Compulsory Membership:

Can it be valid in the future and does it fit with freedom of services and competition law?

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INTRODUCTION

1. **RESEARCH SUBJECT: COMPULSORY MEMBERSHIP -** Membership to a pension scheme can be made compulsory by a generally applicable collective agreement for all employees and employers in a given sector. The reasons behind this are twofold: on the one hand it prevents a race to the bottom in terms of employment conditions, and on the other hand, it introduces a solidarity element both for employers and employees. Occupational pensions usually make use of compulsory membership to establish the protection of working conditions. However, these collective agreements often grant an exclusive right to a pension fund. For this reason, some questions arose in the past regarding their validity in the light of competition law and the freedom to provide services in the European Union. Having as a primary goal to sum-up and answer these questions, this paper analyses the jurisprudence of the European Court of Justice and the legal doctrine. Having as a starting point of the concise presentation of Dutch pension system, we move on to the jurisprudence of the ECJ only to give a comparative overview of several national regulatory frameworks before reaching our conclusions.

2. **COLLECTIVE AGREEMENTS –** Collective agreements play a big role in compulsory membership. They regulate the working conditions of employees in the company or sector for which the collective agreement is concluded. These agreements have somewhat a double nature: they resemble both an agreement as well as a law. The advantages of collective agreements are the saving of costs, the creation of stronger bargaining power and equal working conditions for the employees and the possibility to self-regulate as an employer. The disadvantages may include: the elimination of competitive advantage for employees, circumvention of the government's policy and the free riding of employees.

3. **COMPULSORY MEMBERSHIP IN RELATION TO COMPETITION LAW –** It can be argued that compulsory membership and the granting of an exclusive right to a pension fund creates a restriction to the provisions of competition law and, in particular, that such collective agreements are an abuse of a dominant position. In this paper a closer look to this issue is given by analysing the following jurisprudence of the European Court of Justice: Albany, Pavlov, Van der Woude, Commission v Germany, AG2R Prévoyance and FNV Kunsten Informatie en Media.

4. **COMPULSORY MEMBERSHIP IN RELATION TO FREEDOM OF SERVICES –** Furthermore, compulsory membership will also be discussed from the perspective of the internal market. Can such membership conform with the provisions which seek to guarantee the free movement of

goods, capital, services and labour within the EU? The analysis of the following case law aims to clarify this: Viking, Laval, Rüffert, Kattner Stahlbau and UNIS.

5. **COMPULSORY MEMBERSHIP IN DIFFERENT MEMBER STATES –** The final part of this paper consists of a comparison of compulsory membership in a selection of Member States, namely Belgium, France and Ireland. The main focus in this section will be on the different kinds of national pension systems, the different forms of national collective agreements and the possibility to opt out of the latter.

CHAPTER I. COMPULSORY MEMBERSHIP AND COMPETITION LAW

SECTION I. ECJ CASES: ALBANY, BRENTJENS' AND DRIJVENDE BOKKEN

6. **PILLAR SYSTEM IN THE NETHERLANDS** - For a better understanding of the Albany, Brentjens and Drijvende Bokken cases[1] we must bear in mind that normally pension systems are divided into three pillars. This is the case also in the Netherlands. The first pillar consists of a statutory basic pension (AOW), which is provided by the state and financed on a pay-as-you-go basis. The entitlement to this pension is not linked to employment or self-employment. In fact, the active population pay for the pensions of the non-active population. The second pillar supplements the basic statutory pension and consitutes a collective form of pension. These pension schemes are administered by a pension fund or an insurance company while they are funded by joint contributions of the employer and the employee. Unlike the first pillar pension, this kind of pension is linked to employment. The pension provisions can be applicable to an entire sector (sectoral pension fund) or profession (occupational pension fund). However, an individual company can also decide to organise its own pension fund or to conclude an agreement with a private insurer. By making participation in pension funds compulsory in most industries, the Dutch government aims to provide solidarity and stability.[2] Finally, the third pillar consists of individual pension products and is mainly used by the self-employed or employees in sectors without a collective pension scheme.[3]

7. **SECTORAL PENSION FUNDS AND COMPULSORY MEMBERSHIP** – The Albany, Brentjens and Drijvende Bokken cases have in common that they all concern a sectoral pension fund, which is in each case organizing a supplementary occupational pension scheme established by a sectoral collective agreement that has been extended to all employees in that sector[4] (see *infra*). In that respect, each worker from the three sectors mentioned in the cases had to be affiliated to the

[1] ECJ 21 September 1999, nr. C-67/96, ECLI: EU:C:1999:430, 'Albany'; ECJ 21 September 1999, nr. C-115/97, ECLI: EU:C:1999:434, 'Brentjens'; ECJ 21 September 1999, nr. C-219/97, ECLI: EU:C:1999:437, 'Drijvende Bokken'.
[2] X, 'Pensions & Retirement age in the Netherlands', *I am expat*, (https://www.iamexpat.nl/expat-info/official-issues/pensions-retirement-netherlands).
[3] D. CHEN and R. BEETSMA, "Mandatory participation in occupational pension schemes in the Netherlands and other countries. An update", *Netspar Discussion Paper* 2015, No.10/2015-032, 6-7; S. EVJU, "Collective Agreements and Competition Law. The Albany Puzzle, and van der Woude*", The International Journal of Comparative Labour Law and Industrial Relations* 2001, Vol. 17/2, 167; L. GYSELEN, "Case C-67/96, *Albany v. Stichting Bedrijfspensioenfonds Textielindustrie*; Joined Cases C-115-117/97, *Brentjens' Handelsonderneming v. Stichting Bedrijfspensioenfonds voor de handel in bouwmaterialen*; and Case C-219/97, *Drijvende Bokken v. Stichting Pensioenfonds voor de vervoer- en havenbedrijven*. Judgments of the Full Court of 21 September 1999, not yet reported", *CML Rev* 2000, vol. 37, 426-27.
[4] L. GYSELEN, "Case C-67/96, *Albany v. Stichting Bedrijfspensioenfonds Textielindustrie*; Joined Cases C-115-117/97, *Brentjens' Handelsonderneming v. Stichting Bedrijfspensioenfonds voor de handel in bouwmaterialen*; and Case C-219/97, *Drijvende Bokken v. Stichting Pensioenfonds voor de vervoer- en havenbedrijven*. Judgments of the Full Court of 21 September 1999, not yet reported", *CML Rev* 2000, vol. 37, 427.

sector's fund, unless the fund itself granted an exemption. The three companies - Albany, Brentjens' and Drijvende Bokken - wanted to arrange similar or better pension benefits for their workers, but for a lower price outside the concerning pension funds. In order to be excluded from the compulsory membership established by the sectoral collective agreements, they invoked the EU competition rules.[5]

8. **THE INVOKED COMPETITION RULES –** The three companies argued that compulsory membership to the pension fund granting an exclusive right to the pension fund, is against the rules laid down in art. 81 EC Treaty (now art. 101 of the Treaty on the Functioning of the European Union (TFEU).[6] The provisions of this article boil down to the prohibition of any agreements or cartels between undertakings that could disrupt free competition within the internal market.[7] Against this background, the companies argued that compulsory membership would constitute an agreement between undertakings, which is explicitly prohibited by article 101 TFEU.

9. **TO WHAT EXTENT DO COMPETITION RULES APPLY IN SOCIAL PROTECTION ISSUES? –** The question arose: to what extent do the competition rules apply to entities which organise social protection for workers in a particular sector? The ECJ has set up in the grounds of its judgements for the three cases a basic immunity for the social partners and their sectoral collective agreements in the European competition law. This immunity is also known as the 'Albany exception'. In any case, the immunity is relative, since the provision has to undergo a test that concerns the nature and the purpose of that provision.[8] (see *infra*)

SECTION II. COLLECTIVE AGREEMENTS

§1. Meaning

10. **DEFINITION –** According to the sociological definition of Jacobs, a collective agreement is a contract between employers or employers' associations and trade unions, which mainly regulates the working conditions of employees in the undertaking or industry for which the collective agreement has been concluded.[9] Although not all employees are usually trade union members, a collective agreement that has been extended (see *infra*) is applicable to most employment

[5] N. BRUUN and J. HELLSTEN (eds.), *Collective agreement and competition in the EU. The report of the COLCOM-project.*, Copenhagen, DJOF Publishing, 2001, 33, nr. 63.
[6] ECJ 21 September 1999, nr. C-115/97, ECLI: EU:C:1999:434, 'Brentjens', par. 46.
[7] Art. 101 of the Treaty on the Functioning of the European Union (TFEU).
[8] N. BRUUN and J. HELLSTEN (eds.), *Collective agreement and competition in the EU. The report of the COLCOM-project.*, Copenhagen, DJOF Publishing, 2001, 53-54, nr. 108.
[9] A.T.J.M. JACOBS, "Collectief arbeidsrecht" in *Collectief Arbeidsrecht (MSR nr 28),* Deventer, Kluwer, 2013, 96.

contracts. Therefore, individual employment contracts will have to be in conformity with the working conditions agreed upon and included in the collective agreement.[10] Furthermore, provisions in a collective agreement are often more favourable than those prescribed by law, but they cannot contradict the law.[11]

11. **NATURE** - The collective agreement has somewhat a double nature. On the one hand, it is called an agreement, and, on the other hand, it resembles to a law as well, because it sets standards that are compulsory for the individual employment contracts that are subject to it. This is even more the case when the collective agreement is made generally applicable[12] (for more on the extension see next paragraph). Under such circumstances, the freedom of contract for both the employers and the employees is restricted, either voluntarily or not, and can therefore be seen as anti-competitive.[13] (see *infra*)

12. **THE DUTCH COLLECTIVE AGREEMENT –** Under Dutch law, a collective agreement refers to an "*agreement entered into by one or more employers or one or more employers' associations with one or more trade unions having full legal capacity, governing mainly or exclusively working conditions*".[14] The law only imposes 2 conditions on trade unions and employers' organisations: they must be associations with full legal capacity and have statutory authority to conclude collective agreements.[15] Statutory authority means that the statutes of the organisation mention explicitly the power to conclude collective agreements. Collective agreements are legally binding for the signing parties and the employers who are bound by these agreements must offer the standards of the provisions to all employees.[16] In addition, only the included parties of a collective agreement can ask the Minister of Social Affairs to render its terms generally binding for all employees in a particular sector.[17] In order for this to happen, the law states that the agreement must already cover a "substantial proportion" of the employees in the industry, which according

[10] Art. 12 Law of 1 January 2007 on the collective labour agreements; J. DOP, "Collective agreements in the Netherlands", *Rusell* 23 December 2014, *(*https://www.russell.nl/publication/collective-agreements-in-the-netherlands).
[11] ACCESS, "What is a CAO (collective labour agreement)" in *employment contracts*, Access, (*https://access-nl.org/dual-careers-netherlands/working/employment-contracts/what-is-a-cao-collective-labour-agreement/).*
[12] Art. 9 Law of 1 January 2007 on the collective labour agreements; A.T.J.M. JACOBS, "Collectief arbeidsrecht" in *Collectief Arbeidsrecht (MSR nr 28),* Deventer, Kluwer, 2005, 108-109.
[13] J. VAN DRONGELEN, "Vakverenigingsvrijheid. Het recht op collectief onderhandelen. Mededingingsrecht" in *Collectief arbeidsrecht deel 2,* Zutphen, Paris, 2009, 107.
[14] Art. 1 (1) Law of 1 January 2007 on the collective labour agreements.
[15] Art 1 (1) and art. 2 Law of 1 January 2007 on the collective labour agreements.
[16] Art. 14 Law of 1 January 2007 on the collective labour agreements.
[17] Art. 4 (1) 2 wet van 1 januari 2019 betreffende het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten.

to the literature is normally 55 percent or more.[18] A company might ask the Minister of Social Affairs to be exempted from the obligation to participate in the collective agreement, but the conditions for receiving this exemption are not included in the law.[19] In practice, it appears that such an exemption is not granted often.[20]

§2. Advantages and disadvantages

In this paragraph we will discuss briefly some arguments which highlight the advantages and disadvantages of collective agreements for both employers and employees. The advantages can be situated within the framework of labour law and the principle of solidarity, while the disadvantages can be rather found in competition law.

