

Chapter 1. Employee-like worker: Competitive entrepreneur or submissive employee? Reflections on ECJ, C-413/13, FNV Kunsten Informatie

Eva Grosheide* and Beryl ter Haar†

Abstract

It seems that the time of the employment contract as the standard legal device of employment is over and that a variety of employment relationships have emerged. Many forms raise questions and uncertainties about social protection. One of these forms are false or quasi self-employed workers. In the case of FNV KIEM the European Court of Justice (ECJ) ruled on this. In this contribution we assess to what extent the ruling of the ECJ has contributed to clarifying some of the qualification issues involved with these type of workers. Thereto, we describe how the case was raised in the Netherlands; we elaborate on the arguments raised in the subsequent national court decisions and the ECJ; we reflect on the notion of (false) self-employed from the perspective of the notion of undertaking/entrepreneur and that of employee in order to determine what the ECJ considers to be decisive requirements for each category; and we reflect on the meaning of the ruling of the ECJ in the FNV KIEM case for the Netherlands.

* PhD student, Hugo Sinzheimer Institute, University of Amsterdam.

† Assistant Professor of European and international labour law, Leiden University.

1. Introduction

The notions of ‘employee’ and ‘entrepreneur’ hold a monopoly when it comes to legally qualifying labour, and it matters a great deal in which of the two categories someone is placed. On the one hand, if a worker qualifies as an employee, he or she will enjoy the full protection of the labour law. On the other hand, if a worker qualifies as an undertaking, he or she will be subjected to the prohibitions of competition law. An in-between category of employee-like workers seems to be emerging. Within labour law discourse, a pressing and recurring issue is to what degree employee-like workers should be offered social protection. Simultaneously, in competition law the issue arises whether, and to what extent, employee-like workers qualify as undertakings.

In the Netherlands, social partners attempt to mitigate some of the effects resulting from the rise of this in-between category of workers through adopting minimum fees for self-employed persons in collective bargaining agreements.³ Firstly, their aim is to dampen the downward pressure on wages as a consequence of stark competition caused by (quasi or bogus) self-employed persons.⁴ Secondly, they act to mitigate the lack of social protection for certain groups of self-employed persons that for various reasons qualify as employee-like workers.⁵ From a labour law perspective this initiative of social partners is in general considered to be a positive development because it offers some social protection to persons who have limited opportunities to bargain for reasonable fees and terms of employment themselves, and it may put a halt to the effects of social dumping. From a competition law perspective, however, this progressive action by social partners sits uncomfortably with competition law prohibitions. Self-employed persons collectively establishing fees is considered to be a hard-core cartel.

The tension between the fundamental goals of social and competition policy came to a head in the European Court of Justice (ECJ) Case FNV Kunsten Informatie en Media (hereafter: FNV KIEM)⁶. The pivotal matter in the case is whether the self-employed substitutes for whom fixed

³ Collective agreement for architectural firms 2015-2017; Collective agreement for private bus transportation 2013-2014, 2012-2013, 2008-2011 and 2006-2008; Collective agreement for musicians substituting for members of an orchestra 2006-2007.

⁴ E.F. Grosheide and M. Barenberg, ‘Minimum Fees for the Self-Employed: A European Response to the “Uber-ized” Economy?’, *Columbia Journal of European Law*, 22(2), p. 200.

⁵ *Idem*.

⁶ C-413/13, *FNV Kunsten Informatie en Media v. Staat der Nederlanden*, ECLI:EU:C:2014:2411.

fees were agreed in a collective labour agreement, qualify as an employee or an undertaking – a qualification which is rather important because of the legal consequences. If the substitutes qualify as an employee, the provision of the collective bargaining agreement containing minimum fees falls in principle under the collective bargaining exception (or *Albany*-exception) formulated by the ECJ.⁷ If the substitutes qualify as an undertaking, the provision is subjected to competition law and probably deemed to be a violation thereof.

Because the qualification of employee-like workers in legal systems only acknowledging the notions of employee and entrepreneur leads to vigorous debate, and legal uncertainty hurts these workers who seemingly fall between the cracks. The aim of this contribution is to analyse to what extent the ruling of the ECJ in *FNV KIEM* has contributed to creating more (legal) certainty for employee-like workers. Therefore, we will first elaborate on the notion of the employee-like worker as discussed in the Netherlands context. In the second part we will describe the case itself, by paying attention to what induced the case, the national procedures, the ECJ's ruling and the decision of the Netherlands Court of Appeal that asked for the preliminary ruling. In the third part we elaborate on the consequences of *FNV KIEM*. First, by focusing in detail on the notion of undertaking in competition law, and second, by discussing the notion of the false self-employed introduced by the ECJ. In the last part we analyse to what extent the ruling of the ECJ in *FNV KIEM* has contributed to creating more clarity in the qualification of employee-like workers with a focus on the Dutch context.

