Symphonic metamorphoses

Variations on vulnerability: orchestral musicians' employment in times of crisis

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11. En route to the *FNV KIEM* case: competition law and labor law

"Competition law must be tough with the strong and gentle with the weak."[1066]

"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."[1067]

"It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment."[1068]

That jurisprudence lies at the heart of much of legal research is a given, however what laypeople, such as orchestral musicians want to know is: how 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 KIEM* fits the bill.[1069] Did a seminal piece of European Court of Justice (ECJ) jurisprudence create a solution for orchestral freelancers seeking resolution to employment status questions? Or 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 in *FNV KIEM* paved the road to success for other types of self-employed workers under similar bargaining agreements, as exemplified by the Irish experience.[1070] Before analyzing the case within the push-pull of competition law, this *movement* offers an overview of EU policies and a line-up of EU jurisprudence with relevance to key aspects of *FNV KIEM*.

At the crux of *FNV KIEM* is the nagging dichotomy between who is 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 central to this study since the late 1990s, there is little consensus as to where orchestral

[1066] Thiébaut Weber, Confederal Secretary, European Trade Union Confederation (ETUC).
[1067] D. Asiagbor. "Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration" 2013 p. 307.
[1068] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds* at 52. ECLI:EU:C:1999:430
[1069] *FNV Kunsten Informatie en Media* (KIEM) C-413/13 [2014].
[1070] The Irish Bille Competition (Amendment Bill) 2017 and the long journey to achieve its admirable aims will be discussed at the end of the *movement*.

freelance substitutes fit within definitions of employment found in legislation and case law. A conventional view on the fundamental differences between the employed and the self-employed has shaped European jurisprudence, legislation, and social policies for decades. "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."[1071]

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 *Wet arbeidsmarkt in balans* (WAB) (Labor Market in Balance Act) 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.[1072] 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.[1073] The self-employed are deemed to be entrepreneurs who exercise greater freedom in their employment choices. In the current orchestral marketplace, shrinking opportunity resulting from financial crisis has diminished occupational choices for musicians in extremis. In *Back in the USA*, the U.S. approach to the classification of self-employed workers is examined through legislative definitions and court rulings. A cautious appraisal relevant jurisprudence shows that National Labor Relations Board (NLRB) decisions tip the balance away from self-employed status towards employee status for freelance substitute musicians.[1074]

En route to *FNV KIEM*, several key elements of the employment relationship related 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

[1071] Opinion Advocate-General Wahl at para. 43. C-413/13 *FNV Kunsten Informatie en Media (KIEM)* [2014]. ECREU:C:2014:2411
[1072] The WAB is discussed in the *FAQs* and further analyzed in *A long and winding road*.
[1073] 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."
[1074] See *Back in the USA movement*.

regulates worker-related rights such as the freedom of movement (Art. 45 TFEU) some 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 over social matters, a growing number of legal scholars find that the relationship between the EU's economic and social pillars has created more tension than compatibility.[1075]

11.1 Back to Basics: European conventions and the pillar of EU social rights

This *movement* will provide examples of how EU fundamental rights have extended into the realm of the employment relationship at the individual and the employer-trade union level in ECJ case law. Before progressing to the ECJ and its attempts to balance social and economic rights in leading cases, it is important to mention what appear to be competing objectives within the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and the European Union (EU) Treaty: the exercise of economic freedoms and the observance of fundamental rights.[1076]

In 2017, the EU Commission, the EU Council, and the European Parliament gave credence to an admirable goal: to deliver "new and more effective rights for citizens" and to embrace equal access to the labor market, fair working conditions, and social protection.[1077] Soon thereafter, the Commission opted for a narrow interpretation of these rights, as illustrated in the updated *Written Declaration* 91/533/EEC announcing the Pillar of EU Social Rights.[1078] The EU Parliament, Commission and Council's commitment to implement the Pillar of EU Social Rights[1079] added fuel to the fires of academicians and labor activists who pin their hopes on a greater impetus for social rights within the EU economic framework.[1080] Based on twenty central principles, the Pillar is divided into three categories:

[1075] See 21st century contributions by Catherine Barnard, Janice Bellace, Brian Bercusson, Guy Davidov, Simon Deakin, Miriam Kullmann, Brian Langille, and Fritz Scharpf for starters.
[1076] European Commission "General Policy Framework" (EC 2015) outlines the cornerstone agreements and the economic freedoms.
[1077] For the full text of the *Declaration* of 17 November 2017, see: https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en
[1078] For the full text of the update, see: https://ec.europa.eu/social/main.jsp?langId=en&catId=1313
[1079] For further details concerning the Social Pillar, see, https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en
1080 Along with ETUC, FIM and many other union groups who support this stance, the long list of distinguished legal scholars includes A.C.L. Davies, Mark Freedland, and Guy Standing.

