Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

4 December 2014*

(Reference for a preliminary ruling — Competition — Article 101 TFEU — Substantive scope — Collective labour agreement — Provision laying down minimum rates for independent service providers — Definition of 'undertaking' — Definition of 'employee')

In Case C-413/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Gerechtshof te 's-Gravenhage (Netherlands), made by decision of 9 July 2013, received at the Court on 22 July 2013, in the proceedings

FNV Kunsten Informatie en Media

v

Staat der Nederlanden,

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, A. Borg Barthet, E. Levits, M. Berger and S. Rodin, Judges,

Advocate General: N. Wahl,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 18 June 2014,

after considering the observations submitted on behalf of:

— FNV Kunsten Informatie en Media, by R. Duk, advocaat,

— the Netherlands Government, by M. Bulterman and J. Langer, acting as Agents,

— the Czech Government, by M. Smolek, J. Vláčil and T. Müller, acting as Agents,

— the European Commission, by F. Ronkes Agerbeek and P.J.O. Van Nuffel, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 September 2014,

gives the following

* Language of the case: Dutch.

Judgment

1 This request for a preliminary ruling concerns the interpretation of the substantive scope of Article 101(1) TFEU.

2 The request has been made in proceedings between FNV Kunsten Informatie en Media ('FNV'), a trade union, and the Staat der Nederlanden concerning the validity of a reflection document by which the Nederlandse Mededingingsautoriteit (Netherlands Competition Authority) ('the NMa') found that the provision of a collective labour agreement setting minimum fees for the supply of independent services is not excluded from the scope of Article 101(1) TFEU.

Legal context

3 Article 1 of the Law on collective labour agreements (Wet op de collectieve arbeidsovereenkomst) provides:

'1. "Collective labour agreement" means an agreement entered into by one or more employers, or one or more associations of employers having full legal capacity, and one or more associations of workers having full legal capacity, which governs principally or exclusively the conditions of employment that must be respected in the context of employment contracts.

2. A collective labour agreement may also relate to contracts for the performance of specific work and contracts for professional services. The provisions in the present law concerning labour agreements, employers and employees shall then apply *mutatis mutandis*.'

4 Article 6(1) of the Law on competition (Mededingingswet, 'the Mw'), the wording of which corresponds to that in Article 101(1) TFEU provides:

'Agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings, which have as their object or effect the prevention, restriction or distortion of competition on the Netherlands market or on part of it, shall be prohibited.'

5 Under Article 16(a) of the Mw:

Article 6(1) shall not apply to:

'(a) a collective labour agreement within the terms of Article 1(1) of the Law on collective labour agreements.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

6 As is apparent from the file, Dutch independent service providers in the Netherlands have the right to join any trade union or employers' or professional association. Therefore, according to the Law on collective labour agreements, employers' federations and organisations representing employees may conclude a collective labour agreement in the name and on behalf not only of employees, but also of independent service providers who are members of those organisations.

7 In 2006 and 2007, the FNV and Nederlandse toonkunstenaarsbond (Netherlands Musicians' Union), an employees' association, on the one hand, and Vereniging van Stichtingen Remplaçanten Nederlandse Orkesten (Association of Foundations for Substitutes in Dutch Orchestras), an employers' association, on the other, concluded a collective labour agreement relating to musicians substituting for members of an orchestra ('the substitutes').

8 In particular, that collective labour agreement laid down minimum fees not only for substitutes hired under an employment contract ('the employed substitutes'), but also for substitutes who carry on their activities under a contract for professional services, who are not regarded as 'employees' for the purposes of the agreement itself ('self-employed substitutes').

9 Specifically, Annex 5 to that collective labour agreement provided that self-employed substitutes were to receive at least the rehearsal and concert fees negotiated for employed substitutes plus 16%.

10 On 5 December 2007, the NMa published a reflection document in which it stated that a provision of collective labour agreement laying down minimum fees for self-employed substitutes was not excluded from the scope of Article 6 of the Mw and Article 81(1) EC, for the purpose of the judgment in *Albany*, C-67/96, EU:C:1999:430. According to the NMa, a collective labour agreement which governs contracts for professional services is altered in its legal nature 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 regard not as an employees' association, but as an association for self-employed workers.

11 Following the adoption of that position, the employers' association, Vereniging van Stichtingen Remplaçanten Nederlandse Orkesten, and the employees' association, Nederlandse toonkunstenaarsbond, terminated the collective labour agreement and refused to conclude a fresh agreement containing a provision on minimum fees for self-employed substitutes.

