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Kurzbauer, H.R.

Publication date
2023

Link to publication

Citation for published version (APA):
Kurzbauer, H. R. (2023). *Freelancers vs. Employees: beyond the dichotomy, the perils of vulnerability in the orchestral sector*. Paper presented at 6th Labour Law Reseach Network conference, Warsaw, Poland.

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Download date:16 Jan 2025

Freelancers vs. Employees: beyond the dichotomy, the perils of vulnerability in the orchestral sector

Heather Kurzbauer*

Introduction

For the past decade, I have mapped the vulnerabilities of orchestral musicians in uncertain job markets with a focus on the Netherlands and the United States, two countries renowned for orchestral excellence, and two countries where I have been privileged to work as a professional musician. While a great deal of academic attention has been paid to vulnerability in a multiplicity of sectors, musicians, the original gig workers, have escaped such scrutiny. The 21st-century interplay of general downward trends in cultural financing, efficiency-driven cultural policies, and the devastating impact of COVID-19 has continued to exacerbate working musicians' employment.

The story of orchestral musicians' quest for fair remuneration and acceptable employment conditions parallels challenges faced by precarious workers in other sectors. Despite their unequal bargaining position, Dutch-based self-employed orchestral musicians customarily barred from collective bargaining due to EU competition rules have regained territory in terms of empowerment thanks to the influence of the *FNV KIEM* (further, *FNV*) case[1] and recent Dutch legislation. On the other side of the Atlantic, National Labor Relation Board (NLRB) decisions that show little conformity have impacted the musical workspace for vulnerable freelance musicians.

This paper highlights the Dutch touch: a focus on a freelance musician's attempt to gain full employment, the run-up to and impact of *FNV*, the effect of recent fair pay legislation, and a brief introduction to an alt-labor mobilizing platform that has helped to reframe dialogue and decision-making in a beleaguered sector.

Part I opens the space of deliberation to examine a case in which an orchestral freelancer attempted to reach that well-nigh impossibility of full employment almost a decade prior to *FNV*. Part II examines *FNV* and its effect on litigation and collective action on the part of Dutch musicians.

Outsourced workers exemplified by Uber/Lyft and Deliveroo food service drivers have attained significant media attention in their quest for employee status at the heart of the independent contractor vs. employee debate. Their fight for employee recognition has given face and place to the debate concerning the evolution of work, where atypical has become the new typical in the context of accepted modes of employment in the 21st century. Employment

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*Heather Kurzbauer studied at Yale University and the University of Amsterdam. She has performed as a professional orchestral violinist for over three decades and received her PhD from the University of Amsterdam Law School in 2022.

[1] *FNV Kunsten Informatie en Media (KIEM)* C-413/13 [2014].

patterns in the developed world now mirror the patterns of precarity that traditionally plagued the developing world. Shifting between such world of work terms as 'atypical,' 'contingent,' 'nontypical,' 'precarious' and last but certainly not least, 'gig' workers abandons those who do this type of work to the whim of nomenclature. These vague determinations show little regard for the transformative structures of employment that dominate the world of work not to speak of the needs for protection on the part of the workers.[2]

Although the work lives of freelance musicians bear little direct relationship to outsourced app-dependent delivery workers, both types of workers suffer from the same frustrations and share in a quest for a living wage with "all that frosting on the cake, that good stuff that sweetens the dream of adequate employment."[3] Freelance musicians invariably fashion a portfolio career or what some interviewed refer to less euphemistically as a patchwork career in which musicians work at different jobs often simultaneously in an attempt to earn a living. These musicians face a precarious and competitive labor market characterized by a diversity of ensembles that contract musical services for varying time periods with varying degrees of call back success. To mirror the stories told by freelancers, not all orchestras are created equal, and not all gigs are paid at a rate that comes close to a minimum wage. Many musicians are forced to take on underpaid work in the hopes that it will lead to something better, that it will widen their circle of possibilities, and lead to improved work prospects. More often than not, the improved prospects are illusory.

To open the floodgates inherent to a discussion on the asymmetrical nature of freelancing would be counterproductive to an enquiry that seeks to make things better for gigging musicians. For those looking for a legal solution, regulation and inclusion might offer the key to improve conditions for all workers, freelance and fully employed. Yet, for those freelancers who earn an adequate living by working at will, there is some reticence to support any type of restrictions on their freedom to operate. "You might say that our solidarity moves directly towards our pocketbooks, as long as regulation is good for our earnings, we support it. If not, we would rather be as elusive as possible, that is how giggers are, chameleons who move from place to place, gig to gig, sometimes present and when the taxman comes around elusive."[4]

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[2] Contingent workers include those who are independent contractors, who work less than full-time, or whose jobs are structured to last only a limited length of time.
[3] Conversations with the ultimate bass gig-master, Buell Neidlinger, LA freelancer, former principal bass, Warner Brothers studio orchestra.
[4] Successful LA-based gig musician whose income is primarily based on studio gigs, and royalties, anonymity assured.

Types of freelance orchestral musicians

In the orchestral vernacular, there are several varieties of freelancers who are called upon to perform side-by-side with contracted orchestral members. It is important to discuss classifications of freelance orchestral musicians before turning to examples of case law and legislation that attempt to define categories of employees. Substitute players on call replace regular members who have taken ill, or are off on sabbatical or for that matter, using any mutually and contractually acceptable reason for missing work.[5] Another group of freelance players are the extras, the musicians who are called in to augment the complement- the number and/or type of orchestral musician - when the musical score demands extra musical reinforcement. Extras are vital as performers in massive pieces within the orchestral repertoire that call for a large number of players: Mahler's Symphony No. 8 *Symphony of a Thousand* is a prime example of an XXL orchestral complement.[6] A performance of George Gershwin's *Rhapsody in Blue* would be unthinkable without a soprano sax and a banjo, instruments not commonly employed by orchestras. Much of my research examines the vulnerabilities of freelance substitutes, the musicians who play side-by-side with regularly contracted colleagues in an orchestra. Yet, the most precarious of all freelance orchestral musicians are those who perform in non-unionized pick up orchestras with a great deal of variance in terms of payment as the following quote reveals:

> "One of the guys I play with is musical director for a small church…he has recruited me to play. My question for those who play these kinds of gigs is whether any of you are getting paid and, if so, what's the general rate. He is paying barely enough to make it worth setup time, but I do enjoy playing. . . and it's a church."[7]

What's in a name: interim musicians, extra musicians et al.,

Adding to the external complexity of classifying freelance musicians is the contract-driven internal complexity that differentiates orchestral performers and the benefits they may receive. An examination of a standard U.S. orchestral collective bargaining agreement (CBA) reveals no less than four categories: 'musician'; 'interim musician'; 'part-time musician' and 'extra musician' within the Dallas Symphony Orchestra (DSO). A musician is "a person

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[5] Illness, pregnancy leave other forms of personal leave are the most common reasons to hire substitutes. In the last several decades, it has become commonplace practice to hire substitutes to fill a position left open following auditions if no player(s) are hired. are hired when a vacancy is not filled post-audition.

[6] Composed in the summer of 1906, Gustav Mahler's monumental choral work is scored for eight voices, two mixed choruses, children's chorus, organ and a very large orchestra including off-stage brass and many harps! Incidentally, Mahler was not partial to the moniker, Symphony of a Thousand.

[7] Quote taken from the Talk Bass forum website. Available at: https://www.talkbass.com/threads/questions-about-church-gig.1335924/

employed by the Employer as a playing member or Librarian under full contract with the DSO."[8] Two categories are classified by the number of services contracted: "extra musicians" performs sixty-four or more services, not under full contract[9] and "part-time musicians" are employed for sixty-three or less services per season.[10] It would make sense that the latter two categories would be classified as "interim musicians" defined under the CBA as non-tenure track members who are "ineligible to receive a contract for a third consecutive Season. . . and cannot serve on committees but is otherwise entitled to all benefits and rights of a Musician."[11]

How do you get an orchestral gig in this town?

The lack of a system for hiring freelance substitute players[12] in orchestras relates to different traditions within each individual orchestral organization. To outsiders, the freelance orchestral world seems haphazard as the distribution of work does not follow any particular coordinated structure. Perhaps the very nature of a profession centered on public performance calls for a flexible system, or more accurately, lack thereof. "Other professions warrant more control before a replacement employee shows up to work, we often work with a lead time of a few hours, even less last-minute debacles occur right before a concert. We can't be held accountable for not following a prescribed list; our first priority is to reassure the conductor that an empty seat will be filled, as soon as possible, the show must go on."[13] Substitute wind, brass and percussion players in major orchestras are either known entities, professional musicians who hold jobs in other orchestras free to perform in their free weeks or stellar recent conservatory graduates recommended by leading orchestral players. To confuse matters further, although some orchestras hold substitute string player auditions, personnel managers prefer not to divulge how the results of those auditions are put into practice, how the priority lists work, or if in fact these lists are used at all. "I have won places as a 'remplaçant' in three Dutch orchestras and am still waiting for the phone to ring while one of my closest friends from my student days at the Conservatory plays regularly in two of those orchestras without ever having gone through the audition process. It's a mystery!"[14]

Part I: Pintus v. Concertgebouworkest: a freelancer claims employment

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[8] Section 8.14 CBA Dallas Symphony Association and Dallas/Fort Worth Professional Musicians Association, Local Union No. 72-147 American Federation of Musicians, 2015.
[9] Ibid., art. 8.5
[10] Ibid., art. 8.18.
[11] Ibid., art. 8.11.
[12] The consensus within the ranks of several hundred freelance orchestral players interviewed is that freelance substitute best describes their position within an orchestra.
[13] Ibid.,
[14] Interview, Dutch freelance string player waiting for a breakthrough, anonymity assured.