- Equal opportunities and access to the labor market
- Fair working conditions
- Social protection and inclusion[1081]

The section entitled *Delivering on the European Pillar of Social Action* articulates what could be a game-changing policy if implemented:

> *"Delivering on the principles and rights defined under the European Pillar of Social Rights is a joint responsibility of the European Union institutions, member states, social partners and other stake holders. The European institutions will help set the framework and give direction on the way forward for implementation of the Pillar through legislation* **where needed** *(emphasis added by the author) in full respect of member states' competences and taking into account the diversity of their situations."*[1082]

11.2 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 in the Netherlands and subsequently 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 2007-2008 financial crisis. 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."[1083] After a decade of windfall, the financial crisis 2007-2008 prompted a sharp rise in unemployment levels, and for many EU countries, negative growth.[1084] The underlying liberalization concepts that depend on a flexible workforce to answer to the needs of economic efficiency did not, according to critics, answer to calls for increased social justice. Instead, they heighten the conflict between free competition imperatives and social protection measures.[1085] 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.[1086] Advocating a holistic approach to flexicurity, the Dutch approach called upon social

[1081] See, *supra*, fn. 1079.
[1082] Ibid.,
[1083] COM (2007) 359. "Towards Common Principles of Flexicurity: more and better jobs through flexibility and security" adopted on 27 June 2007 p. 2.
[1084] Ibid.,
[1085] 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?" 2013 pp. 314-332 and J. Heyes "Flexicurity in crisis: European labour market policies in a time of austerity"2013 pp. 71–86. Also, Sonja Bekker "Flexicurity in the European Semester: still a relevant concept?" 2018.
[1086] M. Nardo and F. Rossetti. "Final Report on Flexicurity in Europe" European Commission 2013 p. 2.

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, singles out a rift between flexibility and efficiency.[1087] Flexicurity was crafted as a response to economic and policy issues associated with globalization. Its critics observe that its excellent track record in times of economic stability and/or growth is curbed markedly during the recession and post-recession phases that followed the crisis.[1088] Christopher Hermann inspired by research undertaken by the European Trade Union Confederation (ETUC) in 2007 asserts that flexibility has developed into an excessive means to an end that leads to heightened precariousness.[1089] 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."*[1090]

A selection of explanatory documents including *travaux préparatoires* reinforce the notion that economic and social aims were intended as mutually supportive, not contradictory.[1091]

The European Commission has presented an explanation of the aim of Article 3(3) TEU 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."[1092] 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

[1087] See, Martin Potuček, in Zlatica Zudová-Lešková, Emil Voráček et al., *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
[1088] See, *supra*, fn. 1085.
[1089] 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, available at: https://doi.org/10.1177/0143831X14555708
[1090] See "Motion for a European Parliament Resolution on Common Principles of Flexicurity" (2007/2009 (INI) at B.
[1091] 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).
[1092] Art. 3(3) TFEU.

exclusion. Flexicurity has not led to the promised land of healthy employment and adequate labor benefits for freelance 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 European Court of Justice (ECJ) that was called upon to tackle conflicting TEU provisions.[1093]

11.3 Legislative barriers

Before embarking on a quick tour through leading cases en route to *FNV KIEM*, it is important to mention EU competition law legislative barriers that affect the collective bargaining rights of freelance workers. The Treaty's Common Provisions found in Art. 4(3) TFEU:

> *"The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.*

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

Art. 4(3) TFEU, read alongside Arts. 101 and 102 TFEU, requires states to refrain from any action (including legislation) that conflicts with EU competition provisions and additionally requiring states to refrain from enacting measures that compromise the attainment of Treaty objectives. This caveat exacerbates the tension between social rights and competition provisions as the cases discussed in the pages to follow highlight. Art. 101(1) TFEU details a prohibition on collusive conduct between undertakings that could restrict competition and Art. 102 TFEU prohibits an undertaking's abuse of a dominant position. If a contractual agreement promotes economic progress Art. 101 (1) could be inapplicable under the block exemptions found in Art. 101(3) TFEU.[1094]

11.4 The reach of Article 101 (1) TFEU*: Albany* and social policy[1095]

Albany is one of a trio of 1999 decisions in which the ECJ tackled the fault line between

[1093] The TEU stands for the Treaty on European Union, the Maastricht Treaty, in effect since 1993.
[1094] Comparing Art. 101 (3) to Art. 101 (1), the complete TFEU text is available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A12008E10
[1095] See in particular, *Albany, supra* fn. 1070 at 60.