A. Advantages

13. **STRONGER BARGAINING POWER -** A first advantage of having a collective agreement is that, by collective bargaining individuals can increase their bargaining power, thus overcoming their individual limitations. This means that collective bargaining leading to a collective agreement can offer greater opportunities for higher standards and better conditions than an individual agreement would make[21], thus being advantageous primarily for the employees.

14. **NO COMPETITION ON WORKING CONDITIONS -** Moreover, a collective agreement which is made generally applicable eliminates competition in terms of occupational pensions, wages, etc. and helps to the convergence of labour market standards. After all it makes sense to think that employers should compete with each other on the quality of their products and not on the working conditions of their employees. Again, this argument is in favour of the employee.

15. **SELF-REGULATION -** Thirdly, the possibility of making the collective agreement generally applicable creates the possibility for self-regulation and allows for the delegation of regulatory

[18] Art. 2 wet van 1 januari 2019 betreffende het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten; FULTON, *Collective bargaining. The Netherlands,* 2015, (https://www.worker-participation.eu/National-Industrial-Relations/Countries/Netherlands/Collective-Bargaining)*;* H. VAN MEERTEN and E. SCHMIDT, "Compulsory membership of pension schemes and the free movement of services in the EU", *EJSS* 2017, vol. 19(2), (118) 119.

[19] Art. 7A wet van 1 januari 2019 betreffende het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten.

[20] Art. 2 and 7A wet van 1 januari 2019 betreffende het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten; A.T.J.M. JACOBS, "Collectief arbeidsrecht" in *Collectief Arbeidsrecht (MSR nr 28),* Deventer, Kluwer, 2005, 187 et seq.

[21] J. VAN DRONGELEN, "Vakverenigingsvrijheid. Het recht op collectief onderhandelen. Mededingingsrecht" in *Collectief arbeidsrecht deel 2,* Zutphen, Paris, 2009, 53.

power.[22] This can be a serious advantage for companies, since it can meet the specific needs of each industry.

16. **COST SAVING –** Lastly, without binding collective agreements it would be much more difficult to ensure the costs of provisions such as training. With collective agreements these costs can be borne proportionately by all the companies in the sector so this is important for employers when bearing in mind the cost-saving factor.[23] In the same vein, compulsory affiliation to a pension fund with a sufficient economy of scale enables cost efficient management of the offered schemes.[24]

B. Disadvantages

17. **ELIMINATION OF COMPETITION –** There is also the argument that competition on the working conditions of the employees it should be possible, because otherwise they could be too far out of line with the free market. A few years ago, this 'competition' argument gained a renewed legal relevance from the perspective of competition law (as it appears in the Albany case). Initially, competition law was not really present in the Netherlands, but following the developments of European law, it has become increasingly important. In that context, the question might arise whether a generally binding collective agreement does not constitute an infringement of competition law[25] (*infra*), since for instance the elimination of competition on wages could be also bad for the economy. For example, collective bargaining can keep wages too high and might ultimately lead to loss of jobs.[26]

18. **CIRCUMVENTION OF THE GOVERNMENTS' POLICY** – Furthermore, it can also be argued that the fact that the Minister of Social Affairs is able -by means of declaring the collective agreement generally binding- to give general validity to regulations that may go against the policy of the government raises questions about the democratic legitimacy of collective agreements.[27]

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[22] A.T.J.M. JACOBS, "Collectief arbeidsrecht" in *Collectief Arbeidsrecht (MSR nr 28),* Deventer, Kluwer, 2005, 198.
[23] A.T.J.M. JACOBS, "Collectief arbeidsrecht" in *Collectief Arbeidsrecht (MSR nr 28),* Deventer, Kluwer, 2005, 198; ILO, "benefits of international labour standards", (*https://www.ilo.org/global/standards/introduction-to-international-labour-standards/the-benefits-of-international-labour-standards/lang--en/index.htm*); H. VAN MEERTEN and E. SCHMIDT, "Compulsory membership of pension schemes and the free movement of services in the EU", *EJSS* 2017, vol. 19(2), 118.
[24] S. REICHERT, "The Dutch pension system: an overview of the key aspects", *VB,* (http://www.pensiondevelopment.org/documenten/The%20Dutch%20Pension%20System.pdf?mod=article_inline).
[25] A.T.J.M. JACOBS, "Collectief arbeidsrecht" in *Collectief Arbeidsrecht (MSR nr 28),* Deventer, Kluwer, 2017, par. 6.4.
[26] A.T.J.M. JACOBS, "Collectief arbeidsrecht" in *Collectief Arbeidsrecht (MSR nr 28),* Deventer, Kluwer, 2005, 198.
[27] A.T.J.M. JACOBS, "Collectief arbeidsrecht" in *Collectief Arbeidsrecht (MSR nr 28),* Deventer, Kluwer, 2005, 198.

19. **FREE RIDING EMPLOYEES** – Finally, another disadvantage of a binding sectoral collective agreement is that it deprives employees of the incentive to organise themselves. By making the collective agreement generally binding, the Minister of Social Affairs gives the employees not belonging to a trade union free protection to the provisions of the collective agreement, in contrast to the organised workers, who often pay more than one hundred euros per year to maintain a trade union, responsible for all the negotiating work.[28]

SECTION III. COMPETITION LAW

§1. The prohibition of cartels and abuse of dominant position

20. **COMPETITION LAW -** The primary objective of competition law is to make the market mechanism work optimally. Competition leads to an optimisation of the price-quality ratio of goods and services from which ultimately the consumer benefits.[29] Competition law has both a national and a European nature while the European competition law has two central rules set out in the Treaty on the Functioning of the European Union: article 101 and article 102. [30]

21. **ART. 101 TFEU** – Article 101 TFEU prohibits agreements between two or more independent undertakings which restrict competition. The most famous example of a conduct that infringes this article is cartel forming, which may involve price-fixing as well.[31] In addition to the legislative exception in paragraph 3 of article 101 TFEU, certain case law also provides exceptions to this article (see *infra*).

22. **ART. 102 TFEU** – Article 102 TFEU prohibits undertakings that hold a dominant position on a given market, to abuse that position. Examples of conduct that infringe this provision is to set unfair prices, limiting production, etc.[32]

23. **SCOPE OF APPLICATION OF ART. 101 AND 102 TFEU** - The personal scope of application of articles 101 and 102 TFEU provides that the prohibition of cartels and the abuse of a dominant

[28] A.T.J.M. JACOBS, "Collectief arbeidsrecht" in *Collectief Arbeidsrecht (MSR nr 28),* Deventer, Kluwer, 2005, 198
[29] J. VAN DRONGELEN, "Vakverenigingsvrijheid. Het recht op collectief onderhandelen. Mededingingsrecht" in *Collectief arbeidsrecht deel 2,* Zutphen, Paris, 2009, 107.
[30] D. SCHIEK and A. GIDEON, "Outsmarting the gig-economy through collective bargaining – EU competition law as a barrier to smart cities?", *International Review of Law: computers and technology* 2018, vol. 32, (275) 279; J. VAN DRONGELEN, "Vakverenigingsvrijheid. Het recht op collectief onderhandelen. Mededingingsrecht" in *Collectief arbeidsrecht deel 2,* Zutphen, Paris, 2009, 109.
[31] Art. 101 TFEU; X, "Antitrust overview", *European Commission* 2014, (http://ec.europa.eu/competition/antitrust/overview_en.html).
[32] Art. 102 TFEU; X, "Antitrust overview", *European Commission* 2014, (http://ec.europa.eu/competition/antitrust/overview_en.html).

position must relate to an undertaking, namely *"any entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed".*[33] An economic activity is defined by the European Court of Justice as: "*any activity consisting in offering goods and services on a given market is an economic activity".*[34] The material scope of application of both articles can differ for some sectors and certain sectors are even exempted from these rules.[35] The jurisprudence also made some exemptions, like for instance in the Albany case.[36] (see *infra*)

24. **OBJECTIVES OF COMPETITION LAW -** European competition law has several objectives. For example, on the one side there are normative and economic objectives, but on the other side there competition law has also integration and social objectives. As a result of these last two objectives, not all restrictions constitute a violation or restriction of the scope of competition law.[37] (See *infra*)

§2. The Albany exception

Inspired by the EU law, a new legal basis was given to the Dutch competition policy in 1997.[38] However, it did not take long before the European Court of Justice had to answer the following preliminary question in the Albany case: do collective agreements – and in particular: does compulsory membership established by these collective agreements – constitute an infringement of the European and Dutch competition law?[39]

25. **FACTS OF THE ALBANY CASE -** The ECJ got confronted in 1999 with a specific problem concerning collective agreements. Namely, in the Netherlands a pension fund system for workers in the textile industry existed which was compulsory for all companies. The textile company 'Albany' in the Netherlands tried to exempt itself from the obligation to affiliate to this pension fund by saying that it already offered better pension benefits for its workers. The Albany company used the European competition rules as a basis for claiming that the mandatory affiliation to the pension scheme was in restraint with their competitiveness.[40]

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[33] ECJ 21 September 1999, nr. C-67/96, ECLI: EU:C:1999:430, 'Albany', par. 77; ECJ 21 September 1999, nr. C-115/97, ECLI: EU:C:1999:434, 'Brentjens', par. 77; ECJ 21 September 1999, nr. C-219/97, ECLI: EU:C:1999:437, 'Drijvende Bokken', par. 67; ECJ 12 September 2000, nr. C-180/98, ECLI:EU:C:2000:428, 'Pavlov', par. 74.
[34] ECJ 12 September 2000, nr. C-180/98, ECLI:EU:C:2000:428, 'Pavlov', par. 75.
[35] Art. 101 (3) TFEU.
[36] ECJ 21 September 1999, nr. C-67/96, ECLI: EU:C:1999:430, 'Albany'.
[37] D. TIPS, *CAO's en mededingingsrecht,* masterproef KU Leuven, 2012-2013, 33.
[38] OECD, "Country studies: Netherlands – the role of competition policy in regulatory reform", *OECD* 1998, (http://www.oecd.org/netherlands/2497317.pdf).
[39] A.T.J.M. JACOBS, "Collectief arbeidsrecht" in *Collectief Arbeidsrecht (MSR nr 28),* Deventer, Kluwer, 2013, 189.
[40] Art. 81(1) EC Treaty (now: art. 101 (1) TFEU); ECJ 21 September 1999, nr. C-67/96, ECLI: EU:C:1999:430, 'Albany', par. 36 and following.

26. **ECJ JUDGEMENT –** The ECJ held in the Albany case "*that collective agreements between management and labour in the pursuit of a social policy objective, such as the improvement of conditions of work, fall outside the scope of art. 101 TFEU"*, because it is not the purpose of competition law to affect collective agreements.[41] The purpose of competition law is to regulate anti-competitive conduct by companies so the first preliminary question was answered negatively. Namely, it is allowed to set up a single sectoral pension fund by a collective agreement and the parties may ask the national authorities to make the affiliation compulsory for all workers in that sector without violating the competition rules.[42] The court defended its position by saying: "*Such a scheme seeks generally to guarantee a certain level of pension for all workers in that sector and therefore contributes directly to improving one of their working conditions, namely their remuneration.*"[43] Although, the pension fund was engaged in an economic activity and had a dominant position according to art. 102 TFEU, the court found that this restriction of competition was justified because of the particular social task of general interest of the fund.[44]

27. **THE ALBANY EXCEPTION –** The legal doctrine picked up the Albany case and started to write articles about the Albany exception. These authors[45] had read in the judgement that if two conditions are fulfilled, the collective agreements can fall outside the scope of competition law. On the one hand a social goal is needed, and on the other hand the agreement must be the result of negotiations between the social partners.[46]

A. Goal

28. **IMPROVING THE WORKING CONDITIONS -** The social goal is according to the ECJ what justifies compulsory membership to pension funds.[47] In particular, the goal of the collective agreement should be about improving the working conditions. When the content of the collective agreement