2. Employee-like worker

The notion of an employee-like worker is widely used as reference to persons who are as self-employed active on the labour market. However, these workers are different from genuine self-employed persons because the latter are entrepreneurs being in competition with other undertakings and bearing economic and financial risks. The term employee-like worker refers to the situation where there is an element in the contractual relation between the service provider and the client indicating that the position of the service provider is more comparable to that of an employee than that of an entrepreneur. Indications could be: i) the service provider more or

⁷ ECJ 21 September 1999, Case C-67/96, *Albany*, ECLI:EU:C:1999:430.

less maintains to work under subordination of one or more client(s); ii) the service provider is economically dependent of one or few clients that have superior bargaining power; iii) the service provider does not bear financial or commercial risks attached to the performance of the services.

The data on self-employed persons suggests that the category of employee-like workers is increasing in Europe, and especially in the Netherlands.⁸ This is merely a suggestion since the data also includes genuine self-employed persons (entrepreneurs) and definitions on who qualifies as self-employed person vary throughout the European Union. Nonetheless, this indicates a tendency of the growth of self-employed persons and, when combined with general developments of the work force on the labour market per EU Member State, it is hard to deny that part of this growth is made up by employee-like persons. When considering this in the Netherlands context, first and foremost, there are persons who made the deliberate choice to work as self-employed and behave like true entrepreneurs. At the same time, we note in the Netherlands a trend that the entrance into self-employment is in some cases steered by the former employer.⁹

There are various reasons for persons to work as self-employed and for companies to hire self-employed persons rather than employees. For instance, the Netherlands has various fiscal incentives that make it rather easy and attractive for individuals to work as self-employed. Also, like elsewhere, there are technological developments that facilitate self-employment,¹⁰ for example, crowd sourcing in the ICT sector. From the employer's perspective, strong arguments have been made that the employment contract is too overloaded with obligations, including two years paying wages in case of illness and a complex system for dismissals, pushing the employer towards the simpler contract of services with self-employed persons.¹¹

These pull and push factors towards self-employment are acceptable when an individual is in a good position to negotiate the terms of services and is able to incorporate entrepreneurial risks

⁸ P. Hasekampe.a., 'IBO Zelfstandigenzonderpersoneel', *Ministry of Financial Affairs, Netherlands*, April 2015, p. vi.

⁹ *Idem*, p. vii-viii.

¹⁰ *Idem*, p. viii.

¹¹ S.S.M. Peters (2016), 'Arbeidsrechtelijke lastendruk en ondernemersbescherming', *Tijdschrift voor Recht en Arbeid*, 32(4), p. 3-9.

in the fees. However, this development becomes problematic when an individual is in a weak bargaining position and cannot sufficiently negotiate fees and terms of service in his or her favour. In the latter situation, the self-employed person may resemble an employee more than an entrepreneur. One could argue that at least in some cases the self-employed person is actually mislabelled with major consequences in the unjust denial of labour law protection.

It is in response to this binary approach in law – an individual is either an employee and therefore fully protected by employment law, or a self-employed person without any employment protection at all – that Dutch trade unions have stepped up in an attempt to moderate the effects of the tendency towards self-employment. Their motive for action is twofold. On the one hand, raising employment protection for self-employed persons who are more like employees should make it less appealing for employers to replace employees with these employee-like workers in order to reduce costs. On the other hand, by offering some social protection to these employee-like persons, trade unions aim to soften the effect of social dumping for both groups of workers. This is softening for self-employed persons since they get some social protection they may not be able to negotiate themselves given their economic position at the market. Simultaneously, it softens the effect of social dumping for employees because it takes the pressure off their working conditions and wages.

Article 1(2) of the Netherlands Act on collective labour agreements (Wet cao) provides that a collective labour agreement negotiated and concluded between social partners can also be applied to contracts of services. Based on this competence, several collective labour agreements in the Netherlands include minimum fees for self-employed.¹² An example can be found in the collective labour agreement Remplaçanten Nederlandse Orkesten 2006-2007 (further: CLA Remplaçanten). However, notwithstanding the competence of social partners to conclude such agreements, issues have been raised in the context of EU competition law, especially article 101(1) TFEU, resulting in *FNV KIEM*.

¹²Op cit. note 1.

3. Case C-413/13 and the ruling of the Gerechtshof 's-Gravenhage

Before going into the details of the case, we will turn to what triggered it. At first sight, many labour law scholars and practitioners generally felt it was a positive development that the fees for substitute self-employed musicians were fixed by the CLA Remplaçanten. Especially, from one of the fundamental ideas of labour law, namely to offer protection to workers because of their weaker bargaining position. In practice, substitute self-employed musicians have little to no influence over the terms of their contract, therefore, having those terms fixed by the CLA Remplaçanten provides transparency and legal certainty in knowing what they are entitled to. Moreover, it has been argued that the fixed fees for substitute self-employed musicians, i.e., the wage of employees plus 16.5%, was to put a stop to the downward pressure on the wages of the musicians employed as employees.¹³ Who would object against this? Therefore, in this section we begin by setting out what induced the case. This is followed by a description of the national court procedures and the ECJ's preliminary ruling. We close with the final ruling of the Netherlands Court of Appeal that posed the questions.