Maria Tiziana Pintus, an Amsterdam-based Italian violinist received her advanced performance diploma at the Utrecht Conservatory in the early 1990s and became active on the orchestral freelance scene shortly thereafter. She was invited to perform regularly in both the first and second violin sections of the Royal Concertgebouw Orchestra (RCO) between 1995-2003. She worked under a series of fixed contracts in both first and second violin sections, taking part in all performance-related musical activities: rehearsals, concerts, recording sessions and tours. Preparation for these musical activities was not compensated: freelance substitute musicians akin to their regular contracted orchestral colleagues are responsible to be prepared fully by the time the first rehearsal begins. But unlike the regular players, freelance substitutes do not benefit from the *forfait*[15] nor do they receive pension benefits, instrument insurance and other assorted extras. It is the inner workings and outer applicability of this series of contracts, the duration of the work completed, and the differences, or lack thereof, in performing in a first and/or second violin section that lie at the crux of the litigation. Pintus asserted the claim that her regular freelance work following a fourth employment contract entitled her to a permanent contract.[16] Yet, without winning an audition for a specific first or second violin position, what type of contract would have answered to her claim?

Dutch employment legislation and *Pintus*: consecutive fixed term contracts

The relevant articles of Dutch employment legislation with reference to the *Pintus* case are found in the Dutch Civil Code *Section 7.10.9. End of an employment agreement*. Under the terms set forth in Article 7:667 DCC, an employment agreement is terminated when either the time period that has been contractually agreed upon or the time period agreed upon by law or 'common usage' expires.[17] The subsequent article, Art. 7:668 DCC *Tacit continuation of a fixed-term employment agreement* and Article 7:668a DCC *the chain of fixed-term employment agreements* were leading.

According to Pintus' understanding of the chain rule as expressed in Art. 668a DCC, she was legally entitled to proceed from a fixed contract to an open-ended contract starting on 12 March 2002, the date of her fourth specific term contract as an RCO freelance substitute violinist. Several points call for further clarification. Firstly, as a substitute player at the RCO, she had signed contracts with the Foundation for Substitute Players Royal Concertgebouw

[15] *Forfait* is a term that refers to compensation for practice/ preparation hours.
[16] In Dutch, 'arbeidsovereenkomst voor onbepaalde tijd', literally an employment contract of infinite duration' or permanent contract.
[17] Author's translation, see Art. 7:667 DCC (entry into force 1 January 1992.)

Orchestra, further: RCO Foundation[18] and not the RCO. The RCO Foundation was officially registered at the Chamber of Commerce on 1 August 2001. Secondly, the collective agreement for substitute players,[19] in force during the years Pintus substituted in the RCO, carved out an exemption to the applicability of Art. 7:668a in the CAOs Article 3(2) stipulating that Article 668a DCC was not applicable "waardoor in geen enkel geval een arbeidsovereenkomst voor onbepaalde tijd onstaat"(thus without exception [literally: in no case] an employment contract for an indefinite period of time does not exist."[20] Pintus and her legal advisors were of a different opinion based on the nature of the work performed under contract. "Even though we (my legal advisor and I) knew about that exception, we wanted to prove our point that this loophole was simply not fair to orchestral freelance substitutes who perform exactly the same work as the regular contracted musicians."[21]

The special case of violinists

For extra insight into some of the motivations behind the court's rejection of Pintus' claims, it is important to take note of the difference between the roles she fulfilled within the orchestra. The largest section in the orchestra (the violins) offers the greatest amount of freelance employment per capita based on the number of players per orchestra and the chance that tenured violinists may be unavailable for work. While both first and second violin positions call for a high level of professionalism, they are not considered to be interchangeable Interestingly, for violinists at the New York Philharmonic for example, "we are very strict about who gets to play in a string sections with a tradition of substitutes playing in the second violins and our own players [who are] second violinists moving into the first violins if substitutes are called for."[22] With regard to the interchangeability of the two positions within the orchestra the Amsterdam court held:

> "The parties disagree about the question about the interchangeability of the functions of first and second violinist. This question is important to the extent that if it must be concluded that these functions are so far apart that the employment contracts with which the performance of this work has been agreed cannot be regarded as a successor to the previous contract, there is no way to arrive at an adequate application of Art. 668a DCC. The Court of Appeal finds that Pintus has worked alternately as first and second violinist in the period indicated under 3.3 iii and on the basis thereof - assuming evidence to the contrary - assumes that both functions are interchangeable to a large extent and that consequently there are subsequent employment

[18] Foundation for Substitute Players RCO; Stichting Remplaçanten van het Koninklijk Concertgebouworkest. KCO refers to the Dutch, Koninklijk Concertgebouworkest whereas RCO refers to the English translation, Royal Concertgebouw Orchestra.
[19] In Dutch, Collectieve Arbeidsovereenkomst (CAO) Remplaçanten Nederlandse Orkesten 1 november 2000-31 october 2001, ongewizgd verlengd tot en met 31 maart 2002.
[20] Ibid., Article 3(2).
[21] Excerpts taken from discussions with Tiziana Pintus in 2015, 2016.
[22] Interview, Judy Nelson, New York Philharmonic viola section player for over three decades.

contracts. The Court noted that successive employment contracts could only be refuted if there was a substantial difference between the work agreed in the contracts."[23]

The Amsterdam Court's holding in *Pintus* paved the way to a Ministerial exception in the form of a regulation that set the stage to change the treatment of specific groups of 'special' employees regarding the 'chain of fixed-term employment agreements found in Article 7:668a (8) Book 7 DCC.[24] "This exception is necessary due to the intrinsic nature of the industry. Thus, it is necessary to perform the work solely on the basis of fixed-term employment contracts, not employment contracts specified as temporary employment contracts referred to in Article 690."[25] The regulation grants an exception to contracted football professionals, and importantly for the scope of this research, to various categories of performers and employees in the cultural sector. *Section sub e*. reads in relevant part: 'the following are designated as positions referred to in Art. 668a(8)(e) Book 7 DCC: substitute players employed by the SRNO or the Dutch Broadcasting Music Center."[26] How the exception will play out at the orchestral work place remains to be seen, as many freelance substitutes share the concern "although one might think that we gain security through an exception, we fear that our employers, the orchestras could well prefer to switch between freelancers in the large pool of available players than stay true to a core of reliable, long-term players."[27] A freelance substitute player's fear is reinforced by statements made by an orchestra manager who reflected, "this puts us in what might become a difficult place in terms of decision-making as to who we hire and for how long, the personnel issues are tricky to begin with and do not seem to find resolution through legislation."[28]

Pintus redux 2019

The *Pintus* case took on new meaning almost fifteen years after the violinist's hopes of permanent employment at the RCO were dashed. Fearful of a significant rise in the cost of hiring substitute players, the RCO sought to formulate a distinction between the employment relationship of a permanent musician and a substitute player in 2019, showing a complete disregard of jurisprudence and legislation that reinforces the notion of orchestral substitutes

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[23] *Pintus* at r.o. 3.11.
[24] Regeling van de Minister van Sociale Zaken en Werkgelegenheid van 22 december 2016 tot wijziging van de Regeling ketenbepaling bijzondere functies Staatscourant 2017, 132, in force the day following publication, January 2, 2017. Text, in Dutch available at: https://zoek.officielebekendmakingen.nl/stcrt-2017-132.html
[25] Author's translation Art. 7:668 DCC para. 8.
[26] In Dutch: "remplaçant in dienst bij de door de Nederlandse orkesten opgerichte Stichtingen Remplaçanten of het Muziekcentrum van de Omroep."
[27] Conversations with freelance substitute violinist Gideon Nelissen.
[28] Conversations with Roland Kieft, former Artistic Director, the Hague Philharmonic (2013-2016), subsequently, Director (Stichting Omroep Muziek) Dutch Broadcasting Music Foundation.

as false self-employed: musicians who perform the same duties as their regularly employed colleagues.

The Dutch Minister of Social Affairs and Employment (2017-2022) Wouter Koolmees alluded to the *Pintus* case in his answer to the question: 'what are the consequences of the *Wet arbeidsmarkt in balans* (WAB) (Balanced Labor Market Act)[29] in specific relation to the employment regime of substitute players hired at the RCO?' In a meagerly researched response, he reflected that in order to answer the question properly, the RCO would have to determine whether the orchestra and/or its Foundation of Freelancers (Stichting Remplaçanten, earlier referred to as the RCO SRNO) engaged in payrolling. Explaining the two requirements to establish payrolling under the law, he underlined:

> "Firstly to satisfy the payrolling requirement, the formal employer (hirer)cannot engage in allocation in which selection and hiring is undertaken by the employer. You state in your letter that the recruitment and selection of substitute players are carried out by the Concertgebouw Orchestra (hirer). . .What is key to make a proper determination is the question of whether the RCO's Foundation (SRNO) renders the 'employee' exclusively available to the Concertgebouw Orchestra or whether it offers the services of the 'employee' to other employers to work under different supervision. If both conditions are met, the conditions of payrolling are satisfied."[30]

The RCO stated that it is the orchestra itself, and not the SRNO that engages in recruiting and hiring. According to common orchestral practice discussed earlier in this enquiry, the 'custom' at work mandates that certain key musicians, often principal players recommend substitute players. And, sometimes, orchestras hire substitutes from lists of those who have 'almost' succeeded to win a previous audition. "The selection of players should be based on musicianship and 'fit' that can only be determined by musicians, not a Foundation."[31] The RCO emphasized that its SRNO could not be construed as a clearinghouse for musicians; it does not engage in offering services of substitutes/freelancers to other orchestras. Rather, the SRNO is "an intermediary between the orchestral foundation and the part-time players."[32] With regard to the second factor, 'exclusivity,' the RCO's SRNO allocated freelance musicians solely to the RCO, an exclusive activity by definition.