[41] ECJ 21 September 1999, nr. C-67/96, ECLI: EU:C:1999:430, 'Albany', par. 60.
[42] ECJ 21 September 1999, nr. C-67/96, ECLI: EU:C:1999:430, 'Albany', par. 87.
[43] ECJ 21 September 1999, nr. C-67/96, ECLI: EU:C:1999:430, 'Albany', par. 63.
[44] ECJ 21 September 1999, nr. C-67/96, ECLI: EU:C:1999:430, 'Albany', par. 98.
[45] S. EVJU, "Collective Agreements and Competition Law. The Albany Puzzle, and van der Woude*", The International Journal of Comparative Labour Law and Industrial Relations* 2001, Vol. 17/2, 165-184; L. GYSELEN, "Case C-67/96, *Albany v. Stichting Bedrijfspensioenfonds Textielindustrie*; Joined Cases C-115-117/97, *Brentjens' Handelsonderneming v. Stichting Bedrijfspensioenfonds voor de handel in bouwmaterialen*; and Case C-219/97, *Drijvende Bokken v. Stichting Pensioenfonds voor de vervoer- en havenbedrijven*. Judgments of the Full Court of 21 September 1999, not yet reported", *CML Rev* 2000, vol. 37, 425-448; A.T.J.M. JACOBS, "Collectief arbeidsrecht" in Collectief Arbeidsrecht (MSR nr. 28), Deventer, Kluwer, 2005, 422 p.
[46] A.T.J.M. JACOBS, "Cao-recht, het mededingingsrecht, het EU-recht met betrekking tot staatssteun, openbare aanbesteding en de vier basisvrijheden van de Europese markt*"* in *Collectief arbeidsrecht (MSR nr. 28),* Deventer, Kluwer, 2017, 6.4.
[47] ECJ 21 September 1999, nr. C-67/96, ECLI: EU:C:1999:430, 'Albany', par. 59-60.

cannot be seen as such a social policy objective, it will have to pass the test of competition law.[48] Both the ECJ and EFTA Court have adopted a broad interpretation of the social policy objective. So, the fulfilment of this criterium is rarely problematic.[49]

29. **SOCIAL POLICY OBJECTIVE** - According to the European Court of Justice, the exemption from the competition law scope of such collective agreements is justified because of the objectives of the European Community. As the Court stipulates, Community action does not only ensure the proper functioning of the internal market, but also has the task of promoting a high level of employment and social protection.[50] In support of this social task, the Court refers in the Albany, Drijvende Bokken and Brentjens cases, primarily to articles 151-161 TFEU, which designate the promotion of the social dialogue at European level.[51] In addition, the Court refers to the Agreement on social policy and considers that the objectives of social policy in this Agreement would not be achieved if the social partners, in their joint effort to improve employment and working conditions, had to comply with European competition law.[52]

30. **OUTCOME OF ALBANY** – With regards to the purpose of the collective agreement at issue in the Albany case, the ECJ considered that the obligation for the textile companies to affiliate to the pension fund was intended to ensure a certain level of pension for all workers in the sector, thus contributing directly to improving one of the working conditions of the workers. Therefore, the Court ruled that the social objective was met.[53]

[48] A.T.J.M. JACOBS, "Cao-recht, het mededingingsrecht, het EU-recht met betrekking tot staatssteun, openbare aanbesteding en de vier basisvrijheden van de Europese markt*"* in *Collectief arbeidsrecht (MSR nr. 28)*, Deventer, Kluwer, 2017, 6.4.

[49] ECJ 21 September 1999, nr. C-67/96, ECLI: EU:C:1999:430, 'Albany', par. 59-60; EFTA 22 March 2002, nr. E-8/00, 'Four Norwegian cases', par. 44; A.S. JOHANSEN, "Competition law and collective agreements – the municipal pension scheme presented for the EFTA Court", *The international journal of comparative labour law and industrial relations* 2001, vol. 17/1, 94 and following.

[50] ECJ 21 September 1999, nr. C-67/96, ECLI: EU:C:1999:430, 'Albany', par. 54; N. JANSEN, "De CAO-exceptie in het Europese recht" in J.H. BENNAARS, M. WESTERVELD and E. VERHULP (eds.), *De werknemerachtige in het sociaal recht*, Deventer, Kluwer, 2018, par. 8.5.2.

[51] ECJ 21 September 1999, nr. C-67/96, ECLI: EU:C:1999:430, 'Albany', par. 55-56; N. JANSEN, "De CAO-exceptie in het Europese recht" in J.H. BENNAARS, M. WESTERVELD and E. VERHULP (eds.), *De werknemerachtige in het sociaal recht*, Deventer, Kluwer, 2018, par. 8.5.2.

[52] ECJ 21 September 1999, nr. C-67/96, ECLI: EU:C:1999:430, 'Albany', par. 59-60; D. COMANDE, "The right to collective bargaining in action: the ongoing short-circuit between the economic and social dimensions", *EJSL* 2012, vol. 2, (99) 101.

[53] ECJ 21 September 1999, nr. C-67/96, ECLI: EU:C:1999:430, 'Albany', par. 59-60; N. JANSEN, "De CAO-exceptie in het Europese recht" in J.H. BENNAARS, M. WESTERVELD and E. VERHULP (eds.), *De werknemerachtige in het sociaal recht*, Deventer, Kluwer, 2018, par. 8.5.2.

B. Nature

31. **NEGOTIATED BETWEEN SOCIAL PARTNERS -** In order for the collective agreement to enjoy the Albany exception, it must be bargained between both sides of the industry. It should be noted that the Court of Justice assesses this requirement very strictly as it is examined below.[54] The level at which the collective bargaining agreement is concluded is irrelevant, for example it may concern both a collective agreement at company level as well as a collective agreement at industry level.[55]

32. **CERTAIN DEGREE OF REPRESENTATIVENESS NEEDED? -** The question might arise whether, in order to meet the nature requirement, employers' associations and trade unions must have a certain degree of representativeness. Under Dutch law there is no such requirement for the validity of a collective agreement.[56] In addition, from the perspective of the ILO (Convention 98), it is necessary to have stable and independent employer and employee organisations. In order to meet this requirement these organisations will probably need some kind of degree of representativeness. Since all European Member States have ratified this convention, it can be said that this obligation is part of the EU's constitutional tradition. This would mean that the Court should keep this requirement in mind in its assessment, but no judgments have yet been filed on this matter.[57] However, this international requirement could also simply be seen as an interpretation of the definition of a collective agreement. Agreements between employers' organisations and trade unions which are dependent from the employers, could thus never fall under the Albany exception, because otherwise employers could simply make arrangements with themselves to circumvent the cartel ban of art. 101 TFEU.[58]

§3. Later case law

A. Pavlov

33. **FACTS OF THE CASE -** This Dutch case is about compulsory membership to an occupational pension scheme: in fact, affiliation to a pension fund for medical specialists was made compulsory. Again, it was foreseen in the collective agreement that exemptions could be granted

[54] Opinion Adv. Gen. JACOBS, nr. C-67/96, ECLI:EU:C:1999:28.
[54] S. EVJU, "Collective Agreements and Competition Law. The Albany Puzzle, and van der Woude*", The International Journal of Comparative Labour Law and Industrial Relations* 2001, Vol. 17/2, 170.
[55] D. TIPS, *CAO's en mededingingsrecht,* masterproef KU Leuven, 2012-2013, 47.
[56] D. TIPS, *CAO's en mededingingsrecht,* masterproef KU Leuven, 2012-2013, 47.
[57] Art. 2 ILO - Right to Organise and Collective Bargaining Convention, 1949 (No. 98); D. TIPS, *CAO's en mededingingsrecht,* masterproef KU Leuven, 2012-2013, 47.
[58] D. TIPS, *CAO's en mededingingsrecht,* masterproef KU Leuven, 2012-2013, 47.

by the pension fund. Some medical specialists refused to pay their contributions, claiming that the compulsory membership was against competition rules.[59]

34. **ECJ JUDGEMENT** – The ECJ highlights the cumulative nature of conditions of the Albany exception in this judgement, meaning that both conditions need to be present for the exemption to take place. Even though the compulsory pension scheme had a social objective, namely guaranteeing a certain pension level, the regulation was not the result of collective bargaining between the social partners. The 'nature' requirement was therefore not met and the Albany exception was thus not applicable in this case.[60] Following the Albany decision, the Court examined whether the conditions for the application of the cartel ban (art. 101 TFEU) were met. It was decided that the compulsory occupational pension scheme is compatible with the competition rules because, on the one hand, it promotes competition, and, on the other hand, the restriction of competition is not appreciable.[61]

B. Van der Woude

35. **FACTS OF THE CASE** –Mr. Van der Woude, was an employee who was affiliated to a supplementary health insurance scheme set up by a collective agreement, which had been declared generally binding for the sector concerned and by which his employer, "Stichting Beatrixoord", was bound. In respect to this agreement, whenever an employee opted for a supplementary health insurance, the employers was obliged to pay 50 percent of the premium due. The collective agreement had a clause that designated one specific fund, the IZZ, for the purpose of implementing the agreement. IZZ was allowed to subcontract the practical insurance business to one or more not-profit insurance companies and it had done so since 1977. The provisions of the collective agreement that applied to Mr. Van der Woude's employment contract, could not be derogated from. However, Mr. Van der Woude wished to become a member of another health insurance scheme, which offered more favourable terms, while maintaining the employer's 50 percent contribution to the premiums. This was not possible due to the designation clause of the collective agreement, unless this clause was seen as an infringement with the competition rules.[62]

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[59] Art. 101, 102 and 106 TFEU; ECJ 12 September 2000, nr. C-180/98, ECLI:EU:C:2000:428, 'Pavlov', par. 42-49.
[60] ECJ 12 September 2000, nr. C-180/98, ECLI:EU:C:2000:428, 'Pavlov', par. 68-70.
[61] ECJ 12 September 2000, nr. C-180/98, ECLI:EU:C:2000:428, 'Pavlov', par. 95-99 and 128.
[62] ECJ 21 September 2000, nr. C-222/98, ECLI:EU: C:2000:475, 'Van der Woude', par. 11-17; N. BRUUN and J. HELLSTEN (eds.), *Collective agreement and competition in the EU. The report of the COLCOM-project.*, Copenhagen, DJOF Publishing, 2001, 56, nrs. 114-115; S. EVJU, "Collective Agreements and Competition Law. The Albany Puzzle, and van der Woude*", The International Journal of Comparative Labour Law and Industrial Relations* 2001, Vol. 17/2, 177.

36. **ECJ JUDGEMENT** – The Court dismissed the claim of Mr. Van der Woude by emphasizing the liberty of the social partners with regards to the implementation of a collective agreement, covering subcontracting as well.[63] The collective agreement is by nature and by purpose exempted from the application of the competition rules, because it is the result of collective bargaining between the social partners and because a supplementary health insurance contributes to the improvement of the employees' working conditions.[64] The fact that IZZ subcontracted the practical insurance business to another insurance company cannot prevent the application of the Albany exception.[65]

C. Commission v Germany

37. **FACTS OF THE CASE** – The European Commission stipulated that Germany had not fulfilled the conditions set out in Directives 92/50/ECC and 2004/18/EC on the public procurement of services. Certain local authorities in Germany had awarded some insurance companies directly with a particular task without making a call for tender at European Union level, which was obliged by a collective agreement for additional security services.[66] In particular, there was a problem concerning the implementation procedure for the selection of the insurance companies. The provision in which the implementation procedure was laid down violated EU law whereas the legislation did not foresee the tender notice. The European Commission brought a case before the ECJ for infringing article 258 TFEU, because of the failure to implement European Union Directives. As a response, Germany invoked the Albany case law.

38. **ECJ JUDGEMENT** – The difference from the Albany and Van der Woude cases is that in this case the pension arrangements of the public sector are at stake and that that the law on public procurement of services (Directives 92/50/EEC and 2001/18/EC) is being invoked instead of the competition rules.[67] The Court starts by examining whether, by their nature and purpose, the awarding of some insurance companies fall outside the scope of the public procurement Directives:

[63] ECJ 21 September 2000, nr. C-222/98, ECLI:EU: C:2000:475, 'Van der Woude', par. 26.
[64] ECJ 21 September 2000, nr. C-222/98, ECLI:EU: C:2000:475, 'Van der Woude', par. 24-25; N. BRUUN and J. HELLSTEN (eds.), *Collective agreement and competition in the EU. The report of the COLCOM-project.*, Copenhagen, DJOF Publishing, 2001, 56, nr. 116.
[65] ECJ 21 September 2000, nr. C-222/98, ECLI:EU: C:2000:475, 'Van der Woude', par. 26.
[66] ECJ 15 July 2010, nr. C-271/08, ECLI:EU:C:2010:426, 'Commission v Germany', par. 30; D. COMANDE, "The right to collective bargaining in action: the ongoing short-circuit between the economic and social dimensions", *EJSL* 2012, vol. 2, (99) 103.
[67] B. DE WOLF and I. VAN HIEL, "Tien lessen uit de rechtspraak van 2010", *Or.* 2011, (130) 138.