3.1. Inducement of the case

the Netherlands Competition Authority (NCA) thought differently about the adoption of minimum fees for self-employed persons in collective labour agreements and took the CLA Remplaçanten as inducement to publish an extensive reflection document on the issue more generally. Topics addressed in this document include a delineation of the concepts of undertaking and associations of undertakings and the treatment of collective labour agreements by competition law. The NCA stressed that in this context it is important to make a distinction between persons who qualify as employees and persons who qualify as self-employed persons. This is followed by an exploration of to what extent minimum fees for self-employed persons adopted in collective labour agreements hinder competition among Member States of the EU.

In essence, the NCA concludes that competition law distinguishes natural persons who perform economic activities by offering their services or goods on a certain market and bear financial

¹³M. Wirtzand en H. Noten (2016), 'ZZP-ers en de cao', *Working Paper AWWN*, p.14.

and commercial risks related to the performance of those activities from natural persons who perform certain activities under subordination and in exchange for wages. No in-between categories are acknowledged by the NCA. Furthermore, the NCA argues that a trade union that represents only, or mostly, self-employed persons, is in fact an association of undertakings and as such falls within the scope of competition law. Consequently, a collective labour agreement fixing minimum fees for self-employed persons is an agreement between undertakings, *in casus*, for instance, between the orchestras and the trade union representing the self-employed substitutes (making the trade union an association of undertakings). As a result, the nature and characteristics of the collective labour agreement alters into an inter-professional agreement, negotiated on the trade union side by an organisation which acts in that regard not as an employees' association, but as an association for self-employed workers or undertakings. Therefore, the NCA concluded that in general these provisions do not fulfil the requirements to fall within the *Albany*-exception as ruled by the ECJ.¹⁴ For the sake of completeness, the NCA did not reflect on the situation where a union only represents employees and bargains minimum fees for self-employed persons solely on behalf and in the interest of these employees, e.g., to dampen the effects of social dumping.

3.2. National proceedings

The NCA's vision document resulted in the termination of the CLA Remplaçanten by the Association of Foundations for Substitutes in Dutch Orchestras (organization for employers) and the Netherlands Musicians' Union (organization for employees). Both parties refused to negotiate a new collective labour agreement including fees for self-employed substitutes with FNV KIEM (organisation for employees). Moreover, since the publication of the vision document in 2007 and the court proceedings in 2010, no provisions on fees for self-employed persons were concluded in collective labour agreements.¹⁵ In response, FNV KIEM brought an action before the Rechtbank 's-Gravenhage (district court, The Hague) seeking: i) a declaration that it is not contrary to Netherlands or EU competition law for a provision of a collective labour agreement to require the employer to adhere to minimum fees not only for employed substitutes,

¹⁵Cf. Rechtbank 's-Gravenhage 27 October 2010, ECLI:NL:RBSGR:2010:BO3551, point 2.6.

but also for self-employed substitutes; and ii) that the Netherlands State should be ordered to rectify the position adopted by the NCA in its reflection document.

The Rechtbank 's-Gravenhage begins with a reference to the ECJ's cases *Albany*¹⁶, *Brentjes*¹⁷, and *DrijvendeBokken*¹⁸, in which the collective bargaining exception (or *Albany*-exception) is introduced. Relief from the competition law prohibitions by the collective bargaining exception is subjected to two cumulative requirements:

1. the collective labour agreement is the result of negotiations between employer and employee associations (nature);
2. the collective labour agreement contributes directly to the improvement of the working and employment conditions of the employees (purpose).¹⁹

Regarding the second requirement, the Rechtbank 's-Gravenhage considered that minimum fees for self-employed persons only indirectly – and thus not directly – improve the working conditions of employees. The second requirement of the exception is not fulfilled.²⁰ No assessment is made on the nature of the collective labour agreement (the first requirement). With respect to the secondary claim of FNV KIEM, the Rechtbank 's-Gravenhage is of the opinion that FNV KIEM failed to prove that the self-employed substitutes are actually to be considered employees rather than undertakings. Therefore, the Rechtbank 's-Gravenhage sees no reason to reconsider its conclusion.

Dissatisfied with the ruling of the Rechtbank 's-Gravenhage, FNV KIEM appealed to the Gerechtshof 's-Gravenhage (court of appeal, The Hague)²¹ raising the question of 'whether the prohibition of agreements restricting competition laid down in Article 101(1) TFEU applies to a provision of a collective labour agreement setting minimum fees for self-employed service providers performing the same activity for an employer as that employer's employed workers.'²² Gerechtshof 's-Gravenhage, unlike the Rechtbank 's-Gravenhage, observes that the

¹⁶ ECJ 21 September 1999, Case C-67/96, ECLI:EU:C:1999:430.

¹⁷ ECJ 21 September 1999, Case C-115/97-C-117/97, ECLI:EU:C:1999:434.

¹⁸ ECJ 21 September 1999, Case C-219/97, ECLI:EU:C:1999:437.

