OPINION OF ADVOCATE GENERAL
WAHL
delivered on 11 September 2014 (1)

Case C-413/13

FNV Kunsten Informatie en Media
v
Staat der Nederlanden

(Request for a preliminary ruling from the Gerechtshof ’s-Gravenhage (Netherlands))

(Collective labour agreement — Contracts for professional services — Minimum fees — Competition — Article 101 TFEU — Prevention of social dumping — ‘Albany exception’)

1. In a well-established line of authority, which started with *Albany*, (2) the Court has, essentially, ruled that agreements entered into within the framework of collective bargaining between employers and employees and intended to improve employment and working conditions are excluded from the scope of Article 101(1) TFEU.

2. The fundamental issue raised by the present proceedings is whether that exception covers provisions of collective agreements which regulate aspects of the professional relationship between self-employed persons and their customers or clients, and, if so, under what conditions.

I – Relevant Netherlands legislative provisions

3. Article 1 of the Wet op de collectieve arbeidsovereenkomst (Law on Collective Labour Agreements; ‘the WCAO’) defines ‘collective labour agreement’ for the purposes of national law and provides as follows:

‘1. “Collective labour agreement” means an agreement entered into, on the one hand, by one or more employers, or one or more associations of employers having full legal capacity, and, on the other hand, by one or more associations of workers having full legal capacity, which governs principally or exclusively the working conditions which must be respected in the context of employment contracts.

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

…’

4. Article 6(1) of the Mededingingswet (Law on competition; 'the Mw') prohibits 'agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition on the Netherlands market or part of it'.

5. Article 16(a) of the Mw excludes from the scope of that law collective labour agreements within the terms of Article 1(1) of the WCAO.

II – Facts, procedure and the questions referred

6. In 2006 and 2007, FNV Kunsten Informatie en Media ('FNV') and the Nederlandse toonkunstenaarsbond ('the Ntb'), associations representing employees and self-employed persons, and Vereniging van Stichtingen Remplaçanten Nederlandse Orkesten ('the VSR'), an employers' association, concluded a collective labour agreement ('the CLA at issue') concerning substitute musicians in Dutch orchestras (CAO Remplaçanten Nederlandse Orkesten). One of the aspects governed by that agreement was the minimum fee to be received by musicians who take the place of other musicians ('substitutes') in an orchestra and who enter into a work relationship to that effect with that orchestra. The CLA at issue also included provisions on 'self-employed substitutes'.

7. However, in a reflection document published in December 2007, (3) the Netherlands Competition Authority (Nederlandse Mededinginsautoriteit; 'the NMa') adopted the general position that provisions of a collective labour agreement relating to minimum fees for self-employed persons are not exempted from the prohibition in Article 6 of the Mw.

8. As a result of that position adopted by the NMa, the VSR and the Ntb terminated the CLA at issue and refused to conclude any new collective labour agreement with FNV which included a provision relating to self-employed substitutes.

9. In the light of that development, the FNV lodged an action before the Rechtbank 's Gravenhage (District Court, The Hague), seeking, essentially: (i) a declaration that competition law did not preclude a provision in a collective labour agreement which obliges an employer to respect specific minimum fees with regard to self-employed persons without staff, and that the publication of the reflection document was unlawful in respect of FNV, and (ii) that the Netherlands State should be ordered to rectify the position adopted in the reflection document.

10. After the Rechtbank had dismissed FNV's claims, the latter brought an appeal before the Gerechtshof 's-Gravenhage (Regional Court of Appeal, The Hague).

11. The appeal concerns the interpretation of Article 6 of the Mw. However, the Gerechtshof 's-Gravenhage pointed out that Article 6 of the Mw is largely inspired by Article 101 TFEU and that the national legislature had decided that those two provisions are to be applied consistently.

12. For that reason, entertaining doubts as to the correct interpretation of Article 101 TFEU, the Gerechtshof 's-Gravenhage decided to stay the proceedings and to refer the following questions for a preliminary ruling:

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

(2) [I]f the answer to the first question is in the negative, does that provision then fall outside the scope of Article 101 TFEU in the case where that provision is (also) intended to improve the working

conditions of the employees who come within the scope of the collective labour agreement, and is it also relevant in that regard whether those working conditions are thereby improved directly or only indirectly[?]'

13. Written observations in the present proceedings have been submitted by FNV, by the Netherlands and Czech Governments, and by the Commission, all of whom, with the exception of the Czech Government, presented oral argument at the hearing on 18 June 2014.

III – Analysis

14. By its two questions, the referring court asks, in substance, whether provisions in a collective agreement concluded between, on the one side, an association of employers and, on the other side, trade unions representing employees (4) and self-employed persons, which provide that self-employed persons who, on the basis of a contract for professional services, perform the same work for an employer as the workers who come within the scope of that collective labour agreement must receive a specific minimum fee ('the provisions in question'), fall outside the scope of Article 101 TFEU.

