SUMMARY

2015/53 Genuine or false self-employed substitutes? (NL)

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Facts

Before setting out the facts of this case it is useful to make some preliminary observations. The first is that Dutch law allows collective labour agreements to include provisions that are not directly related to terms of employment. Secondly, it is not only employees who can join a union. Self-employed individuals may also become a member of a union. A collective labour agreement may include terms for such self-employed workers. Thirdly, ECJ case law holds that the EU anti-trust rules (embodied principally in Article 101 TFEU) do not apply to

collective agreements between employers' associations and employees' associations that contribute directly to improving workers' employment and working conditions. This case law began in 1999 with the ECJ's ruling in the Albany case (C-430/99), for which reason the doctrine exempting collective agreements from the scope of Article 101 TFEU is sometimes referred to as the 'Albany doctrine'. Article 101 TFEU (formerly Article 81 EC) prohibits anti-competitive agreements and behaviour, including the fixing of 'selling prices'. Agreements prohibited by Article 101(1) TFEU "shall be automatically void".

This case concerns a collective agreement (the 'Collective Agreement') entered into between, on the one hand, an artists' union affiliated with the largest Dutch union FNV and, on the other, an association whose name is abbreviated as 'VSR'. This association represents organisations that hire out 'orchestra substitutes'. An orchestra substitute is a musician who stands in whenever a regular member of an orchestra is unable to attend a rehearsal or performance. A substitute may be an employee of the organisation that rents him or her out to an orchestra or a self-employed individual. The Collective Agreement included a provision (the 'Contested Provision') according to which the fee to be paid to a self-employed substitute for attending a rehearsal or performance must be no less than that paid to an employed substitute plus 16%. In December 2007, the Nederlandse Mededingingsautoriteit (the Netherlands Competition Authority, the 'NMa') took the position that the contested provision was not covered by the Albany doctrine and was therefore void. According to the NMa, a collective labour agreement which governs contracts for professional services by non-employees is "altered in its legal nature" (i.e. ceases to be a real collective labour agreement) and acquires the characteristics of an inter-professional agreement, in that it is negotiated on the trade union side by an organisation which acts in that respect, not as an employees' association, but rather as an association for self-employed workers. The trade union FNV, in effect being the contracting party of the collective agreement, disputed the position taken by the NMa. It brought a court action against the Dutch State, seeking a declaratory judgment that the contested provision was not in violation of competition law. It argued that the prohibition of agreements restricting competition does not apply to a provision of a collective labour agreement setting minimum fees for self-employed service providers performing the same activity for an employer as that employer's employed workers.

The Court of Appeal of The Hague referred questions to the Court of Justice ('ECJ'). In essence it asked whether, under EU law, a provision of a collective labour agreement, setting minimum fees for self-employed service providers who, under a contract for professional services, perform for an employer the same activity as that employer's employed workers, falls within the scope of Article 101(1) TFEU.

In its decision of 4 December 2014 (C-413/13), summarised in EELC 2014-4, the ECJ recalled

that, although some competition restrictions are inherent in collective agreements between organisations representing employers and employees, the social policy objectives pursued by such agreements would be seriously compromised if the contracting parties were subject to Article 101(1) TFEU when seeking jointly to adopt measures to improve conditions of work and employment. Agreements concluded in this collective bargaining process between employers and employees and intended to improve employment and working conditions, given their nature and purpose, do not fall within the ambit of that Article.

In the underlying matter, however, the collective agreement was concluded between an employers' organisation and employees' organisations of mixed composition, which negotiated not only for employed substitutes but also for affiliated self-employed substitutes. Therefore, the ECJ needed to examine whether the nature and purpose of this specific agreement enabled it to be included in collective negotiations between employers and employees and to justify its exclusion, with regard to minimum fees for self-employed substitutes, from the scope of Article 101(1) TFEU. In that analysis, the ECJ made a distinction between, briefly put, 'genuine self-employed substitutes' and 'false self-employed substitutes'.

Genuine self-employed substitutes that perform the same activities as employees are 'undertakings' within the meaning of Article 101(1) TFEU. Organisations representing these genuine self-employed substitutes do not act as trade union associations and therefore as a social partner, but in fact as associations of undertakings. The TFEU does not encourage genuine self-employed service providers to conclude collective agreements with a view to improving their terms of employment and work. Therefore, the contested provision concluded by an employees' organisation in its capacity as a body acting on behalf of genuine self-employed services providers who are its members, does not constitute the result of a collective negotiation between employers and employees. In such a case, it cannot be excluded from the scope of Article 101(1) TFEU.