¹⁹ Rechtbank 's-Gravenhage, 27 October 2010, ECLI:NL:RBSGR:2010:BO3551, par. 4.2

²⁰ *Idem*, par. 4.6.

²¹ Gerechtshof 's-Gravenhage, 9 July 2013, ECLI:NL:GHDHA:2013:5381.

²² ECJ 4 December 2014, Case C-413/13, *FNV KIEM*, ECLI:EU:C:2014:2411, par. 14.

outcome of the dispute is not so clear based on either the Treaty or the ECJ's case law. Therefore, the Gerechtshof 's-Gravenhage decided to stay the proceedings and to refer the case to the ECJ for a preliminary ruling on the following questions:

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

(2) If the answer to the first question is in the negative, does that provision then fall outside the scope of Article 101 TFEU in the case where that provision is (also) intended to improve the working conditions of the employees who come within the scope of the collective labour agreement, and is it also relevant in that regard whether those working conditions are thereby improved directly or only indirectly?²³

3.3. The ECJ's preliminary ruling

The ECJ decided to examine the two questions together and rephrased it substantially into the following question: 'whether, on the proper construction of EU law, a provision of a collective labour agreement, which sets minimum fees for self-employed service providers who are members of the contracting employees' organisations and perform for an employer, under a work of service contract, the same activity as that employer's employed workers, does not fall within the scope of Article 101(1) TFEU'.²⁴

Advocate-General Wahl takes the view that 'collective agreements which contain provisions negotiated on behalf of and in the interest of self-employed persons are not, and should not be, covered by the *Albany*-exception',²⁵ but when a trade union negotiates only on behalf of

²³ ECJ 4 December 2014, Case C-413/13, *FNV KIEM*, ECLI:EU:C:2014:2411, par. 12.

²⁴ *Idem*, par. 21.

²⁵ Opinion AG Wahl, 11 September 2014, Case C-413/13, *FNV KIEM*, ECLI:EU:C:2014:2215, par. 65.

employees, then the provision may enjoy relief of the *Albany*-exception after all. Therefore, the aim of the provision should be to prevent a real and serious risk of social dumping, and, if such a risk exists, the provision in question should be necessary to achieve that goal and be proportionate.²⁶ The extent to which the risk of social dumping is real and serious depends on the sector of the economy and the type of industry. It is up to social partners to prove the existence thereof. Furthermore, with reference to US Supreme Court case law²⁷ based on the Sherman Act, AG Wahl finds that the notion of the direct improvement of the employment and working conditions of employees must not be too narrowly construed. More particularly he argues that ‘the fact that a contractual provision in a collective labour agreement lays down minimum fees 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.’²⁸ Therefore, he concludes that it is up to the referring court to determine whether the conditions of the *Albany*-exception are satisfied, and, to that end, the referring court needs to establish whether those provisions improve directly the employment and working conditions of employees by genuinely and effectively preventing social dumping without going beyond what is necessary to achieve this objective.²⁹

The ECJ observed first that an organisation representing workers carrying out negotiations in the name and on behalf of its self-employed members is not acting as a social partner but as an association of undertakings.³⁰ From this it follows that a provision in a collective labour agreement, like the one in the CLA Remplaçanten, is not the result of collective negotiations between employers and employees. Therefore it cannot by reason of its nature be excluded from the scope of Article 101(1) TFEU.³¹ This is unless the service providers in name and on behalf of whom the trade union negotiated, are, in fact, ‘false self-employed’, *i.e.*, service providers in a situation comparable to that of employees.³²

²⁶ *Idem*, par. 89-90.

²⁷ 391 U.S. 99 (1968); 325 U.S. 797 (1945); 381 U.S. 657 (1965).

²⁸ Opinion AG Wahl, 11 September 2014, Case C-413/13, *FNV KIEM*, ECLI:EU:C:2014:2215, par. 99.

²⁹ *Idem*, par. 100.

³⁰ ECJ, 4 December 2014, Case C-413/13, *FNV KIEM*, ECLI:EU:C:2014:2411, par. 28.

³¹ *Idem*, par. 30.

³² *Idem*, par. 31.

In determining how to qualify self-employed persons, the ECJ relied on case law about both the term undertaking (within the meaning of competition law) and the term employee (within the meaning of the fundamental freedoms). Regarding the former term, the ECJ noted that a service provider can lose the status of an undertaking if he or she does not determine independently his or her own conduct on the market, but instead is entirely dependent on his or her principal. Such a dependency exists when the service provider does not bear any of the financial or commercial risks arising out of the principal's activity and operates as an auxiliary organ of the principal's undertaking.³³ The latter term, employee, is characterised by the employment relationship and means that one person performs services for and under the direction of another person in return for remuneration.³⁴ According to the Court, situations in which a person acts under the direction of his or her employer with regard to his or her freedom to choose the time, place and content of his or her work; does not share in the employer's commercial risks; and, for the duration of the relationship, forms an integral part of that employer's undertaking, are indications that the person in question provides his or her services as an employee rather than as a self-employed person.³⁵ Furthermore, the ECJ stresses that the classification of a self-employed person under national law does not prevent a person being classified as an employee under EU law.³⁶ However, the assessment of the status of the persons involved, *in casus* the orchestra substitutes, is in principle up to the national court.