> *"However […] a derogation from the application of the Directives must be interpreted strictly and cannot extend to a provision of services which, as in the present case, is founded not on an employment contract, but on a contract between an employer and an undertaking providing pensions […]."*[68]

In this case the ECJ rejects the immunity method of Albany. In the end the Court finds that the implementation procedure for the selection of the insurance companies does fall within the scopes of Directives 92/50/EEC and 2001/18/EC. For this reason, the ECJ rules that Germany violated the Directives on the public procurement of services.[69] From this judgement it can be concluded that the application of the Directives on the public procurement of services on collective agreements in the public sector leads towards a more severe evaluation than the application of the competition rules on collective agreements in the private sector.[70]

D. AG2R Prévoyance

39. **FACTS OF THE CASE** – When French employees incur healthcare costs because of illness or accident, these costs are partly reimbursed by the social security scheme. A supplementary health insurance can reimburse the part of the costs that remains to be paid by the insured person. In certain sectors affiliation to such a supplementary scheme might be compulsory based on a collective agreement.[71] One of the parties in this case, Beaudout, has been affiliated to an insurance company other than AG2R - which is the insurance company designated by the collective agreement - and thus had been refusing to join the compulsory scheme managed by AG2R. AG2R brought proceedings against Beaudout in order to seek regularisation of the affiliation to the scheme and payment for the outstanding contributions.[72] The French court asked in a preliminary question if it is against competition rules to have a provision which makes affiliation to a scheme for supplementary healthcare cover compulsory without having a waiver of the affiliation obligation.[73]

40. **ECJ JUDGEMENT** – The court concluded the following:

[68] ECJ 15 July 2010, nr. C-271/08, ECLI:EU:C:2010:426, 'Commission v Germany', par. 82.
[69] ECJ 15 July 2010, nr. C-271/08, ECLI:EU:C:2010:426, 'Commission v Germany', par. 105.
[70] I. VAN HIEL, "CAO's moeten mededingingsrecht (nog steeds) niet respecteren", *Juristenkrant* 2011, vol. 122, 5.
[71] ECJ 3 March 2011, nr. C-437/09, ECLI:EU:C:2011:112, 'AG2R Prévoyance', par. 3-4..
[72] ECJ 3 March 2011, nr. C-437/09, ECLI:EU:C:2011:112, 'AG2R Prévoyance', par. 17-20; D. TIPS, *CAO's en mededingingsrecht,* masterproef KU Leuven, 2012-2013, 77-78.
[73] ECJ 3 March 2011, nr. C-437/09, ECLI:EU:C:2011:112, 'AG2R Prévoyance', par. 22.

> "*Article 101 TFEU, read in conjunction with Article 4(3) EU, must be interpreted as not precluding the decision by the public authorities to make compulsory, […], an agreement which is the result of collective bargaining and which provides for compulsory affiliation to a scheme for supplementary reimbursement of healthcare costs for all undertakings within the sector concerned, without any possibility of exemption."*[74]

The ECJ qualifies the services offered by AG2R as services of general economic interest. Due to this qualification, the French supplementary healthcare cost scheme that was at issue in this judgement can benefit from the Albany exception, even though there was no provision for exemption from the affiliation in the collective agreement – unlike the agreement at issue in the Albany case.[75] The scheme has after all a social objective an is characterised by a high degree of solidarity.[76] With this judgement, it seems that the Court wants to limit the case law of 'Commission v Germany' only to pension arrangements established by collective agreements in the public sphere.[77] The French case law that was based on this case will be further examined later on.

E. FNV Kunsten Informatie en Media

41. **FACTS OF THE CASE -** In 2006 and 2007, Dutch associations representing contractual and self-employed workers in the performing arts sector and an association representing orchestras in the Netherlands made an agreement that included a minimum fee for self-employed musicians who temporarily replaced other musicians in orchestras. The Dutch competition authority objected to this arrangement, considering that it was essentially a price-fixing scheme. Therefore, the agreement was ended unilaterally by one of the parties, which led to a legal procedure and the current preliminary question. The ECJ had to decide in this case whether competition law applies to collective arrangements which are bargained by trade unions for the self-employed and it had to address the common issue of the 'false self-employed'.[78] A false self-employed is somebody who in reality works under an employer's authority but acts as a self-employed.

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[74] ECJ 3 March 2011, nr. C-437/09, ECLI:EU:C:2011:112, 'AG2R Prévoyance', par. 39
[75] ECJ 3 March 2011, nr. C-437/09, ECLI:EU:C:2011:112, 'AG2R Prévoyance', par. 33; H. VAN MEERTEN and E. SCHMIDT, "Compulsory membership of pension schemes and the free movement of services in the EU", *EJSS* 2017, vol. 19(2), (118) 126.
[76] ECJ 3 March 2011, nr. C-437/09, ECLI:EU:C:2011:112, 'AG2R Prévoyance', par. 52.
[77] B. DE WOLF and I. VAN HIEL, "Tien lessen uit de rechtspraak van 2010", *Or.* 2011, (130) 140.
[78] ECJ 4 December 2014, nr. C-413/13, ECLI:EU:C:2014:2411, 'FNV Kunsten Informatie en Media', par. 6 and following; X, *Atypical workers and collective bargaining in the live performance and audio-visual sectors,* 8 September 2015, 14, (*http://europeanjournalists.org/wp-content/uploads/2015/09/Discussion-Note-Collective-Bargaining-FINAL-3.pdf*).

42. **ECJ JUDGEMENT –** The ECJ starts its ruling by finding that the Albany exception does not *prima facie* apply to this case, because of the nature requirement that is not completely met. It finds that a collective agreement concluded by an employees' organisation in the name, and on behalf, of the self-employed substitutes who provide services to orchestras does not constitute the result of a collective agreement between employers and employees, and therefore cannot be exempted from the scope of art. 101 TFEU.[79] In other words, a trade union which bargains not only for employees, but also for the self-employed cannot be seen as a social partner.[80] Secondly, the Court rules that freelance substitute orchestra musicians that aim to improve their working conditions can be excluded from the competition rules if they can be qualified as 'workers', because they are in reality 'false self-employed'.[81] Thus, those who are false self-employed do fall under the Albany exception[82]:

> "*a provision of a collective labour agreement, in so far as it sets minimum fees for service providers who are 'false self-employed', cannot, by reason of its nature and purpose, be subject to the scope of Article 101(1) TFEU.*"[83]
>
> (Own underlining)

§4. Applying the case law to compulsory membership

43. **ONLY JURISPRUDENCE –** Since the limits on compulsory membership are determined by the ECJ, the legal justification of compulsory membership relies on EU jurisprudence.[84] This means that in the future this jurisprudence might change, unless incorporated in European legislation.

44. **ALBANY EXCEPTION TO AVOID APPLICATION OF COMPETITION LAW-** After reading the above case law, it can be concluded that the Albany exception is still very much valid today. If the social partners want to make membership to an occupational pension scheme compulsory by using a collective agreement, they will have to bear in mind the cumulative conditions set out in the Albany case to avoid the application of the competition law. On the one hand a social goal is needed, and on the other hand the agreement must be the result of negotiations between the social

[79] ECJ 4 December 2014, nr. C-413/13, ECLI:EU:C:2014:2411, 'FNV Kunsten Informatie en Media', par. 26-30; X, *Atypical workers and collective bargaining in the live performance and audio-visual sectors*, 8 September 2015, 14, (*http://europeanjournalists.org/wp-content/uploads/2015/09/Discussion-Note-Collective-Bargaining-FINAL-3.pdf*).
[80] V. PERTRY and S. GOOVAERTS, "Cao's voor zelfstandigen moeten mededingingsrecht respecteren", *Juristenkrant* 2015, vol. 305, 16.
[81] ECJ 4 December 2014, nr. C-413/13, ECLI:EU:C:2014:2411, 'FNV Kunsten Informatie en Media', par. 37-39.
[82] J.W. VAN DEN GRONDE, "Europees mededingingsrecht en niet-economische belangen", *SEW* 2016, vol. 11, 474-475.
[83] ECJ 4 December 2014, nr. C-413/13, ECLI:EU:C:2014:2411, 'FNV Kunsten Informatie en Media', par. 41.
[84] D. CHEN and R. BEETSMA, "Mandatory participation in occupational pension schemes in the Netherlands and other countries: an update", *Netspar Discussion Paper* 2015, No.10/2015-032, 20.

partners. If both conditions are met, the collective agreement that set out the compulsory membership will probably be safe. Moreover, exemptions from the affiliation to the occupational pension scheme must not be provided in the collective agreement.

45. **PUBLIC SECTOR –** For collective agreements in the public sector providing compulsory membership, a more severe evaluation of the conditions can be excepted in order to fall within the Albany exception and avoid the application of competition rules.[85]

46. **THE SELF-EMPLOYED** – Collective agreements which are bargained for the self-employed, cannot be seen as 'negotiated between the social partners' and therefore cannot enjoy the Albany exception. These collective agreements will be evaluated in the light of the competition rules. However, those who are false self-employed do fall under the Albany exception, according to the ECJ.[86]

CHAPTER II. COMPULSORY MEMBERSHIP AND FREEDOM OF SERVICES

SECTION I. FREEDOM OF SERVICES

The possible exemption from competition law rules does not mean that the activities of the pension scheme must not be in conformity with the internal market, which seeks to guarantee the free movement of goods, capital, services, and labour within the EU. More precisely, occupational pensions must also pass the test of freedom to provide services. This will be the focus of the next chapter.

§1. Current state of affairs

A. Art. 56 TFEU

47. **DEFINITION** - Article 56 TFEU guarantees the freedom to provide services in the European internal market. According to article 57 TFEU: "*services shall be considered to be 'services' within the meaning of the treaties where they are normally provided for remuneration.*"[87] Three conditions can be deduced from both articles. First, there must be a service. Both article 57 TFEU and the ECJ case law provide some examples: activities of an industrial character, activities of a

[85] ECJ 15 July 2010, nr. C-271/08, ECLI:EU:C:2010:426, 'Commission v Germany'.
[86] ECJ 4 December 2014, nr. C-413/13, ECLI:EU:C:2014:2411, 'FNV Kunsten Informatie en Media', par. 31 and 41.
[87] Art. 57 TFEU.

commercial character, activities of craftsmen[88], education[89]; lotteries[90], etc. Secondly, the service must 'normally be provided for remuneration'. This condition excludes voluntary services from the scope of the Treaty. Thirdly, the services must be temporary. The specific circumstances of the case have to be taken into account when assessing this condition.[91] This last condition is also the reason why generally the home Member State controls the activities of the migrant person or company.[92]

48. **CROSS-BORDER ELEMENT** – Article 56 TFEU applies whenever the service provider and service recipient are established in different Member States, covering numerous situations. For instance, both the service provider and the recipient can travel to another Member State to offer or receive a service. It may even be the case that both travel and meet each other in a third Member State.[93] A rather new situation is the one where neither the provider nor the recipient have to physically move, but the service itself moves, such as internet services. It appears from the case law that even domestic service contracts fall within article 56 TFEU if an important part of the work for which the service provider is paid takes place abroad.[94] Lastly, a measure that could potentially restrict the offering or receiving of services in cross-border situations, is already sufficient for the application of article 56 TFEU.[95]

49. **MARGIN OF APPRECIATION –** The European Court of Justice is not the primary regulator of the issues that concern freedom of services, only supervising the legislation of the Member states. However, the Court has been an important actor for defining the scope of art. 56 TFEU. It has used a variety of principles in its judgements over the years, but it always had to acknowledge the national margin of appreciation where choices of social or moral policy are concerned.[96]

[88] Art. 57 TFEU.
[89] ECJ 18 March 1980, nr. C-62/79, ECLI:EU:C:1980:84, 'Coditel v Cine Vog Films'.
[90] ECJ 24 March 1994, nr. C-275/92, ECLI:EU:C:1994:119, 'Schindler'.
[91] ECJ 11 December 2003, nr. C-215/01, ECLI:EU:C:2003:662, 'Schnitzer'; C. BARNARD and S. PEERS (eds.), *European Union law*, Oxford, Oxford University Press, 2017, 414-415.
[92] C. BARNARD and S. PEERS (eds.), *European Union law*, Oxford, Oxford University Press, 2017, 410.
[93] D. CHALMERS, G. DAVIES and G. MONTI, *European Union law: text and materials*, Cambridge, Cambridge University Press, 2014, 803.
[94] ECJ 28 October 1999, nr. C-55/98, ECLI:EU:C:1999:533, 'Vestergard', par. 18-19; D. CHALMERS, G. DAVIES and G. MONTI, *European Union law: text and materials*, Cambridge, Cambridge University Press, 2014, 804.
[95] D. CHALMERS, G. DAVIES and G. MONTI, *European Union law: text and materials*, Cambridge, Cambridge University Press, 2014, 805.
[96] D. CHALMERS, G. DAVIES and G. MONTI, *European Union law: text and materials*, Cambridge, Cambridge University Press, 2014, 800-801.