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[29] Regeling van de Minister van Sociale Zaken en Werkgelegenheid van 22 december 2016 tot wijziging van de Regeling ketenbepaling bijzondere functies Staatscourant 2017, 132, in force the day following publication, January 2, 2017. Text, in Dutch: https://zoek.officielebekendmakingen.nl/stcrt-2017-132.html

[30] See text H.R. Kurzbauer, *Symphonic metamorphoses. Variations on vulnerability: orchestral musicians' employment in times of* crisis (diss. Amsterdam UvA), 2022, Epilogue: Appendix 24. Translations, Heather Kurzbauer

[31] Conversations with Joel Fried, Artistic director, Royal Concertgebouw Orchestra (2017-2020).

[32] Conversations with Angela Garland, Artistic Coordinator, Netherlands Philharmonic Orchestra.

To answer the crucial question as to whether the RCOs substitute players are entitled to receive the same employment benefits as permanent members of the RCO, the Minister relied on the provisions of the WAB legislation.

> "If payrolling has been established, the WAB legislation will have effect as the law equalizes the position of the freelancer and the regular employee. To quote 'a 'freelance' worker is entitled to the same legal position and employment conditions as employees **in the same or equivalent position**s (In Dutch, gelijkwaardige functies) who are directly employed by the hirer."[33] If the position of substitutes is indeed to be seen as a separate function and is therefore not equivalent to that of permanent orchestra members of the Concertgebouw Orchestra, then a derogation in the CAO for substitute players is permissible."[34]

Have we come full circle back to the slippery sands of *Pintus* in which the first violin-second violin functions were never specified, or could we infer that the freelance substitutes are entitled to the same employment conditions as permanent members? Musically speaking, reiterating what colleagues noted in discussions of orchestral tradition, the long term expectations associated with a tenured musician's performance requirements point to distinctive requirements within the realm of orchestral musical participation. Any musician would comment that indeed a freelance substitute player is required to blend, join in, and play the same notes at the same time etc., Yet if the other requirements that lie within an orchestral CAO are taken into consideration, a permanent member does have to fulfil other requirements related to their membership in the orchestral organization.

Part II moves forward to describe the impact of a seminal European Court of Justice (ECJ) case on the orchestral workforce.

Part II: En route to *FNV KIEM:* of musicians and labor law

"Competition law must be tough with the strong and gentle with the weak."[35]

"The initial thinness of social policy provisions within the EU integration project was premised on a consensus that the creation of a common market would not require harmonisation of labour standards or national systems of labour law."[36]

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[33] See Minister Koolmees' response, H.R. Kurzbauer, *Symphonic metamorphoses. Variations on vulnerability: orchestral musicians' employment in times of* crisis (diss. Amsterdam UvA), 2022, Appendix 24. Translation, Heather Kurzbauer.
[34] Ibid.,
[35] Thiébaut Weber, Confederal Secretary, European Trade Union Confederation (ETUC).
[36] D. Asiagbor, "Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration" 19 *European Law Journal* 303 p. 307.

That jurisprudence lies at the heart of much of legal research is a given, however what laypeople such as orchestral musicians seek to ascertain is: can case law help resolve employment related challenges in the here and now? If any case could begin to fulfil the wishes of orchestral freelancers desperately seeking improved employment status, *FNV* fits the bill.[37] *FNV* is indisputably a crown jewel amongst the cases considered here particularly as it is the only piece of ECJ jurisprudence to spotlight orchestral freelance substitute musicians as a particular class of workers. Literature concerning the case is extensive and ranges from laudatory appraisals that hailed a new era in the struggle against false self-employment to critical assessments with regard to the ECJ's restraint.[38] The ECJ's pronouncement that focused on the false self-employed deserves repetition as the jury is still out as to whether the court opened new doors of protection or merely offered a smoke screen in the guise of social protection:

> "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."[39]

Did a seminal piece of ECJ jurisprudence create a solution for Dutch orchestral freelancers seeking resolution to employment status questions? Has it inspired more comprehensive legislative and/or policy-related solutions? Brought by a Dutch union on behalf of orchestral freelance substitutes whose terms of employment were regulated under a collective labor agreement, the ECJ decision paved the road to success for other types of self-employed workers under similar bargaining agreements, as exemplified by the Irish experience.[40] Before analyzing *FNV* within the push-pull of competition law, this section offers an overview of EU policies and a concise line-up of EU jurisprudence with relevance to key aspects of *FNV*.

A nagging dichotomy

A conventional view on the fundamental differences between the employed and the self-employed has shaped European jurisprudence, legislation, and social policies for decades.

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[37] See *FNV, supra*.

[38] See, for two thought-provoking examples: Martin Risak and Thomas Dullinger, "The Concept of 'Worker' in EU Law: Status Quo and Potential for Change," 2018. Available at SSRN: https://ssrn.com/abstract=3190912 and Eva Grosheide & Beryl Ter Haar, "Employee-like worker: Competitive entrepreneur or submissive employee? Reflections on ECJ, C-413/13, FNV Kunsten Informatie." In *Law and Social Rights in Europe: The Jurisprudence of International Courts. Selected Judgements,* University of Gdansk Press, 2018 .

[39]*FNV*, para. 42

[40] Referencing *The Irish Bille*, Competition (Amendment Bill) 2017.

"The reason for the distinction drawn by the draftsmen of the Treaties between workers and the self-employed persons is rather straightforward: as a general rule, the ways in which the professional activities of those two groups are organized and exercised differ profoundly."[41] At the crux of *FNV* is the nagging dichotomy between who is/is not an employee and importantly, who holds the power to make that call? Although non-standard employment has greatly outstripped standard contracted employment in both countries examined, there is little consensus as to where orchestral freelance substitutes fit within definitions of employment found in legislation and case law.

It should be emphasized that the differences between the employed and the self-employed are not merely a matter of semantics. In the Netherlands, for example, until the WAB enacted in 2020 leveled the playing field between employees and "zzp'ers" (Dutch abbreviation for self-employed/independent contractors), conspicuous disparities in terms of compensation, levels of protection, and benefits were discernable. An employee is by definition dependent on his/her employer for protection against work-related risks including income protection in case of inability to work. Art. 7:660 Dutch Civil Code (DCC) describes this subordinance fully.[42] The self-employed are deemed to be entrepreneurs who exercise greater freedom in their employment choices.

En route to *FNV*, several key elements of the employment relationship with regard to European national and transnational reactions to the dramatic changes in the nature of work should be noted, keeping in mind that self-employment has outstripped traditional employment models in the 21st century. Firstly, EU law set forth in the Treaty (TFEU) does not define the term worker. Secondly, although the TFEU regulates worker-related rights such as the freedom of movement (Art. 45 TFEU), other social-economic rights are regulated through directives and national legislation. Thirdly, the hierarchy between the EU's fundamental rights and freedoms is neither set in stone nor in black letter law. Frustrated by the perception that economic concerns take precedent to social matters, a growing number of legal scholars find

[41] Opinion Advocate-General Wahl at para. 43. C-413/13 *FNV Kunsten Informatie en Media (KIEM)* [2014]. ECREU:C:2014:2411

[42] Art. 7:660 DCC in author's translation reads in relevant part:
"The employee is required to follow instructions given by or on behalf of the employer with regard to the work. The employee must follow instructions that are intended to maintain the proper functioning of the enterprise, given by or on behalf of the employer within the limits set by the employment agreement and law, either individually or as a part of a group of employees."

that the relationship between the EU's economic and social pillars has created more tension than compatibility.[43]

A side-step to Europe's flexicurity policy

A side-step to flexibilization is warranted. Also referred to as flexicurity, the policy vigorously pursued first in Denmark and subsequently in the Netherlands was promoted actively by the European Commission from the 1990s onwards and played a major role in public policy embraced by member states before, during, and even after the financial crisis 2007-2008. Flexicurity has been described succinctly as "an integrated strategy to enhance **at the same time** (emphasis added by the author) flexibility and security in the labour market."[44] After a decade of windfall, the financial crisis 2007-2008 prompted a sharp rise in unemployment levels, and for many EU countries negative growth.[45] The underlying liberalization concepts that depend on a flexibile workforce to answer to the needs of economic efficiency did not, according to critics, answer to calls for increased social justice. Instead, they heightened the conflict between free competition imperatives and social protection measures.[46] A double bind in which greater labor market flexibility corresponds to success on the globalized competitive market must be accompanied by high-level employment security according to those who believe in integrated social and economic justice.[47] Advocating a holistic take on flexicurity, the Dutch approach called upon social partners to provide the balance between labor market needs and social protection.

