MARC VAN DER WOUDE[*]

The Undertaking and its Employees; Some Reflections on an Ambiguous Relationship

Introduction

When the University of Szeged proposed me to contribute to the Festschrift for Otto Czucz, I immediately accepted this prestigious invitation. This is because Professor Czucz is a pleasant and well esteemed colleague. Knowing that Otto Czucz is a reputed academic in the field of labour law and also has a broad experience as a judge in competition law cases, I decided to write about the interplay between the two areas of law. I felt comforted in my choice after having read the recent judgment of the Court of Justice in the FNV case,[1] which deals with the question as to whether collective agreements between organisations representing employers and employees are caught by the cartel prohibition of Article 101(1) TFEU when these agreements are negotiated not only on behalf of employees but also for the benefit of self-employed service providers. As will be discussed below, the Court ruled in essence that such agreements fall within the scope of Article 101(1) TFEU, in so far as these service providers are independent undertakings, but that they do not, if these service providers are in fact "false self-employed", i.e. if they find themselves in a situation comparable to that of employees.

I propose to revisit the issue of the relationship between the concept of undertaking and the concept of workers in the light of the findings of the FNV case. The first section will give an overview of the facts of that case and of the Court's judgement in FNV (I). In the following section (II) I will try to develop some ideas which came to my mind when I analysed that judgment. These ideas concern the distinction between the concept of undertaking and its employees, a distinction that tends to become blurred in today's economy. Section II also addresses the question as to whether collective agreements concluded between genuine self-employed are necessarily caught by Article 101 TFEU. The third and last section (III) will deal with yet another question: are employees liable toward their employers for antitrust infringements?

Before dealing with these various topics, I would like to underline that my contribution to Otto Czucz's Festschrift should be seen as an essay and that it does not have any scientific pretentions. It is more an invitation to carry out research in the future than the result of research carried out in the past.

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[*] Professor Erasmus, University Rotterdam, Judge at General Court of the EU.

[1] FNV Kunsten Informatie en Media, C-413/13, EU:C:2014:2411

I. The FNV case and collective labour negotiations

On 21 September 1999, the Court of Justice ruled in the Albany case that collective agreements concluded between organisations representing employers and employees do not fall within the scope of Article 101(1) TFEU.[2] It acknowledged that such agreements may restrict competition amongst the undertakings that are represented in negotiations leading to such agreements, but held that the social policy considerations pursued by such agreements would be seriously undermined if management and labour were subject to the cartel prohibition when seeking jointly to improve conditions of work and employment (ground 56).

Fifteen years later, the Court of Justice was requested to refine this "Albany exception" in a case relating to a collective labour agreement concluded between the branch of the trade union dealing with musicians, FNV Kunsten en Media (FNV) and the Nederlandse toonkunstenaarsbond (NTB), on the one hand, and an employers association (Vereniging van Stichtingen Remplaçanten Nederlandse Orkesten (VSR), on the other hand. The agreement provided, inter alia, that independent/self-employed musicians who replace other musicians in an orchestra are entitled to receive a minimum fee. In 2007, the NTB and VSR refused to prolong this agreement, because of the position taken by the Dutch competition authority, which had expressed the view that collective labour agreements are not exempted from the scope of Dutch competition law, when the minimum fees also relate to self-employed persons.[3] The FNV subsequently sought to obtain a judgment from Dutch courts declaring that the competition rules do not apply to collective labour agreements involving self-employed persons. The Court of appeal of The Hague referred the matter to the Court of Justice by asking the two following questions. First, does a provision imposing the payment of a minimum fee to self-employed persons who perform the same work as employees, fall outside the scope of Article 101 TFEU, if that provision is contained in a collective labour agreement? Second, if the answer to the first question is negative, does that provision nevertheless fall outside the scope of Article 101 TFEU where that provision is also intended to improve the working conditions of the employees concerned?

In his opinion Advocate General Wahl considered that self-employed persons are undertakings and, hence, that an association representing self-employed persons cannot be regarded as an association of employees. In his view, the social policy considerations referred to by the Court in Albany do not apply to the self-employed. This is essentially because self-employed are not in a subordinate position, unlike employees in their relations with their employer. Self-employed persons act independently and must assume the economic risks of their business. This risk taking is compensated by the possibility of retaining the profits they generate. Advocate General Wahl admits that the distinction between workers and self-employed tends to be blurred in today's economy

[2] In the cases at hand the agreements concerned the creation of a single pension fund responsible for managing a supplementary pension scheme to which affiliation was supposed to become compulsory through public measures (Brentjens, C-115/97 à C-117/97, EU:C:1999:434 and Albany, C-67/96, EU:C:1999:430).