competition law and social protection.[1096] 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.[1097] 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."[1098] 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."[1099] 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."[1100]

11.4.1 Art. 101 (1) 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."[1101] Thus, in EU-speak, an undertaking is an entity engaged in economic activity, which 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

[1096] *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.
[1097] *Albany*, *supra* at fn. 1068 at para. 97.
[1098] *Albany*, at 59, 60.
[1099] *Albany,* at 59.
[1100] 30 See, *Albany* at 60; *Brentjens* at 57 and *Drijvende Bokken* at 47.
[1101] 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, nor do they bear the risks as such.[1102] However, the ECJ positioned self-employed workers, especially those who engage in 'liberal professions' within the 'undertaking' category in *Pavlov*.[1103] In what could be seen as a rehearsal for issues central to *FNV Kiem*, 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."[1104] Strict compliance with stringent competition rules was the ECJ's strong message.[1105] 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.[1106] The ECJ stopped short of blocking the pension scheme in question as it did not distort competition through abuse of a dominant position.[1107] The Court's construal of core concepts such as agreement, undertaking and the all-important restriction of competition, suggests an interpretational divide between *Albany* and *Pavlov*.[1108] 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 KIEM* was to reroute that course, at least for the false self-employed.

11.5 *Allonby*: who is a worker under Art. 141 EC?[1109]

En route to *FNV KIEM*, a capstone for judicial consideration with particular regard to the self-employed in a European legal context, it is prudent to make a stopover

[1102] C-22-98 *Criminal proceedings against Jean Claude Becu, Annie Verweire, Smeg NV and Adia Interim NV*. (1999) ECLI:EU:C:1999:419
[1103] Case C 180-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* (2000). ECLI:EU:C:2000:428
[1104] Ibid., at 11.
[1105] Ibid., at 84-89.
[1106] Ibid., at 69.
[1107] Ibid., at 120.
[1108] See, Mark Freedland and Nicola Kountouris. "Some reflections on the 'personal scope' of collective labour law" 2017 pp. 52–71.
[1109] Articles followed by EC refers to the numbering system of the Treaty establishing the European Community see, https://eur-lex.europa.eu/resource.html?uri=cellar:8d1c14fc-6be7-4d4e-8416-f28cfc7b3b60.0006.01/DOC_17&format=PDF

to reconsider *Allonby*,[1110] a landmark ECJ case with its links to the TFEU's social provisions. As a memory refresher, the facts of the case follow in abbreviated form. Debra Allonby was employed as an adjunct-lecturer at a U.K.-based college. Shortly after national legislation was enacted to ensure an increase in benefits for part-timers, the college dismissed several adjunct lecturers, including Ms. Allonby. Following redundancy, the lecturers were offered the opportunity to continue to teach their courses at the college through the intermediary services of an employment agency. Crucial to the case and our endeavor to flesh out a definition of self-employment, the lecturers under the aegis of the employment agency were categorized as self-employed workers. As such, they could not take advantage of social benefits proffered to regular college-employed lecturers such as access to a pension scheme.[1111] Comparing herself to male lecturers who worked full-time at the college and received full benefits, Ms. Allonby brought an equal pay claim before the ECJ. Could she be considered to be a "worker" within a proper interpretation of Art. 141 EC? Further, could the equal pay protections in Article 141 EC (now, Art. 157 TFEU) be extended to individuals who performed the same duties at the same undertaking (the college) under different employment contracts (college vs. employment agency)?

In 1986, the *Lawrie-Blum* court specifically cautioned against a reliance on a narrow definition of 'worker. Relying on the wider implications of yet another European classic (the *Levin* case) the ECJ stressed that the "concept of a 'worker' must be interpreted broadly"[1112] and further emphasized the importance of subordination within the definition of an employment contract.[1113]

Moving into the minefield of self-employment in *Allonby*, the ECJ reasoned that "the formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of Art. 141 (1) EC, *if his independence is merely notional*."[1114] Opening the door to offer an expanded interpretation of the right to receive equal pay for equal work, the Court noted that this right was protected by the aforementioned article. Wide interpretations aside, the *Allonby* court did not provide a definition of worker but rather hinted at a description based on many factors. Examples such as "any limitation on their freedom to choose

[1110] C-256/01 *Allonby* [2004] ECR I-873.
[1111] *Allonby*, paras. 16-32.
[1112] C-53/81 *Levin* [1982] para. 16.
[1113] C-66/85 *Lawrie-Blum* [1986].
[1114] *Allonby*, at para. 71.

their timetable, and the place and content of their work"[1115] were seen as relevant to move towards an appropriate definition. The Court stressed Ms. Allonby's employment status could not be compared to coworkers who were full-time college employees. Her primary legal relationship was linked to the employment agency, not the college.