The two-faced character of the EU, or as Martin Potuček fittingly labels, its Janusian face, signals a rift between flexibility and efficiency.[48] Flexicurity was crafted as a response to economic and policy issues associated with globalization. Its critics observe that its excellent

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[43] See 21st century contributions by Catherine Barnard, Janice Bellace, Brian Bercusson, Guy Davidov, Simon Deakin, Miriam Kullmann, Brian Langille and Fritz Scharpf for starters.
[44] COM(2007) 359. "Towards Common Principles of Flexicurity: more and better jobs through flexibility and security" adopted on 27 June 2007, p. 2.
[45] Ibid.,
[46] See, critical notes expressed on the European Trade Union Confederation (ETUC) website https://www.etuc.org/IMG/pdf/Depliant_Flexicurity_EN.pdf, and scholarly articles by: Astrid Sanders, "The changing face of 'flexicurity' in times of austerity?" In: Countouris, Nicola and Freedland, Mark, (eds.) *Resocialising Europe in a Time of Crisis*. New York: Cambridge University Press, 2013, pp. 314-332. J. Heyes, 'Flexicurity in crisis: European labour market policies in a time of austerity', *European Journal of Industrial Relations* 19(1), 2013, pp. 71–86. Also, Sonja Bekker, "Flexicurity in the European Semester: still a relevant concept?" Journal of European Public Policy, Vol 25 (2) 2018.
https://www.cambridge.org/core
[47] See, M. Nardo and F. Rossetti. Final Report on Flexicurity in Europe. European Commission 2013, p. 2.
[48] See, Martin Potuček, in Zlatica Zudová-Lešková, Emil Voráček et al., eds., *Theory and Practice of the Welfare State in Europe in 20th Century*, 2014, p. 143.
Available at: http://www.hiu.cas.cz/en/download/open-acces-online-research-cutputs/2014/theory-and-practice-2014.pdf

track record in times of economic stability and/or growth was curbed markedly during the recession and post-recession phases that followed the crisis. Inspired by research undertaken by the European Trade Union Confederation (ETUC) in 2007.[49] Christopher Hermann asserts that flexibility has developed into an excessive means to an end that leads to heightened precariousness.[50] A selection of explanatory documents including *travaux préparatoires* reinforced the notion that economic and social aims were intended as mutually supportive, not contradictory.[51] The strong link between the social and economic strands of European cooperation was underlined in a proposal for a motion for a European Parliament resolution on flexicurity:

> "Whereas flexicurity, therefore, should be seen as an important component of the European social model fostering competitive and adaptable businesses and workforces; whereas the term 'flexicurity' arouses strong concerns among European workers, who fear increased job insecurity, and whereas, therefore, this term, and the firm principles it covers, should be defined as precisely as possible."[52]

The European Commission presented an explanation of the aim of Article 3(3) TFEU as an expression of the need for balance and sustainability in the model that is based on two complementary pillars: "on the one hand, the enforcement of competition, and on the other, social policy measures to guarantee social justice by correcting negative outcomes and bolster[ing]social protection."[53] Nevertheless, flexibility and economic efficiency and competitiveness are increasingly at odds with the ideals of social justice and social rights, participative prosperity and the fight against poverty and social exclusion. Flexicurity has not led to the promised land of healthy employment and adequate labor benefits for freelance orchestral musicians. A survey of several of leading ECJ cases shows that social rights have rarely trumped economic rights. Of the EU organizations that could answer the question as to how the EU's social market economy objective could and should be fulfilled, it is the ECJ that was called upon to tackle conflicting Treaty provisions.

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[49] ETUC, op cit., 2007.
[50] Christoph Hermann, "Crisis, structural reform and the dismantling of the European social model(s)" *Economic and Industrial Democracy*, *Economic and Industrial Democracy*, Vol 38:1,2014, pp. 51-68, at: https://doi.org/10.1177/0143831X14555708
[51] See, for example, European Economic and Social Committee's exploratory opinion on 'Flexicurity (internal flexibility dimension - collective bargaining and the role of social dialogue as instruments for regulating and reforming labour markets)' of 11 July 2007 (SOC/272).
[52] See, *Motion for a European Parliament Resolution on Common Principles of Flexicurity* (2007/2209 (INI) at B.
[53] Art. 3(3) TFEU.

Albany: restrictions on competition?[54]

Albany is one of a trio of 1999 decisions in which the ECJ tackled the fault line between competition law and social protection.[55] Challenging the legality of compulsory participation in a pension fund that had been organized inhouse by a company with the intention to increase social protection for employees, the *Albany* court argued that this measure restricted competition notwithstanding its original intent.[56] The ECJ did not doubt that "certain restrictions of competition are inherent in collective agreements" but nonetheless took the line of reasoning that "the social policy objectives of such agreements would be seriously undermined. . .subject to EC competition law."[57] Stressing the tensions between social policy and competition, the ECJ emphasized, "the social policy objectives pursued by (collective) agreements would be seriously undermined if management and labour were subject to Art. 81(1) of the Treaty."[58] In principle, *Albany* instructs: if a collectively bargained agreement contains clauses that improve work and employment conditions, the contract should not fall within the reach of the competition law, Article 101(1) TFEU. The ECJ ascertained that an exception to competition law could find its basis through collective agreement provisions that led to "a direct improvement of working conditions."[59]

The self-employed as undertakings

Article 101(1) TFEU prohibits all agreements between undertakings, decisions by associations of undertakings, and concerted practices within the EU that have as their object or effect the prevention, restriction or distortion of free competition. Notwithstanding the stated prohibitions, the Treaty does not offer a definition of undertakings. Although the ECJ avoids engaging in definitions, it lent its support to a broad conception of undertakings in *Höfner*: "undertakings encompass every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed."[60] Thus, in EU-speak, an undertaking is an entity engaged in economic activity and encompasses individuals who offer goods and/or services on the market and bear financial risks associated with the performance of these services. Significantly in *Becu*, the ECJ reasoned that employees should not be categorized as

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[54] *Albany,* at 60.
[55] *Albany*, *Brentjens* and *Drijvende Bokken*: and Joint Cases C-115/97, C-116/97 and C-117/97, *Brentjens' Handelsonderneming BV v. Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen,* and Case C-219/97, *Maatschappij Drijvende Bokken BV v. Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven,* September 21, 1999.
[56] *Albany*, at 97.
[57] *Albany*, at 59, 60.
[58] *Albany,* at 59.
[30] See, *Albany* at 60; *Brentjens* at 57 and Dri*jvende Bokken* at 47.
[60] Case 41/90 *Höfner and Elsner v Macrotron* (1990), at 21. ECLI:EU:C:1991:161

undertakings because they do not engage in autonomous economic activity and do not bear the risks as such.[61] However, the ECJ positioned self-employed workers, especially those who engage in liberal professions within the undertaking category in *Pavlov*.[62]

In what could be seen as a rehearsal for issues central to *FNV*, the ECJ showed its reticence to extend exceptions to competition law to a group of self-employed Dutch-based medical professionals who intended to top-up their pensions by contributing to a supplemental pension scheme set up under a collective agreement. "A fund entrusted with the management of a supplementary pension scheme set up by a collective agreement concluded between organizations representing employers and workers in a given sector…was an undertaking within the meaning of Art. 85 et seq. of the Treaty."[63] Strict compliance with stringent competition rules was the ECJ's strong message.[64] Decisively, the ECJ pointed out that the Treaty was silent with regard to advancing 'the members of the liberal professions' to enter into agreements to improve their work conditions.[65] The ECJ stopped short of blocking the pension scheme in question as it did not distort competition through abuse of a dominant position.[66] The ECJ's construal of core concepts such as agreement, undertaking and the all-important restriction of competition suggests an interpretational divide between *Albany* and *Pavlov*.[67] The narrow interpretation of undertakings in *Pavlov* might have indicated a roadblock to a more open interpretation to the concept of the self-employed as undertakings: *FNV* was to reroute that course, at least for the false self-employed.

Setting the stage for *FNV*: in the shadow of budget cuts

A reliance on a sizeable number of freelance substitute musicians is a given in the orchestral profession: "without freelancers, there would be no performances, it is really that simple."[68] Worldwide orchestras were adversely affected by the financial crisis 2007-2008 resulting in personnel cuts at best and in many worst case scenarios collective dismissals. "When the institution is threatened by downsizing and subsidy reductions, the most precarious workers,

[61] C-22-98 *Criminal proceedings against Jean Claude Becu, Annie Verweire, Smeg NV and Adia Interim NV*. (1999) ECLI:EU:C:1999:419
[62] Case C 180-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* (2000). ECLI:EU:C:2000:428.
[63] Ibid., at 11.
[64] Ibid., at 84-89.
[65] Ibid., at 69.
[66] Ibid., at 120.
[67] See, Mark Freedland and Nicola Countouris. "Some reflections on the 'personal scope' of collective labour law."
[68] Conversations with Angela Garland.

the freelancers, are even more threatened and unfortunately the slippery slope became non-negotiable."[69]

Dutch orchestral musicians are bound by employment contracts negotiated between various consortia of orchestras,[70] and the unions. To improve employment conditions for freelance musicians, two Dutch musician's unions, the FNV KIEM (Dutch Trade Union Confederation Art, Information and Media) and the Nederlandse Toonkunstenaarsbond (Dutch Musician's Union) collaborated with the Vereniging van Stichtingen Remplaçanten Nederlandse Orkesten (Association of the Foundation for Substitute Players in Dutch Orchestras, further VSR) to formulate a CAO on behalf of the substitute players. The musicians' CAO set forth minimum fees in a mixed membership agreement comprised of substitute orchestral musicians hired on the basis of employment contracts and substitute orchestral players hired under contracts for services. The latter group were considered by employers as self-employed substitutes as opposed to the former who were deemed to be employed substitutes. Under a provision put forward in Annex 5 CAO the self-employed substitutes were entitled to receive the same minimum payment for rehearsals and concerts as employed substitutes augmented by 16%.[71]

The FNV's[72] attempt to level the playing field for freelance substitutes was brought to the attention of the Dutch competition law administrative body, the (Nederlands Mededingingsauthoriteit, Dutch Competition Authority, further NMa). In opposition to the CAO that set minimum rates for substitute musicians, the NMa observed: "a union bargaining on behalf of self-employed members is an association of undertakings and is not permitted to take advantage of the social exception."[73] Apprised of the FNVs bargaining activities on behalf of the self-employed substitute players, the NMa initiated an informal inquiry to ascertain the

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[69] Conversations with Martin Kothman, Senior director Audiovisual media & classical music sector, FNV Media & Culture.