12 The FNV brought an action before the Rechtbank Den Haag (District Court, The Hague) for a declaration that it is not contrary to Netherlands or EU competition law for a provision of a collective labour agreement to require the employer to adhere to minimum fees not only for employed substitutes, but also for self-employed substitutes, on the one hand, and an order that the Netherlands State should rectify the position adopted by the NMa in its reflection document, on the other.

13 Hearing that action, the Rechtbank Den Haag observed that such a provision did not fulfil one of the two cumulative conditions which would enable it to avoid the application of EU competition law for the purpose of the judgments in *Albany*, EU:C:1999:430; *Brentjens'*, C-115/97 to C-117/97, EU:C:1999:434; *Drijvende Bokken*, C-219/97, EU:C:1999:437; and *van der Woude*, C-222/98, EU:C:2000:475. According to the Rechtbank Den Haag, the fixing of the fees by that provision must, first, have been generated by dialogue between management and workers and have been concluded in the form of a collective agreement between employers' and employees' organisations and, secondly, must contribute directly to improving workers' employment and working conditions. In this instance, the provision at issue does not contribute directly to improving workers' employment and working conditions. For that reason, the Rechtbank Den Haag rejected the FNV's claims, without even ascertaining whether the first condition laid down by that case-law, that it is necessary for the relevant provision, by its nature, to be generated by dialogue between management and workers, had been satisfied.

14 The FNV brought an appeal against that judgment before the Gerechtshof te 's-Gravenhage (Court of Appeal, The Hague), raising a single ground of appeal regarding the question whether the prohibition of agreements restricting competition laid down in Article 101(1) TFEU applies 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.

15 In connection with that appeal, although it had provisionally classified the self-employed substitutes as 'commercial operators', on the grounds that their income depends on assignments obtained independently on the market for substitutes, that they are in competition with other substitutes and that they invest in musical instruments, that court nonetheless observed that the outcome of the dispute in the main proceedings was not clear either from the Treaty or from the case-law of the Court.

16 It was in those circumstances that the Gerechtshof te 's-Gravenhage decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

'(1) Must the competition rules of EU law be interpreted as meaning that a provision in a collective labour agreement concluded between associations of employers and associations of employees, which provides that self-employed persons who, on the basis of a contract for professional services, perform the same work for an employer as the employees who come within the scope of that collective labour agreement must receive a specific minimum fee, falls outside the scope of Article 101 TFEU, specifically on the ground that that provision occurs in a collective labour agreement?

(2) If the answer to the first question is in the negative, does that provision then fall outside the scope of Article 101 TFEU in the case where that provision is (also) intended to improve the working conditions of the employees who come within the scope of the collective labour agreement, and is it also relevant in that regard whether those working conditions are thereby improved directly or only indirectly?'

Jurisdiction of the Court

17 As a preliminary point, it must be determined whether the Court has jurisdiction to answer the questions referred. As the Gerechtshof te 's-Gravenhage observed in its order for reference, the agreement at issue in the main proceedings concerns a purely internal situation and has no impact on intra-Community trade. Consequently, Article 101 TFEU is not applicable to the dispute in the main proceedings.

18 In that connection, the Court has repeatedly held that it has jurisdiction to give preliminary rulings on questions concerning EU law in situations in which the facts in the main proceedings fell outside the direct scope of that law, provided always that those provisions had been rendered applicable by the national law, which adopted, for solutions applied to purely internal situations, the same approach as that for solutions provided for under EU law. In such cases, according to settled case-law, it is clearly in the interest of the European Union that, in order to forestall future differences of interpretation, provisions or concepts taken from EU law should be interpreted uniformly, irrespective of the circumstances in which they are to apply (judgment in *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 20).

19 So far as this request for a preliminary ruling is concerned, it should be noted that Article 6(1) of the Mw faithfully reproduces Article 101(1) TFEU. Furthermore, it is apparent from the order for reference that the Netherlands legislature expressly meant to harmonise national competition law with EU law, intending Article 6(1) of the Mw to be given an interpretation strictly in accordance with that of Article 101(1) TFEU.

20 In those circumstances, it must be concluded that the Court has jurisdiction to answer the questions submitted, even though Article 101(1) TFEU does not directly govern the situation at issue in the main proceedings.

The questions referred for a preliminary ruling

21 By its two questions, which must be examined together, the referring court asks essentially whether, on a proper construction of EU law, a provision of a collective labour agreement, which sets minimum fees for 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, does not fall within the scope of Article 101(1) TFEU.

22 In that connection, it is to be recalled that, according to settled case-law, 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 of work and employment (see judgments in *Albany*, EU:C:1999:430, paragraph 59; *International Transport Workers' Federation and Finnish Seamen's Union*, C-438/05, EU:C:2007:772, paragraph 49 and *3F* v *Commission*, C-319/07 P, EU:C:2009:435, paragraph 50).