15. At the outset, I would like to deal briefly with the issue of admissibility. In my view, there is no doubt that the present request for a preliminary ruling is admissible, even if the case under consideration were to fall outside the scope of Article 101 TFEU. Indeed, it is well established that the Court has jurisdiction to give a preliminary ruling on questions concerning EU law in situations where the facts of a case before the referring court are outside the direct scope of EU provisions, but where those provisions are made applicable by national law, which has adopted, for internal situations, the same approach as that provided for under EU law. (5)

16. As to the substance of the case, the referring court essentially seeks guidance as to whether the 'Albany exception' (6) may apply to a collective agreement such as the CLA at issue.

17. In their observations, the Czech and Netherlands Governments argue, as does the Commission, that the Court should answer that question in the negative, whereas FNV argues that the Court should answer in the affirmative.

18. In the following, I will seek to illustrate why I cannot fully subscribe to either position. Indeed, I take the view that the question referred by the national court calls for an answer which is not as straightforward and easy as those proposed.

19. As mentioned in point 1 above, it is settled case-law that agreements entered into within the framework of collective bargaining between employers and employees and intended to improve employment and working conditions must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 101(1) TFEU. (7)

20. It is thus necessary to inquire into the nature and purpose of the CLA at issue (and, more specifically, into the nature and purpose of the provisions in question) to ascertain whether or not its complete exclusion from the scope of Article 101(1) TFEU is warranted. (8)

21. Against that background, for reasons of clarity, I will examine that issue from two complementary angles. Since Dutch law allows trade unions to represent both workers and self-employed persons, two different legal situations should be distinguished. On the one hand, I will consider whether the Albany exception covers provisions negotiated, and included in a collective agreement, on behalf of and in the interests of self-employed persons. On the other hand, I will examine whether or not that exception applies when, despite regulating the working conditions of self-employed persons, the provisions in question have been negotiated, and included in a collective agreement, on behalf of and in the interests of workers. This systematic analysis broadly follows the organisation of the two questions referred, as formulated by the Gerechtshof 's-Gravenhage.

A – *Provisions negotiated, and included in a collective agreement, on behalf of and in the interests of self-employed persons*

22. One of the arguments put forward by FNV is that a contract such as the CLA at issue is entirely covered by the Albany exception — and therefore falls outside the scope of Article 101(1) TFEU — merely because it is concluded in the form of a collective agreement. The fact that some provisions of that agreement regulate the working conditions of self-employed persons would be irrelevant in that regard.

23. I cannot agree.

1. The Albany exception does not cover contractual provisions concluded on behalf of and in the interests of self-employed persons

24. In the Albany line of cases, the Court has ruled that collective agreements do not fall within the scope of Article 101 TFEU when two *cumulative* conditions are met: (i) they are entered into in the framework of collective bargaining between employers and employees ('the first condition'), and (ii) they contribute directly to improving the employment and working conditions of workers ('the second condition').

25. Like the Netherlands Government and the Commission, I have serious doubts as to whether the first condition is fulfilled where an agreement, despite resulting from a process of collective bargaining, is (in whole or in part) negotiated and entered into on behalf of self-employed persons.

26. In fact, when trade unions act on behalf of self-employed persons, and not of workers, they can hardly be regarded as 'associations of employees'. In those circumstances, in fact, they would rather appear to be acting in another capacity: that of a professional organisation, or of an association of undertakings. (9) Accordingly, it would be difficult to consider those trade unions as representing 'labour', within the meaning referred to in *Albany*. (10)

27. In any event, it is unnecessary to delve further into that issue, to the extent that the second condition, in my opinion, is clearly not fulfilled. The Court's case-law has consistently referred to the employment and working conditions of *employees*. To date, the Court has never extended — implicitly or explicitly — its findings to contractual provisions which seek to improve the working conditions of self-employed persons.

28. More importantly, there can be no doubt, to my mind, that such contractual provisions fall outside the scope of the Albany exception.

29. The reason for this is mainly twofold.

30. First, the status of self-employed persons and the status of workers are, for the purposes of the EU competition rules, fundamentally different and, *ipso facto*, cannot be equated.

31. Workers are not undertakings under the EU competition rules (11) and Article 101 TFEU was not conceived to regulate labour relationships.

32. Conversely, self-employed persons are, under the EU competition rules, undertakings. (12) Accordingly, as mentioned above, a trade union acting on behalf of self-employed persons is to be regarded as an 'association of undertakings' within the meaning of Article 101 TFEU. (13)

33. Plainly, there are good socio-economic reasons to restrict, or even to eliminate, wage competition among workers through collective bargaining. (14) However, the situation is different when it comes to agreements which have the object or effect of restricting or eliminating competition between undertakings.