[70] The majority of subsidized orchestras are members of the Association of Foundations for Dutch Orchestras (VvNO Vereniging van Nederlandse Orkesten) however the radio orchestras negotiate separate agreements, and the Royal Concertgebouw Orchestra also negotiates separately.

[71] Collectieve Arbeidsovereenkomst Remplaçanten Nederlandse Orkesten 1 november 2006 – 31 augustus 2007. The text of Annex 5, in the original Dutch. "Aan de zelfstandige remplaçant, d.w.z. remplaçanten waarmee een overeenkomst van opdracht en geen arbeidsovereenkomst wordt aangegaan, wordt tenminste het in bijlage 2 genoemde repetitie- en concerttarief betaald plus 16%. Bedoelde zelfstandige remplaçant is geen werknemer in de zin van artikel 1 c van deze CAO." At: https://adoc.tips/collectieve-arbeidsovereenkomst-remplaanten-nederlandse-orke.html

[72] Although the acronym FNV is used throughout the paper, it bears repetition that the parties who bargained collectively on behalf of the substitutes were the FNV, the Dutch Musicians Union (Nederlands Toonkunstenaarsbond, NTB) and the Foundations for Substitutes in Dutch Orchestras (VSR).

[73] Visie Document, "CAO-tariefbepalingen voor zelfstandigen en de Mededingingswet published in Dutch on 12 December 2007. Available, in Dutch at: https://www.sdu.nl/content/staatscourant-2007-241-visiedocument-cao-tariefbepalingen-voor-zelfstandigen-en-de-mededingingswet

CAO's legality. Their findings were published in a Vision document, 'CAO fees for self-employed in light of Dutch Competition Law' (author's translation).[74] According to the Vision document, the CAO's Annex 5 could restrict competition in the Dutch market prohibited under Art. 6 (1) Mw (Mededingingswet/Competition Law) in relevant part:

> "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 Dutch market or on part of it, shall be prohibited."

The FNV maintained that both categories of orchestral substitutes under the aforementioned collective labor agreement were entitled to receive negotiated minimum rates outside the reach of competition law and additionally, "the NMA's actions went much too far by singling out the lawful collectively bargained agreement. "We felt that their actions, not ours were unlawful."[75] At the Hague District Court (Court of First Instance), the FNV sought a declaration that competition law did not preclude the mixed membership CAO, "an agreement had the strong mission to protect the weakest of all parties within the freelance orchestral sector."[76] The Hague Court rejected the FNV claim finding that the FNV failed to prove that fixed fees directly contributed to improving labor conditions for the freelance substitute musicians.[77] Subsequently, the FNV applied to the Gerechtshof s'Gravenhage (The Hague Regional Court of Appeal) for a correct interpretation of Art. 6 Mw. According to the Court of Appeal, the soundest approach to national legislation largely influenced by EU legislation, Art. 101 TFEU, was to initiate a request for an ECJ preliminary ruling based on the following two questions:

> "(1) Does Art. 101 TFEU apply if a collective labor agreement sets minimum fees for self-employed workers performing the same functions under a contract for services as employed workers and,
> (2) If so, would the collective labor agreement fall within the Art. 101 (1) regime if the agreement was intended to improve the working conditions (either directly or indirectly) of all of the workers within the scope of the agreement?"[78]

Holding steadfastly to that cardinal concept of the split between employees and undertakings, the ECJ acknowledged that in principle social dialogue should benefit employees but not independent service providers, the self-employed. Carefully applying a checklist of employment characteristics, the Court found that substitute musicians who play alongside

[74] Ibid.,
[75] Conversations with Mark Gerrits, Kunstenbond, formerly NtB music representative.
[76] Conversations with Martin Kothman.
[77] *FNV Kunsten Informatie en Media v. De Staat der Nederlanden,* Rechtbank 's-Gravenhage 27 October 2010. ECLI:NL:RBSGR:2010:BO3551.
[78] Court of Appeal, The Hague, *FNV Kunsten Informatie en Media v Staat der Nederlanden* (C-413/13) 9 July 2013.

member musicians were workers who could be classified as 'false self-employed,' a category that could benefit from the *Albany*-exception to Article 101(1) TFEU.[79]

In a narrow interpretation of how the benefits of a collective labor agreement between unions and orchestral freelancers should be interpreted, the ECJ noted that the substitute musicians should be classified as undertakings under EU law: they perform services in a specific market (orchestras); receive remuneration (fees for rehearsals/performances paid by the employer and importantly, perform the aforementioned activities as independents in relation to their employers. A labor organization that negotiates on their behalf does not function as a bona fide social partner representing the interests of these musicians but rather as an "association of undertakings." While the provisions within the TFEU encourage social dialogue to answer to the social objectives (see, Arts. 151, 153 and 155 TFEU), the intent of the legislation is to ameliorate employment situations for employees not for entrepreneurial self-employed persons unless of course these persons can be classified in a special category, in *FNV*, the false self-employed.

> "That being said, it must be held that the minimum fees scheme put in place by the provisions in the collective labour agreement directly contributes to the improvement of the employment and working conditions of those substitutes, classified as 'false self-employed'. 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."[80]

The ECJ considered that, according to the Dutch law on collective labor agreements, a Dutch independent service provider (self-employed person) has the right to join a trade union. Furthermore, trade unions are within their right to negotiate collective labor agreements on behalf of employees including the self-employed whose services are provided to the employer.

As *Albany* instructed, a collectively bargained agreement created to improve employment conditions does not fall within the scope of Art. 101(1) TFEU. However according to superficial appraisals, the self-employed substitute orchestral players who play their instruments as part of an orchestral collective in return for remuneration could be construed as entrepreneurs, in the parlance of competition law, undertakings competing in a specific market. What is the relationship between a freelance substitute player and his/her employer? Did the FNV and partners negotiate a CAO for these musicians in good faith in order to improve the

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[79] See *Albany* at 60.
[80] *FNV* at 39 and 40.

employment situation for individual freelance substitute players, or was the union negotiating on behalf of an association of undertakings? If in fact the FNVs collective bargaining activities were undertaken on behalf of an association, the resulting agreement was subject to competition law under Art. 101(1) TFEU. What requirements did the Court set to define self-employed service providers who fall within their newly defined category of false self-employed workers? To meet the requirements of this hybrid category, the worker must be dependent on the employer, possesses no ability to determine his/her market-related conduct, and cannot bear any responsibility for the employers' financial risks.

Confusion as to attribution reigns if we consider that a worker can be qualified as self-employed according to the national law of member states, and the same worker could be classified as an employee according to tax regulations. In the ECJ's view, if the substitute musicians would be classified by national courts as genuinely self-employed, the collectively bargained agreements concluded by their representative organizations would not be exempt from the long reach of Article 101 TFEU. However, should national courts ascertain that these freelance substitute musicians were employees according to national and EU definitions, then their collectively bargained agreement would merit exemption under *Albany*. In the ECJ's consideration, a self-employed substitute musician reaps the benefits from more independence and flexibility than regularly employed musicians who perform the same activity with regard to work schedules, the location of the work and manner of performing the tasks assigned, in other words, the rehearsals and concerts. Further, recalling *Albany*, the ECJ emphasized that the collective bargained agreement would have to contribute to the improvement of the employment and working conditions of the substitute musicians. Turning its attention to the employment relationship, the ECJ looked back to past holdings: "The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration."[81]

FNV has left many questions open for consideration

The ECJ took a conservative approach to the FNV's expansion of collective bargaining activities to include all of its self-employed members. In essence, the Court demoted social dialogue on the part of trade unions on behalf of these self-employed members to a lower level than collective bargaining between bona fide employers and employees. The case was

[81] *Lawrie-Blum C-66/85 [1986],* at 42.

certainly not resolved at either the EU or the national level, keeping in mind the ruling at the Hague Court of Appeal with its admonishment (loosely translated): "we cannot give judgment on the question of whether self-employed other than substitutes (such as self-employed workers without employees in general or working in another sector) could be categorized as false self-employed." As mentioned above, a victory for competition exceptions with regard to certain categories of self-employed workers led to legislative change, the aforementioned WAB.[82] No solid definitions of the false self-employed were provided and despite the hopes of legal certainty in terms of definitions, the 'false self-employed' in the freelance orchestra sector still face challenges in terms of employment, as they are to quote a Dutch union representative, 'vis noch vlees.'[83]

The AG moves beyond European borders to consider U.S. jurisprudence

In his quest to find a balance between worker's rights and competition law concerns in *FNV*, Advocate General (AG) Wahl's referenced three pieces of U.S. Supreme Court (SCOTUS) jurisprudence as a basis for an Opinion submitted on 11 September 2014.[84] His choice focused on cases that date back more than half a century and include a case that involved the specific concerns of musicians. These U.S. precedents will be considered briefly.