The thorny issues of triangular work relationships within the character of employment did not come to the fore nor was discrimination based on gender considered to be a relevant factor that could have moved the final decision in another more socially proactive direction. Taking on an admonishing tone, the ECJ asserted, "a woman is not entitled to reply, vis-à-vis the intermediary undertaking, on the principle of equal pay, using as a basis for comparison the remuneration received for equal work or work of the same value by a man employed by the woman's previous employer."[1116] In the court's view, Ms. Allonby compared apples to oranges by equating a self-employed situation with that of other 'employed' lecturers. Her claim of gender discrimination was deemed irrelevant, as the comparison was based on the false premise of 'equality' within the employment relationship.[1117] To 'win' on a discrimination charge, she would have had to prove that the alleged inequality was attributable to a single source.[1118] Not so hidden beneath the claims in *Allonby* was the fact that a disproportionate percentage of women experienced employment discrimination along similar lines.[1119] The holding in *Allonby* did little to expand social rights to self-employed workers who brought claims based on an equal pay claim.

Although a 21st century informed vantage point concerning the problems of the self-employed within the context of employment rights might consider *Allonby* to be outdated, yet there is an element of 'credit where credit is due' that deserves en passant reference. Advocate-General (AG) Geelhoed lifted the veil to reveal present-day employment conditions by questioning "whether the courts must turn a blind eye to the fact that in the circumstances of the main proceedings a legal device has been used precisely. . . to evade the consequences of the principle of equal treatment laid down in Art. 141 EC?"[1120] Showing greater prescience, he pointed to the dynamic employment trend "in which the classic employer-employee relationship under an

[1115] Ibid., at para. 72.
[1116] *Allonby*, at para. 50.
[1117] Ibid.,
[1118] Ibid, at para. 46.
[1119] See, Francine Blau and Lawrence Kahn. "The Gender Pay Gap: Going, Going . . . But Not Gone" 2006.
[1120] AG Geelhoed Opinion *European Court Reports 2004 I-00873*, para. 43 ECLI:EU:C:2003:190

employment contract is being supplanted by contractual arrangements under which the providers of the services operate as self-employed persons."[1121] Regrettably, AG Geelhoed's observation is singularly void of commentary as to the desirability of these 'new contractual arrangements' with regard to the self-employed.

11.6 *FNV*: EU Competition law and substitute musicians

FNV is indisputably a crown jewel amongst the many cases reflected upon in this research, as it is the only piece of ECJ jurisprudence that spotlights 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 disguised self-employment to critical assessments with regard to the ECJ's restraint.[1122] 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."*[1123]

11.6.1 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 as previous *movements* have described in detail: "without freelancers, there would be no performances, it is really that simple."[1124] As emphasized throughout the research, orchestras were adversely affected by the financial crisis 2007-2008 with personnel cuts at best and in many worst-case scenarios, collective dismissals. "When the institution is threatened by cuts, the most precarious workers, the freelancers are even more threatened and unfortunately the slippery slope became

[1121] Ibid.
[1122] 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?" 2018.
[1123] *FNV-KIEM*, para. 42
[1124] Conversations with Angela Garland Artistic Coordinator, Netherlands Philharmonic Orchestra.

non-negotiable."[1125]

Dutch orchestral musicians are bound by employment contracts negotiated between various consortia of orchestras[1126] and the unions: collective labor agreements known as CAOs in Dutch (collectieve arbeidsovereenkomsten). To improve employment conditions for freelance musicians, two Dutch cultural unions, the FNV KIEM (Dutch Trade Union Confederation Art, Information and Media, further FNV) and the Nederlandse Toonkunstenaarsbond (Dutch Musician's Union, further Ntb) collaborated with the Vereniging van Stichtingen Remplaçanten Nederlandse Orkesten (Association of the Foundation for Substitute Players in Dutch Orchestras, further VSR) to formulate a collective bargaining agreement (CAO, in Dutch) on behalf of the freelance substitute players.