B. Restrictions

50. **PROHIBITION AGAINST ANY RESTRICTION -** Article 56 TFEU contains a prohibition against any kind of restriction of the freedom to provide services.[97] Additionally the Court of Justice made it clear that any form of discrimination against a service provider or any other restriction that hinders the provision of services is contrary to the freedom of services.[98]

51. **DISCRIMINATORY RESTRICTIONS –** Nonetheless, direct discriminatory restrictions still exist, such as a discrimination on ground of nationality. For such measures only the exceptions of article 52 TFEU provide grounds of justification. These grounds are public policy, public security and public health. In general, it can be concluded that a discriminatory restriction is harder to justify than a non-discriminatory restriction.[99]

52. **NON-DISCRIMINATORY RESTRICTIONS –** Furthermore, in its case law the ECJ has developed a number of criteria that may justify non-discriminatory restrictions on the free movement of services.[100] The Court distinguished four conditions that need to be fulfilled in order to be able to invoke a justification ground.[101] Firstly, the national measure that hinders the freedom of services, must be applied in a non-discriminatory manner. Secondly, this national measure should be justified by overriding reasons in the general interest. Thirdly the national measures should be suitable for obtaining the objective pursued. Lastly, they must not go beyond what is necessary to achieve that objective.[102]

C. IORP II Directive

53. **THE IORP II DIRECTIVE -** The IORP II Directive[103] is a revision of the IORP I Directive and adds some new elements that have to do with the rules addressing cross-border activity,

[97] D. CHALMERS, G. DAVIES and G. MONTI, *European Union law: text and materials,* Cambridge, Cambridge University Press, 2014, 813; H. VAN MEERTEN and E. SCHMIDT, "Compulsory membership of pension schemes and the free movement of services in the EU", *EJSS* 2017, vol. 19(2), (118) 125.
[98] ECJ 25 July 1991, nr. C-76/90, ECLI:EU:C:1991:331, 'Säger v Dennemeyer'; H. VAN MEERTEN and E. SCHMIDT, "Compulsory membership of pension schemes and the free movement of services in the EU", *EJSS* 2017, vol. 19(2), (118) 125.
[99] H. VAN MEERTEN and E. SCHMIDT, "Compulsory membership of pension schemes and the free movement of services in the EU", *EJSS* 2017, vol. 19(2), (118) 125.
[100] H. VAN MEERTEN and E. SCHMIDT, "Compulsory membership of pension schemes and the free movement of services in the EU", *EJSS* 2017, vol. 19(2), (118) 125.
[101] ECJ 30 November 1995, nr. C-55/94, ECLI:EU:C:1995:411, 'Gebhard'.
[102] ECJ 30 November 1995, nr. C-55/94, ECLI:EU:C:1995:411, 'Gebhard', par. 37; D. CHALMERS, G. DAVIES and G. MONTI, *European Union law: text and materials,* Cambridge, Cambridge University Press, 2014, 820.
[103] Directive (EU) 2016/2341 of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs).

governance and information requirements. Since occupational pension systems across the EU are so diverse and because of the central role that national social and labour law plays in this field, the Member States are left some room to implement the IORP II Directive.[104] For this paper on compulsory membership, the cross-border activities of IORP's are relevant.[105]

54. **ART. 11 (1) IORP II DIRECTIVE -** Like the Treaty on the functioning of the European Union (TFEU), the IORP II Directive contains also provisions that are relevant for the free movement of services in relationship to compulsory membership. Article 11 (1) of the IORP II Directive stipulates:

> *"Without prejudice to national social and labour law on the organisation of pension systems, including compulsory membership and the outcomes of collective bargaining agreements, IORPs should have the possibility of providing their services in other Member States upon receipt of the authorisation from the competent authority of the IORP's home Member State.* […]*"*[106] (Own underlining)

Article 11 of the IORP II Directive stipulates the procedure for cross-border activities of IORP's. Cross-border activity arises when the home Member State of the pension fund differs from the host Member State of the contributing company and the employee. For example: if a Belgian company pays contribution for its Belgian employee to a Dutch pension fund, there is a cross-border activity.[107] A summary of the procedure can be found under section II comparison – Belgium. (See *infra*)

§2. ECJ case law concerning compulsory membership

A. Viking

55. **FACTS OF THE CASE –** The Viking case refers to a large ferry operator named Viking. The 'Rosella' was one of the operator's vessels which navigated from Finland to Estonia and back. Since this vessel was under the Finnish flag, Viking should have followed the Finnish law and an

[104] P. BORSJE, and H. VAN MEERTEN, "Voorstel IORP II-richtlijn: aanzet tot hervorming van het Nederlands pensioenstelsel", *Nederlands tijdschrift voor Europees recht* 2014, nr. 8, (264) 265; S. MIOTTO, "AEIP welcomes the new rules on the institutions for occupational retirement provisions (IORPs)", *AEIP* 5 July 2016, (https://aeip.net/o/images/Press_Release_IORP_II.pdf*)*.
[105] J-P. SERVAIS, "Transposition of IORP II", *FSMA* 8 January 2019, 2.
[106] Art. 11 (1) of Directive (EU) 2016/2341 of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs).
[107] Art. 11 of Directive (EU) 2016/2341 of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs).

applicable collective agreement to pay the ship's crew salary at the same level as those applicable in Finland. As a result of the direct competition from the vessels operating on the same route, but with the Estonian flag and thus lower salary costs, the Rosella was running at a loss. For that reason, Viking wanted to reflag its vessel by registering in Estonia and by entering into a new collective agreement with a trade union established in Estonia. The Finnish trade union was against this and threatened with collective action while demanding that the crew would be subject to Finnish law even after the reflagging.[108] Through the use of private international law, the case came before a Court of Appeal in the United Kingdom, which referred some preliminary questions to the ECJ.[109]

56. **ECJ JUDGEMENT –** On the one hand, the ECJ ruled in this case for the first time that collective action - including the right to strike - is a fundamental right, albeit not an absolute one. On the other hand, the Court held that collective action falls inside the scope of the four freedoms and more in particular, the freedom of establishment.[110] This was surprising since the trade unions invoked the Albany case law, where the ECJ gave precedence to a social policy objective over the economic considerations by creating an employment-related exemption from the European competition rules. In Viking the Court could have similarly argued that collective agreements fall outside the scope of freedom of establishment. But it did not do so. Even more, the ECJ ruled that the principles of the four freedoms may be invoked against trade unions. This is called the 'horizontal direct effect'[111] meaning that employers can now start a claim before a court arguing that a collective action is violating their economic freedoms.[112] In the end, the Court found that the blocking of the ship was an infringement of the freedom of establishment. However, it did not itself make a statement as to whether the restriction was justifiable.[113] But it did give the referring Court of Appeal some guidelines, such as the need for an overriding reason of public interest. For instance, the protection of workers:

[108] ECJ 11 December 2007, nr. C-438/05, ECLI:EU:C:2007:772, 'Viking', par. 6 and following.
[109] P. PECINOVSKY, *Arbeidsrecht deel 3*, Brugge, die Keure, 2017, 543-544.
[110] ECJ 11 December 2007, nr. C-438/05, ECLI:EU:C:2007:772, 'Viking', par. 54; J. MALMBERG, "The impact of the ECJ judgements on Viking, Laval, Rüffert and Luxembourg on the practice of collective bargaining and the effectiveness of social action", *EMPL* 2010, 5, (*http://www.europarl.europa.eu/document/activities/cont/201107/20110718ATT24274/20110718ATT24274EN.pdf*); P. PECINOVSKY, *Arbeidsrecht deel 3*, Brugge, die Keure, 2017, 544.
[111] A. BÜCKER and W. W ARNECK. (eds.), *Viking – Laval – Rüffert: consequences and policy perspectives*, Brussels, ETUI, 2010, 8-9; H. VAN MEERTEN and E. SCHMIDT, "Compulsory membership of pension schemes and the free movement of services in the EU", *EJSS* 2017, vol. 19(2), (118) 127.
[112] ECJ 11 December 2007, nr. C-438/05, ECLI:EU:C:2007:772, 'Viking', par. 61.
[113] P. PECINOVSKY, *Arbeidsrecht deel 3*, Brugge, die Keure, 2017, 544.

"*ITF, […], maintains that the restrictions at issue in the main proceedings are justified since they are necessary to ensure the protection of a fundamental right recognised under Community law and their objective is to protect the rights of workers, which constitutes an overriding reason of public interest.*

In that regard, it must be observed that the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty.[114]

[…] In the present case, it is for the national court to ascertain whether the objectives pursued by FSU and ITF by means of the collective action which they initiated concerned the protection of workers."[115]

In any event, the collective action needs to be proportional as well.[116]

B. Laval

57. **FACTS OF THE CASE** - The Laval case was about a Latvian company, which posted Latvian employees to work for construction companies in Sweden. The Swedish trade unions started collective action against Laval in order to force them into negotiations with this trade union on the rates of pay for posted workers.[117] The Swedish trade unions feared that otherwise the posted workers would receive lower pay and worse labour conditions and would undercut local wages and local standards. However, the employers considered that their freedom of services was hindered by the industrial action, which was effectively preventing them from carrying out their building projects.[118]

58. **ECJ JUDGEMENT** - The ECJ acknowledged in this case again the fundamental right to take collective action.[119], but it ruled that in this case it was illegal with respect to article 56 TFEU and

[114] ECJ 11 December 2007, nr. C-438/05, ECLI:EU:C:2007:772, 'Viking', par. 76-77.
[115] ECJ 11 December 2007, nr. C-438/05, ECLI:EU:C:2007:772, 'Viking', par. 80.
[116] ECJ 11 December 2007, nr. C-438/05, ECLI:EU:C:2007:772, 'Viking', par. 84; A. BÜCKER and W. WARNECK. (eds.), *Viking – Laval – Rüffert: consequences and policy perspectives*, Brussels, ETUI, 2010, 8-9; J. MALMBERG, "The impact of the ECJ judgements on Viking, Laval, Rüffert and Luxembourg on the practice of collective bargaining and the effectiveness of social action", *EMPL* 2010, 5, (http://www.europarl.europa.eu/document/activities/cont/201107/20110718ATT24274/20110718ATT24274EN.pdf).
[117] J. MALMBERG, "The impact of the ECJ judgements on Viking, Laval, Rüffert and Luxembourg on the practice of collective bargaining and the effectiveness of social action", *EMPL* 2010, 5, (http://www.europarl.europa.eu/document/activities/cont/201107/20110718ATT24274/20110718ATT24274EN.pdf).
[118] ECJ 18 December 2007, nr. C-341/05, ECLI:EU:C:2007:809, 'Laval', par. 27-38; D. CHALMERS, G. DAVIES and G. MONTI, *European Union law: text and materials*, Cambridge, Cambridge University Press, 2014, 817.
[119] ECJ 18 December 2007, nr. C-341/05, ECLI:EU:C:2007:809, 'Laval', par. 91; P. PECINOVSKY, *Arbeidsrecht deel 3*, Brugge, die Keure, 2017, 545.

the Posting of workers Directive.[120] Unlike the Viking judgement, the Court did express in this case an explicit opinion on the possible justification. On the one hand, the collective action had a legitimate objective: protecting the interest of host state workers against social dumping. On the other hand, collective action cannot be justified by this objective because the obligations (payment of the high Swedish salary) that followed from the intended accession to the collective agreement are inadmissible since they are contrary to the Posting of Workers Directive. [121]

59. **CRITICISM ON BOTH CASES -** In both the Viking and Laval cases, the refusal to exclude the right to strike from the scope of the internal market rules was criticised. It was made clear by the Court that the Albany exception was not being transferred to the provisions on the freedom of services. An argument was that the Court is giving precedence to economic freedoms over social rights. The second criticism was that the EU has no legislative power over the right to strike and thus that the ECJ should have refrained from ruling on this.[122]

C. Rüffert

60. **FACTS OF THE CASE –** The Rüffert case refers to the construction of a German prison. According to the law of the particular German region the contractor must undertake to pay at least the remuneration that was prescribed by a collective agreement. This clause was also part of the public contract with the German contractor. The contractor subcontracted work to a Polish service provider and the Polish workers were paid lower wages than prescribed by the collective agreement. Because the German contractor did not comply with the contract with regards to this aspect, the contract was annulled and financial penalties were imposed on the constructor.[123] The German Court of Appeal referred the case to the ECJ to determine whether the public procurement rules in that particular German region are compatible with the freedom to provide services in the EU.

