be produced on a commercial basis, it is presumed to be an exercise of public powers.[75]

7.1 Are the actors of the labour market undertakings?

One of the main questions in this essay is whether trade unions and employers' associations can be classified as undertakings. This is very important to consider in establishing whether their activities can fall within the labour exception. Unfortunately, the ECJ has never addressed this question, but the Swedish courts and CA have had the opportunity to look deeper into this question.[76]

7.1.1 Trade Unions

Edwardsson has presented three possible solutions to the question of whether trade unions should be defined as undertakings or not.[77]

Firstly, a trade union can be classified as an undertaking because it is involved in economic activity. This economic activity consists of the trade

[73] Eva Edwardsson, pp.957f
[74] Piet Jan Slot, The concept of undertaking in EC Competition Law, Festschrift für Ulrich Everling, Band II, Nomos Verlagsgesellschaft Badeb-Baden 1995, p.1416
[75] ibid. pp.1420f.
[76] I have not been able to find any case in this subject from the Danish courts or competition authority.
[77] Eva Edwardsson is a candidate for the doctor's degree at the University of Uppsala, Sweden. She is doing research in European Law.

union negotiating agreements of salary and other terms of employment for members who pay a fee to be members of the union. What can be argued against this solution is that the ECJ so far only has recognised economic activity in the product market (the labour market is not normally defined as a product market).[78]

Secondly, a trade union can be defined as an undertaking when it is performing certain activities. For this solution it is essential to define what can be seen as a typical activity for the trade union, or in other words what are its industrial relations activities. These activities consist of concluding and administrating collective agreements and influencing the labour law regulations. In this case the conclusions would be that as long as the trade union is performing its industrial relations activities it would not be defined as an undertaking. But when the trade union acts outside this area it can be an undertaking. The problem lies in how to define the scope of industrial relations activities.[79]

The last alternative should be that a trade union never could be defined as an undertaking. This option has been presented by the Swedish Trade Union Confederation (STUC) in a case handled by the CA. STUC based this opinion on the fact that a trade union is performing a solidary activity in the whole of Sweden and that the activity has a social purpose. This argument comes from the Pouçet and Pistre-case[80], which established that the administration of a public security system could not be defined as economic activity. It was later expressed that broad conclusions should not be made from this particular case. The court is always taking account of the actual activity of the entity and not what legal status the entity has.[81]

The most widely accepted opinion in EC-law today seems to be that a trade union is not an undertaking when it performs its industrial relations activities, but if the trade union engages in commercial activities it would probably be defined as an undertaking.[82] In Swedish law, a trade union is normally classified as a non-profit organisation. The reason for this is that its industrial relations activities are non-economic. But, as shown earlier in this essay, the association's legal status is of minor importance for the ECJ because they take account of the actual activity of the association.[83]

The Swedish CA has in some decisions discussed the question whether a trade union should be classified as an undertaking or not. There has been a

[78] Eva Edwardsson, p.959
[79] ibid. pp.959f
[80] C-159/91 and C-160/91 Christian Pouçet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Rousillon and Daniel Pistre v Caisse autonome nationale de compensation de l'assurance vieillesse des artisans
[81] Eva Edwardsson, p.960
[82] Piet Jan Slot, p.1421 and Christopher Bellamy & Graham D. Child, Common Market Law of Competition, 1993 4th edition, Sweet & Maxwell, p.40f
[83] Eva Edwardsson, pp.969f

gradual development of the opinion of the CA. The first two decisions can be said to represent the earlier opinion of the CA. It was then stated that a trade union was not an undertaking when it acts in the interest of its members. According to the CA it should also be a part of the trade unions activities in the best interest of its members to offer insurance of different kinds. Later there was a change of opinion of the CA, which can be seen, in the last decision.

An insurance company, Trygg Hansa SPP, concluded a frame agreement concerning group insurance with 22 trade unions.[84] By this agreement the members were offered to sign up for a householders' comprehensive insurance and an insurance of property. The insurance was not mandatory. The trade unions, by this agreement, obliged themselves not to conclude similar agreements with other insurance companies. The parties applied for negative clearance.

The CA pointed out that a trade union is not normally seen as an undertaking in EC-law. In this case the activity of the trade union could not be classified as economic activity. Thus the trade union was not an undertaking and the clause of exclusiveness could not be tried according to the competition rules. The CA also concluded that the insurance company was not dominating within the relevant market. Negative clearance was given.

The same insurance company also concluded a frame agreement with the Swedish police trade union about group insurance, among others a householders' comprehensive insurance.[85] This agreement was also exclusive, just as in the previous case. The parties applied for negative clearance. The CA again concluded that a trade union should not be classified as an undertaking when it acts in the interest of the members and the activity in question was not to be seen as economic. But in this case the trade union was also handling the administration of the insurance and it received payment from the insurance company for this work. The CA classified this part of the activity as economic and therefore the trade union was seen as an undertaking when it was performing these tasks. The part of the agreement, which regulated the trade unions administrative work, did not however contain any restraint of competition and therefore there was no violation of the competition rules. Finally the CA stated that the insurance company was not dominating within the relevant market. Negative clearance was granted.