3.4. Final Ruling Gerechtshof 's-Gravenhage

Following the ruling of the ECJ, the Gerechtshof 's-Gravenhage continued its proceedings by assessing the status of the substitute musicians. The main question is whether the substitute musicians are self-employed persons or whether they are to be considered as false self-employed and therefore in fact are employees. First of all, the Gerechtshof 's-Gravenhage observed that it should be assessed per situation whether a self-employed person is actually a false self-employed person. Thus its ruling would have no wider meaning than the assessment

³³ *Idem*, par. 33; ECJ, 14 December 2006, Case C-217/05, *Confederación Española de Empresarios de Estaciones de Servicio*, ECLI:EU:C:2006:784, paras. 43 and 44.

³⁴ *Idem*, par. 34; ECJ, 10 September 2014, Case C-270/13, *Haralambidis*, ECLI:EU:C:2014:2185, par. 28.

³⁵ *Idem*, par. 36, with references to *Allonby*, ECLI:EU:C:2004:18; *Aegate*, ECLI:EU:C:1989:650, and *Becu and Others*, ECLI:EU:C:1999:419.

³⁶ ECJ, 13 January 2004, Case C-256/01, *Allonby*, ECLI:EU:C:2004:18, par. 71.

of the status of substitute musicians.³⁷ Secondly, the Gerechtshof 's-Gravenhage emphasised that the evaluation of the status of the substitute musicians is limited to the particular service they provide for an orchestra. Excluded from the qualification endeavour are other services they may provide, e.g., giving music lessons, being substitutes in other orchestras, playing in an ensemble, etc.³⁸

Having set these demarcations, the Gerechtshof 's-Gravenhage compared the situation of self-employed substitute musicians to that of employed substitutes performing in an orchestra. It finds that the self-employed substitutes have the same duties as employees; they play from the same sheet music as the employees; they have to follow the same strict schedule for rehearsals and concerts; and they have to perform their duties in person and thus they cannot replace themselves.³⁹ Therefore, the Gerechtshof 's-Gravenhage is of the opinion that self-employed substitutes are in reality false self-employed persons. Unlike 'genuine' self-employed persons, self-employed substitutes are during the contract of service subordinated to the orchestra like the employees of the orchestra. Comparisons with soloists, who are without doubt accepted as self-employed persons, break down because they are not subordinated to the conductor and they do not perform the same duties as regular orchestra players. Consequently, the Gerechtshof 's-Gravenhage declared for law that it is not contrary to Netherlands or EU competition law for a provision of a collective labour agreement to require the employer to adhere to minimum fees for self-employed substitutes as understood in its ruling (thus false self-employed substitutes).

4. Reflections on the notion of (false) self-employed⁴⁰

This case makes clear that the notion of a self-employed person is demarked from two sides, namely by the concept of the employee and by the concept of the entrepreneur or undertaking. In this section we will reflect upon the notion of the self-employed from these two sides. First, by further exploring the ECJ's case law regarding the concept of undertaking within the field

³⁷Gerechtshof 's-Gravenhage, 1 September 2015, ECLI:NL:GHDHA:2015:2305, par. 2.1.

³⁸*Idem*, par. 2.2 and 2.7. The Gerechtshof 's-Gravenhage refers for this to paras. 36 and 37 of the ECJ's the preliminary ruling in this case.

³⁹*Idem*, par. 2.5.

⁴⁰ The reflections in this paragraph are derived from paragraph 3 ('de onderneming') and paragraph 4 ('werknemer versus ondernemer') from an article in Dutch written by E.F. Grosheide (2015), 'Overheid en sociale partners op wenkbrauwgesprek bij Europa', *Tijdschrift Recht en Arbeid*, 7(12).

of competition law, and second, by expounding on the notion of false self-employed introduced by the ECJ and by analysing how the ECJ distinguishes between employee and entrepreneur and what it considers to be the decisive requirements for each category.

4.1. Self-employed and competition law

Competition law regulates the behaviour of entrepreneurs or undertakings. In this case, the ECJ clarified that this notion of undertaking is relevant for the *Albany*-exception. After all, as the ECJ considers, a trade union is not a social partner when it negotiates on behalf of and in the interest of self-employed persons. The trade union acts then in fact as an association of undertakings.⁴¹ From the ECJ's case law it follows that the concept of an undertaking 'encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'.⁴² An entity conducts economic activity when it offers goods and services on the market.⁴³

Employees do not qualify as undertakings within the meaning of EU competition law. In *SuikerUnie* the ECJ held that employees form an integral part of the economic unit (or undertaking) of the employer.⁴⁴ The rationale underlying this approach is the principle that employees are subject to the instructions and orders of their employer. Therefore, they do not independently offer goods and services on the market.⁴⁵ Employees receive wages independent of the quality of the work delivered or the transactions concluded by the employer. They do not bear the financial and commercial risk related to the economic activities performed for the employer.