34. Those are precisely the type of agreements to which Article 101 TFEU is intended to apply.

35. Moreover, even if any restriction of competition which may stem from collective agreements regulating the employment conditions of workers is often incidental or of limited effect, (15) the same does not necessarily hold true with regard to agreements regulating the working conditions of self-employed persons. That is especially so with regard to agreements which regulate *price* competition among the self-employed.

36. Pricing is one of the most important, if not often the single most important, aspect on which undertakings compete. That is why point (a) of the 'black list' set out in Article 101(1) TFEU refers to agreements which 'directly or indirectly fix purchase or selling prices or any other trading conditions'. Accordingly, agreements fixing minimum prices for goods or services have consistently been considered to constitute a significant restriction of competition. (16)

37. Thus, an interpretation of Article 101 TFEU grounded in the well-established case-law of the Court suggests that provisions negotiated and included in an agreement, on behalf of and in the interests of self-employed persons, cannot *a priori* be immune from review under the EU competition rules.

38. Second, as the Netherlands Government stressed at the hearing, the status of self-employed persons is clearly different from that of workers, not only under the EU competition rules, but, more generally, under the scheme of the EU Treaties. As a result, the social policy considerations which justified the Albany exception for workers cannot be considered valid with regard to the self-employed.

39. In essence, the thrust of the Albany line of cases is that it would not be possible to read the EU Treaties as encouraging collective bargaining between social partners so as to pursue social objectives, while at the same time placing those collective agreements under a general prohibition.

40. Yet, the social objectives to which the Court referred in *Albany* relate to employees. The provisions of the FEU Treaty on 'employment' (Articles 145 to 150 TFEU) and 'social policy' (Articles 151 to 161 TFEU) are centred on the notion of the 'worker'.

41. Development of the economic activities carried out by the self-employed, on the other hand, falls within the European Union's competences in the field of industrial policy, as provided for in Article 173 TFEU.

42. Notably, there are two key differences between Article 173 TFEU and the provisions on employment and social policy mentioned above. First, Article 173 TFEU (or, for that matter, any other Treaty provision) — unlike Articles 151 and 155 TFEU — does not encourage the self-employed to conclude collective agreements with a view to improving their working conditions. (17) Second, Article 173 TFEU makes it clear that it applies without prejudice to the applicability of the competition rules. In fact, under the second subparagraph of Article 173(1), the European Union and the Member States are to take action in the industrial field 'in accordance with a system of open and competitive markets'. The FEU Treaty goes on to specify, in the second subparagraph of Article 173(3) TFEU, that the provisions relating to industry (Title XVII) do not provide a legal basis for, inter alia, 'the introduction by the [European] Union of any measure which could lead to a distortion of competition'. No echo of this is to be found in the FEU Treaty's provisions concerning employment or social policy.

43. The reason for the distinction drawn by the draftsmen of the Treaties between workers and self-employed persons is rather straightforward: as a general rule, the ways in which the professional activities of those two groups are organised and exercised differ profoundly.

44. One of the key features of any employment relationship is the *subordination* of the worker to his employer. (18) The employer is not only empowered to give instructions and direct the activities of his employees, but he may also exercise certain powers of authority and control over them. A self-employed person follows the instructions of his customers but, generally speaking, they do not wield extensive powers of supervision over him. Because of the absence of a subordinate relationship, the self-employed person has more independence when choosing the type of work and tasks to be executed, the manner in

which that work or those tasks are to be performed, his working hours and place of work, as well as the members of his staff. (19)

45. Furthermore, a self-employed person must assume the commercial and financial risks of the business, whereas a worker normally does not bear any such risk, being entitled to remuneration for the work provided irrespective of the performance of the business. (20) It is the employer who, in principle, is responsible towards the outer world for the activities carried out by his employees within the framework of their work relationship. The higher risks and responsibilities borne by the self-employed are, on the other hand, meant to be compensated by the possibility of retaining all profit generated by the business.

46. Lastly, it is barely necessary to point out that, while self-employed persons offer goods or services on the market, workers merely offer their labour to one (or, on rare occasions, more) particular employer(s).

47. Thus, it is inherent in the status of being self-employed that, at least if compared with workers, self-employed persons enjoy more independence and flexibility. In return, however, they inevitably have to bear more economic risks and will often find themselves in more unstable and uncertain working relationships. All these aspects seem to be closely interrelated.

48. Therefore, the legal and economic reasons which justify the Albany exception are not valid in the case of self-employed persons. (21) This is why a complete and *a priori* exclusion from the scope of Article 101 TFEU for collective agreements negotiated on behalf of and in the interests of the self-employed is inconceivable to me.

49. That said, another argument put forward by FNV calls for discussion.

2. Workers and self-employed persons are not alike, despite traditional distinctions becoming blurred

50. FNV stressed in its written observations that the only self-employed persons whose tariffs are regulated by the CLA at issue are those without staff and who, in terms of bargaining power, are in a position relatively similar to that of employees.