If, however, the contested provision relates to 'false self-employed', things are different. False self-employed service providers are service providers in a situation comparable to that of employees. False self-employed contractors cannot be regarded as 'undertakings'. They lose their status of independent traders (undertakings) if they do not determine independently their own conduct on the market, but are entirely dependent on their principal, because they do not bear financial or commercial risks arising out of the principal's activity and operate as auxiliaries within the principal's undertaking. The term 'employee' must for the purpose of EU law be defined according to objective criteria. The essential feature of the employment relationship is that for a certain period of time one person performs services for and under the direction of another in return for which he or she receives remuneration. In that regard, the ECJ has already held that the classification of a 'self-employed person' under national law

does not prevent that person being classified as an employee within the meaning of EU law if his or her independence is merely notional, thereby disguising an employment relationship. A 'worker' is an employee according to EU law, regardless of the national treatment of that person, as long as that worker acts under the direction of the employer as regards, in particular, the freedom to choose the time, place and content of the work, he or she does not share in the employer's commercial risks, and, for the duration of the relationship, forms an integral part of the employer's undertaking, so forming an economic unit with that undertaking.

The ECJ made clear that it was up to the national court to decide whether the workers were genuine or false self-employed substitutes. Thus, it is for that court to ascertain whether, on the facts, the substitutes found themselves in the circumstances set out above and, in particular, whether their relationship with the orchestra was one of subordination during the contractual relationship, or whether they enjoyed more independence and flexibility than employees who performed the same activity, as regards determining working hours and the place and manner of performing the tasks assigned.

If the substitutes are false self-employed substitutes, the minimum fees scheme should be regarded as contributing directly to the improvement of the employment and working conditions of those substitutes. In that case, the contested provision cannot, by reason of its nature and purpose, be subject to the scope of Article 101(1) TFEU.

Judgment

The Court of Appeal of The Hague, to which the case returned following the ECJ's judgment, holds that the self-employed substitutes are musicians who fill in for one or more orchestras and, with the exception of a soloist substitute, perform the same work as the musicians that are employed by these orchestras. It therefore happens that a self-employed substitute works at the same worktable as an employee (or an employee substitute), playing exactly the same music. Self-employed substitutes, just like the employees of the orchestra, must attend work according to a fixed time schedule during concert rehearsals. They must, just like the employees, follow directions from the orchestra conductor. The quality of an orchestra production depends on continuity in the musicians. It is difficult to catch up with rehearsals at a later date. Self-employed substitutes may not be replaced by any other person appointed by them; if necessary the orchestra itself will arrange a replacement that meets the standards set by the orchestra itself. Self-employed replacements can, and usually do, earn income by performing this work, but also by acting as a music teacher. The self-employed substitutes must, according to the Court of Appeal, be regarded as 'false self-employed'. Contrary to genuine businesses, self-employed substitutes are in a subordinate relationship during the

contractual term. They must not only follow the directions of the conductor, but should also be present at rehearsals and concerts, just like musicians employed by the orchestra.

There is no flexibility or independence with respect to time schedules, place of work or how the work is performed.

The fact that self-employed substitutes are free to decide whether or not they enter into a contract, does not alter this analysis. The same applies to employee substitutes. Further, the position of a self-employed substitute should be considered during the contractual term, as this is the appropriate timeframe once the substitute has accepted the contract.

For these reasons, the self-employed substitutes had to be regarded as false self-employed substitutes, and the Collective Agreement setting out minimum fees did not fall within the ambit of competition law.

Commentary

The decision of the ECJ adds a third category to the existing categories of employees and self-employed service providers. The position of this newly introduced category of 'false self-employed service providers' falls somewhere between an employee and a genuinely self-employed service provider. The false employed service provider may, according to the ECJ, be offered protection in a collective labour agreement without the interference of competition law, but may be treated in the same way as genuinely self-employed service providers in all other respects.

In the Netherlands, the position of self-employed workers often raises questions. There are sometimes discussions about whether a self-employed worker is in fact an employee. The Dutch Civil Code even has legal assumptions in that regard: if a worker performs work for pay over three consecutives months on a weekly basis or for at least 20 hours per month, that worker is presumed to perform this work on the basis of an employment agreement. But even if the agreement proves to be a proper service contract, as opposed to an employment agreement, the position of these self-employed workers is not free from concern. It is argued, in particular by the trade unions, that these workers are open to exploitation by the stronger party and that they should be offered an additional level of protection.