The following decision is the most recent decision from the CA concerning collective group insurance.[86] The facts in the case are that STUC has concluded an agreement, which gives the trade unions (which are members

[84] KKV dnr. 1478/93 (1994-03-14) Trygg Hansa SPP
[85] KKV dnr. 1477/93 (1994-09-15) Svenska Polisförbundet
[86] KKV dnr. 533/95 (1997-05-02) LO & Folksam

of STUC) the possibility to take out collective householders' comprehensive insurance for its members in the Swedish insurance company Folksam. If a member does not want to be a party to the insurance agreement he may so choose, but this does not give him the right to pay a lower membership fee to the trade union.

A group of insurance companies reported the agreement to the Swedish CA where they claimed that STUC was restricting competition by organising this insurance for their 2,2 million members with one insurance company. They also claimed that Folksam abused its dominant position. To support these arguments they first pointed out that this is no agreement about salary or other terms of employment and does thereby not fall under art.2 of the Swedish Competition Act. Further they stated that the trade unions were to be considered as undertakings while they were engaged in economic activity by offering insurance to their members, which were financed by membership fees. The group of insurance companies also stressed that this particular kind of economic activity can not be seen as a part of trade unions traditional industrial relations activities. They also claimed that this agreement would channel more than 50% of the customers in the relevant market to Folksam, and this would mean that Folksam would obtain a dominating position on the market. The agreement would also most likely impact on the members interest in buying insurance from other companies.

STUC claimed that they were not to be seen as undertakings while they didn't engage in any economic activity. The insurance would be financed solidary and this means that there is no obvious connection between the membership fee that is paid and the insurance the member will get. STUC further pointed out that the social benefits provided by the state were declining and therefore the trade unions viewed it as their responsibility to act in the interest of their members and organise insurance that would cover the gaps in the social security system. According to the charter of STUC it shall act to secure the interests of the members on the labour market and within economic areas. STUC then claimed that the organising of insurance is a part of a trade unions' industrial relations activities. They also referred to EC-law to support their opinion that a trade union is not an undertaking. They supported this by referring to the Pouçet-case, claiming that this case established that an association, which is based on the principle of solidarity and has a social purpose, could not be an undertaking.

Folksam stated that according to case NJA 1987 p. 394[87], concluding agreements of collective householders' comprehensive insurance are included in the industrial relations activities of a trade union. Folksam also claimed that a trade union is a non-profit organisation and does not participate in any economic activity. The agreement does not contain a clause of exclusivity so STUC or the trade unions ought to be free to conclude agreements with other insurance companies.

[87] See p. 8 above

The Swedish National Board for Consumer Policies (NBCP)[88] commented on the fact that a member who does not want to have the insurance will not get a discount on the membership fee. They claimed that the freedom for a member to choose whether or not to be a party to the insurance is not actually existent if this will not effect his economic contribution to the trade union.

On the other hand the Private Insurance Supervisory Service[89] stated that it is up to the trade union to decide how to use membership fees and therefore nothing can be said about the means of financing the insurance.

The CA concluded that there is a restriction of competition in the agreement because the member who does not want to take part in the insurance will still contribute to the financing of it. The CA accordingly agreed with the NBCP. The fact that a single member who excludes himself from the insurance still does not get a lower membership fee will most likely lead to that it's more difficult for other insurance companies to get and keep customers among those who were offered the group insurance. Further the CA stressed that the definition of an undertaking should follow the definition in EC-law. According to EC-law a trade union is normally not an undertaking when it acts in the interests of its members within the frame of their industrial relations activities. The CA concluded that STUC and the trade unions should not be classified as undertakings. With this decision the CA accepts STUCs argument that the agreement concerning collective householders' comprehensive insurance has a social purpose and the financing is based on the principle of solidarity. Further the CA agrees with STUC that it is important to improve the social security system for the members with a private insurance, while the state subsidised system has suffered from cut backs the latest years.[90] Finally, the CA concluded that the activity in question could not include a commercial or economic purpose. It was also stated that Folksam could not act independently of its competitors even though it holds a big part of the relevant market, and this means that the CA did not think that it had a dominant position.

In the preparatory works for changes in the Competition Act.[91], the Swedish government tries to clarify the present practice by stating that a trade union is not an undertaking when it acts within the area of industrial relations activities, or when it is acting in its function as a trade union and finally need not to be considered as an undertaking when it acts outside the area of its industrial relations activities. The last statement comes from the CA-decision above, where a trade union, which was performing economic

[88] Konsumentverket
[89] Försäkringsinspektionen
[90] In this case it was especially the cut backs in legal aid that was an argument.
[91] Prop. 97/98:130, par. 6.7.2. Förhållandet till arbetsrätten

activities, still was not defined as an undertaking with notice taken to the social purpose of the action.[92]

7.1.2 Employers' associations

Finally a short comment on the status of an employers' association in competition law. Generally an employers association has to be classified as an undertaking. But when such an organisation concludes agreements about salary and other terms of employment together with a trade union they are covered by the labour exception.[93] This is so even when the employers' association consists of undertakings.[94]

[92] KKV dnr. 533/95 (1997-05-02) LO & Folksam
[93] Eva Edwardsson, p.960
[94] prop. 97/98:130, par. 6.7.2. Förhållandet till arbetsrätten

8 Economic activity and group insurance

The purpose of group insurance is to lower the price of the insurance premium compared to what individual insurance would have costed. To do this the administrative costs will have to be cut down. This is possible to do because the insurance company can use the administration of the group in question to administrate the insurance.[95]

Collective group insurance started to become more common in Sweden in the 1980's. Before that there were only two occasions of group insurance, one in 1925 and one in 1943.[96]