[3] The wording of Article 6 of the Dutch Competition Act is identical to that of Article 101 TFEU, with the exception of the terms relating to the effect on interstate trade. In addition, the Dutch legislator has expressed the will that Article 6 should be interpreted in the same way as Article 101 TFEU.

and that some self-employed find themselves in a comparable situation of dependence as workers. Yet, this fact would not imply that all self-employed are so called "false self-employed", to whom the 'Albany' exception would apply. Since the category of self-employed persons is vast and heterogeneous, the imposition of minimum tariffs may be in the interest of some, but not of all self-employed. Moreover, the collective labour agreement in the case at hand does not deal with the issue of such "false self-employed", who must in any event be assimilated to workers.

After having thus excluded the benefit of the Albany exception to collective agreements involving self-employed, the Advocate General addresses the second question of The Hague Court of appeal. He considers that this exception can only be extended to contractual provisions which directly contribute to the improvement of working conditions of employees. In his view, the imposition of a minimum fee can be considered as such a direct contribution, since employees do indeed have an interest to strengthen their bargaining position by preventing employers to replace them by less costly self-employed substitutes. The fight against social dumping is an overriding requirement in the public interest and has been acknowledged by the EU legislature in various legal instruments.

Even so, the Advocate General expresses some doubts as to the question whether these considerations apply to the collective labour agreement in the case at hand. This is because this agreement does not cover issues such as remuneration and working hours which typically appear in collective labour agreements. The essence of this agreement relates to the regulation of the relationship between the employer and self-employed. If the agreement primarily intends to regulate competition between self-employed, it should not benefit from the Albany exception. In order to examine this, the Advocate General underlines two aspects: first, the referring court should assess whether there exists a real and serious risk of social dumping and, second, it should assess whether the minimum fee does not go beyond what is necessary to counter that risk.

Unlike Advocate General Wahl, the Court does not separately address the two questions of the referring court, but chooses, as it often does, to reformulate the questions into one: does an agreement such as the one in the case at hand benefit from the Albany exception? The Court starts its analysis by noting that self-employed persons should, as a rule, be seen as undertakings performing their activities as independent operators. An organisation that acts on behalf of such persons cannot be qualified as a trade union but should be seen as an association of undertakings. A collective agreement concluded in the name and on behalf of such service providers does not benefit from the Albany exception.

However, the situation is different if the collective agreement is negotiated by trade unions acting in the name and on behalf of "false employees", that is to say service providers which find themselves "in a situation comparable to that of employees". It recalls that it is not always easy to establish the status of self-employed persons as undertakings. A self employed service provider may lose this status, if he or she is entirely dependent on the principal and does not bear any economic risk arising from his activity. The Court also referred to its previous case law according to which the qualification of self-employed under national law does not prevent that person from being regarded as an employee within the meaning of EU law. The decisive criterion is the fact that the person performs services under the direction of another person, i.e. the employer who determines

the time, place and the content of the work. This also implies that the person in question does not share in the employer's commercial risks and that he or she forms, for the duration of the relationship, an integral part of that employer's undertaking. The Court invites the referring national court to assess in the light of these findings whether the substitutes in the case at hand are in fact workers.

The Court continues its analysis by focusing on the purpose of a collective agreement imposing a minimum fee for the recruitment of "false self-employed". This purpose corresponds, according to the Court, to the reasons underlying the Albany exception, because the minimum fee scheme directly contributes to improving the working conditions of the substitutes concerned (and hence not those of the employees). It not only guarantees that these "false self-employed" receive a higher pay than they would have received otherwise, but also that they are in a position to contribute to pension insurance.

These considerations lead to the following answer to the preliminary reference questions : "it is only when self-employed service providers who are members of one of the contracting employees' organisations and perform for an employer, under a work or service contract, the same activity as that employer's employed workers, are 'false self-employed', in other words, service providers in a situation comparable to that of those workers, that a provision of a collective labour agreement, such as that at issue in the main proceedings, which sets minimum fees for those self-employed service providers, does not fall within the scope of Article 101(1) TFEU."

This answer appears to me less complete than the one proposed by Advocate General Wahl. The Court focuses on the issue of false self employed, an issue which, according to the Advocate General (at para. 61), is not at stake in the case at hand. The real question is in his view whether the Albany exception also applies to collective agreements which are concluded on behalf of both workers and 'true' self-employed, but which seek to protect the interests of the former by protecting them against social dumping. Since the Court does not address this question, I assume that it interprets the Albany exception in a stricter manner than the Advocate General: if the collective agreement is also concluded on behalf of self employed, the exception quite simply does not apply.

II. Is the Albany exception the end of the competition law story?

Despite their apparently diverging views, both the Court and the Advocate General agree that distinguishing a self-employed person from an employee is not an easy task in today's economy. They allude in this respect to outsourcing. Firms increasingly seek to reduce their pay roll by outsourcing work which was previously done by their workers to independent service providers (catering, security, IT, call centres etc.). In order to distinguish independent service providers from employees, the Court focused on the concept of undertaking. In its view, false independents are in essence employees that constitute together with the undertaking one and the same economic entity. Since collusion within the meaning of Article 101 TFEU can only exist in the presence of a plurality of undertakings, this provision does not apply if there is only one economic entity. In order to bolster its reasoning in FNV, the Court referred to two earlier judgments.