A fundamental issue in this context is which, some or all, activities need to be taken into account when deciding whether the service provider i) is an independent undertaking or ii) forms an integral part with the undertaking of the client. For example, a commercial agent who trades in his own name and on his own account, is undoubtedly an undertaking.⁴⁶ Less clear is the

⁴¹ECJ, 4 December 2014, Case C-413/13, *FNV KIEM*, ECLI:EU:C:2014:2411, par. 28 and 30.

⁴²ECJ, 23 April 1991, Case C-41/90, *Höfner and Elser*, ECLI:EU:C:1991:161, par. 21.

⁴³ECJ, 16 June 1987, Case C-118/85, *Commission/Italy*, ECLI:EU:C:1987:283, par. 7.

⁴⁴ECJ, 16 December 1975, Case C-40/73, e.o., *SuikerUnie*, ECLI:EU:C:1975:174, par. 540-542.

⁴⁵Opinion AG Jacobs, 28 January 1999, Case C-67/96, *Albany*, ECLI:EU:C:1999:28, par. 215.

⁴⁶*Cf.* ECJ, 16 December 1975, Case C-40/73, e.o., *SuikerUnie*, ECLI:EU:C:1975:174, par. 541.

situation in which the agent acts in the name and on the account of his or her principal. When the activities of the agent are conducted on behalf of the principal, the agent is likely to form an integral part with the economic unit, or undertaking, of the principal. This means that the agent is not an independent economic operator on the same market as the principal.⁴⁷ However, when a broader approach is taken and all activities of the agent are taken into consideration, this agent could very well qualify as an undertaking as understood by competition law. The agent competes with other commercial agents on the market of ‘commercial agents’ in order to acquire assignments. Taking this broader view the agent does bears the financial and commercial risks. Thus, to determine the status of a commercial agent, either as an undertaking or not, it is important to know what is considered to be the relevant market under competition law.

With regard to *FNV KIEM*, one gets the impression that the case only attempts to assess whether or not the self-employed substitutes form an economic unit with the orchestra. From this perspective, arguments are made that it is not about the qualification of a self-employed substitute as an employee or an undertaking. Merely, the activities the substitute has to perform under a specific contract play a role. Thus, it is about establishing whether in the execution of a particular contract the self-employed substitute forms an integral part with the orchestra’s undertaking because he or she is in a situation similar to that of employees and is conducting similar activities. When taking the wider view, by considering the collective of contractual relationships between the service provider (the substitute) and various clients (e.g., orchestras, students, music schools) it may well be that a substitute qualifies as an undertaking. An interesting comparison can be drawn here with the aforementioned commercial agents: substitutes are competing with each other on the market of orchestras in need of substitutes. Subsequently, the question emerges which markets are relevant from a competition law perspective. The ECJ has not elaborated on this but took the market of the orchestra’s, due to particular facts of the case, as the relevant market. A plausible conclusion, based on this interpretation, is that it is possible for social partners to adopt measures for substitutes, and enjoy relief of the *Albany*-exception, if those substitutes have become an integral part of the entity of the client for the respective activities. This, despite the fact that the substitute is an undertaking when taking into account all his or her activities.

⁴⁷Opinion AG Jacobs, 28 January 1999, Case C-67/96, *Albany*, ECLI:EU:C:1999:28, par. 209 and 214.

This is one possible interpretation of the case. Arguments can also be made that the ECJ actually did intend to rule that substitutes are in fact employees based on EU law, even though they are formally performing on a commercial contract of services.⁴⁸ This argument is based on the fact that the core of the case seems to be about the qualification of the substitute as an undertaking or an employee. Also, the ECJ provides no explicit consideration about the fact that the substitutes compete with each other on the market of orchestra substitutes.⁴⁹ Moreover, the ECJ is rather clear in indicating that the relevant market of competition is that on which the client, *in casu* the orchestra, is active.⁵⁰ This approach, to assess whether the service provider has become an integral part of the client's economic unit based on the market the principal competes on, is not new. In the guidelines on vertical restrictions, the European Commission confirms this:

The determining factor in defining an agency agreement for the application of Article 101(1) is the financial or commercial risk borne by the agent in relation to the activities for which it has been appointed as an agent by the principal. In this respect it is not material for the assessment whether the agent acts for one or several principals.⁵¹

In this the Commission seems to follow the vast jurisprudence of the ECJ on this subject.⁵² From this it follows that in order to determine whether the substitute became an integral part of the economic unit of the orchestra it is necessary to assess the relationship between the service provider (substitute) and the client (orchestra). Important elements are the extent of autonomy the substitutes have and to what extent they bear risks on the same market as that of their client. As such, in *FNV KIEM*, the ECJ could suffice with the determination that the substitute became an integral part of the economic unit of the orchestra. However, the ECJ is quite explicit in

⁴⁸ R. M. Babirad (2015), 'Case comment: FNV Kunsten Informatie en Media v Staat der Nederlanden', *European Competition Law Review*, 36(4); and V. Dehaeck (2015), 'FNV Kunsten Informatie en Media: een orkestrale nuancering van de Albany-uitzondering', *SEW Tijdschrift voor Europees en economisch recht*, 149(9).