In 1983 the Swedish trade union of Electricians, concluded an agreement of a householders' comprehensive insurance with the Swedish insurance company Folksam. All members of the trade union were automatically parties to the insurance. With this case the discussion about collective group insurance started. Other insurance companies had many opinions about this "new" kind of insurance. Those opinions relevant for this essay are that competition would be restricted while one company would get such a big group of clients by compulsory membership, and that the trade union was not competent to conclude such an insurance agreement for its members.[97] The competition authority stated that this kind of insurance could lead to a restriction of competition but it also believed that it could lead to the opposite. The competition could put pressure on the insurance companies to develop their insurance and prices.[98]

A public investigation was initiated to examine the lawfulness and effects of compulsory collective insurance and the result came in the official report SOU 1985:34. The report concluded that a new law, which would prohibit compulsory collective group insurance, was not necessary. The Private Insurance Supervisory Service[99] would be able to act against such insurance without explicit legal backup.[100]

Nowadays, group insurance has become common in Sweden and most insurance companies offer them in different forms.[101] There are two different kinds of group insurance. Firstly, there is insurance, which is financed by the employer. These agreements have three parties; the trade

[95] Filip Bladini, Gruppskadeförsäkring, Norstedts Förlag, Stockholm 1990, pp.37f
[96] ibid., p.59
[97] ibid., pp.61f. NJA1987 p.394
[98] ibid., p.63
[99] Försäkringsinspektionen
[100] Filip Bladini, pp.74f
[101] ibid., pp.38f

union, the employer/employers' association and the insurance company. Secondly there are agreements of group insurance with only two parties; the trade union and the insurance company. In these cases the employer is not involved and therefore the exception in art.2 of the Swedish Competition Act is not applicable. For the competition rules to be applicable to these kinds of agreements it has to be established that the trade unions are involved in economic activity. A trade union is normally not involved in economic activity when it performs its industrial relations activities. Therefore it is crucial to make clear whether the conclusion of the two-party agreements in question can be included in the traditional industrial relations activities of a trade union or not.

8.1 Three-party agreements

In all three cases concerning collective group insurance mentioned under chapter 6.1 (pages 17-18), the agreement between the trade unions and the employers' associations were considered to fall under art.2 of the Competition Act. This means that the CA considers agreements concerning insurance of life, pension, health, survivors' protection and severance pay as agreements of salary or other terms of employment.

These cases also show that the CA is aware of that a restriction of competition might occur when the trade union names one explicit insurance company to supply insurance. But by using the arguments which are put forward in the preparatory works of the act, the CA is able to exempt the agreements between the labour organisations and the insurance companies.

In the first two cases the insurance companies were owned by a majority of the parties to the agreement. The insurance was then seen as a payment in kind from the employer. In these two cases the CA decided that those parties, which didn't have any owners' interest in the insurance companies still wouldn't be effected by the competition rules. The CA justifies this by a mixture of arguments. The CA stressed that this insurance was very special and could not exist on a competitive market and also referred to the social purpose, etc. of the insurance. It seems that especially the last argument has become a standard resort, which the CA uses when there are no other argument to base a decision on.

In the last case the CA used the social purpose and the principle of solidarity to except an agreement that was concluded with four independent insurance companies. Eva Edwardsson has objected to this argument and pointed out that it should be enough to conclude that sometimes, insurance companies have to co-operate to be able to provide group insurance for so many people.[102]

[102] Eva Edwardsson, p. 968

8.1.1 Cases pending before the ECJ

Right now there are four cases concerning three-party agreements of group insurance pending before the ECJ.[103] All cases have been referred to the ECJ from courts in the Netherlands and they all concern collective agreements about pension insurance. This is the first time that the ECJ will give decisions in this subject. While the outcome of these cases most likely will effect the Swedish system of collective insurances STUC has presented the cases to the Swedish government in two petitions.[104] STUC has stressed that it is important to inform the ECJ of the present state of affairs in Sweden and how a decision might affect Sweden.

The first three cases are joined together. A company in the building sector, Brentjens' Handelsonderneming BV, has since 1968 had an agreement of pension insurance with the private insurance company Generali. From the 1 of January 1990 Brentjens' was forced to enter into agreement concerning pension insurance with the Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen (Pensioenfond). Through a collective agreement it was decided that this Pensioenfond should supply pension insurance for all companies in the building sector and that membership should be compulsory. This agreement was made legally binding for all companies in this sector by a decision of the Minister of Social Affairs. In the Netherlands it is common that the Minister of Social Affairs can make certain parts of a collective agreement into law. Brentjens' objected to the compulsory membership of the Pensioenfond, because according to their opinion the pension insurance supplied by Generali was more favourable than the one supplied by the Pensioenfond. Therefore Brentjens' applied for an exemption from the compulsory membership, but this was denied. The Pensioenfond sued Brentjens' because they had on three occasions not paid the insurance premium. In these three cases the Dutch court asked four questions to the ECJ.[105]

1. Can an agreement concluded between social partners concerning pension insurance and the setting up of a Pensioenfond, which is to supply this insurance, and to which membership is compulsory for workers in a specific sector, be seen as an agreement between undertakings and that it restricts competition between the member states according to art.85(1)?
2. Is there a breach of art.3(g), 5 and 85 of the EC-Treaty when the state makes membership in the Pensioenfond compulsory by law?