51. For my part, I admit that, in today's economy, the distinction between the traditional categories of worker and self-employed person is at times somewhat blurred. The Court, in fact, has already had to examine a number of cases in which the working relationship between two persons (or one person and one entity) did not — because of its peculiar features — fall neatly into one or other category, displaying features characteristic of both. (22)

52. Moreover, I take account of the fact that there are some self-employed persons who, in terms of their professional relationship with actual or potential customers, are in a position rather similar to that typically existing between a worker and his employer. In particular, some self-employed persons may enjoy very little independence in terms of when, where and how they carry out the tasks assigned. They may also have a rather weak position at the negotiating table, especially as concerns compensation and working conditions. That is particularly true with regard to the case of the 'false self-employed': employees who are disguised as self-employed in order to avoid the application of some specific legislation (for example, labour or fiscal regulations) which is considered unfavourable by the employer. Another example is the case of self-employed persons who are economically dependent on a sole (or main) customer. (23)

53. However, leaving aside the cases in which there is some circumvention or avoidance of the labour or fiscal rules, which are for the national legislature of each Member State to regulate, I still do not see any valid reason *always* to treat workers and self-employed persons in the same way.

54. The purpose of collective agreements is to set certain standards that, as such, apply across the board to all situations falling within their scope. Thus, they are meant to cover a whole category of professionals,

irrespective of the specific situation of an individual or of the peculiar circumstances in which an individual might take up certain employment opportunities.

55. Yet, the self-employed are a notoriously vast and heterogeneous group. Some of them may have deliberately chosen to offer their services under that particular legal regime, while others may have been forced to do so, in the absence of a more stable employment opportunity. Depending on, on the one hand, their skills, competences, experience and reputation, and, on the other hand, the particular circumstances of each case (such as the size and economic power of the customer, the urgency and/or complexity of the service to be provided, the number of other professionals available), their bargaining power may be stronger or weaker than that of their customers. This is in stark contrast to workers, who are traditionally considered to be in an asymmetrical position when negotiating working conditions with employers, because the offer of labour is higher than its demand in all modern western societies.

56. Importantly, self-employed persons may also have profoundly diverging approaches to the prospect of being subject to provisions binding for them all as a group. For example, in the case under consideration, whereas some self-employed musicians may welcome provisions fixing minimum tariffs, others may not. In fact, such provisions can deprive younger or less famous professionals from being able to compete effectively with more experienced or renowned colleagues, by offering their services at more advantageous rates. Without the possibility of competing on price, some self-employed would have far fewer opportunities to win a contract and would risk being marginalised from the job-market entirely.

57. In that context, I also see a potential problem of legitimacy when trade unions representing only a limited number of the self-employed enter into collective agreements which bind employers vis-à-vis all the self-employed.

58. Accordingly, the mere fact that *some* self-employed persons may find themselves in a position which, economically speaking, shares certain characteristic features with workers, does not warrant a complete and *a priori* assimilation of the two categories of economic actors.

59. Against that background, one could perhaps argue that provisions in a collective agreement concluded on behalf of and in the interests of self-employed persons *should* be covered by the Albany exception when applied to self-employed persons who are in a situation comparable to that of workers, but not be covered by the exception when, conversely, applied to situations where those similarities do not exist.

60. In my view, however, that would not be a tenable solution.

61. As pointed out by the Netherlands Government, the CLA at issue does not deal with the ‘false self-employed’. Indeed, it is common ground between the parties that such persons fulfil the definition of ‘worker’ under EU law and, as such, any collective agreement regulating their position would in principle be able to benefit from the Albany exception.

62. The CLA at issue deals with real self-employed. Consequently, extending to them a general exclusion from the scope of Article 101 TFEU would not only — for the reasons already explained — fly in the face of the Treaty provisions on competition law and social policy, but would also introduce an element of uncertainty and unpredictability in a system, namely that of labour relations, which has a particular need for stability, clarity and transparency.

63. Indeed, to my mind, individuals and businesses, not to mention national administrations and courts, need a rule whose meaning is unambiguous and whose application is predictable. The distinction between workers and self-employed persons is, overall, relatively straightforward and accordingly makes it possible, for any authority called upon to do so, to determine, with a reasonable degree of certainty, when an agreement entered into by some group of professionals falls outside the scope of Article 101 TFEU, and when it does not.

64. I do not see how it could be in the interests of the social partners to negotiate and enter into collective agreements whose validity in a number of specific cases is at best uncertain, and thus easily the source of dispute, and which, as a result, fail to set the labour standards in the sector covered.