The 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 the 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%.[1127]

The FNV's[1128] attempt to level the freelance playing field for freelance substitutes was brought to the attention of the Dutch competition law administrative body, the NMa.[1129] Apprised of the FNV's bargaining activities on behalf of the self-employed substitute players, the NMa initiated an informal inquiry to ascertain the CAOs legality. Their

[1125] Conversations with Martin Kothman, senior director FNV Media & Cultuur.
[1126] As previous *movements* explained, most 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 (RCO) also negotiates separately.
[1127] 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."
https://adoc.tips/collectieve-arbeidsovereenkomst-remplaanten-nederlandse-orke.html
[1128] FNV is used throughout this *movement*, however 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 8f Foundations for Substitutes in Dutch Orchestras (VSR).
[1129] Pre-2013 the regulator was known as the Nederlands Mededingingsauthoriteit, the Dutch Competition Authority, further NMa). Post April 2013: Autoriteit Consument en Markt, the Netherlands Authority for Consumers and Markets (further, ACM).

findings were published in a Vision document, 'CAO fees for self-employed in light of Dutch Competition Law' (author's translation).[1130] According to the Vision document, the CAOs Annex 5 could restrict competition in the Dutch market prohibited under Art. 6 (1) Mw (Mededingingswet, in English, Competition Law). Art. 6 (1) Mw providing 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."*

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."[1131]

The FNV maintained that both categories of orchestral substitutes under the aforementioned CAO 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 CAO, a lawful collectively bargained agreement. We felt that **their** actions, not ours were unlawful."[1132] 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."[1133] 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.[1134]

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,*

[1130] 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
[1131] Ibid.,
[1132] Conversations with Mark Gerrits Kunstenbond, formerly NtB music representative.
[1133] Conversations with Martin Kothman,
[1134] *FNV Kunsten Informatie en Media v. De Staat der Nederlanden,* Rechtbank 's-Gravenhage 27 October 2010. ECLI:NL:RBSGR:2010:BO3551.

> *(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?"*[1135]

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 held that substitute musicians who play alongside member musicians were workers who could be classified as 'false self-employed,' a category that could take advantage of the *Albany*-exception to Article 101(1) TFEU.

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: 1) the substitutes perform services in a specific market (orchestras), 2) receive remuneration (fees for rehearsals/performances paid by the employer and 3) perform these 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 could be classified in a special category, in *FNV KIEM*, 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."*[1136]

The ECJ considered that under the Dutch law on collective labor agreements, an independent service provider (self-employed person) has the right to join a trade

[1135] *FNV Kunsten Informatie en Media v Staat der Nederlanden* Court of Appeal, The Hague (C-413/13) 9 July 2013, subsequently referred to the ECJ.
[1136] *FNV KIEM* at paras. 39 and 40.

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 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 employment situation for individual substitute players, or was the union negotiating on behalf of an association of undertakings? If in fact, the FNV's 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 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 of more independence and flexibility than regularly employed musicians who perform the same activity in terms of work schedules, the location of the work, and the manner of performing the tasks assigned in other words, the rehearsals, recordings and/or 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 their 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."[1137]

FNV has left many questions open for further jurisprudence to consider. The ECJ took a conservative approach to the FNV's expansion of collective bargaining activities to include all 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 certainly not resolved at either the EU or the national level. Keep in mind the ruling at the Hague Court of Appeal with its admonishment loosely translated: "[the court] 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 *Wet Arbeid in Balans* (WAB) [the Labor Market in Balance Act] WAB) discussed at length in *A long and winding road*.[1138] 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.'[1139]

11.7 The Irish experience: the Bille 2017

> *"The growth of bogus self-employment is just the tip of the iceberg and the iceberg is also about low-paid, flexi-hour contracts, if-and-when contracts, non-union employment and other attacks on the traditional values of working class people by the great and good in academia, as well as some newspaper columnists who think the very idea of a secure, pensionable, well-paid job belongs to history books and has no place in the brave new world where foreign direct investment and paying no taxes are treated as sacred cows."*[1140]

[1137] *Lawrie-Blum, supra* fn. 1113 at 42.
[1138] 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
[1139] Literal translation 'neither fish nor meat' means the category is ambiguous, quote by Mark Gerrits, Kunstenbond.
[1140] Deputy Brid Smith, Dáil Éireann (Irish Parliament), parliamentary debate, 28 February 2017.

Freelancers in cultural fields beyond the orchestral profession felt empowered to renew their quest for equality energized by *FNV KIEM*. Irish advocates in their long march forward to achieve bargaining rights for self-employed voice-over actors found inspiration in arguments mounted by the plaintiffs in *FNV*. "We were fighting to set minimum rates for freelance workers since 2004, a long and often frustrating battle. Setbacks did not deter us as we believed in our cause. *FNV* reinforced our belief that the overall context of competition law had to change and that the workers whose rights we upheld were indeed, false self-employed workers."[1141]

In 2004, the Irish Competition Authority published a decision which defined freelance actors who provided voice-over services for advertising production as "undertakings" and the trade unions who negotiate for them as "associations of undertakings" for the purpose of Article 4 of the Irish Competition Act.[1142] The union negotiation for equitable prices was considered to be in breach of competition law as it was tantamount to price fixing. In its Decision no. E/04/002, the Irish Authority insisted that Irish Actors' Equity (SIPTU) cancel all of its negotiated collective agreements that entailed set fees. Further, the Authority took action to prevent collective bargaining on behalf of freelance musician-members of the Musicians Union of Ireland and freelance photographers and journalists, members of the National Union of Journalists. The similarities between the NMa's original contention in the *FNV* case and the views held by the Irish Competition Authority are remarkable.