[103] C-115-117/97 Brentjens' Handelsonderneming BV v. Stichting Bedrijfspensionsfonds voor de handel in bouwmaterialen.
C-222/98 Hendrik van der Woude v. Stichting Beatrixoord
[104] Kurt Junesjö (jurist at LO-TCO Rättsskydd AB), LO-45210-KJ (1997-06-13) petition to the Ministry of Labour and the Ministry of Industry.
Kurt Junesjö, LO-52385-KJ (1998-08-06) petition to the Ministry of Industry
[105] Rapport ter terechtzitting in de gevoegde zaken C-115/97, C-116/97 en C-117/97, p.7

3. Is the Pensioenfond in question an undertaking according to art.85?
4. Is there a breach of art.86 and 90 when the state gives the Pensioenfonds an exclusive right, which results in a restriction of the freedom to choose private pension insurance?[106]

STUC means that the judgement of the ECJ might answer the questions whether a trade union is an undertaking or not, and if a collective agreement concerning normal terms of employment can fall under art.85(1) in the EC-Treaty. The Swedish CA has suggested that a collective agreement could be classified as a concerted practice according to art. 85(1).[107]

The forth case concerns the employee Hendrik van der Woude. A collective agreement regulated that the employer should finance 50% of a health insurance in a special health insurance system. Hendrik van der Woude wished to have his health insurance in another system, which he believed was more profitable. He therefore wanted the employer to finance 50% of the other insurance instead. The employer was only obliged to co-finance the insurance that was specified in the collective agreement. According to the collective agreement it is prohibited to make an agreement with the employer concerning other things than those specified in the collective agreement. Therefore Hendrik van der Woude could not have his insurance in a different insurance system. The question is if this leads to a restriction of competition according to art.85 or an abuse of dominant position according to art.86.[108]

All these questions are of great interest for Sweden and other Nordic countries. A collective agreement is binding when it concerns the employer-employee relationship, contains an obligation and is signed by both parties. Those who are parties to the agreement may not conclude any agreement, which is contrary to the collective agreement. In Sweden we also have collective agreements concerning insurance where the employees does not have the possibility to choose in which company they want their insurance.[109] LO stress that the industrial relations on the labour market should be left without interference from the competition rules. This is also explicitly written in art. 2(6) of the Maastricht Protocol on Social Policy.[110]

The ECJ has not delivered judgements in these cases yet. The proceedings in the first three cases were held in November so the judgement will come sometime later this year. The governments of the Netherlands, Germany, France and Sweden have delivered their opinions of the case in the hearing before the court. Also the Commission has given their opinion.

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[106] Rapport ter terechtzitting in de gevoegde zaken C-115/97, C-116/97 en C-117/97, p.10. This is my own translation from Dutch to English. The offical languages of the report are French and Dutch.
[107] Kurt Junesjö, LO-45210-KJ pp.1f
[108] Kurt Junesjö, LO-52385-KJ p.1
[109] ibid., pp.2f
[110] ibid., p.9

Brentjens' claims that the agreement is concluded between the companies in the building sector and therefore it is an agreement between undertakings. The agreement concerning compulsory membership and the law connected to it are in breach with art.85(1), because they restricts the freedom to choose a private pension insurance. Further they claim that the Pensioenfond has a dominating position on the market because it has an exclusive right to supply insurance for an entire sector.[111] Brentjens' claims that the member states may not diminish competition by law or by any other means. With the ministerial decision the Netherlands has violated art.3(g), 5 and 85.[112] According to Brentjens' the Pensioenfond should be defined as an undertaking in the meaning of art.86, because the activities of the Pensioenfond can be compared to those of a private insurance company. The social purpose of the insurance can be applied to every insurance company supplying pension insurance and is therefore not decisive in this case.[113] Further the Pensioenfond is abusing its dominating position within the market in breach of art.86 and 90. The abuse consists of not fulfilling the wishes of the members, as for example not to exempt Brentjens' from the compulsory membership. This results in that a company that wishes to have a more profitable insurance than the one the Pensioenfond is offering has to buy an additional insurance from another company. To have two agreements of insurance will result in higher administrative costs for the company.[114]

The Pensioenfond claims that agreements between social partners can not fall under the competition rules. If they would do so this would restrict the right to conclude collective agreements. The right to conclude collective agreements is recognised in several international agreements, for example the treaties from the International Labour Organisation, but also in the EC-Treaty in art. 118 and 118B. Further the dialogue on a European level between the social partners is encouraged and protected in the Maastricht Protocol on Social Policy. [115] The Pensioenfond also stresses that it is rather small compared to Pensioenfonds in other sectors. For the moment there are 81 different Pensioenfonds in the Netherlands, excluding the one in question.[116] Further the Pensioenfond claim that an agreement between the social partners never can result in that a country violates art.3(g), 5 or 85. But even if the court would come to the decision that it does violate these articles, the breach could be justified, because the matter is of general interest. Accordingly the exception in art. 90(2) could be applicable.[117] The Pensioenfond refers to the decisions in the Höfner and Elser-case and the Pouçet and Pistre-case to justify that it should not be defined as an undertaking. It is not making any profit, it has a social function, it is based

[111] Rapport ter terechtzitting in de gevoegde zaken C-115/97, C-116/97 en C-117/97, p.12
[112] ibid., pp.24f
[113] ibid., pp.31f
[114] ibid., pp.43f
[115] art. 2(6), 3(1) and 4(1)
[116] Rapport ter terechtzitting in de gevoegde zaken C-115/97, C-116/97 en C-117/97, pp.12f
[117] ibid., pp.26f

on solidarity and there is no connection between the premiums paid and the pension received. They also stress that the solidarity stretches over generations because those who are working now pays the pensions for those whom are older. Further there is no health test needed to qualify as a member, which means that there is solidarity between the healthy workers and the sick workers etc. It would not be possible to finance this insurance without the compulsory membership and the solidarity, which it result in.[118] Finally the Pensioenfond claims that it is operating under a legal exclusive right and that can never fall under art.86 or 90.