⁴⁹ P. Kreijger (2015), 'Schijn bedriegt of juist niet? De introductie van de 'schijnzelfstandige' en de cao-exceptie', *M&M* 2015/35, issue 1, p.21.

⁵⁰ ECJ, 4 December 2014, Case C-413/13, *FNV KIEM*, ECLI:EU:C:2014:2411, paras 27 and 37.

⁵¹ European Commission (2010), *Guidelines on Vertical Restriction*, SEC(2010)411, par. 13.

⁵² Court of First Instance, 15 September 2005, Case T-325/01, *Daimler Chrysler v. Commission*, ECLI:EU:T:2005:322; ECJ, 14 December 2006, Case C-217/05, *Confederación Española de Empresarios de Estaciones de Servicio v. CEPSA*, ECLI:EU:C:2006:784; and ECJ, 11 September 2008, Case C-279/06, *CEPSA Estaciones de Servicio SA v. LV Tobar e Hijos SL*, ECLI:EU:C:2008:485.

going beyond this and directs towards a qualification of the substitute in terms of either being an entrepreneur or an employee based on EU law. Thereto the ECJ considers:

In the light of those principles, in order that the self-employed substitutes concerned in the main proceedings may be classified, not as ‘workers’ within the meaning of EU law, but as genuine ‘undertakings’ within the meaning of that law, it is for the national court to ascertain that, apart from [...].⁵³

Also, this case was not the first time the ECJ ruled about the status of workers in light of EU competition law. In *Becu*, the ECJ ruled that dock workers were not undertakings since they had to be regarded as ‘workers’ in the meaning of Article 48 EC Treaty (now Article 45 TFEU).

This stance does not entail, however, that a substitute cannot qualify as an undertaking for other activities. If, apart from being a substitute in an orchestra, a musician independently performs economic activities on a market, he or she could qualify as an undertaking for these other activities.

4.2. Employee versus entrepreneur

In our view the ECJ has intended to distinguish between employees and entrepreneurs.⁵⁴ The in-between category of false self-employed persons, or employee-like workers, does not fit well in the system of EU law. For instance, the free movement provisions are based on a distinction of employees on the one hand (Article 45 TFEU) and entrepreneurs (or: undertakings) on the other (Articles 49 and 56 TFEU). With the term false self-employed, the ECJ refers to a situation in which a person is performing services on a contract of services that is based on false pretences (non-legitimate grounds) in the context of EU law. In this respect AG Wahl considers:

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

⁵³ ECJ, 4 December 2014, Case C-413/13, *FNV KIEM*, ECLI:EU:C:2014:2411, par. 37.

⁵⁴P. Kreijger (2015), ‘Schijn bedriegt of juist niet? De introductie van de ‘schijnzelfstandige’ en de cao-exceptie’, *M&M* 2015/35, issue 1, p. 20.

(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.⁵⁵

The ECJ follows this consideration and notes that ‘the status of worker within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons, as long as that person acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work [...], does not share in the employer’s commercial risks, [...] and for the duration of that relationship, forms an integral part of that employer’s undertaking, so forming an economic unit with that undertaking.’⁵⁶ This means that a person who is not subordinated to the employer, but is economically dependent of the principal, is considered to be a self-employed person. From this it follows that the notion false self-employed refers to an abusive situation in which position the person is self-employed based on formal grounds, but in fact performs his or her services in subordination.

It would go too far to implicate that EU law intends to correct national qualifications of self-employed/employee. However, it raises the question whether the European notion of ‘employee’ is wider than that of the Netherlands. If so, this would mean that social partners can negotiate for provisions in a collective labour agreement on behalf and in the interest of persons who qualify as self-employed based on national law, yet are employees under EU law. Consequently, such provisions would fall within the *Albany*-exception. Accepting that the Netherlands and European notions of employee are not identical, it is clear that the European interpretation of the notion influences that of the Netherlands. What both definitions have in common is that an employee is a person who performs his duties under the direction of another person and receives wages in return. Although the European interpretation of the notion of employee cannot directly correct the Netherlands’ interpretation of this notion, it influences it by determining in a particular case that a person is performing his or her duties in subordination and that this person is not able to determine his position on the market independently.

⁵⁵ Opinion AG Wahl, 11 September 2014, Case C-413/13, *FNV KIEM*, ECLI:EU:C:2014:2215, par. 52; with references to: European Commission (2006), *Green Paper – Modernising labour law to meet the challenges of the 21st century*, COM(2006) 708 final, pp. 10 to 12; and C. Barnard (2012), *EU Employment Law*, Oxford University Press, Oxford: 2012 (4th ed.), pp. 144 to 154.

⁵⁶ ECJ, 4 December 2014, Case C-413/13, *FNV KIEM*, ECLI:EU:C:2014:2411, par. 36.