65. On the basis of all the above considerations, I take the view that collective agreements which contain provisions negotiated on behalf of and in the interests of self-employed persons are not, and should not be, covered by the Albany exception. Indeed, I believe that those contractual provisions cannot be excluded outright from the scope of the EU competition rules.

B – *Provisions negotiated, and included in the collective agreement, on behalf of and in the interests of workers*

66. As mentioned in point 21 above, it is also necessary to examine whether the conditions of the Albany exception may be satisfied where the provisions in question were negotiated, and included in the collective agreement, on behalf of and in the interests of workers.

67. Indeed, FNV argues that the purpose of the provisions in question was to improve the working conditions of the employees concerned. In particular, the objective pursued by those provisions was to prevent social dumping. FNV maintains that, by providing a counterweight to the potentially lower costs borne by employers when replacing workers with self-employed, the provisions in question are intended to ensure that employers do not lose all incentive to hire workers.

68. The Czech and Netherlands Governments, as well as the Commission, stress that only provisions designed to contribute *directly* to improving the working conditions of employees are covered by the Albany exception. In their view, however, that pre-requisite is not satisfied with regard to the contractual provisions in question. Those provisions would, if anything, contribute to improving those conditions only *indirectly*, that is, by creating more employment opportunities for workers.

69. I must point out, first of all, that when trade unions, within the framework of collective bargaining, negotiate contractual provisions on behalf of and in the interests of workers, the first condition of the Albany exception is manifestly satisfied.

70. As for the second condition, I agree with the Czech and Netherlands Governments and the Commission that only contractual provisions which contribute *directly* to the improvement of the employment and working conditions are covered by the Court's case-law.

71. That requirement was emphasised by the Court in *Albany*, (24)*Brentjens* (25) and *Drijvende Bokken*. (26) It is true that the Court did not mention the term 'directly' in its subsequent judgments in *Van der Woude* and *AG2R Prévoyance*. Yet, in my view, that was unnecessary to the extent that, in both cases, there could be no doubt that the measures in question — respectively, a sickness insurance scheme and a scheme for supplementary reimbursement of healthcare costs — would produce an immediate and clear benefit for the workers.

72. The purpose of the *Albany* line of cases is not, as mentioned above, to discourage or undermine collective bargaining between the social partners. This is why the Court has referred to provisions which improve *directly* the employment or working conditions of employees. Matters such as remuneration, working hours, annual leave, pensions, insurance and health-care are at the very heart of collective negotiations. If workers were deprived of the possibility to negotiate those matters freely, the essence of their right to collective bargaining would be frustrated. (27)

73. Conversely, there is no valid reason to afford such far-reaching legal protection (namely, total immunity from antitrust laws) when workers negotiate with employers on matters which only *indirectly* affect their employment or working conditions. Workers (and employers) maintain an interest in collective bargaining even if what is agreed in matters which do not immediately and significantly affect employment or working conditions is potentially open to review under antitrust laws.

74. That said, I must say that I agree with FNV that the protection of current and future employment opportunities for workers is a matter which may be regarded as a direct improvement of their employment and working conditions. I believe that the risk of social dumping may clearly and immediately affect those conditions, for two reasons.

75. One reason is that having a safe and stable employment is clearly, for workers, even more important than the improvement of, for example, their working hours or annual leave rights. If it were convenient for the employers, from an economic point of view, to replace workers with self-employed persons, there would be a risk that many workers might immediately lose their job, or become gradually marginalised over time.

76. The elimination of wage competition between workers — which is in itself the very *raison d'être* for collective bargaining — implies that an employer can under no circumstances hire other workers for a salary below that set out in the collective agreement. On that basis, and from the perspective of a worker, there is really no difference if he is replaced by a less costly worker or by a less costly self-employed person.

77. Another reason is that the possibility for employers to replace workers with other individuals in respect of whom they do not have to apply the working conditions laid down in the relevant collective agreement may significantly weaken the negotiating position of workers. For instance, how could workers credibly ask for a salary increase if they knew that they could be easily and promptly replaced with self-employed persons who would probably do the same job for a lower remuneration?

78. Thus, unless workers have a certain level of protection from social dumping, their ability and incentive to enter into collective bargaining with employers would be seriously weakened. From that angle, the possibility for workers to include, in collective agreements, provisions designed to ensure the continuous existence of a certain number of positions of employees in the employers' businesses may be regarded as a necessary pre-condition for them to be effectively able to negotiate improvements of other employment and working conditions.

79. For all those reasons, I take the view that preventing social dumping is an objective that can be legitimately pursued by a collective agreement containing rules affecting self-employed persons and that it may also constitute one of the core subjects of negotiation.