61. **ECJ JUDGEMENT** – The Court ruled that Directive 96/71/EC on the posting of workers is applicable in this case.[124] The court also noted that the German law did not foresee a minimum

[120] ECJ 18 December 2007, nr. C-341/05, ECLI:EU:C:2007:809, 'Laval', par. 95.
[121] Furthermore, the ECJ laid down in this judgement some strict interpretations regarding the Posting of Workers, but given the subject of this paper, this is of less importance. ECJ 18 December 2007, nr. C-341/05, ECLI:EU:C:2007:809, 'Laval', par. 69-71; ECJ 18 December 2007, nr. C-341/05, ECLI:EU:C:2007:809, 'Laval', par. 108-111; P. PECINOVSKY, *Arbeidsrecht deel 3*, Brugge, die Keure, 2017, 545.
[122] P. PECINOVSKY, *Arbeidsrecht deel 3*, Brugge, die Keure, 2017, 546.
[123] ECJ 3 April 2008, nr. C-346/06, ECLI:EU:C:2008:189, 'Rüffert', par. 10-16; J. MALMBERG, "The impact of the ECJ judgements on Viking, Laval, Rüffert and Luxembourg on the practice of collective bargaining and the effectiveness of social action", *EMPL* 2010, 6, (http://www.europarl.europa.eu/document/activities/cont/201107/20110718ATT24274/20110718ATT24274EN.pdf).
[124] ECJ 3 April 2008, nr. C-346/06, ECLI:EU:C:2008:189, 'Rüffert', par. 19-20.

wage, but only the collective agreement that was not generally applicable, as it only applied to public construction contracts.[125] Again, the ECJ underlined in this case the need for justifying the restriction of the freedom to provide services. In this case, the given justification, which was the protection of workers' interests, was rejected by the Court. The reason for this was that the collective agreement was not generally applicable and the private sector workers did not benefit from the German law.[126] Also, the ECJ did not accept the financial sustainability of social security systems or the autonomy of trade unions as justifications for any restriction[127] and eventually, the Court found a violation of article 56 TFEU.[128]

D. Kattner Stahlbau

62. **FACTS OF THE CASE** – This case was about compulsory affiliation to social insurance schemes for labour-related accidents. The German private company Kattner did not want to join the compulsory insurance scheme for labour accidents and asked to opt out or cancel the affiliation to this scheme. The provider of the scheme answered that this was not possible and that it was compulsory to join the scheme. As a result, the provider started proceedings against Kattner.[129] Kattner appealed and the Appeal Court asked some preliminary questions to the ECJ including the following: "*does compulsory affiliation of Kattner to this scheme infringe Community law?"*[130] In particular, Kattner had argued that there had been an infringement of the freedom of services and that there were no overriding reasons of public interest to justify the monopoly of the insurance provider.[131]

63. **ECJ JUDGEMENT** – First, the ECJ concluded that the competition rules did not apply to Kattner Sthalbau, since they are not engaged in economic activities.[132] Secondly, the ECJ ruled in this case that it is up to the Member States to regulate social security matters.[133] But when exercising this prerogative, Member States have to bear in mind that they do not violate the freedom of services provisions. The Court even emphasised this very clearly for compulsory affiliation: "*The system of compulsory affiliation laid down in the national legislation at issue in the main*

[125] ECJ 3 April 2008, nr. C-346/06, ECLI:EU:C:2008:189, 'Rüffert', par. 30-31.
[126] ECJ 3 April 2008, nr. C-346/06, ECLI:EU:C:2008:189, 'Rüffert', par. 39-41.
[127] ECJ 3 April 2008, nr. C-346/06, ECLI:EU:C:2008:189, 'Rüffert', par. 41-42; A. BÜCKER and W. W ARNECK. (eds.), *Viking – Laval – Rüffert: consequences and policy perspectives*, Brussels, ETUI, 2010, 11.
[128] A. BÜCKER and W. WARNECK. (eds.), *Viking – Laval – Rüffert: consequences and policy perspectives*, Brussels, ETUI, 2010, 11.
[129] ECJ 5 March 2009, nr. C-350/07, ECLI:EU:C:2009:127, 'Kattner Sthalbau', par.13-18.
[130] ECJ 5 March 2009, nr. C-350/07, ECLI:EU:C:2009:127, 'Kattner Sthalbau', par. 22.
[131] ECJ 5 March 2009, nr. C-350/07, ECLI:EU:C:2009:127, 'Kattner Sthalbau', par. 9.
[132] ECJ 5 March 2009, nr. C-350/07, ECLI:EU:C:2009:127, 'Kattner Sthalbau', par. 66.
[133] ECJ 5 March 2009, nr. C-350/07, ECLI:EU:C:2009:127, 'Kattner Sthalbau', par. 74.

proceedings must be compatible with the provisions of Articles 49 EC (now: Art. 56 TFEU) *and 50 EC* (now: art. 57 TFEU)."[134] The Court continued that the system that was set up in Kattner may constitute a restriction on the freedom to provide services, because it '*hinders or renders less attractive, or even prevents, directly or indirectly, the exercise of that freedom*'[135] both the insurance companies established outside the concerned Member State, who want to offer their services in the concerned Member State, as well as the companies, their freedom to select a provider from abroad might be affected.[136] The Court ruled that such a restriction might be justified by an overriding reason of 'public interest', such as the objective of ensuring the financial equilibrium of a branch of social security. Moreover, the restriction needed to be proportionate as well and must be suitable to obtain the pursued objective.[137] Finally, the Court concluded that there was no direct discrimination in this case.[138]

E. UNIS

64. **FACTS OF THE CASE** - The Union des Syndicats de l'Immobilier (UNIS) and Beaudout Père et Fils SARL wanted an annulment of two collective agreements that were made generally applicable by the French Minister for Labour in the given sector, because these agreements appointed only one insurer for the reimbursement scheme of healthcare costs. [139] UNIS argued that these binding collective agreements were "*against the obligation of transparency arising from the principles of non-discrimination on grounds of nationality and of equal treatment, which derive from article 56 TFEU*."[140]

65. **ECJ JUDGEMENT** – When national authorities exercise an exclusive right, the principle of transparency must be complied with. For instance, when the authorities declare a collective agreement binding *erga omnes*. This principle implies equal treatment and non-discrimination.[141] The ECJ nuances that this principle does not necessarily require a public call for tenders, but it

[134] ECJ 5 March 2009, nr. C-350/07, ECLI:EU:C:2009:127, 'Kattner Sthalbau', par. 76.
[135] ECJ 5 March 2009, nr. C-350/07, ECLI:EU:C:2009:127, 'Kattner Sthalbau', par. 82; H. VAN MEERTEN and E. SCHMIDT, "Compulsory membership of pension schemes and the free movement of services in the EU", *EJSS* 2017, vol. 19(2), (118) 126-127.
[136] ECJ 5 March 2009, nr. C-350/07, ECLI:EU:C:2009:127, 'Kattner Sthalbau', par. 83; H. VAN MEERTEN and E. SCHMIDT, "Compulsory membership of pension schemes and the free movement of services in the EU", *EJSS* 2017, vol. 19(2), (118) 126-127.
[137] ECJ 5 March 2009, nr. C-350/07, ECLI:EU:C:2009:127, 'Kattner Sthalbau', par. 84; H. VAN MEERTEN and E. SCHMIDT, "Compulsory membership of pension schemes and the free movement of services in the EU", *EJSS* 2017, vol. 19(2), (118) 126-127.
[138] ECJ 5 March 2009, nr. C-350/07, ECLI:EU:C:2009:127, 'Kattner Sthalbau', par. 92.
[139] ECJ 17 December 2015, nr. C-25/14, ECLI:EU:C:2015:821, 'UNIS', par. 10-11.
[140] ECJ 17 December 2015, nr. C-25/14, ECLI:EU:C:2015:821, 'UNIS', par. 11.
[141] ECJ 17 December 2015, nr. C-25/14, ECLI:EU:C:2015:821, 'UNIS', par. 38.

does require "*a high degree of publicity sufficient to enable, on the one hand competition to be opened up and, on the other hand, the impartiality of the award procedure to be reviewed*."[142] In that regard, when Member States create exclusive rights for certain service providers, they need to bear in mind the principle of transparency.[143] In that sense, the requirements of transparency, equal treatment and non-discrimination, must be met not only by the Member States, but also by the social partners.[144] Eventually, the ECJ decided that in this case the principle of transparency was not met and thus the extension of the collective agreement should have been precluded.[145]

§3. Compulsory membership in the national context

66. **SUMMARY OF ABOVE CASE LAW -** The above case law with regards to freedom to provide services can be summarized as follows. Restrictions are in principle permissible. However, discriminatory restrictions can only be justified by one of the grounds of art. 52 TFEU (e.g. national pension funds are treated more favourably than providers from another Member State) and non-discriminatory measures must be applied in a non-discriminatory manner. This means that they have to be justified by overriding reasons based on the general interest. Moreover, they have to be suitable for obtaining the pursued objective and must not go beyond what is necessary to obtain that objective.[146] Lastly, the requirement of transparency should be met by both the Member States, as well as the social partners.[147]

SECTION II. COMPARISON: COMPULSORY MEMBERSHIP IN A SELECTION OF MEMBERSTATES

§1. Belgium

67. **BELGIAN PENSION SYSTEM -** The Belgian pension system can be divided into three pillars. The first pillar consists of a statutory pension scheme and is seen as the most important one. This pension scheme covers employees, the self-employed and civil servants. In the private sector the first-pillar schemes are part of social security while, in general, social security is financed by

[142] ECJ 17 December 2015, nr. C-25/14, ECLI:EU:C:2015:821, 'UNIS', par. 39 and 44.
[143] ECJ 17 December 2015, nr. C-25/14, ECLI:EU:C:2015:821, 'UNIS', par. 41; H. VAN MEERTEN and E. SCHMIDT, "Compulsory membership of pension schemes and the free movement of services in the EU", *EJSS* 2017, vol. 19(2), (118) 127.
[144] H. VAN MEERTEN and E. SCHMIDT, "Compulsory membership of pension schemes and the free movement of services in the EU", *EJSS* 2017, vol. 19(2), (118) 128.
[145] ECJ 17 December 2015, nr. C-25/14, ECLI:EU:C:2015:821, 'UNIS', par. 46.
[146] H. VAN MEERTEN and E. SCHMIDT, "Compulsory membership of pension schemes and the free movement of services in the EU", *EJSS* 2017, vol. 19(2), (118) 127.
[147] ECJ 17 December 2015, nr. C-25/14, ECLI:EU:C:2015:821, 'UNIS', par. 46.

salary-related contributions in the case of employees and the self-employed. The second pillar consists of occupational pension schemes for employees and the self-employed. These schemes cover about 75 percent of employees through single or group company schemes or schemes covering a whole sector of employment. These occupational pension schemes are organised through pension funds and group insurances and in practice, an overwhelming majority of pay-outs happen in the form of a lump sum. The third pillar is made up of personal retirement savings and life insurance schemes.[148]

68. **COLLECTIVE AGREEMENTS IN BELGIUM –** In Belgium multiple types of collective agreements exist. The first type is the collective agreement at company level between the company and one or more trade unions.[149] For this type of collective agreement, the scope of application is determined in the agreement itself. The second type is the sectoral collective agreement, which is bargained between the social partners in the Joint Committee[150] and can be made generally applicable by the King. When this is the case, the extension of the collective agreement will be binding for an entire sector and employers and employees that were not parties to the collective agreement, can be obliged to join the scheme.[151] Finally, a third type of agreement is the collective agreement at national level. This agreement is concluded in the Belgian National Labour Council[152] and is generally applicable to all employers and employees in Belgium.[153]

69. **COMPULSORY MEMBERSHIP IN BELGIUM?** – The occupational pension plans can be either employer/company based or sectoral based but both have a non-compulsory character. In other words, employers or social partners voluntarily decide if they provide occupational pensions. Nevertheless, if the social partners decide to provide a sectoral occupational pension scheme based on a collective labour agreement that was made generally applicable by the King, an employer can be obliged to join that scheme. For employees the situation is somewhat different.