In *Allen Bradley*,[85] a New York based electricians' union took closed-shop agreements with equipment manufacturers to a new level. To protect local suppliers, New York City manufacturers agreed to boycott contractors who used equipment that was not produced locally. Non-New York City manufacturers claimed that such activities not only quashed competition but also denied them access to operate freely in the market. The question posed to SCOTUS: is there evidence of a violation of the Sherman Antitrust Act of 1890 if labor unions and their members unite with employers and manufacturers of goods to restrain competition to monopolize the marketing of such goods with the aim of improving the wages of local workers?[86] Recognizing the difficulty of balancing market competition with the rights of workers, the SCOTUS majority explained:

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[82] Regeling van de Minister van Sociale Zaken en Werkgelegenheid van 22 december 2016 tot wijziging van de Regeling ketenbepaling bijzondere functies Staatscourant 2017, 132, in force the day following publication, January 2, 2017. Dutch text at: https://zoek.officielebekendmakingen.nl/stcrt-2017-132.html

[83] Literal translation 'neither fish nor fowl,' that means the category is ambiguous, quote by Mark Gerrits, Kunstenbond union.

[84] Opinion Advocate General Nils Wahl, *Case C-413/13 FNV KIEM*, 4 December 2014, at 99.

[85] *Allen Bradley Co. v. Electrical Workers*, 325 U.S. 797 (1945)

[86] Sherman Antitrust Act of 1890 15 U. S. C. §§1-7, in relevant part: "'Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine to conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor."

> "Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups. . . The difficulty of drawing legislation primarily aimed at trusts and monopolies so that it could also be applied to labor organizations without impairing the collective bargaining and related rights of those organizations has been emphasized both by congressional and judicial attempts to draw lines between permissible and prohibited union activities."[87]

Importantly, the Court recognized that to grant free rein to the union to effectuate secondary boycotts could obstruct legitimate public policy concerns and could further put the Court in the place reserved for the legislator.[88] Soon thereafter in a shift reflective of anti-union sentiment, the U.S. Congress passed the Taft-Hartley Act (THA) in which secondary boycotts were categorized as unfair labor practices.[89]

> "Section 8(b)(4) of the Act makes it unlawful for a labor organization or its agents "(i) to engage in, or induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services," [90] and more generally, "any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry affecting commerce" is prohibited.[91]

At the heart of the New York gig scene

While precedents concerning antitrust behavior abound, *Carroll* was the only case of judicial weight concerning musicians to reach SCOTUS.[92] Posing the question as to whether price lists -- also designated as price floors, a group-imposed minimum charge set by orchestra leaders, were designed to protect musicians or merely an excuse increase the leaders' powers, SCOTUS was challenged to ascertain whether or not the powerful musician's union, the American Federation of Musicians (AFM) Local 802, had conspired together with orchestra leaders to violate federal anti-trust laws Of relevance, the THA defines industry affecting commerce as: "any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry affecting commerce within the meaning of the Act. [93] Taking us to the heart of the New York's gig scene in its 1960s heyday, the courts were challenged to differentiate between gig

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The other relevant antitrust legislation: Clayton Antitrust Act, 15 U. S. C. §§ 12-27 and the Norris-LaGuardia Act 29 U.S.C. §§ 101-115 specifically exempt trade unions of workers from antitrust law "provided they act in their own interest.

[87] *Allen v. Bradley*, at 25.

[88] Ibid., at 810.

[89] Labor Management Relations Act, 1947. [LMRA, the Taft-Hartley Act] §8(b)(4). Title 29, U.S.C. § 402(c).

[90] Ibid.,

[91] Ibid.,

[92] *American Fed'n of Musicians v. Carroll,* 391 U.S. 99 (1968).

[93] Title 29 U.S.C. § 402(c)) *Taft-Hartley* is also referred to as the *Labor Management Act* 1947.

contractors or “leaders” and hired musicians: “subleaders” and “sidemen.” Lucrative New York City engagements were closed-shop gigs. Working musicians were required to join the union and club owners were required to hire local unionized musicians and required to pay fees set in a “Price List Booklet.” According to Carroll and three other orchestra leaders (the claimants), these union practices were tantamount to “conspiracy with a nonlabor group.”[94] Their claim asserted that the AFM Local 802 violated the Sherman Act as its fee setting activities “created a combination with a nonlabor group.”[95]

Under a doctrine established by SCOTUS during World War II, unilateral actions undertaken by a union can be exempt from the long arm of antitrust laws under two conditions set forth in *Hutcheson*.[96] Importantly, there must be proof that the union has acted in its own self-interest and secondly, the union is not permitted to have joined forces with a nonlabor entity. The reach or more appropriately lack thereof when applied to pit orchestras performing in New York clubs was decisive within the context of *Carroll*.

Before the case reached SCOTUS, the United States Court of Appeals for the Second Circuit had found that such price-setting practices were direct infringements of the Sherman Act.[97] The SCOTUS majority opined that since the *Carroll* leaders were in competition with their fellow musicians (subleaders and sidemen) they were entitled to establish price lists. Following a precedent set by *Jewel Tea*, “the crucial determinant is not the form of the agreement--e.g., prices or wage--but its relative impact on the product market and the interests of union members."[98] The union’s activities were exempt from antitrust limitations because protective actions such as price floors to protect wages of the subcontracted players were well shielded by existing legislation.[99] Although *Carroll* marked an attempt to establish a justification for anticompetitive schemes devised by the unions and employers that could benefit union members, SCOTUS chose not to define “labor group.” Critics are more than reasonable in their skepticism concerning the expansion of the AFM’s powers as a result of a firm reliance on the value of promoting “greater union interest.” It could be argued that the AFM, as the strong and sole union representing U.S. musicians’ interests, already exerted far-

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[94] Ibid.,
[95] See, *Allen Bradley, supra.*
[96] *U.S. v. Hutcheson,* 312 U.S. 219, 232 (1941).
[97] *Carroll v. Associated Musicians of Greater New York*, 183 F.Supp.636 (S.D.N.Y. 1960), affirmed 284 F.2d 91 (2 Cir. 1960).
[98] See, *Local 189, Meat Cutters v. Jewel Tea Co.* 81 U.S. 676 (1965).
[99] See, Norris-LaGuardia Act § 13, 29 U.S.C. § 113 (c) (1964). “The term labor dispute includes any controversy concerning terms or condition of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.”

reaching control over musicians' employment with specific focus on adequate pricing, without the additional allowances put forth in *Carroll*. Equally questionable is the Court's avoidance of a central tenet within the object and purpose of the National Labor Relations Act (NLRA): the support of collective bargaining at the workplace.[100] The imposition of price lists under union bylaws and other regulations gives the union the power to take charge of a vital job condition setting the price for labor, without discussing this condition within the collective bargaining process. "By combining with a nonlabor group, the musicians' union has obtained effective control of the entire club-date industry. . .the Court treads dangerous ground. . .to deny a particular industry the normal competitive conditions envisioned by the antitrust laws, conditions usually viewed as essential for maintaining services and prices at satisfactory levels."[101] Acutely aware of the differences between the workings of competition law vs. antitrust in their respective EU-U.S. contexts, AG Wahl relied on the aforementioned SCOTUS examples to encourage the ECJ to employ restraint when applying the *Albany* exception to self-employed workers. In his view, the ECJ held the responsibility to gage "whether the provisions at issue directly improve the employment and working conditions of employees, by genuinely and effectively preventing social dumping and not going beyond what is necessary to achieve that objective."

Social Dumping: Differentiations between AG Wahl and ECJ findings

Concerned with the effects of social dumping, AG Wahl reasoned that minimum rate provisions for self-employed workers are in the interests of employees, because otherwise it becomes more attractive for employers to exchange employees for self-employed workers who may cost less than employees. In his opinion, the prevention of social dumping falls squarely within a category of direct and legitimate objectives to be pursued in collective bargaining provisions concerning self-employed workers. The direct element is reinterpreted in such a way that it does not exclude the possibility of including collective agreement provisions relating to self-employed workers that improve the employment and working conditions of employees.[102] The ECJ did not opt to call social dumping either by its name nor allude to it in passing. Instead, the Court underlined that minimum rate provisions make a positive contribution to the employment and working conditions of the false self-employed and further enable this specific category of workers to avail themselves of collective pension insurance.

[100] National Labor Relations Act (NLRA) 29 U.S.C. §§ 151-169 (1935).
[101] Dissent by William O. Douglas, see, *Carroll*, *supra*.
[102] Opinion of AG Nils Wahl, *FNV Kunsten Informatie en Media v Staat der Nederlanden* 11 September 2014. See in particular, A-G Wahl's conclusion *FNV KIEM*, paras. 74-94.

U-turns and other considerations inspired by *FNV* and *Carroll*

Legal scholars Mark Barenberg and Eva Grosheide developed a theory that applies U.S. legal interpretation principles that could lessen the restrictions of European competition law with regard to the rights of the self-employed to negotiate minimum fees.[103] According to these scholars, it is advisable, at least conceptually, to advance concepts tested by U.S. courts to come to grips with employment-related issues in European cases with similar 'fact patterns.' They suggest creative paths to elude competition law restrictions via legal maneuvers, 'about-faces' or in their preferred vernacular, 'U-turns.' Pushing aside the oft-cited differences between common law and civil law, one of their U-turn examples extends the U.S. concept of a "labor group" to an amalgamation of employee associations comprised of self-employed persons. If such an extension could reach Europe they argue, it could provide a workable solution to problems faced by freelancers and self-employed workers keen to gain fair remuneration through collectively bargained agreements akin to the substitute musicians in *FNV*. According to the Barenberg and Grosheide, the *FNV* court "dodged the question" of whether the minimum fees bargained for on behalf of the freelance substitute musicians met the *Albany*-exception standard. The ECJ did not step to the plate and free self-employed persons from the shackles of a classification as entrepreneurs who perform economic activities by opting to remand the issue back to the Hague Court of Appeal for a final status appraisal as to whether the substitutes were false self-employed.[104]

Their third U-turn examines the theoretical possibility for fee scales to be set through a system of government mandates with the caveat that EU member states would bear the responsibility to monitor fee-setting independent bodies. These independent bodies would be mandated to set fees in the public interest and maintain distance from the beneficiaries such as the self-employed in privileged professions (the medical professionals in *Pavlov* come to mind).[105] Their far-reaching fourth and final U-turn calls upon the ECJ to consider SCOTUS' adoption of the concept of the 'labor group,' an intermediate category that includes include associations-groups of self-employed persons akin to the labor group considerations in the *Carroll* case.[106]

Winds of change? *FNV* meets the future

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[103] Mark Barenberg and Eva Grosheide, "Minimum Fees for the Self-Employed: A European Response to the Uber-ized Economy" *Columbia Journal of European Law* 22, no. 2, Spring 2016, pp. 193-236.
[104] See for example, *Pavlov*, supra.
[105] Ibid., p. 236.
[106] See, *Carroll v. Associated Musicians of Greater New York*, 183 F.Supp.636 (S.D.N.Y. 1960) affirmed 284 F.2d 91 (2 Cir. 1960). Debates concerning whether or not the decision was correctly reasoned still rage with freelance musicians challenging the court's logic.