80. This position is supported by the case-law of the Court and can also be found, expressed as a principle, in EU legislation. The Court has consistently stated that the objective of preventing social dumping may, in principle, constitute an overriding requirement in the public interest which is capable of justifying a restriction on the fundamental freedoms. This is true with regard both to restrictions introduced by means of a Member State measure,(28) and to those created as a result of collective action taken by workers. (29)

81. Furthermore, I would note that, tellingly, the EU legislature has, in a number of legal instruments, required Member States to introduce rules on minimum working standards (and, in particular, on minimum pay) — including by means of collective agreements — precisely with a view to preventing social dumping.

82. For example, the Temporary Agency Work Directive (30) lays down the principle that basic working and employment conditions applicable to temporary agency workers should be at least on a par with those that would apply to such workers if they were recruited by the user undertaking to occupy the same job. (31) In that context, Member States, on the one hand, may allow the social partners to define the applicable working and employment conditions and, on the other hand, may introduce certain derogations to the principle of equal treatment, on the basis of collective agreements concluded by the social partners. (32)

83. On that basis, I conclude that provisions designed to prevent social dumping, which are negotiated and included in a collective agreement on behalf of and in the interests of workers, are in principle to be regarded as improving directly their employment and working conditions, within the meaning of the Albany line of cases.

C – *Consideration of the situation at issue*

84. The fulfilment of the two conditions for application of the Albany exception in any given case is, in principle, a matter for the relevant national competition authorities and courts to assess. It is clearly an assessment that can only be made on a case-by-case basis, in the light of the specific provisions contained in a collective agreement and of all the characteristic circumstances of the relevant market.

85. Therefore, whether the Albany exception actually applies with regard to the provisions in question is for the Gerechtshof ’s-Gravenhage to determine, on the basis of all the information and evidence submitted to it by the parties in the main proceedings.

86. That said, I must stress that, unlike the cases which the Court examined in the past, the main proceedings concern — as highlighted above — a collective agreement entered into by trade unions representing both employees and self-employed persons. In addition, the provisions of the agreement under scrutiny in the main proceedings do not regulate any of the traditional aspects of the employer-employee working relationship (such as remuneration, working hours and vacations) but instead the relationship between the employer and another category of professionals: the self-employed.

87. These peculiarities undoubtedly make the legal analysis of the referring court quite complex, in so far as the effective fulfilment of the Albany conditions — and, in particular, the second condition — is less evident than in other cases. Therefore, in order to assist the referring court in its analysis, I will now move on to consider some additional points concerning the elements that, in my opinion, the referring court should take into account in order to decide whom the CLA at issue in fact benefits.

88. Fundamentally, given the dual character of the CLA at issue, the referring court has to decide whether that agreement has been entered into for the benefit of musicians who are employed by the orchestras represented by the VSR — and, accordingly, liable in principle to improve employment or working conditions directly — or, alternatively, whether the CLA at issue is primarily intended to restrict competition between self-employed persons and should consequently fall outside the scope of the Albany exception. This cannot be determined *in abstracto*, merely on the basis of the allegations made by the parties who signed the agreement, but needs to be determined *in concreto*. To verify whether that is so, I am of the view that the national court may find it particularly useful to inquire into the following two aspects.

89. First, the national court should determine whether there exists a real and serious risk of social dumping, and, if so, whether the provisions in question are *necessary* to prevent such dumping. There must be an actual possibility that, without the provisions in question, a not insignificant number of workers might be replaced with self-employed persons at lower costs. This phenomenon might occur through the immediate dismissal of workers or through gradual economisation by not replacing workers whose contract has come to an end.

90. Indeed, if the risk of social dumping is not real and serious, any possible improvement of the employees’ status would, far from being direct, be rather uncertain and purely speculative. Whether any such risk is real enough in any given case would mainly depend, in my view, on the sector of the economy and the type of industry to which the collective agreement applies.

91. In the main proceedings, the crucial question in that context appears to be whether the orchestras which are members of the VSR would be generally inclined to replace, immediately or progressively, a non-negligible number of ‘employee’ musicians with self-employed musicians, if no minimum rate of remuneration for the latter was included in the CLA at issue.

92. Second, the national court must investigate the scope and thrust of the provisions in question, that is to say, whether they go beyond what would seem to be necessary to achieve the objective of preventing social dumping. Contractual provisions which exceed their stated objective can hardly be regarded as being of genuine and effective benefit to workers. Some of those provisions — those which are excessive or unwarranted — cannot be considered to improve directly the employment and working conditions of employees.

93. An example of provisions that I would regard as going beyond what is necessary would be contractual provisions according workers higher protection *vis-à-vis* self-employed persons than *vis-à-vis* other workers. In other words, I would consider provisions which set minimum tariffs for the self-employed at a level significantly higher than the minimum wages for workers as evidence that the intention underlying the provisions in question was another than protection against social dumping.

94. On the basis of the above, I take the view that provisions such as those contained in the CLA at issue should be unconditionally accepted, despite their anticompetitive effects, if it can be proved that they actually are necessary to prevent social dumping. Otherwise, the provisions in question would weaken competition between self-employed persons (and, potentially, between employers), while providing little or no benefit to workers.