The Dutch government stress that every member state is free to decide in which way they want to organise their social security system. In the Netherlands the social partners have been given an important role because parts of their agreements can become legally binding by the decision of a minister. In this way the social partners have the possibility to influence the laws concerning labour and social security. The Dutch government also refers to international agreements and the EC-Treaty which are protecting the right to conclude collective agreements. Further they question if the decision of a minister can fall under art. 85(1). The Dutch government interprets the notion salary as including pension. They also conclude that trade unions and employers can not be defined as undertakings when they negotiate salaries and working conditions because they are not performing any economic activity.[119] There is no breach of art. 85(1) and therefore the second question should also be answered in the negative. The social purpose of the compulsory membership is very strong. One example is that fever employees lack pension insurance. The employees are also protected by certain rules if the company goes bankrupt or if they wish to change job within the same sector.[120] The Dutch government does not define the Pensioenfond as an undertaking because it is performing public tasks, it has a social function, it is based on the principle of solidarity, it has no goal of profit and there is no connection between the premiums paid and the pension received.[121] Further they claim that the compulsory membership-rule can not be seen as giving the Pensioenfond an exclusive right, because it is only allowed to supply insurance to one sector.[122]

The French government is very sceptical to the possibility that an agreement concluded between trade unions and employers ever can fall under the application of the competition rules.[123] Therefore they see the second question as irrelevant. Further the French government stresses that the Pensionenfond has a pure social purpose, it is acting within its legal frames,

[118] ibid., pp.32f
[119] ibid., pp.15f
[120] ibid., pp.29f
[121] ibid., pp.35f
[122] ibid., pp46f
[123] ibid., pp.18f

has solidarity between the members in the same sector, has no goal of profit and is controlled by the Private Insurance Supervisory Service[124].[125]

The Swedish and German governments have given less extensive comments to the questions. They are both negative to the definition of the Pensioenfond as an undertaking. Their opinions are based on that the Pensioenfond has a social purpose according to the Pouçet and Pistre-case and the Fédération française des sociétés d'assurance-case.[126]

Finally the Commission has commented on the questions. It is clear that an agreement concerning salary can influence the competition between undertakings. It is also possible that such an agreement could influence trade between member states. A collective agreement could not be exempted by art.85(3). If an agreement between the social partners would be defined as an agreement between undertakings this would give unacceptable consequences. The right to conclude collective agreements is recognised in for example the EC-Treaty. Therefore the Commission concludes that traditional collective agreements concerning salary and other working conditions must be exempted from the application of art. 85(1).[127] When the agreement cannot fall under art.85(1) the application of the agreement cannot fall under the competition rules either.[128] The Commission concludes that the Pensioenfond should be defined as an undertaking according to the competition rules, because it can be compared with a private insurance company. The most important argument is that the Pensioenfond is free to decide how high the premiums to the insurance should be and how high the pension received by a member should be.[129] Further the Commission claims that there can be no breach of art.86 or 90 when there is no breach of art.85(1). It also points out that art.90 does not prohibit the creation of a dominant position by an exclusive right, but it does prohibit the abuse of such a position. Further the Commission stresses that representatives of trade unions and employers' associations compose the board of the Pensioenfond.[130]

I asked Kurt Junesjö for his opinion about the cases. He said that these cases are very politically important. He also stressed that there have been cases where a great public opinion against the proposal of the advocate general has convinced the ECJ to give a decision in the total opposite direction. Kurt Junesjö believes that the political opinion in these cases can affect the outcome in a similar way. He points out that the ECJ is very sensitive to political opinions.

[124] Verzekeringskamer in Dutch.
[125] Rapport ter terechtzitting in de gevoegde zaken C-115/97, C-116/97 en C-117/97, p.39
[126] ibid., pp.20f and pp.38f
[127] ibid., pp.22f
[128] ibid., pp.33
[129] ibid., pp.41f
[130] ibid., pp.48f

8.2 Two-party agreements

The three cases concerning two-party agreements, which are referred under chapter 7.1 (p.26-28), all escaped the competition rules because the trade unions did not engage in economic activity and were therefore not classified as undertakings by the CA.

In the last case a restriction of competition was established to exist and therefore the agreement would had been prohibited according to the Competition Act if the trade unions had been classified as undertakings. The question here is if the CA was right in its decision concerning the classification of the trade unions.

In the last decision the CA stated that a trade union is not normally classified as an undertaking when it acts in the interest of its members within the frame of its industrial relations activities. So far there is nothing to object to about the reasoning of the CA. In this essay it has been shown that this is the most accepted view in EC-law today. Then we must consider the CAs comment on the question whether STUC is involved in economic activity or not by offering the members householders' comprehensive insurance from Folksam.

The Pouçet and Pistre-case[131] has been having a great impact on the decisions of the Swedish CA and there are also references to the case in the preparatory works for changes in the Competition Act, prop.1997/98:130. The outcome of this case and the outcome of the later Job Centre-case[132] are the reasons to why the decision of the CA can be questioned.