The move to prevent bargaining that intended to create equitable employment conditions for vulnerable freelancers gave the Irish unions the impetus to lobby for corrective legislation. According to an Explanatory Memorandum for an amendment to grant union rights to the self-employed:

> *"The implications of the case are important for all those in atypical employment, who find themselves under pressure to re-organise their work as self-employed contractors. Not only will they lose the benefit of much of employment protection legislation, but they may well be prevented from organising collectively to better their terms and conditions of service.*
>
> *This state of affairs is anomalous and unfair. The very same grounds that justified trade unions receiving recognition and immunity for employees over a century ago are still relevant and available to justify organizing and collective bargaining by self-employed persons. Individually, they are weak, whereas united there is some rectification of the institutionalized inequality of bargaining power between the two parties. The reality is*

[1141] Remarks by Patricia King, President, ICTU delivered at the Organising & Bargaining for Atypical Workers Conference, Dublin, February 11, 2020.
[1142] Decision of the Competition Authority No. E/04/002 (Agreements between Irish Actors' Equity SIPTU and the Institute of Advertising Practitioners in Ireland concerning the terms and conditions under which advertising agencies will hire actors) 31 August 2004 (Case COM/14/03)

> *that collective negotiation on behalf of trade associations of self-employed individuals is very much a standard feature of industrial relations practice. It is also a standard feature of the procurement of professional services by the Government, for health and other public welfare programmes."*[1143]

Seeking validation on the international front, the Irish Congress of Trade Unions (ICTU) presented an official complaint to the ILO requesting an examination of the issue claiming a breach of *ILO Convention No. 87 on the Freedom of Association and Protection of the Right to Organise* 1948. Article 2 reads in relevant part:

> *"Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation."*

A great deal of patience, steadfast lobbying by advocates, unions and a powerful pro bono advocate coupled with long-awaited political change bore fruit. The Competition (Amendment) Act 2017[1144] provides specific exceptions in its Section 4 "class of false self-employed worker," a categorization inspired directly by the ECJ decision in *FNV KIEM*. The Competition Act:

> *"shall not apply to collective bargaining and agreements in respect of a relevant category of self-employed worker identified as actors engaged as voice-over actors, musicians engaged as session musicians and journalists engaged as freelance journalists."* [1145]

Further, and in keeping with the ECJ's holding in *FNV KIEM*, the Irish bill allows for trade unions to apply to the Minister in order to add other categories of worker to the list of exemptions to competition restrictions.

11.8 The ECJ moves beyond European borders: of antitrust and unions

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 SCOTUS jurisprudence as a basis for an Opinion submitted on 11 September 2014.[1146] His choice focused on cases that date back more than half a century[1147] and include a case that involved the specific concerns of musicians. These U.S. precedents will be considered briefly.

[1143] https://data.oireachtas.ie/ie/oireachtas/bill/2016/8/eng/memo/b816s-memo.pdf
[1144] The Irish Competition (Amendment) Act has been in effect from September 1, 2017.
[1145] See relevant Irish Competition Amendment, available at: http://www.irishstatutebook.ie/eli/2017/act/12/enacted/en/print#sec3
[1146] Opinion Advocate General Nils Wahl, *Case C-413/13 FNV KIEM* 4 December 2014 at para. 99.
[1147] *Allen Bradley Co. v. Electrical Workers* 325 U.S. 797 (1945)

In *Allen Bradley Co. v. Electrical Workers*, a New York based electricians' union took closed-shop agreements with equipment manufacturers to a new level. To protect local suppliers, New York City-based 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? [1148] Recognizing the difficulty of balancing market competition with the rights of workers, the SCOTUS majority explained:

> *"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."[1149]*

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 sacrosanct place reserved for the legislator.[1150] Soon thereafter, as *Back in the USA* explains, Congress passed the Taft-Hartley Act (THA) in which such secondary boycotts were categorized as unfair labor practices.[1151] The Act in relevant part:

> *"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,"[1152] 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.[1153]*