23 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 (see, to that effect, judgments in *Albany*, EU:C:1999:430, paragraph 60; *Brentjens'*, EU:C:1999:434, paragraph 57; *Drijvende Bokken*, EU:C:1999:437, paragraph 47; *Pavlov and Others*, C-180/98 to C-184/98, EU:C:2000:428, paragraph 67; *van der Woude*, EU:C:2000:475, paragraph 22; and *AG2R Prévoyance*, C-437/09, EU:C:2011:112, paragraph 29).

24 In the case in the main proceedings, the agreement concerned was concluded between an employers' organisation and employees' organisations of mixed composition, which negotiated, in accordance with national law, not only for employed substitutes but also for affiliated self-employed substitutes.

25 Therefore, it is necessary to examine whether the nature and purpose of such an agreement enable it to be included in collective negotiations between employers and employees and justify its exclusion, as regards minimum fees for self-employed substitutes, from the scope of Article 101(1) TFEU.

26 First, as regards the nature of that agreement, it is clear from the findings of the referring court that the agreement was concluded in the form of a collective labour agreement. However, that agreement, specifically as regards the provision in Annex 5 thereto on minimum fees, is the result of negotiations between an employers' organisation and employees' organisations which also represent the interests of self-employed substitutes who provide services to orchestras under a works or service contract.

27 It must be held in that regard that, 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 on a given market (judgment in *Ordem dos Técnicos Oficiais de Contas*, C-1/12, EU:C:2013:127, paragraphs 36 and 37) and perform their activities as independent economic operators in relation to their principal (see judgment in *Confederación Española de Empresarios de Estaciones de Servicio*, C-217/05, EU:C:2006:784, paragraph 45).

28 It is clear, as also observed by the Advocate General in point 32 of his Opinion and the NMa in its reflection document, that, in so far 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.

29 It should also be added that, although the Treaty encourages dialogue between management and labour, it does not, however, contain provisions, like Articles 153 TFEU and 155 TFEU or Articles 1 and 4 of the Agreement on social policy (OJ 1992 C 191, p. 91), encouraging self-employed service providers to open a dialogue with the employers to which they provide services under a works or service contract and, therefore, to conclude collective agreements with a view to improving their terms of employment and working conditions (see, by analogy, judgment in *Pavlov and Others*, EU:C:2000:428, paragraph 69).

30 In those circumstances, it follows that a provision of a collective labour agreement, such as that at issue in the main proceedings, in so far 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.

31 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.

32 As observed by the Advocate General in point 51 of his Opinion, and by the FNV, the Netherlands Government and the European Commission at the hearing, 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.

33 As far as concerns the case in the main proceedings, it must be recalled that, according to settled case-law, on the one hand, a service provider can lose his 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 (see, to that effect, judgment in *Confederación Española de Empresarios de Estaciones de Servicio*, EU:C:2006:784, paragraphs 43 and 44).

34 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 (see judgments in *N.*, C-46/12, EU:C:2013:97, paragraph 40 and the case-law cited, and *Haralambidis*, C-270/13, EU:C:2014:2185, paragraph 28).

35 From that point of view, 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 (see, to that effect, judgment in *Allonby*, C-256/01, EU:C:2004:18, paragraph 71).

36 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 persons acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work (see judgment in *Allonby*, EU:C:2004:18, paragraph 72), does not share in the employer's commercial risks (judgment in *Agegate*, C-3/87, EU:C:1989:650, paragraph 36), and, for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking (see judgment in *Becu and Others*, C-22/98, EU:C:1999:419, paragraph 26).

37 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, in other words, the rehearsals and concerts.

38 As regards, second, the purpose of the collective labour agreement at issue in the main proceedings, it must be held that the analysis in the light of the case-law referred to in paragraphs 22 and 23 above would be justified, on that point, only if the referring court were to classify the substitutes involved in the main proceedings not as 'undertakings' but as 'false self-employed'.

39 That being said, it must be held that the minimum fees scheme put in place by the provision in Annex 5 to the collective labour agreement directly contributes to the improvement of the employment and working conditions of those substitutes, classified as 'false self-employed'.

40 Such a scheme not only guarantees those service providers basic pay higher than they would have received were it not for that provision but also, as found by the referring court, enables contributions to be made to pension insurance corresponding to participation in the pension scheme for workers, thereby guaranteeing them the means necessary to be eligible in future for a certain level of pension.

41 Accordingly, 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.

42 In the light of those considerations, the answer to the questions referred is that, 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.

Costs

43 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

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.

[Signatures]