[148] The 2018 Pension Adequacy Report: current and future income adequacy in old age in the EU (2018), *DG EMPL and SPL*, Volume II catalogue n° KE-01-18-458-EN-N, 9-10.
[149] H. DE MUYNCK, *Sociaal recht in België*, Gent, Academia press, 2009, 189.
[150] A joint Committee in Belgium is a permanent body at sectoral or subsectoral level on which representative employers' associations and trade unions are represented. They are established only for the private sector, with the exception of public credit institutions; EUROFUND, *Joint Committee Belgium*, *(*https://www.eurofound.europa.eu/efemiredictionary/joint-committee*).*
[151] H. VAN MEERTEN and E. SCHMIDT, "Compulsory membership of pension schemes and the free movement of services in the EU", *EJSS* 2017, vol. 19(2), (118) 133.
[152] The present National Labour Council is composed of a maximum of twenty-four members with an equal number of substitutes. As a joint body, its composition is equally divided between representatives of the most representative employers' associations and trade unions. The innovation introduced by the 1968 Collective Agreements and Joint Committees Act is of great importance. It empowered the National Labour Council to conclude collective agreements covering a number of different industries and applicable over the whole of Belgium.; EUROFOUND, *National Labour Council Belgium*, (https://www.eurofound.europa.eu/efemiredictionary/national-labour-council).
[153] Art. 7 CAO-wet; H. DE MUYNCK, *Sociaal recht in België*, Gent, Academia press, 2009, 190.

They are in general obliged to join the pension scheme and membership is thus compulsory.[154] However, employees already working for the employer at the time of instauration of the scheme can decide not to join the scheme or postpone their membership, if this possibility is enacted in the regulation of the scheme, unless the scheme was introduced via a collective agreement or the scheme qualifies as a 'social' scheme.[155]

70. The collective agreement upon which the occupational pension scheme is based, determines the pension's rules and choses the pension provider. There is no nationality requirement for this provider.[156] It is possible for companies to opt-out of a binding sectoral pension scheme, when this option is explicitly foreseen in the collective agreement. If a company wants to make use of this opting-out option, it has to offer a company scheme for all employees who would normally have fallen within the scope of the sectoral pension scheme. Furthermore, the level of protection offered by the company scheme has to meet at least the same level of protection as the sectoral scheme.[157]

71. To conclude, in Belgium the employers or social partners decide voluntarily if they want to establish an occupational pension scheme. But when the social partners decide to provide a binding sectoral pension scheme, membership to this scheme is compulsory for all employers in that sector. Moreover, the employees' membership to the pension scheme is always compulsory.

72. **TRANSPOSING LAW OF IORP II DIRECTIVE BELGIUM -** Belgium usually figures among the 'good student' member states, having already transposed Directive (EU) 2016/2341 into Belgian law and thus respecting the deadline for transposing the Directive into national law. The Belgian act on IORPs has changed a little bit with the incorporation of the provisions of the Directive. In the past Belgium put itself on the map as one of the prime locations for pension funds of other Member States. To this end, the Belgian law created a specific, flexible legal entity (the OFP) and a generous tax regime was foreseen.[158] For the Belgian IORP act, it is important to note that the Directive does not impose quantitative capital requirements on IORPs, such as those that are

[154] Explanatory Memorandum to the Act on Supplementary Pensions (WAP), *Parl. St.* Chamber 2015-2016, nr. 1510/001, section 3; H. VAN MEERTEN and E. SCHMIDT, "Compulsory membership of pension schemes and the free movement of services in the EU", *EJSS* 2017, vol. 19(2), (118) 133.
[155] Art. 15 WAP.
[156] Art. 3, §1, 16° WAP and art. 2, 1 wet van 27 oktober 2006 betreffende het toezicht op de instellingen voor bedrijfspensioenvoorziening; H. VAN MEERTEN and E. SCHMIDT, "Compulsory membership of pension schemes and the free movement of services in the EU", *EJSS* 2017, vol. 19(2), (118) 133.
[157] C. VAN SCHOUBROECK and Y. STEVENS, *Aanvullende sociale verzekeringen*, Leuven, VRG, 2018, 45-48.
[158] CLAEYS & ENGELS, "Newsletter: The New Act on IORPs is coming", *Ius laboris Belgium* January 2019, 1 and 6.

applicable to insurance companies.[159] The provisions on cross-border activities - these are activities that exist when the home Member State of the IORP differs from the host Member State of the contributing company and the employee[160] - in the Belgian IORP act are transposed almost word for word from the Directive and do not impose additional rules.[161]

73. **FOREIGN IORPS IN BELGIUM –** Would this be possible if a Belgian IORP would like to broaden its playing field by providing services in the Netherlands as well? According to article 11 of the IORP II Directive this is a possibility: "[…] *Member States shall allow an IORP registered or authorised in their territories to carry out a cross-border activity.*"[162] Prior authorisation by the relevant competent authority in the home Member State is needed.[163] For Belgium this competent authority would be the FSMA. If the FSMA agrees to the cross-border activity, it shall communicate the received information to the competent authority of the host Member State (for the Netherlands this will be the AFM) and inform the IORP accordingly.[164] The AFM will then inform the FSMA about the requirements of social and labour law relevant to the field of occupational pension schemes under which the IORP must operate in the host Member State. Subsequently, the FSMA shall communicate this information to the IORP.[165] Finally, the IORP can begin carrying out its cross-border activity in accordance with the national legal requirements of the host Member State, in that way becoming subject to the supervision of the AFM.[166] This exact procedure is in Belgium transposed into the articles 64-68 of the Belgian IORP act.[167] In

[159] DIRECTIVE 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II); CLAEYS & ENGELS, "Newsletter: The New Act on IORPs is coming", *Ius laboris Belgium* January 2019, 6.
[160] Art. 6 (19)) of Directive (EU) 2016/2341 of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORP II); S. DEFREYNE, "IORP II: The New European Pension Fund Directive", *Vanbreda Risk & Benefits,* (https://www.vanbreda.be/en/news/iorp/*)*.
[161] T. KEUNEN, *Holistic balance sheet approach: impact on Belgian IORPs*, masterthesis KU Leuven, 2013, 14.
[162] Art. 11 (1) of Directive (EU) 2016/2341 of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORP II); art. 69 law of 27 October 2006 betreffende het toezicht op de instellingen voor bedrijfspensioenvoorziening.
[163] Art. 11 (2) of Directive (EU) 2016/2341 of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORP II); art. 65 and 69/3-69/4 law of 27 October betreffende het toezicht op de instellingen voor bedrijfspensioenvoorziening.
[164] Art. 11 (4) of Directive (EU) 2016/2341 of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORP II); art. 66 and 69/5-69/6 law of 27 October 2006 betreffende het toezicht op de instellingen voor bedrijfspensioenvoorziening.
[165] Art. 11 (7) of Directive (EU) 2016/2341 of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORP II); art. 67 and 69/7 law of 27 October 2006 betreffende het toezicht op de instellingen voor bedrijfspensioenvoorziening.
[166] Art. 11 (8) and (10) of Directive (EU) 2016/2341 of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORP II); art. 68 law of 27 October 2006 betreffende het toezicht op de instellingen voor bedrijfspensioenvoorziening.
[167] Art. 64-68 law of 27 October 2006 betreffende het toezicht op de instellingen voor bedrijfspensioenvoorziening.

conclusion, the national authorities have the final say on carrying out a cross-border activity as an IORP, since their prior approval is necessary.

§2. France

FRENCH PENSION SYSTEM – The French pension system can be divided into three pillars. On the one hand, the first pillar consists of a statutory pension scheme and of a pension scheme that is set up and governed by the social partners (hereafter referred to as "paritarian pension scheme"). The statutory pension scheme is part of the national social security system and includes a general scheme (which covers two thirds of the working population), an agricultural scheme, a scheme for the self-employed and special schemes for some types of employees (train drivers, civil servants, …).[168] This statutory pension is complemented by a paritarian scheme in the case of wage-earners in the private and farmer sectors (around 70% of the working population). This scheme is compulsory by law as well, because it's financed on a pay-as-you-go basis[169] and is administered by AGIRC-ARRCO.[170] AGIRC was established in 1947 by the social partners for the managers and other executive staff. In 1972 the same thing happened for all the employees in the private sector and from then on, it was obligated to contribute to this pension scheme. In 2015, due to financial and logistic reasons, French social partners decided that AGIRC and ARRCO should merge. In 2019 this merge went into force and a new regime is being implemented through agreements of the social partners.[171]

74. On the other hand, the French pension system has a second and third pillar. In France the second pillar consists of occupational pension schemes. The two most important types of occupational pensions are the DB- and DC-schemes. The DB-schemes are mostly offered to a limited number of senior managers employed in large companies[172], while the DC-schemes cover a large number of workers. Both schemes can be made generally applicable by a decision of the competent

[168] The 2018 Pension Adequacy Report: current and future income adequacy in old age in the EU (2018), *DG EMPL and SPL*, Volume II catalogue n° KE-01-18-458-EN-N, 9-10.
[169] Droit-Finances, "Retraite complémentaire - Définition et obligations", *Droit-Finances* maart 2019, (https://droit-finances.commentcamarche.com/contents/1180-retraite-complementaire-definition-et-obligations#obligatoire).
[170] CLEISS, "The French social security system III Retirement", *Cleiss* 2018, (https://www.cleiss.fr/docs/regimes/regime_france/an_3.html).
[171] Cfdt: retraités, "Agirc-Arrco et Ircantec Pourquoi des retraites complémentaires?", *Fiche 31 Cfdt*, (https://www.xn--cfdt-retraits-mhb.fr/31-Agirc-Arrco-et-Ircantec-Pourquoi-des-retraites-complementaires).
[172] M. NACZY and B. PALIER, "Complementing or replacing old age insurance? The growing importance of funded pensions in the French pension system", *Working papers on the reconciliation of work and welfare in Europe* 2010, REC-WP 08/2010, (*http://www.socialpolicy.ed.ac.uk/__data/assets/pdf_file/0018/44082/REC-WP_0810_Naczyk_Palier.pdf*); H.VAN MEERTEN and E. SCHMIDT, "Compulsory membership of pension schemes and the free movement of services in the EU", *EJSS* 2017, vol. 19(2), (118) 134.

minister.[173] These occupational pension schemes may be administered by insurance companies, pension funds and mutual societies.[174] Because of substantial cuts in all kinds of pension schemes, the gradual growth of third pillar schemes started. This pillar offers a wide range of private life insurance contracts used as savings for retirement as well as personal pension products.[175] Joining such a private pension scheme is always voluntary.