Edwardsson has sharply criticised the decision of the CA. She stresses that STUC has no social purpose for buying insurance, the purpose is simply to lower the costs of insurance for its members. This must be seen as an economic activity. She also criticised STUC and the CAs interpretation of social purpose and principle of national solidarity. STUC claims that most of their members have very low salaries and that this should make the activity in question social. The CA seems to accept this argument. Further the court in the Pouçet-case spoke of a principle of national solidarity for the social security system. It is very difficult to see the connection to a principle of solidarity, which only includes the members of the STUC. Edwardsson also claims that when a private organisation tries to compensate its members for the decline of social benefits, which the state earlier provided, this is no

[131] C-159/91 and C-160/91 Christian Pouçet v Assurances générales de France and Caisse mutuelle régionale du Languedoc- Rousillon and Daniel Pistre v Caisse autonome nationale de compensation de l'assurance vieillesse des artisans
[132] C-55/96 Job Centre Coop. Arl.

longer a social activity.[133] Even if the trade union would have a recognised social purpose for concluding this kind of insurance, that would not be enough to exempt the agreement from the competition rules. The Job Centre-case showed that an entity can have a social purpose and still be classified as an undertaking because it performs economic activity.

Edwardsson classifies the activity of the trade unions in these cases as being in the best interest of its members as consumers, not as employees.[134]

8.3 Future development

There is a tendency towards further integration in the area of collective agreements in Europe. The trade unions are already co-operating on a European level in the European Trade Union Confederation (ETUC). The employers co-operate in the Union of Industrial and Employers Confederation of Europe (UNICE). There is also a special organisation for public owned undertakings and their employers, Centré Europeén des Enterprises à Participation Publiques (CEEP). These three organisations are taking part in the Social Dialogue with the Commission.[135] The Maastricht Protocol on Social Policy opened up the possibility to conclude collective agreements on a European level.[136] Since then two framework agreements have been concluded. The first one concerned parental leave and later there was one about part-time work. These agreements have both been implemented through directives. Framework agreements for specific sectors have also been concluded. One example of this is the framework agreement on employment in agriculture.[137] Maybe the work within the social dialogue will lead to even deeper co-operation between the trade unions and the employers' associations in Europe in the future. More and more of the enterprises in Europe (and in the rest of the world of course) develop into multinational co-operations. This might lead to collective agreements covering all workers of an international undertaking, even though they work in different countries.[138] Agreements like that might restrict competition and effect trade between member states if they for example include an agreement of insurance.

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[133] Eva Edwardsson, p.975
[134] ibid. pp.975f
[135] Birgitta Nyström, EU och arbetsrätten. Fritzes Förlag AB, Stockholm 1995, p.72f.
[136] Roger Blanpain and Birgitta Nyström, EG/EU arbetsrätt och arbetsmarknad, CE Fritzes AB, Stockholm 1994, p.265. Here you can read about the possibilities for collective agreements on a Eurpoean level. The Protocol on Social Policy art. 4(1)
[137] The European Social Dialogue – impasse or new opportunities? http://www.eiro.eurofound.ie/servlet/ptconvert/eu9806110f.sgm
[138] For futher discussion about this see Joris Van Ruysseveldt and Jelle Visser, Industrial Relations in Europe– Traditions and Transitions, SAGE Publications in association with the Open University of the Netherlands, Heerlen 1996, p.34-41

Here in Scandinavia we have a regional example of co-operation between trade unions in the Öresund-region. Anders Magnhagen works at STUCs office in Malmö and he is responsible for the co-operation between STUC in the Malmö-region and its sister organisation in Denmark in the Copenhagen-region. In this region there are many cross-border workers. The trade unions in this region have since 1995 had a co-operation concerning labour market policy and education. Magnhagen does not believe that collective agreements will be concluded for the whole region within the nearest future. The reason to this is that there are to many obstacles to cross border agreements, such as for example different national laws on taxes and labour. But he stresses that it is a goal within the EU to make it easier to conclude cross border agreements. This would facilitate further integration and free movement of workers. Employers' associations have suggested that a "free zone of Öresund" would be established. Then it would be possible to have special laws in this area, independently of the state of Sweden and Denmark. But the trade unions are not supporting this idea. Today a cross border worker is recommended to remain a member of the trade union in the country where he lives.

9 Conclusions

The governments of Sweden and Denmark have the policy to interfere as little as possible in the relations between the parties on the labour market. This has been pointed out in the preparatory works of the Competition Acts. They also thought that it was necessary with a special protection for agreements about salary and other terms of employment against the competition rules. Therefore the labour exception came into existence. The governments claimed that the parties on the labour market are so equal in strength that this would guarantee a fair competition, or at least a competition that is favourable for the parties. The interests of third parties were not mentioned at all. The reason for this might be that when these preparatory works were written, in 1937 and 1953, it was very unusual that a collective agreement would effect third parties within the market of products and services. If the employees would not be allowed to work together in trade unions they would have to compete independent of each other against a much more powerful employer. Consequently the labour exception also has a social purpose, which is to protect the rights of the workers.

It has been established in this essay that the exceptions in the Swedish and Danish Competition Acts have the same meaning. Both acts are also in accord with the EC-law of Competition. It is though, a bit astonishing to see that the EC-rules of competition where implemented in the Swedish Competition Act earlier than in the Danish Act. Denmark has, after all, been a member of the Community much longer than Sweden.

The case law shows that the labour exception has a similar application in the two countries. Through a combination of preparatory works and case law it has been possible to define the concept of an employee, the concept of terms of employment and also the concept of an undertaking. These three concepts are necessary to define to establish how far the labour exception reaches.