In a controversial Dutch case in 2015, several categories of nonstandard, self-employed workers in the mail delivery branch employed by PostNL organized a strike and a blockade which they publicized through social media. PostNL sought remedy in court for these actions claiming that they were illegal because some of the striking workers were self-employed. The judge who oversaw the interlocutory proceedings afforded the entire group of workers, including a group he described as false self-employed[107] the right to strike under Art. 6(4) European Social Charter (ESC), thus extending the right to the newly minted false self-employed.[108] To strike is anathema for freelancers in general. "If we would go on strike, a countless number of musicians would be ready to jump in and replace. A lack of solidarity and the fear of losing work once and for all keeps us vulnerable, even precarious."[109]

Thus, despite the promise of legal certainty implied by *FNV,* the 'false self-employed' in the freelance orchestra sector face challenges in terms of employment. Take the case of a saxophone player engaged to perform with a leading Dutch orchestra. Common knowledge of classical orchestra's repertoire informs that saxophone players are not regular members of an orchestra as their services are only needed on rare occasions. If a self-employed saxophone player is hired for a short series of rehearsals and concerts, would the union be permitted to fix a price for the musician's services, or would that action involve illegal price-fixing as it is impossible to determine the degree of disguised employment for a musician who does not technically take on a 'side-by-side' role in the orchestra? To quote a Dutch colleague, "de laatste loodjes wegen het zwaarst"(loosely translated by the author: the last mile is the longest).[110]

In keeping with the ECJ's answers to the pair of prejudicial questions posed in *FNV,* the Hague Court of Appeal ruled that the freelance substitute orchestral players should be categorized as false self-employed persons.[111] As subordinates, the freelance substitutes worked 'side-by-side' performing the same tasks as regular orchestral employees and did not have the option to determine the particulars of their work schedules like true self-employed persons. Crucially, the Court of Appeal rejected the State's counter-argument that a self-employed orchestral substitute could "execute or execute only partially the assignment," in other words, the

[107] To quote the Dutch term, *schijnzelfstandigen*.
[108] Art. 6 (4) ESC revised 1996 upholds: "the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into." Available at: https://rm.coe.int/168007cf93
[109] Conversations with Dorine Schoon, one of the founders of the Dutch-based *Platform voor Freelance Musici*.
[110] Conversation with Mark Gerrits.
[111] The Hague Court of Appeal, *FNV Kunsten Informatie en Media v. De Staat der Nederlanden, Case 343076/HA ZA 09-2395,* 1 september 2015.

musician could opt out and not attend some of the rehearsals.[112] In a correct assessment of an orchestral freelancers dependent status, the Hague Court observed, "even if such freedom existed in a strictly legal sense, it must be assumed that it is unlikely that such a substitute will be hired a second time by the orchestra. . .a real freedom does not exist."[113] The Court did not go beyond the boundaries of the ECJ ruling to consider if false self-employed persons who are not bona fide self-employed under the competition law regime could be categorized as employees under Dutch law, under Art. 6:610 DCC.[114]

A number of determining questions come to mind when considering the effects of *FNV* in practice. As the *Irish Bille* example proves, the impact of *FNV* with regard to the uphill battle for freelance equality was significant, "it provided us with a beacon of light, a reminder never to give up."[115] The union advanced arguments to support the idea that freelance substitute musicians are employees, not entrepreneurs or undertakings whose fees prompt price fixing. Difficulties in classification arise when considering a substitute musician's activities beyond the orchestral sphere. Contemplate the fact that a freelance musician often switches roles between orchestral performance under contract, private teaching, teaching at a music school and/or conservatory, performing as a member of a chamber music group and engaging as a freelance performer in other musical enterprises. Are these musicians then false self-employed as orchestral musicians when they play alongside their contracted musical colleagues and simultaneously bona fide self-employed when performing chamber music concerts with, for the sake of argument, a string quartet. Which specific criteria should be taken into consideration?

If false self-employed workers who are hired to perform under contracts of services would be regarded as employees under domestic law, should they be covered under collective bargaining agreements? Is the national authority sufficiently competent and well-versed in the nuances within freelance situations and self-employment to fairly determine if an employee is false? Professor Evert Verhulp has never wavered from his conviction that substitute musicians in an orchestra are employees *pur sang*. "Unthinkable, how can an orchestral musician be classified as self-employed? The conductor directs and controls what an orchestral musicians does. The musician follows those orders and is totally dependent in every

[112] Ibid., at para. 2.8.
[113] Ibid.,
[114] Ibid, at para. 2.3.
[115] Conversations with Karan O'Loughlin, Services, Industrial, Professional and Technical Union (SIPTU) Sectoral organizer, Arts and Culture.

aspect of work." Musicians chime in wholeheartedly. "What does an orchestral musician do? We breathe together, become one with the music, recreate the conductor's gestures into musical magic and join together to create a performance experience based on notation, that is what an orchestral musician does."[116] Orchestral freelance substitutes must perform their duties, as an individual within a collective, in perfect synchronization with their regularly contracted colleagues. "They certainly are not entrepreneurs who run a business, direct a staff, or share in any sort of commercial endeavor---they are musicians!"[117]

Setting minimum fees breaches European competition law when applied to the 'real' self-employed but allows the false self-employed to benefit from the *Albany*-exception. Following that line of logic, when the FNV engaged in social dialogue on behalf of the orchestral substitutes, the trade union bargained for employees, not self-employed persons. The Court stayed clear of true legal innovation as it certainly did not depart from the binary distinction between employees and self-employed entrepreneurs. The question remains as to how, if and when the *FNV*-doctrine could be expanded to include self-employed persons in collective agreements who are not categorized as false self-employed but for all intents and purposes work in disguised employment situations.

National regulatory action in the Netherlands post *FNV*

The Dutch Authority for Consumers and Market Boards (ACM) changed its tune in the aftermath of *FNV* by allowing independent contractors the freedom to set prices within the framework of collective bargaining agreements as articulated in its 2017 *Leidraad: Tariefafspraken voor zzp'ers in cao's*. (Guidelines: Rate agreements for freelancers in collective agreements).[118] Crucial to the exceptions outlined in the Guidelines is that the self-employed person works "side-by-side with employees and are therefore not an undertaking within the meaning of the Competition Act." Thus, like the orchestral substitute who performs alongside orchestral members, these self-employed persons are indistinguishable from regular employees in terms of their work and should not be placed into the category of entrepreneurs (frequently translated from the Dutch as undertakings) within the meaning of the Competition Act. Under the Guidelines, this special category of self-employed persons are permitted to work under a collective labor agreement that sets minimum fees for their labor.

[116] Conversations with Maestro Christopher Keene.
[117] Conversations with Maestro Mark Elder OBE.
[118] See, in Dutch *Leidraad: Tariefafspraken voor zzp'ers in cao's*. Autoriteit Consument & Markt, 24 februari 2017. Available at: www.acm.nl

Martijn Snoep, Chair of the ACM displayed enthusiasm for this relaxation of the strict application of competition rules "to show consideration for more than one million independent contractors at work in the Netherlands."[119] The cumulative requirements for the competition exception in the Guideline's text adopted in Art. 6(3) Mw are (author's translation):

> "The agreements ensure that the parties involved work more efficiently, as a result of which the advantages outweigh the disadvantages, and
> -a fair share of these benefits are advantageous for customers, and
> -these benefits can only be achieved through the agreements and the agreements do not go beyond necessary measures, and
> -there will be evidence of sufficient competition in the market after the arrangements have been made'. [120]

In the 2007 NMa Vision Document discussed earlier, the ACM's precursor, the NMa had rejected this line of reasoning based on the contention that fixing fees for self-employed workers would exceed necessity in the pursuit of social objectives to benefit workers. Fortunately for substitute musicians, a particularly vulnerable category of freelancers in need of a safety net in terms of social benefits, the formalism of the NMa old-style has made way for a creative new approach to the competition-social benefit dichotomy.