[1148] 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 r 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." 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."
[1149] *Allen v. Bradley*, at para. 25.
[1150] Ibid., at 810.
[1151] Labor Management Relations Act, 1947. [LMRA, the Taft-Hartley Act]
§8(b)(4). Title 29, U.S.C. § 402(c).
[1152] Ibid.,
[1153] Ibid.,

In *United Mine Workers v. Pennington*, the second U.S. case that AG Wahl cited, agreements between the union and a major mine operator, met with SCOTUS' disapproval.[1154] In the opinion of the majority, the impact of a union that joined forces with a nonlabor group exerted undue pressure on the activities of smaller mine operations and their employees. Although wages were rightly viewed as a legitimate subject of mandatory collective bargaining that fell outside the reach of antitrust, the impact of such bargaining on competition within the sector was leading according to the SCOTUS majority.

While precedents concerning antitrust behavior abound, *American Fed'n of Musicians v. Carroll (Carroll)* was the only case of judicial weight in the musical sphere to reach SCOTUS.[1155] 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 to 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 antitrust laws. Of relevance, the Taft Hartley Act 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." [1156]

Taking us to the heart of the New York's gig scene in its 1960s heyday, the courts were challenged to differentiate between gig 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, importantly, club owners were 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."[1157] Their claim asserted that AFM Local 802 violated the Sherman Act as its fee setting activities "created a combination with a nonlabor group."[1158]

Under a doctrine established by SCOTUS during WWII, unilateral actions undertaken

[1154] *United Mine Workers v. Pennington* U.S. 657 (1965).
[1155] *American Fed'n of Musicians v. Carroll* 391 U.S. 99 (1968).
[1156] Title 29 U.S.C. § 402(c)) *Taft-Hartley* is also referred to as the *Labor Management Act* 1947.
[1157] Ibid.,
[1158] See, *Allen Bradley Co. v. Local 3, Elec. Workers*, 325 U.S. 797 (1945) the SCOTUS precedent that established the rule: a union would be disallowed an exemption from antitrust laws if the union combined with a nonlabor group to achieve a commercial restriction.

by a union can be exempt from the long arm of antitrust laws under two conditions set forth in *U.S. v. Hutcheson*.[1159] Firstly, 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, the 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.[1160] At SCOTUS, the majority held 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 *Local 189 Meat Cutters v. Jewel Tea Co.* "the crucial determinant is not the form of the agreement - e.g., prices or wages - but its relative impact on the product market and the interests of union members."[1161] The union's activities were exempt from antitrust limitations because protective actions such as price floors intended to protect wages of the subcontracted players were well shielded by existing legislation.[1162]

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 the concept of "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-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.[1163] The imposition of price lists under union bylaws and other regulations gives the union, in effect, the power to take charge of a vital job condition– setting the price for labor – without discussing this condition

[1159] *U.S. v. Hutcheson* 312 U.S. 219, 232 (1941).
[1160] *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).
[1161] See, *Local 189, Meat Cutters v. Jewel Tea Co.* 81 U.S. 676 (1965).
[1162] 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."
[1163] National Labor Relations Act (NLRA) 29 U.S.C. §§ 151-169 (1935).

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."*[1164]

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 gauge "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."

11.8.1 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 element 'direct' 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.[1165] 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.

11.8.2 U-turns and other considerations inspired by FNV KIEM, Carroll and antitrust

Legal scholars Mark Barenberg and Eva Grosheide developed a theory that applies

[1164] Dissent by William O. Douglas, see, *Carroll, supra* at fn. 1155.
[1165] 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* at paras. 74-94.

U.S. legal interpretation principles that could lessen the restrictions of European competition law concerning the rights of the self-employed to negotiate minimum fees.[1166] 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 include 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 KIEM*. According to Barenberg and Grosheide, the *FNV KIEM* court "dodged the question" of whether the minimum fees bargained for on behalf of the substitute musicians met the *Albany*-exception standard. The ECJ did not step to the plate and free self-employed persons from the shackles of undertakings that 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, this important question was left open to interpretation.[1167]

The third U-turn put forth by Barenberg and Grosheide 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 of monitoring special fee-setting independent bodies. These independent bodies would be mandated to set fees in the public interest and maintain distance from beneficiaries such as the self-employed in privileged professions (the medical professionals in *Pavlov* come to mind).[1168] 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. [1169]

[1166] Mark Barenberg and Eva Grosheide "Minimum Fees for the Self-Employed: A European Response to the Uber-ized Economy" 2016 pp. 193-236.
[1167] See for example, *Pavlov*, *supra* at fn. 1103.
[1168] Ibid., p. 236.
[1169] 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.

