SUMMARY

2011/9: Collective agreement that sets minimum fee for self-employed workers violates anti-trust law (NL)

<p>Agreements restricting competition are covered by the anti-trust rules under Article 81 of the EC Treaty (now Article 101 of the TFEU) unless they meet the requirement for the “social exception” rule, as formulated by the ECJ in its Albany case law. A collective agreement that fixes minimum fees for self-employed workers does not meet these requirements.</p>

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Facts

In 2006, VRS, which is an association of self-employed "remplaçant" musicians, entered into a collective agreement with two unions. A "remplaçant" is a self-employed musician who is hired for one or more concerts or rehearsals to replace an employee of an orchestra who is temporarily absent. Schedule 5 to the collective agreement provided that "remplaçant" musicians should be paid a certain minimum fee, namely the standard rate applying to employed musicians plus 16%. When the Dutch anti-cartel authority, the "Nma", became aware of this, it decided to investigate and it informed the parties to the collective agreement that the agreement was potentially unlawful. This led to premature termination of the collective agreement in November 2007 and to legal proceedings initiated by one of the unions involved ("FNV Kunsten Informatie en Media") against the government. Essentially,

the union asked the court to declare that a provision in a collective agreement requiring the employer to pay self-employed staff a certain minimum fee is covered by what is known as the "social exception" rule and therefore is exempt from national and EU anti-trust law. The ECJ formulated the "social exception" rule in a series of judgments, including those in the cases of Albany[1], Brentjes[2], Drijvende Bokken[3], and Van der Woude[4]. According to this case law, an agreement limiting competition is excluded from the scope of Article 81(1) of the EC Treaty if: a. the agreement forms part of a collective agreement concluded between one or more organisations of employers and employees; and b. it contributes directly to improving the employees' terms of employment. In its defence, the government argued that neither of these conditions had been satisfied, since VRS was not an organisation of employees and the minimum fee arrangement benefited self-employed musicians, not employees.

Judgment

The court focussed on requirement (b), by examining whether the minimum fee for self-employed musicians benefits employed musicians. The plaintiff union answered this question affirmatively, because the minimum fee eliminated underpayment of self-employed musicians, thereby reducing unfair competition and reducing the downwards pressure on the employees' terms of employment. The court rejected this argument. Although eliminating underpayment of self-employed musicians is likely to benefit employed musicians indirectly, it does not do so directly. Therefore, requirement (b) was not satisfied, so there was no need to address requirement (a) and the plaintiff lost the case.

Commentary

In The Netherlands, the number of self-employed workers has increased dramatically in the past five to ten years, partly as a consequence of the hard economic times and the scarcity of regular jobs. This is not to the liking of the unions, but there is not much they can do other than attempt to expand their membership to self-employed workers, a policy that to date has not been very successful. In my view, the most effective way to reduce self-employment would be for the unions to give up their resistance to a relaxation of the dismissal protection laws. That would without doubt lead to employers being more willing to hire regular staff, rather than hiring workers on a selfemployed basis. Unfortunately, most of the unions, with their declining and ageing membership, are unwilling to yield.

Footnotes

1 ECJ 21 September 1999 case C-67/96 (Albany).

2 ECJ 21 September 1999 cases C-115 through 117/97 (Brentjes).

3 ECJ 21 September 1999 case C-219/97 (Drijvende Bokken).

4 ECJ 21 September 2000 case C-222/98 (Van der Woude).

Subject: Collective agreement, unions

Parties: FNV Kunsten Informatie en Media – v – Staat der Nederlanden (the State)

Court: Rechtbank 's-Gravenhage (District Court of The Hague)

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