95. It is probably not without interest that the interpretation of Article 101 TFEU that I am proposing to the Court seems broadly consistent with a number of rulings issued by the US Supreme Court on the applicability of the Sherman Act in the context of labour disputes, to which FNV referred in its written observations.

96. Before turning to those cases, however, it should be pointed out that however similar the relevant EU and US legal frameworks may be, they are not identical. In particular, within the EU legal order there are no express legal provisions equivalent to the provisions of the Clayton Act (33) or the Norris-La Guardia Act (34) providing for an explicit antitrust exception for ‘labor unions, so long as they act in their self-interest and do not combine with non-labor groups’. Despite that difference, certain parallels can, in my view, still be drawn. (35)

97. In *AFM v. Carroll*, (36) the US Supreme Court upheld the validity of a set of minimum prices (‘the price list’) that a trade union (representing musicians and orchestra leaders) (37) required orchestra leaders to apply when entering into contracts with music purchasers. While the Federal Court of Appeal had considered the price list to be a *per se* infringement of the Sherman Act, to the extent that it concerned prices and not wages (the orchestra leaders being self-employed and not employees), the US Supreme Court rejected that approach as overlooking ‘the necessity of inquiry beyond the form’. The US Supreme Court considered that the crucial factor in the case was not whether the price list concerned prices or wages, but whether that list operated to protect the wages of the musicians employed by the orchestra leader. On finding that the latter was indeed the case, the US Supreme Court held that the price list fell within the labour exemption from the Sherman Act. (38)

98. In *Allen Bradley Co. v. Local Union no. 3*, however, the US Supreme Court emphasised that the Sherman Act does not allow trade unions to ‘aid non-labor groups to create business monopolies and to control the marketing of goods and services’. (39) Furthermore, in *United Mine Workers v. Pennington*, the Supreme Court also held that ‘a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. … This is true even though the union’s part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry’. (40)

99. My reading of these decisions is that they support the view that the notion of direct improvement of the employment and working conditions of employees must not be too narrowly construed. The fact that a contractual provision in a collective agreement lays down minimum tariffs for self-employed persons who are in competition with workers for the same job is not, in itself, enough to bring those provisions within the scope of the antitrust rules. Such contractual provisions must genuinely pursue their stated objective

and not aim to help undertakings to limit competition between them. Moreover, those decisions suggest a cautious approach when reviewing, in the light of competition rules, the conduct of trade unions which try to impose the working conditions negotiated by them to other categories of professional which fall outside the scope of their collective agreements.

100. I therefore conclude that it is for the referring court to determine whether the conditions of the Albany exception are satisfied with regard to the relevant provisions of the CLA at issue. To that end, the referring court needs, in particular, to establish whether those provisions improve directly 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.

IV – Conclusion

101. In the light of the foregoing, I propose that the Court answer the questions referred by the Gerechtshof 's-Gravenhage as follows:

Provisions in a collective agreement concluded between, on the one side, an association of employers and, on the other side, trade unions representing employees and self-employed persons, which provide that self-employed persons who, on the basis of a contract for professional services, perform the same work for an employer as the workers who come within the scope of that collective labour agreement must receive a specific minimum fee fall:

– within the scope of Article 101 TFEU if they are entered into in the interests of and on behalf of self-employed persons;

– outside the scope of Article 101 TFEU if they are entered into in the interests of and on behalf of employees, whose employment and working conditions they directly improve. It is for the referring court to ascertain 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.

---

1 – Original language: English.

---

2 – C-67/96, EU:C:1999:430. See also *Brentjens'*, C-115/97 to C-117/97, EU:C:1999:434; *Drijvende Bokken*, C-219/97, EU:C:1999:437; *Pavlov and Others*, C-180/98 to C-184/98, EU:C:2000:428; *Van der Woude*, C-222/98, EU:C:2000:475; and *AG2R Prévoyance*, C-437/09, EU:C:2011:112.

---

3 – Visiedocument of 5 December 2007.

---

4 – In this Opinion, the terms 'employee' and 'worker' are used interchangeably.

---

5 – See, in particular, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraphs 17 to 23 and case-law cited. See also my Opinion in *Venturini*, C-159/12 to C-161/12, EU:C:2013:529, points 46 to 52.

---

6 – For that expression, see Opinion of Advocate General Fennelly in *Van der Woude* (C-222/98, EU:C:2000:226, point 30), with an implicit reference to *Albany* (EU:C:1999:430, paragraphs 59 and 60).

---

7 – *Albany*, EU:C:1999:430, paragraph 60; *Brentjens'*, EU:C:1999:434, paragraph 57; *Drijvende Bokken*, EU:C:1999:437, paragraph 47; *Pavlov and Others*, EU:C:2000:428, paragraph 67; *Van der Woude*,

EU:C:2000:475, paragraph 22; and *AG2R Prévoyance*, EU:C:2011:112, paragraph 29.