11.9 Winds of change? *FNV KIEM* meets the future

In a controversial Dutch case in 2015, several categories of nonstandard, self-employed workers in the mail delivery branch (sub-contracted package couriers for PostNL) organized a strike and a blockade which they publicized through social media. PostNL sought a remedy in court for these 'illegal' actions, claiming that the protester-couriers were not all employees. The judge who oversaw the interlocutory proceedings afforded the entire group of workers including a group he described false self-employed[1170] (defined in *FNV*) the right to strike under Art. 6(4) European Social Charter (ESC) extending the right to strike to the newly minted false self-employed workers.[1171]

Yet, despite the promise of legal certainty implied by *FNV KIEM*, the 'false self-employed' in the freelance orchestra sector still face challenges in terms of employment. Take the case of a saxophone player engaged to perform with a leading Dutch orchestra. Common knowledge of an 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: the last mile is the longest).[1172]

In keeping with the ECJ's answers to the pair of prejudicial questions posed in *FNV KIEM*, the Hague Court of Appeal ruled that the substitute orchestral players should be categorized as false self-employed persons.[1173] As subordinates, the 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 musician could opt out and not attend some of the rehearsals.[1174] In a correct assessment of an orchestral freelancers dependent status,

[1170] To quote the Dutch term, *schijnzelfstandigen*.
[1171] 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
[1172] Mark Gerrits, Kunstenbond.
[1173] *FNV Kunsten Informatie en Media v. De Staat der Nederlanden* Case 343076/HA ZA 09-2395, 1 september 2015.
[1174] Ibid., at para. 2.8.

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."[1175] 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 (Art. 6:610 DCC).[1176]

A number of determining questions come to mind when considering the effects of *FNV KIEM* in practice. As the Irish 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."[1177] In *FNV KIEM,* the union brought forth 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 freelance 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 CBAs? Is the national authority sufficiently competent and well-versed in the nuances within freelance situations and self-employment in order 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 musician does. The musician follows those orders and is totally dependent in every aspect of work." Musicians chime in wholeheartedly. "What does an orchestral musician do? We breathe together, become one with the music, recreate

[1175] Ibid.,
[1176] Ibid, at para. 2.3.
[1177] Conversations with Karan O'Loughlin Services, Industrial, Professional and Technical Union (SIPTU) Sectoral organizer, Arts and Culture.

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."[1178] Orchestral 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!"[1179]

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.

11.10 National regulatory action in the Netherlands post *FNV KIEM*

The ACM changed its tune in the aftermath of the *FNV KIEM* decision 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).[1180] Crucial to the exceptions outlined in these 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 is permitted to work under a collective labor agreement that sets minimum fees for their labor.

[1178] Conversations with Christopher Keene.
[1179] Conversations with Sir Mark Elder.
[1180] 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 Authority for Consumers & Markets Board (ACM) showed 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."[1181] The cumulative requirements for the competition exception in the Guideline's text adopted in Art. 6(3) Mw (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 is 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'.* [1182]

In the 2007 NMa Vision Document discussed earlier in this *movement*, the NMa, the ACM's precursor had rejected this line of reasoning based on the contention that to fix 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.

11.11 The legacy of *FNV KIEM*

The question remains: did *FNV KIEM* 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 stranglehold on the very notion of bargaining freedoms. By circumventing the wide options for workers

[1181] Conversation with Martijn Snoep, Board Chair Authority for Consumers & Markets (ACM).
[1182] Quoted on page 4 *Leidraad*, *supra,* fn. 1180. 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."

to bargain collectively in both the EU Charter on Fundamental Rights Art. 28[1183] and the ILO Convention No. 98,[1184] and turning a blind eye to the European Court of Human Rights' (ECHR) expansive interpretation of these rights in *Baykara*,[1185] the ECJ underlined its conservative approach to workers' rights. Are dancers, photographers or for that matter, self-employed house cleaners protected under *FNV KIEM*? 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 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 lobby groups such as the Platform voor Freelance Musici (PvFM) to monitor the actions of orchestral employers and to create and promote agendas for future protective measures. The final word goes deservedly to a *FNV* representative: "While many find the 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 arduous. The court limited its findings on false self-employed to substitute musicians in orchestras and we want to continue to move forward in the names of all self-employed who deserve protection. We will continue to strive for equality off stage as well as onstage."[1186]

[1183] 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

[1184] *The Right to Organise and Collective Bargaining Convention* No. 98 (1949) www.ilo.org

[1185] *Demir and Baykara v. Turkey* [GC]-34503/97. Judgment 12.11.2008 [GC] [2008] ECHR 1345, (2009) 48 EHRR 54. Available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-1864%22]}

[1186] Conversations with Martin Kothman.