That such influence is not imaginary can be deduced from the ruling of the Gerechtshof 's-Gravenhage in *FNV KIEM*. In its ruling the Gerechtshof 's-Gravenhage follows the indications of the ECJ and considers that, for the duration of the contract, the self-employed substitutes perform their duties in subordination since they have to follow the directions of the conductor and have to conform to the schedule for the rehearsals and the concerts. Furthermore, the Gerechtshof 's-Gravenhage considers that during the contract the self-employed substitutes do not share in the economic and financial risks of the orchestra.⁵⁷ With this interpretation it is hard not to consider self-employed substitutes as employees based on the Netherlands definition of Article 7:610 Civil Code. When reflecting on this context in a wider perspective, it could be argued that in the Netherlands a too wide interpretation of the notion entrepreneur (or self-employed) is followed. As such, the ruling of the ECJ in the case *FNV KIEM* and that of the Gerechtshof 's-Gravenhage, may have wider implications than the specific situation of substitute musicians. Hence, it may have meaning for many more professions where the number of self-employed persons has increased significantly over the last few years, such as home carers, painters, construction workers, mail deliverers, etc.

Furthermore, in light of the *Albany*-exception, these rulings imply that the trade union FNV KIEM negotiated on behalf of employees rather than entrepreneurs. Consequently, the FNV KIEM retains its nature as an association of employees and didn't alter in an association of undertakings. As a result, the first requirement of the *Albany*-exception is fulfilled rendering in retrospective the provision on fees for substitutes in the collective labour agreement the result of a social dialogue. To what extent the second requirement is fulfilled, whether the provision contributes directly to the improvement of the working conditions of the employees, falls outside the scope of our reflection on this case.

⁵⁷ Gerechtshof 's-Gravenhage, 1 September 2015, ECLI:NL:GHDHA:2015:2305, par. 2.6.

5. Reflection of the meaning of the CJEU ruling for the Netherlands (conclusions)

The aim of this contribution was to analyse to what extent CJEU has contributed to creating more (legal) certainty for employee-like workers by its ruling in *FNV KIEM*. Therefore, we first elaborated on the notion employee-like worker as in-between category within the legally recognized notions of entrepreneur on the one hand and employee on the other. Being an in-between category of workers, these persons fall outside the scope of employment law, whereas, at the same time, they do not act as genuine self-employed service providers. Recognising the possible negative effects in terms of social protection for these employee-like workers, social partners in the Netherlands have stepped up. More specifically, in the collective labour agreement *Remplaçanten Nederlandse Orkesten 2006-2007* social partners included minimum fees for self-employed substitutes. This collective agreement ultimately resulted in a ruling by the CJEU in *FNV KIEM*.

Although the CJEU in the case *FNV KIEM* introduced the notion false self-employed, upon closer examination it seems that the ECJ did not intend to create a new legal notion. Indeed, the CJEU seems to uphold the binary distinction in the qualification of employees on the one hand and entrepreneurs on the other. Our reflections on the case *FNV KIEM* indicate that the CJEU hinges on two underlying goals resulting in a sharp dichotomy between employees and entrepreneurs. On the one side the CJEU seemingly aims to prevent denying employees social protection based (purely) on formal grounds. On the other side, the ECJ aims to prevent unjustified limitation of free competition by means of collective bargaining agreements.

Furthermore, *FNV KIEM* makes clear that it needs to be established per contractual relation whether a so-called self-employed is an undertaking or is part of the economic unit of the client. Depending on the specifics per contractual relationship between the self-employed person and its client, the exact status of the self-employed, either an employee or an entrepreneur (undertaking), varies per contract. Thus, when the full spectrum of activities of the self-employed person on the market is viewed, the person may qualify as a genuine self-employed (undertaking) person. However, when the parts of the full spectrum are assessed independently

and on specific contractual merits, the self-employed person may qualify as an employee for that particular contract.

The assessment of the contractual relationship holds basically two elements. Firstly, it needs to be established whether the self-employed person is independently active on the same market as his or her client or that he or she became an integral part of the undertaking of the client. Secondly, in order to assess whether the latter is the case, the status of the self-employed person needs to be assessed in relation to the employees of the client. An essential part of the latter assessment is the extent to which a self-employed person actually conducts his or her services in subordination to the client. To what extent this is the case is for the national court to decide. Since the Netherlands' concept of employee closely resembles the EU concept, the qualification of a worker as false self-employed should actually mean the person is an employee for that specific contract.

To conclude, there is little doubt about the influence of the ruling of the CJEU in *FNV KIEM* in the Netherlands. Proof for this is that the Gerechtshof 's-Gravenhage came to a radically different conclusion than the court in first instance (the Rechtbank 's-Gravenhage) did in the same case. Furthermore, it clearly differs from the interpretation that was given by the NCA in its reflection document that raised the whole issue. As considered by us in this chapter, the interpretations of the CJEU suggest a too lenient acceptance of self-employment in the Netherlands. When following the CJEU approaches, the dichotomy between employee and entrepreneur is sharper. It remains questionable though whether this will also result in more legal certainty for the self-employed person.