---

8 – See, to that effect, *AG2R Prévoyance*, EU:C:2011:112, paragraph 30.

---

9 – I will come back to this issue *infra*, point 32.

---

10 – See, in particular, EU:C:1999:430, paragraphs 56 to 60.

---

11 – See, among many, *Becu and Others*, C-22/98, EU:C:1999:419, paragraph 26.

---

12 – See, to that effect, *Pavlov and Others*, EU:C:2000:428, paragraphs 73 to 77, and *Wouters and Others*, C-309/99, EU:C:2002:98, paragraph 49.

---

13 – See, by analogy, *Pavlov and Others*, EU:C:2000:428, paragraphs 84 to 89.

---

14 – Indeed, it is generally considered that collective bargaining not only helps workers and employers in reaching a balanced and mutually acceptable outcome, but also produces positive effects for society as a whole. As Advocate General Jacobs emphasised in *Albany*, it is generally accepted that ‘collective agreements between management and labour prevent costly labour conflicts, reduce transaction costs through a collective and rule-based negotiation process and promote predictability and transparency’ (C-67/96, EU:C:1999:28, points 181 and 232). I also believe that the promotion of social peace and the establishment of a system of social protection which is equitable for all citizens are aims of the greatest significance in any modern society.

---

15 – See, to that effect, Opinion of Advocate General Jacobs in *Albany*, EU:C:1999:28, point 182.

---

16 – See among many, *Clair*, 123/83, EU:C:1985:33, paragraph 22; *Verband der Sachversicherer* v *Commission*, 45/85, EU:C:1987:34, paragraphs 39 to 42; and *Binon*, 243/83, EU:C:1985:284, paragraph 44.

---

17 – See *Pavlov and Others*, EU:C:2000:428, paragraph 69.

---

18 – See, notably, *Jany and Others*, C-268/99, EU:C:2001:616, paragraph 34 and case-law cited.

---

19 – See, *Commission* v *Italy*, C-596/12, EU:C:2014:77, paragraph 16 et seq. See also, to that effect, *Agegate*, C-3/87, EU:C:1989:650, paragraph 36; *Asscher*, C-107/94, EU:C:1996:251, paragraphs 25 and 26; and my Opinion in *Haralambidis*, C-270/13, EU:C:2014:1358, point 32.

---

20 – See, to that end, *Commission* v *Italy*, C-35/96, EU:C:1998:303, paragraph 37.

---

21 – Expressing the same position, see Opinion of Advocate General Jacobs in *Pavlov and Others*, EU:C:2000:151, point 99, and Opinion of Advocate General Fennelly in *Van der Woude*, EU:C:2000:226, point 30.

---

22 – By way of example, see *Allonby*, C-256/01, EU:C:2004:18, and *Haralambidis*, C-270/13, EU:C:2014:2185.

23 – On this issue, see European Commission, Green Paper — Modernising labour law to meet the challenges of the 21st century, COM(2006) 708 final, pp. 10 to 12. See also Barnard, C., *EU Employment Law*, Oxford University Press, Oxford: 2012 (4th ed.), pp. 144 to 154.

24 – EU:C:1999:430, paragraph 63.

25 – EU:C:1999:434, paragraph 60.

26 – EU:C:1999:437, paragraph 50.

27 – Cf. *Commission* v *Germany*, C-271/08, EU:C:2010:426, paragraph 49.

28 – See, to that effect, *Commission* v *Belgium*, C-577/10, EU:C:2012:814, paragraph 45, and *Wolff & Müller*, C-60/03, EU:C:2004:610, paragraph 41.

29 – See *Laval un Partneri*, C-341/05, EU:C:2007:809, paragraph 103 and case-law cited.

30 – Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (OJ 2008 L 327, p. 9).

31 – Recital 14 in the preamble to Directive 2008/104.

32 – See, to that effect, idem, recitals 16 and 17.

33 – Clayton Antitrust Act, 15 U.S.C. §§ 12 to 27.

34 – Norris-La Guardia Act, 29 U.S.C. §§ 101 to 115.

35 – As Advocate General Jacobs, in his Opinion in *Albany* (EU:C:1999:28, points 96 to 107) has comprehensively analysed the US framework in this field, I refer to that Opinion for a more general description of this. Here, I will only mention a few of the rulings of the US Supreme Court specifically mentioned by FNV.

36 – 391 U.S. 99 (1968).

37 – Orchestra leaders were defined as the musicians who make arrangements with the purchaser of the orchestra services.

38 – Sherman Antitrust Act, 15 U.S.C. §§ 1 to 7.

39 – 325 U.S. 797 (1945).

40 – 381 U.S. 657 (1965).