When defining an employee it is essential that all facts will be evaluated. Most important seams to be that the person is under orders of an employer, that he performs the work himself and that the employer pays social benefits and holiday pay, etc. for the person. In some cases the common opinion in the business has been important when deciding whether a person is an employee or not. The more individual the work is the more likely it is that the person is not an employee. When determining the degree of individuality one should look at where the person performs the work, if he is paid for only the specific work performed, if he is obliged to perform any work and if he is free to work for another employer. This was especially established in the Swedish cases concerning freelance journalists. In the Danish case concerning the Central Organisation of Academics the question of individuality also came up. Here it was concluded that agreements of minimum remuneration for such individual work as lecturing, translating

and writing contributions to scientific books and journals would fall within the area of the Competition Act.

The notion terms of employment can contain many things, as we have learned from the case law. A clause in a collective agreement might not directly seem to fall under the notion terms of employment, but when examining the purpose of the clause it might do so anyway. This was established in the Danish case about the Orchestra Association. Further is has been established that an agreement concerning an undertaking without employees can never fall under the labour exception.

It has also been established that it is important to examine the specific use of a clause in an agreement. The clause in itself might fall under the labour exception, but a specific use of the clause can fall outside. This was so in the case concerning the list of performing times for different kinds of work. The list was used for deciding prices, based on the time it would take to perform the work, and the competition rules were applicable to the use of the list. Therefore the competition rules can be applicable to the specific use of the clause if it restricts competition.

The concept of an undertaking is defined according to EC-law, both in Swedish and in Danish law. Through the case law of the ECJ it has been established that an entity has to be engaged in economic activity to be classified as undertaking. The ECJ doesn't take any notice of the legal status of the entity. This also applies for public authorities. ECJ evaluates every case independently. This might result in a difference of opinion between the ECJ and the member state, especially concerning the definition of a public authority.

Can a trade union be classified as an undertaking? The most widely accepted opinion in EC-law is probably that a trade union is not an undertaking as long as it performs its industrial relations activities. The Swedish Trade Union Confederation has presented the opinion that a trade union never could be classified as an undertaking based on the principle of solidarity. But not even the Swedish CA agrees with STUC in this matter. The Swedish CA has finally come to the conclusion that a trade union is not an undertaking when it acts in the interest of its members within the area of its industrial relations activities. The court also established this in case NJA 1987 p.394. The court came to the conclusion that a task, which is not obviously unfamiliar to the tasks of a trade union, should be defined as falling within the area of industrial relations activities. At first, the definition in Swedish case law and the one presented as dominating in EC-law seem to be the same. But when a closer examination of the Swedish case law is made, a somewhat different picture occurs. The question is how to define a trade unions industrial relations activity and when it engages in economic activities.
My opinion is that Swedish, Danish and EC-law agrees on that the traditional activities of a trade union are normally not of economic nature.

Accordingly these traditional activities should also in EC-law be excepted from the competition rules, because a trade union can not be defined as an undertaking if it is not involved in economic activity. Therefore it is possible to say that the labour exception exists in EC-law. These traditional industrial relations activities consist of concluding agreements about salary and other terms of employment. Through the case law of the Swedish and Danish authorities and courts it is established that the notion 'other terms of employment' can include a benefit to use a gym, a list of performing times for different kinds of work, rules of salary administration, rules of minimum number of persons performing work and different kinds of insurance supplied by the employer, etc. I believe that all these things have a close connection to work and the relationship between the employer and employee. The agreements of insurance, which have been excepted from the competition rules, all have connections to the professional relationship between the employer and employee. The agreements of insurance compensate the worker for the loss of his income and accordingly they are substitutes for salary. The insurance in question are life, health, pension, severance pay and survivors protection insurance.

The four cases concerning pension insurance are pending for the ECJ. The question is whether the ECJ will define the activities of the trade unions to be economic or not. In the report from the hearing in the three cases that are joined together it is obvious that the governments of the Netherlands, France, Germany and Sweden all share the opinion that the competition rules should not be applicable to a normal collective agreement between trade unions and employers' associations. The parties are not involved in any economic activity when they conclude these kinds of agreements, so they can not be defined as undertakings. The governments also stress that the right to conclude collective agreements is mentioned in several international treaties, the EC-Treaty and in the Maastricht Protocol on Social Policy. The Commission came to the same conclusion based on other arguments. First they concluded that a collective agreement concerning salary and other terms of employment can influence the competition between undertakings and trade between member states. The Commission believes that the consequences would be unacceptable if such an agreement would be defined as an agreement between undertakings. A collective agreement could not be exempted by art.85(3) and therefore the Commission thinks that it is best to exempt all traditional collective agreements concerning salary and other terms of employment from the application of art.85(1). I believe that the court will come to a similar conclusion and I have one suggestion for the reasoning of the court.

The ECJ might concludes that strictly speaking the conclusion of agreements concerning this kind of insurance would be defined as economic activity. This would result in that the trade union would be classified as an undertaking. Accordingly the competition rules would be applicable to the restriction of competition in the agreement. This restriction consists of the fact that a specific entity is named, which should supply the insurance. The

members of the trade union do not have the possibility to choose in which company they want to have their insurance. But as I have stressed in this essay, such a decision of the ECJ would probably result in major objections from trade unions and governments. The ECJ has to make a difficult decision. Is the maintaining of unrestricted competition more important than the political opinion in the Community? After all, the competition rules are one of the basics, which the Community is built upon. The ECJ is very sensitive to strong political opinions. Consequently the decision of the court might be given in a totally different direction. Maybe the court will conclude that this kind of insurance is very closely connected to the work and the relationship between the employer and employee, so that it can fall under the traditional industrial relations activities of the trade union to conclude these agreements. Therefore the agreements would fall under the labour exception.