At the same time, the trade unions wish to try to prevent a situation in which cheaper self-employed workers effectively push out more expensive employees (who might be members of that trade union). The solution for these problems is often sought in collective labour agreements. Dutch law, after all, allows collective labour agreements to cover service contracts. But this solution will be much harder to achieve following the ECJ's decision, as the only part

of the agreement exempt from competition law is the minimum fee clause for false self-employed workers.

Certain self-employed workers may be false self-employed, as in the matter at hand, but this is not always the case. Only recently, the District Court Zeeland-West Brabant ruled that certain clauses of the collective labour agreement for public transport (buses) (relating to pay and restrictions on hiring self-employed workers instead of employees) applied to false self-employed bus drivers, but not to genuinely self-employed bus drivers - but without explaining which bus drivers fall into which category (11 February 2015; ECLI:NL:RBZWB:2015:813).

Since the ECJ's ruling in this matter, the term 'false self-employed' has not only been applied for the purpose of assessing collective labour agreements, but also for examining the right to strike. Recently, the Court Mid-Netherlands had to decide whether a strike by self-employed workers was lawful (20 July 2015; ECLI:NL:RBMNE:2015:5373). The court ruled that if the strikers were genuinely self-employed, the strike was unlawful. If, however, the strikers were 'false self-employed' individuals, the answer to whether the strike was lawful should be answered in the same way as it would have been if the workers had been employees. A strike will, in such cases, normally be considered lawful (although not in the case at hand).

In the meantime, the introduction of this third category of false self-employed workers does not make the law any tidier. As of today, it is still uncertain exactly what rights and entitlements they have.

Comments from other jurisdictions

Austria (Martin Risak/Johanna Pinczolits): Austrian labour law generally does not provide for collective agreements to cover independent service providers. Therefore the question touched on in the ECJ decision in the case of FNV/Staat der Nederlandsen (C-413/13) is mostly interesting from a social policy point of view, i.e. to what extent collective bargaining may be extended beyond employees, whilst not being in conflict with EU anti-trust-provisions. The ruling is in our view ambivalent, as it does not clear up what "false self-employment" actually means: Does it cover economically weak self-employed persons who do not decide on their own conduct in the market independently and lack bargaining power vis-à-vis their contractual partners? Or is the organisational integration the relevant criterion, i.e. that a person lacks the freedom to choose the time, place and content of the work? The decision of the Court of Appeal of The Hague seems to point in the second direction. If this is the case, "falsely self-employed persons" are, from an Austrian point of view, actually employees ("bogus self-employment") and there is no need for an intermediate category or an extension of the concept of employee.

Austria does in fact have an intermediary category between workers and independent service providers, so-called "employee-like persons" (arbeitnehmerähnliche Personen), who are covered by some labour legislation (but not the minimum wage). They are defined as economically dependent but personally independent. They would only be considered "falsely self-employed" if this notion was recognised and interpreted widely, based on both organisational criteria and other economic criteria.

In Austria there are certain niche areas in which collectively agreed minimum wages for formally independent service providers are possible: one of these concerns homeworkers (Heimarbeiter), a legacy of the cottage industries that grew up at the beginning of industrialisation, which have no practical importance today. Another case is collectively agreed minimum wages for permanently freelance journalists (ständige freie Mitarbeiter) that are concluded by the trade unions and the employer associations of the media companies. They are of practical importance and may be challenged in the light of the ECJ ruling. There are good arguments as to why these journalists may not be considered "falsely self-employed" if they work differently from and are more loosely connected to the media company than journalists under employment contracts.

Germany (Paul Schreiner) Section 12a TVG (Tarifvertragsgesetz, the Act on Collective Bargaining Agreements) allows the conclusion and application of collective bargaining agreements for certain self-employed individuals. The criteria for deciding which employees can be included in a CBA are in line with the Dutch decision, as they relate to "employee-like persons" who are economically dependent on the customer/employer but equally dependent on social protection as employees. In fact, the few CBAs that apply to people in this situation involve public service broadcasting.

Besides this special situation in which a CBA adresses self employed people, it is also possible that a contractual relationship that the parties have treated as self employment is considered to be employment by the courts (i.e. bogus self-employment). In such a situation, the court will typically also have to determine the amount of remuneration owed for the services rendered and to do so, it may apply a collective bargaining agreement.

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