75. **COLLECTIVE AGREEMENTS IN FRANCE** – In France collective agreements can be concluded at the national, sectoral and company level. The formal collective bargaining coverage is very high in France due to the frequent extensions of industry level agreements to all employers. Such an extension may be requested either by one or both parties of the agreement, or by the government. In order for the request to be valid, the agreement must be 'representative'. This means that it needs to be signed by trade unions representing at least 30% of the votes at sector level and at least one employers' federation, which is recognised as representative. The request is then examined by the National Collective Bargaining Commission[176], which formulates an advice. In the end the Ministry of Labour takes a decision for the extension.[177]

76. **COMPULSORY MEMBERSHIP IN FRANCE?** – France used to have compulsory membership until 2013 in regard to schemes for disability and death benefits as well as health insurance benefits. In the past the French social partners were free to bargain a sectoral collective agreement including a clause designating a provider with which companies were required to insure their employees. In exchange for this exclusivity, the provider was required to cover all the employees in the sector.[178] The French Court of Cassation even decided that the designation clauses were valid in the light of the competition rules.[179] In 2012 the French Court of Cassation followed the AG2R Prévoyance case law and ruled once more that designation clauses were valid.[180] In 2013

[173] Art. L.911-3 of the French Social Security Code.
[174] J. NAIMI, 'L'IRP entrebâille la porte des fonds de pension paneuropéens, *L'Agefi Actifs,* vol. 302, 10-11.
[175] M. NACZY and B. PALIER, "France: promoting funded pensions in Bismarckian corporatism?" in B. EBBINGHAUS (ed.), *The varieties of pension governance: pension privatization in Europe*, Oxford, Oxford University Press, 2011, 348-350; H.VAN MEERTEN and E. SCHMIDT, "Compulsory membership of pension schemes and the free movement of services in the EU", *EJSS* 2017, vol. 19(2), (118) 134.
[176] Tripartite body which must be consulted before a collective agreement is extended or before the SMIC is raised. It also has general responsibilities of review and recommendation with respect to collective bargaining. EUROFOUND, "*National Collective Bargaining Commission*", (https://www.eurofound.europa.eu/efemiredictionary/national-collective-bargaining-commission).
[177] C. ERHEL, *Presentation of the French case*, 24 October 2017, (ec.europa.eu/social/BlobServlet?docId=18595&langId=en); L. FULTON, *Collective bargaining. France*, 2015, (*https://www.worker-participation.eu/National-Industrial-Relations/Countries/France/Collective-Bargaining*).
[178] Old art. L. 912-1 of the French Social Security Code.
[179] Cass. (FR) 10 March 1994, nr. 91-11.516.
[180] AG2R Prévoyance v Beaudout Père et Fils SARL (C-437/09) [2011] EU:C:2011:112; Cass. (FR) 27 November 2012, nr. 11-18.556.

a new law on the protection of employment was adopted and now an explicit legal basis was given to the designation clauses.[181] On 13 June 2013, when article 1 of the law of 14 May 2013 on the protection of employment was examined, the French Constitutional Court found art. L. 912-1 of the French Social Security Code, that was amended by this law of 14 May 2013, unconstitutional, and therefore, the practise of designation clauses came to an end. The Court ruled that these clauses were against the freedom of enterprise and freedom of contract. The Court was critical for this clause because companies were bound to the designated provider by the sectoral agreement.[182] The grounds given for this decision are almost the same as the ones in the Albany case, but strangely enough these grounds led to an opposite outcome:

> The French Constitutional Court rules: *"Considering that it follows from all the foregoing that the provisions of Article L. 912-1 of the Social Security Code make a disproportionate infringement to the freedom to enterprise and the freedom to contract with regard to the pursued goal of risk pooling; that, without it being necessary to examine the other grievances directed against 2 ° of paragraph II of article 1 of the referred law, these provisions as well as those of the article L. 912-1 of the code of the social security must be declared contrary to the Constitution"*[183] (Own translation) (Own underlining)
>
> The ECJ rules in the Albany judgement: "*It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment. It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty*."[184] (own underlining)

[181] French law of 14 May 2013 on the protection of employment; Art. L. 912-1 of the French Social Security Code.
[182] J. BARTHELEMY, "Protection sociale complémentaire. La survie des clauses de désignation", *Droit Social* 2014, vol. 12, (1057) 1062.
[183] Constitutional Court (FR) 13 June 2013, nr. 2013-672 DC, paragraph 13.
[184] ECJ 21 September 1999, nr. C-67/96, ECLI: EU:C:1999:430, 'Albany', paragraphes 59-60; J. BARTHELEMY, "Protection sociale complémentaire. La survie des clauses de désignation", *Droit Social* 2014, vol. 12, (1057) 1062.

77. In other words: a collective agreement including a designation clause did not constitute a prohibited agreement between companies in the Albany case, whilst it was prohibited by the French Constitutional Court. After this decision, a legislative intervention was necessary, and a new article L912-1 of the Social Security Code was established.[185] The new article stipulates that it is possible for the social partners to make a recommendation in the sectoral collective agreement of a provider to manage the social protection scheme, as long as a transparent competitive bidding procedure took place.[186] Hence, the companies are now free to choose a provider, since the recommendation is not binding. For the time being, not many companies have chosen to actually change providers. AG2R is still the biggest provider in France and that probably will not change soon, since this insurer has a lot of experience with the special needs of each sector.[187]

78. **NO COMPULSORY MEMBERSHIP -** In conclusion, France has had compulsory membership for schemes based on collective agreements concerning disability, death benefits and health insurance benefits. Since 2013 this has changed, so France does not have compulsory membership anymore in relation to these schemes. In other words, companies have now the possibility to opt out of the scheme that is offered by the sectoral collective agreement.

§3. Ireland

79. **IRISH PENSION SYSTEM** – The pension system in Ireland consists of three pillars as well. Within the social security system, the first pillar consists of a compulsory state pension. This social insurance system provides a contributory state pension and a non-contributory, means-tested social assistance state pension. This last type is financed out of general taxation and is thus not covered by the social security system. These two pensions are paid at the age of 66. A second pillar, consisting of a voluntary occupational pension, can supplement the first pillar. These pensions may be provided by employers, often through collective negotiation with trade unions and groups of employees. Finally, the third pillar is made up for a personal pension. These plans address mainly employees who are not covered by the occupational plan or for individuals who are not employed.[188] Coverage by the private pension is generally voluntary, although in certain

[185] Art. 14 law of 23 December 2013.
[186] L.912-1 to the Social Security Code.
[187] AG2R la Mondiale, (https://www.ag2rlamondiale.fr/nous-connaitre/notre-identite).
[188] G. HUGHES and J. STEWART, "Public and private provision of pensions and the ideal pension system for Ireland" in D. M. MUIR and J.A. TURNER (eds.), *Imagining the ideal pension system. International perspectives*, Michigan, W.E. Upjohn Institute for employment research, 2011, (77) 80-82.

sectors such as the public service and semi-state sector, pension membership is compulsory.[189] Ireland tries to give incentives to employers and employees to provide private pensions by giving tax relief. According to the European Commission's 2018 Pension Adequacy Report, in Ireland: "*supplementary pension coverage, which includes occupational and personal pensions, varies from around 90 percent in the public sector to approximately 35 percent in the private sector with overall coverage amounting to 47 percent."* [190]

80. **COMPULSORY MEMBERSHIP IN IRELAND? –** By 2022 Ireland wants to have an auto-enrolment system for employees with mandatory employer contributions and a matching state contribution in order to supplement the state pension[191]. The scheme is designed to encourage more fair pension provisions than the current system of tax relief. Furthermore, the scheme is 'quasi-compulsory', meaning that there is an opting-out mechanism, which allows people to temporarily step out of the saving for retirement when they need to do so. The employees are automatically enrolled into this scheme unless they are already a member of their employer's scheme and that scheme provides higher contribution levels or is a defined benefit scheme.[192]

[189] L.A. GALLAGHER and F. RYAN, "Policy paper: a portfolio approach to assessing an auto-enrolment pension scheme for Ireland", *The Economic and Social Review* 2017, vol. 48 (4), (515) 517.
[190] The 2018 Pension Adequacy Report: current and future income adequacy in old age in the EU (2018), *DG EMPL and SPL,* Volume II catalogue n° KE-01-18-458-EN-N, 65-67.
[191] B. MCCALL, "Auto-enrolment now a reality", *The Irish Times* 26 October 2018.
[192] L.A. GALLAGHER and F. RYAN, "Policy paper: a portfolio approach to assessing an auto-enrolment pension scheme for Ireland", *The Economic and Social Review* 2017, vol. 48 (4), (515) 518.

CONCLUSIONS

81. Having performed an extensive analysis of the ECJ jurisprudence as well as of the regulatory and institutional framework in a few Member States, we can attempt to draw several relevant conclusions on compulsory membership in pension schemes as well as in schemes concerning disability, death benefits and health insurance in the case of France.

82. **CONCLUSIONS FOR COMPETITION LAW** - The limits of compulsory membership are determined by the ECJ, hence the legal justification of compulsory membership relies very much on EU jurisprudence. In the context of competition law, compulsory membership remains valid in the future thanks to the Albany exception. In particular, the Albany case sets out certain cumulative conditions that must be met by the social partners, in order for competition law not to be applicable. This means that on the one hand a social goal is needed, and on the other hand the collective agreement must be the result of negotiations between the social partners. If both conditions are met, the compulsory membership set out in a collective agreement will be safe, in the sense that it will fall outside the scope of competition law. For collective agreements in the public sector providing compulsory membership, a more severe evaluation of the conditions can be expected in order to fall within the Albany exception and avoid the application of competition rules. Collective agreements which are bargained for the self-employed, cannot be seen as 'negotiated between the social partners' and therefore cannot enjoy the Albany exception. However, those who are false self-employed do fall under the Albany exception, according to the ECJ.[193]

83. **CONCLUSIONS FOR FREEDOM OF SERVICES** - The case law with regards to freedom of services, can be summarized as follows. Restrictions are in principle permissible; nevertheless, discriminatory restrictions can only be justified by one of the grounds of art. 52 TFEU for reasons of public policy, public security and public health) while non-discriminatory measures have to be justified by overriding reasons based on the general interest. Moreover, the measures have to be suitable for obtaining the pursued objective and not go beyond what is necessary to obtain that objective (proportional). Lastly, the requirement of transparency should be met by both the Member States as well as the social partners.

84. **A COMPARISON BETWEEN COMPETITION LAW AND FREEDOM OF SERVICES** – As mentioned earlier, a social goal is needed to enjoy the Albany exception and be exempted from the provisions

[193] ECJ 4 December 2014, nr. C-413/13, ECLI:EU:C:2014:2411, 'FNV Kunsten Informatie en Media', par. 31 and 41.

on competition law. This social goal is most likely to be seen as an overriding reason based on the general interest within the freedom of services. If thus a non-discriminatory collective agreement - justified by an overriding reason based on the general interest - is proportionate as well, this would mean that the compulsory membership established herein is safe. As far as discriminatory collective agreements are concerned which establish compulsory membership, only 'public policy, public security and public health' constitute a ground of justification. Thus, a collective agreement between social partners which has a social goal but is discriminatory, will fall under the Albany exception, but it will remain rather uncertain if it can be justified by the three justification grounds. In that case, a judge will have to rule on this. So, to conclude, in order for the compulsory membership to safe and survive the ECJ-test, it would be preferable for the social partners to bargain a non-discriminatory collective agreement with a social goal.

85. **COMPARISON COMPULSORY MEMBERSHIP IN DIFFERENT MEMBER STATES –** After a comparison of the national pension systems in the Netherlands, Belgium, France and Ireland, it can be concluded that only the Netherlands and Belgium have compulsory membership stricto sensu while Ireland will introduce it in the near future. In the Netherlands, compulsory membership forms an important part of the Dutch occupational pension system, as this is usually stipulated by the social partners in collective agreements that apply to an entire sector or profession. Both employers and employees are in general obligated to join these pension schemes, since exemptions are not often granted neither to employers nor to employees. Furthermore, there is a nationality requirement for providers in the Dutch occupational pension schemes. In Belgium and France this is not the case. In Belgium an employer is free in general to provide a pension scheme for his employees. There is however one exception in the sense that an employer can be obliged to join an industry-wide pension scheme when the social partners of this sector have decided to set up a sectoral scheme based on a collective agreement made generally applicable by the King. Opting out from this sectoral pension scheme is only possible if it is explicitly foreseen in the collective agreement. Employees are in general obliged to join the pension scheme, but some exceptions are made in the Belgian law.[194] On the other hand, in France, compulsory membership based on collective agreements was present in the past, but it was abolished in 2013 by a judgement of the French Constitutional Court.[195] Today, there is a possibility for companies in France to opt out of the scheme that is offered by the sectoral collective agreement – once again,

[194] Art. 15 Wet 28 april 2003 betreffende de aanvullende pensioenen en het belastingstelsel van die pensioenen en van sommige aanvullende voordelen inzake sociale zekerheid (WAP).
[195] Constitutional Court (FR) 13 June 2013, nr. 2013-672 DC.

we stress that such schemes in France refer to disability and death benefits as well as health insurance benefits. In Ireland compulsory membership will earn a more prominent place in the Irish system due to the introduction of the auto-enrolment system for employees by 2022. This scheme will be quasi-compulsory, meaning that an opting-out mechanism will be foreseen. To conclude, compulsory membership remains important in these Member States but it remains to be seen how this will evolve in the following years.

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