EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

ECJ 4 December 2014, case C-413/13 (FNV Kunsten Informatie en Media – v – Staat der Nederlanden), Collective agreements, Social dumping

Facts

FNV is an association of employees, i.e. a union. Together with an association of self-employed persons, it concluded a collective labour agreement ('CLA') with the employers' association VSR. The CLA provided, inter alia, that self-employed musicians who perform as substitutes for regular members of an orchestra must be paid a certain minimum fee. In 2007, the Dutch Competition Board (the 'Nma') took the position that provisions in a CLA relating to minimum fees for self- employed persons are not exempt from the anti-trust provisions of the Nma. As a result of this position, VSR and one of the unions refused to conclude new CLAs beyond 2007.

National proceedings

FNV lodged an action against the Netherlands State before the district court, seeking, essentially, a declaration that anti-trust law does not preclude a provision in a CLA which obliges an employer to respect minimum fees with regard to self-employed persons. The district court dismissed FNV's claims. FNV appealed. The Court of Appeal referred questions to the ECJ for a preliminary ruling. The questions related to Article 101 TFEU, which prohibits and declares void agreements that distort competition. The relevant provision of Dutch anti-trust law is largely inspired by this and the question here was how this related to 4. the so-called "Albany exception". The Albany exception refers to the ECJ's case law, starting with the 1999 Albany case (C-67/96). According to this, agreements entered into within the framework

of collective bargaining between employers and employees and intended to improve employment and working conditions, are excluded from the scope of Article 101 TFEU.

ECJ's findings

1. Although certain restrictions of competition are inherent in collective agreements between organisations representing employers and employees, the social policy objectives pursued by such agreements would be seriously compromised if management and labour were subject to Article 101(1) TFEU when seeking jointly to adopt measures to improve conditions 5. of work and employment. Thus, the Court has held that agreements entered into within the framework of collective bargaining between employers and employees and intended to improve employment and working conditions must, by virtue of their nature and purpose, be regarded as not falling within the scope of Article 101(1) TFEU (§ 22-23).

2. Although they perform the same activities as employees, service providers such as the substitutes at issue in the main proceedings, are, in principle, 'undertakings' within the meaning of Article 101(1) TFEU, for they offer their services for remuneration in a given market. Consequently, insofar as an organisation representing workers carries out negotiations acting in the name, and on behalf, of those self-employed persons who are its members, it does not act as a trade union association and therefore as a social partner, but, in reality, acts as an association of undertakings. It follows that a provision of a collective labour agreement, such as that at issue in the main proceedings, insofar as it was concluded by an employees' organisation in the name, and on behalf, of the self-employed services providers who are its members, does not constitute the result of a collective negotiation between employers and employees, and cannot be excluded, by reason of its nature, from the scope of Article 101(1) TFEU (§ 27-30).

3. That finding cannot, however, prevent such a provision of a collective labour agreement from being regarded also as the result of dialogue between management and labour if the service providers, in the name and on behalf of whom the trade union negotiated, are in fact 'false self-employed', that is to say, service providers in a situation comparable to that of employees. In today's economy it is not always easy to establish the status of some self-employed contractors as 'undertakings', such as the substitutes at issue in the main proceedings. On the one hand, a service provider can lose the status of an independent trader, and hence of an undertaking, if he does not determine independently his own conduct on the market, but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking. On the other hand, the term 'employee' for the purpose of EU law must itself be defined according to objective criteria that characterise the employment

relationship, taking into consideration the rights and responsibilities of the persons concerned. In that connection, it is settled case law that the essential feature of that relationship is that for a certain period of time one person performs services for and under the direction of another person in return for which he receives remuneration (§ 31-34).

4. The Court has previously 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 independence is merely notional, thereby disguising an employment relationship. It follows that the status of 'worker' within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons, as long as that person acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work, does not share in the employer's commercial risks, and, for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking (§ 35-36).

5. In the light of those principles, in order that the self-employed substitutes concerned in the main proceedings may be classified, not as 'workers' within the meaning of EU law, but as genuine 'undertakings' within the meaning of that law, it is for the national court to ascertain that, apart from the legal nature of their works or service contract, those substitutes do not find themselves in the circumstances set out in paragraphs 33 to 36 above and, in particular, that their relationship with the orchestra concerned is not one of subordination during the contractual relationship, so that they enjoy more independence and flexibility than employees who perform the same activity, as regards the determination of the working hours, the place and manner of performing the tasks assigned (i.e. rehearsals and concerts). Accordingly, a provision of a collective labour agreement, insofar 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 (§ 37-41).

Ruling

On a proper construction of EU law, it is only when self-employed service providers who are members of one of the contracting employees' organisations and perform for an employer, under a works or service contract the same activity as that employer's employed workers, are 'false self-employed', in other words, service providers in a situation comparable to that of those workers, that a provision of a collective labour agreement, such as that at issue in the main proceedings, which sets minimum fees for those self-employed service providers, does not fall within the scope of Article 101(1) TFEU. It is for the national court to ascertain whether that is so.

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Creator: European Court of Justice (ECJ)
Verdict at: 2014-12-04
Case number: C-413/13