The living legacy of *FNV*

The question remains: did *FNV* move into bold protective territory expanding upon the *Albany* exception with its designation of a special category, the false self-employed? With its closed, circle the wagons approach to limit the reach of minimum fees through collective bargaining for this restrictive category of false self-employed substitute musicians, it could be argued that the ECJ created a strangle hold on the very notion of bargaining freedom. By circumventing the wide options for workers to bargain collectively in Art. 28[121] in the EU Charter on Fundamental Rights and the ILO Convention Art. 98 and turning a blind eye to the European Court of Human Rights' (ECHR) expansive interpretation of these rights in

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[119] Conversation with Martijn Snoep, Board Chair, Authority for Consumers & Markets (ACM).
[120] Quoted on page 4, *Leidraad*. In the original Dutch, Artikel 6, lid 3 van de Mededingingswet
"Als afspraken voldoen aan de volgende vier voorwaarden, is er sprake van een uitzondering op het kartelverbod:

> De afspraken zorgen ervoor dat de betrokken partijen efficiënter werken, waardoor de voordelen groter zijn dan de nadelen, en
> -een eerlijk deel van deze voordelen komt ten goede aan klanten, en
> -deze voordelen kunnen alleen bereikt worden door de afspraken en de afspraken gaan niet verder dan nodig, en
> -er blijft genoeg concurrentie over op de markt na het maken van de afspraken."

[121] Art. 28 of the EU Charter on Fundamental Rights reads: "Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action." Available at:
https://fra.europa.eu/en/eu-charter/article/28-right-collective-bargaining-and-action

Baykara,[122] the ECJ underlined its conservative approach to workers' rights. Are dancers, photographers, or for that matter self-employed house cleaners protected under *FNV*? Or for the sake of accuracy, what about orchestral musicians who perform as ensemble players at the behest of a non-orchestral employers in the various manifestations of recording including streaming companies? Can these performers set minimum rates as false self-employed persons?

The judicial ruling established a pattern of understanding and acceptance of the concept of the false self-employed status of orchestral freelance musicians. But where does that lead those who work in the sector? Union organizers valiantly attempt to pave the way to collective bargaining for cultural workers regardless of dependence and classification. Academics ponder ways to transmute hybrid 'employee-worker' categories into positive legislation. In both the Netherlands and the U.S., the boots on the musical ground, are increasingly concerned by continued austerity in on the part of employers with regard to freelancers. "Orchestras nowadays tend to higher fewer freelancers in an attempt to cut costs and have found creative ways to mitigate the costs of employment by taking on student-apprentice players, members of in house training academies who replace seasoned freelancers at reduced rates of pay."[123]

A deeper consideration of the legal landscape as it impacts the most vulnerable workers post *FNV* is invaluable. Comments provided by a Dutch-based bass player who, in her own words, 'mustered the courage' to take her former employer to court in 2020 underscores this observation. "The litigation I was involved in was so much larger than my personal situation that the very idea to go to court struck fear in my heart. I am a bass player and a woman, that says a lot in a corner of the orchestral profession that is full of powerful men. Until the budget cuts (2012) I was a regular employee in my orchestra. Immediately, less than a few weeks following the cuts and my dismissal, 'my' orchestra hired me as a guest player (freelance substitute), and I worked happily for several more years until I was told that I was not needed anymore. How could a former colleague who had proved themselves for years be not needed? I went to court in the name of all those freelancers who are afraid to stand up for their rights. A win for me is a win for all."[124]

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[122] *Demir and Baykara v. Turkey* [GC]-34503/97 Judgment 12.11.2008 [GC] [2008] ECHR 1345 (2009) Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-1864%22]}

[123] Conversations with Angela Garland.

[124] Conversations with former Het Ballet Orkest bass player, Annemieke Marinkovich. She won her case in July 2020. According to the Amsterdam Court, the conditions of her employment may have taken on another contractual wording (guest player post-dismissal; employee for ten years prior to the staff reductions) but her work as a bass player within the section remained the same. The fact that she worked in the orchestra as an independent

The quest for fair remuneration on the part of a Dutch-based musician

Orchestral employees whose jobs have been systematically whittled down from a comfortable 100% pay for 100% work have fallen to new lows in the Netherlands orchestra constellation. With the notable exception of the Royal Concertgebouw Orchestra and one other state-subsidized regional orchestra, the North Netherlands Philharmonic, other Dutch professional orchestral CBAs [125]advance phased contracts ranging from 90% to 65% with fears of further diminution in the future.[126] The majority of Dutch orchestras remaining after drastic culture subsidy cuts (2012-2013) have endured cutbacks in employment for the full complement of players. As the examples cited above highlight, musicians under contract post-cuts receive partial contracts for full-time work. New members entering the orchestra are given percentage contracts, a diminished version of what long-standing members received in years past. Most present-day Dutch orchestral employees experience another variation on the merger/reorganization theme: a deleterious combination of part-time contracts and personnel cuts in which high rates of production are accompanied by diminution of salaries. Maximum scope CBAs have lost out to part-time contracts in the orchestral sector, increased work stress engendered by the aforementioned combination of more work for less pay has become the new norm.

A path to empowerment: the Platform voor Freelance Musici

"Organizing freelancers is like organizing cats. Or maybe, more like giving a cat a bath."[127]

The ongoing push to address and readdress the protection of freelancers, the most vulnerable and often difficult to define category of workers will continue to set the agenda for unions and fueled the formation of an alt-labor group, the *Platform voor Freelance Musici*(PvFM) in the Netherlands. The phenomenon of the free concert as a means to showcase new talent became its first cause célèbre after musicians woke up to the fact that performing for free even at such renowned venues as Amsterdam's Concertgebouw Hall was not an appropriate modus for future success as a professional musician. "No pay, no play" became the clarion call for the alt-labor group.[195] Since its first *Facebook* invitational in 2018, the PvFM has attracted more than

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contractor post dismissal was not a matter of personal choice: it was her only option to continue to work. According to the judge, she was an employee *pur sang*.

[125] See http://www.vvno.nl/ the website of The Association of Dutch Orchestras website (Vereniging van Nederlands Orchestras) for a list of Dutch orchestras 2017.

[126] Statistics gleaned from the Raad van Cultuur (Council for Culture) website at http://bis2017-2020.cultuur.nl/adviezen/podiumkunsten/symfonieorkesten.Nine Dutch orchestras fall under the basic state (BIS) subsidies 2023.

[127] Speech given by Thérèse Boutin, former CEO Orchestre Symphonique du Québec at the Federation International Musiciens (FIM) International Conference, Montreal, Canada, May 2017.

3000 members from the ranks of freelance musicians ranging from its core cadre of orchestral musicians to music teachers, vocalists, and most recently spin-offs that include musicians represented other genres. Its trio of aims: to negotiate for better working conditions for freelancers; to increase mutual solidarity amongst cultural stakeholders and government decisionmakers; and to generate societal support for musicians. The collective's leaders join with union representatives at the bargaining table, monitor the actions of orchestral employers and offer support to members on a multiplicity of issues associated with freelance vulnerability such as how to persuade employers to pay within a reasonable timeframe; how to galvanize momentum with regard to fair practice, issues recently codified in the Dutch Fair Practice Code. To reach fair pay for those who play, the true path forward could become a reality if legislation enacted in the name of fair practice was enforceable. In 2022, a consortium of Dutch 'creatives' including the PvFM under the aegis of Platform ACCT[128] subsidized by the Dutch Ministry of Education, Culture and Science (OCW) have engaged in a series of round table discussions to develop practical tools including the establishment of salary scales for freelance musicians and additional proposals to strengthen enforcement of fair pay policies.

Breaking news at the time of writing from across the channel brings a dire message to the sector from orchestral colleagues in the United Kingdom: the BBC announced a far-reaching plan to slash the salaries of its fully employed orchestral musicians by 20% and will cut the distinguished choral group, the BBC Singers entirely.[129] In a reaction to swift and sharp criticism of the planned cutbacks, the BBC's Head of Orchestras and Choirs commented, "[we] want to be able to work with more musicians, and broadcast from more venues, in all parts of the country. That will mean more opportunities for freelance musicians in our English orchestras, and fewer salaried posts. It's a change that keeps the BBC in line with the industry standard, freelance and salaried musicians working together, but it also realigns us with the founding spirit of the BBC ensembles as flexible performing groups."[130] Adding insult to injury, the BBC musicians learned of the cuts and redundancy plans through social media; no BBC initiated consultation took place before the announcement hit the headlines. The insinuation of an industry standard in which the employed suffer the loss of one-fifth of their salaries in order to make way for freelancers in the name of flexibility is preposterous. Formerly fully

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[128] Platform ACCT Platform Arbeidsmarkt Culturele en Creatieve Toekomst (Platform for a Future Cultural and Creative Labor Market)
[129]There are five BBC orchestras in the United Kingdom, cuts were announced on 7 March 2023. https://www.thestage.co.uk/news/bbcs-plan-to-cut-orchestras-by-a-fifth-devastating-union-warns
[130] Simon Woods' comments available at: https://www.classical-music.com/news/simon-webb-the-bbcs-head-of-orchestras-and-choirs-comments-on-its-2023-classical-review/

employed BBC musicians will be forced to replenish lost income by joining a sizeable cadre of freelancers that will result in an even larger pool of vulnerable freelancers. In the current global orchestral marketplace, shrinking opportunities resulting from financial crises and a preponderance of management decisions that forefront efficiency to the detriment of honest employment practices has diminished occupational choices for orchestral musicians in extremis.

Professor Ruth Dukes has convincingly argued in many of her writings that even well-publicized success at the highest courts do not fill the vacuum of advocacy at the grass roots level. In a paper that brought to the fore real concerns of a particularly vulnerable sector, it is only fair to give the last word to a Dutch *FNV* advocate, "[w]hile many find the *FNV* case to be a landmark and we were pleased after the case was settled in the Hague, we realized that we still had a long way to go---the road to make sure that the playing field is level is long and arduous. The Court limited its findings on false self-employed to substitute musicians in orchestras. What we really need is more judicial distinction, and of course more enforcement of *FNV* principles in the names of all self-employed who deserve protection. We will continue to strive for equality off stage as well as onstage."[131]

[131] Conversations with Martin Kothman.