The Swedish court and CA have also concluded that when a trade union, in a two-party agreement, concludes agreements of householders' comprehensive insurance, this would also fall within the industrial relations activities. I believe that the ECJ might have another opinion in this question, but the court has so far never addressed this question. The Swedish court and the CA have stressed that there has been a development of the industrial relations activities of a trade union during recent years. This is true, but I believe that a line has to be drawn when the trade unions engage in economic activities and restrict competition in the market of products and services. I agree with Edwardsson who stresses that the purpose of concluding an agreement of householders' comprehensive insurance is totally private. This insurance has no connection to work and the employer is not involved in the agreement. The trade union is helping their members, as consumers, by reducing the costs for the insurance. The trade unions argue that they have a social purpose for concluding this insurance, because their members have very low salaries compared to members of other trade unions. I don't find this argument sufficient, in fact I believe that it underlines the private purpose.

I believe that the ECJ would probably decide that when a trade union concludes an agreement concerning householders' comprehensive insurance it is engaged in economic activity. The trade union is far outside the traditional industrial relations activities and it is acting in the product market. If the ECJ would exempt this activity from the competition rules, this could result in even bigger restrictions of competition if collective agreements in the future will be concluded for bigger enterprises with workers in many countries.

My conclusion will be that the Swedish and Danish laws and practises probably are in conformity with the EC-law, except concerning two-party agreements concluded between a trade union and an insurance company concerning householders' comprehensive insurance.

I am anxiously waiting for the decisions of the ECJ in the pending cases. Hopefully the decisions will spread some light over this specific area.

10 Appendix A

This is a list of all the relevant cases that I have found during the time of writing this essay. I have not mentioned them all in the essay because many of them are very similar.

Decisions from the Swedish Competition Authority
Concerning contract of employment
KKV dnr. 219/92 Måleribranschens semesterkassa
KKV dnr. 221/92 Svenska målareförbundet
KKV dnr. 447/92 Måleribranschen
KKV dnr. 867/93 Byggnads och Byggförbundet
KKV dnr. 898/93 Euroc Bygghandel
KKV dnr. 1115/93 Svenska Journalistförbundet
KKV dnr. 1132/93 ABN AMRO Bank i Sverige
KKV dnr. 1158/93 Svenska Journalistförbundet
KKV dnr. 1159/93 Svenska Journalistförbundet
KKV dnr. 1183/93 Glasbranschföreningen
KKV dnr. 1209/93 Landstinget Kronoberg
KKV dnr. 1257/93 Svenska Journalistförbundet
KKV dnr. 1317/93 Asea Brown Boveri
KKV dnr. 1370/93 Läromedelsproducenterna
KKV dnr. 1456/93 Byggförbundets lista
KKV dnr. 638/94 Stockholms Läns sjukvård
KKV dnr. 664/94 Huddinge sjukhus
KKV dnr. 227/96 Luna AB

Concerning collective group insurance
KKV dnr. 1344/93 SAF & LO – AMF
KKV dnr. 1371/93 KFO
KKV dnr. 1416/93 Svenska Kommunförbundet
KKV dnr. 1459/93 ITP-planen
KKV dnr. 1472/93 ITPK-familjeskydd
KKV dnr. 1473/93 SAF & PTK – TGL
KKV dnr. 1477/93 Svenska Polisförbundet
KKV dnr. 1478/93 Trygg Hansa SPP
KKV dnr. 1479/93 Trygg Hansa
KKV dnr. 1536/93 Trygg Hansa
KKV dnr. 533/95 LO & Folksam

Decisions from NO concerning contracts of employment
PKF 1959 p.362 Frisörbranschens prislistor
PKF 1977:1 p.98 Husqvarna

Court cases

Concerning contract of employment

AD 1969:31 Petroliumhandlarna
AD 1987:21 Tidningen Kommunalarbetaren
AD 1998:112 Tidningsdistributörer

MD 1989:13 Målarmästarförbundet
MD 1997:8 Petroliumhandlarnas Riksförbund

Concerning collective group insurance

NJA 1987 p.394 Svenska Elektrikerförbundet

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Fejø, Jens	Konkurrenceloven af 1997 med kommentarer, Jurist- og Økonomforbundets Forlag, København 1997
Fosdal, Peter	Konkurrenceloven, G.E.C Gads Forlag 1990
Jüring, Rolf	Genombrottet för kollektiv hemförsäkring i Sverige, Folksam 1987
Levinsen, Kirsten	Konkurenceloven – med kommentarer af Kirsten Levinsen, Jurist- og Økonomforbundets Forlag, København 1998
Nyström, Birgitta	EU och arbetsrätten, Fritzes Förlag AB, Stockholm 1995
Slot, Piet Jan	The concept of undertaking in EC Competition law, Festschrift für Ulrich Everling, Band II, Nomos Verlagsgesellschaft, Baden-Baden 1995
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Conversations with

Kurt Junesjö	Jurist at LO-TCO rättsskydd
Anders Magnhagen	Responsible for co-operation in the Öresund-region at LO-facken i Skåne

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