The first case is the CEPSA case which concerned the relationship between a petrol company and its service stations. It ruled that this relationship is not caught by Article 101 TFEU where these service stations are in fact intermediaries or agents that do not assume financial and commercial risks arising from the economic activities at stake. The commercial conduct of such agents is thus assimilated to that of the principal, which is the undertaking bearing the risks. The risk question must be assessed on a case by case basis, taking into account of the real economic situation rather than the legal classification of the contractual relationship under national law.[4]

The second reference concerned dock workers in the Belgian port of Ghent.[5] In that case, the Court was requested in essence to examine whether a national rule imposing the use of officially recognised dock workers and thus prohibiting the use of other workers, such as interim workers, complied with the combined provisions of Articles 106(1) and Articles 101 and 102 TFEU. It held in this respect that dock workers could not be seen as undertakings and that for the duration of the employment relationship they are incorporated into the undertakings concerned. It specified that a person's status as worker of an undertaking is not affected by the fact that he is linked, through an association, to the other workers of that undertaking and that there were no indications in the case at hand supporting the inference that these workers collectively operate on the dock market as an undertaking. This specification allowed the Court to distinguish the facts in the Belgian case from those leading to its previous ruling in the Merci case.[6] In Merci, the facts related to an exclusive right granted to a company composed of dock workers for dock work in the Italian ports. The dock workers were thus able to form a common front toward potential customers.

By focusing on the concept of undertaking as the criterion for the distinction between workers and genuine self-employed, the Court did not analyse in these cases the competition law issues to which collective agreements in the social sphere can give rise. Even if self-employed are to be considered as independent undertakings within the meaning of Article 101 TFEU, this provision does not necessarily apply to agreements concluded amongst them. I refer in this respect to the Pavlov case.[7] The facts of the case concerned a decision of the national association of medical specialists setting up for the members of that profession a fund responsible for managing a supplementary pension scheme. The Court held that the Albany exception could not apply to that collective scheme, because it was set up by independent members of a liberal profession and not in the context of collective bargaining between employers and employees. The Court recalled that, unlike for employees, there are no specific Treaty provisions encouraging collective agreements for liberal professions. This being said, the Court nevertheless held that Article 101(1) TFEU did not apply to the complementary pension scheme in question. It stated that when applying this provision, "account should be taken of the economic context in which undertakings operate, the products or services covered by the decisions of those undertakings, the structure of the market concerned and the actual conditions in which it functions". Taking account of this context, the Court notes that the decision of the

[4] Confederación Española de Empresarios de Estaciones de Servicio, C-217/05, EU:C:2006:784.
[5] Becu and Others, C-22/98, EU:C:1999:419.
[6] Merci convenzionali Porto di Genova, C-179/90, EU:C:1991:464.
[7] Pavlov a.o., C-180/98 à C-184/98, EU:C:2000:428.

association of specialists only concerns supplementary pensions and that the specialists remain free to contract their basic pension from any authorised insurance company. It results that the decision in question "produces restrictive effects only in relation to one cost factor of the services offered by self-employed medical specialists, namely the supplementary pensions scheme, which is insignificant in comparison with other factors, such as medical fees or the cost of medical equipment. The cost of the supplementary pension scheme has only a marginal and indirect influence on the final cost of the services offered by self-employed medical specialists". After having noted that the collective scheme also generates objective efficiencies in terms of pension management, in particular economies of scale (ground 96), the Court concludes that the decision of the association of specialists to set up that scheme does not appreciably restrict competition. The fact that the Albany exception does not apply to agreements between self-employed does not necessarily imply that such agreements are caught by Article 101(1) TFEU.

I submit that this latter finding may be relevant to assess another phenomenon of today's economy, to which neither the Advocate General nor the Court referred in FNV and which further blurs the distinction between self-employed and employees. This phenomenon relates to cooperative schemes allowing individuals team up to carry out work together and to offer collectively the same services or products as an undertaking or an association of undertakings. Today's economy increasingly relies on new horizontal and vertical forms of cooperation, which are facilitated by IT tools, such as smart phone applications and electronic platforms. These relatively new tools allow individuals to regroup and coordinate their activities, such as car sharing, taxi driving and crowd funding, as if they were a single firm. These new forms of cooperation raise several questions.

The first question is a labour law question: are the members of these groupings independent undertakings or are they employed by their grouping? The answer to this question cannot be given in the abstract and will depend on the circumstances of the specific case. For example, in the USA, administrative courts and agencies have given diverging rulings in cases opposing Uber and its drivers. The San Francisco company argues that its drivers are independent contractors whereas some drivers argue that they are de facto employees.[8] Similar issues are litigated in the EU, but I am not aware of any EU law precedent in this field.[9]

The next question is a competition law question. Assuming that the participants in the cooperative scheme are no workers, the question arises whether they are independent undertakings to which the competition law applies or whether they are constituent parts of one single firm, in which case Article 101 TFEU does not apply? I am inclined to say that both answers could be correct. Where the participants in cooperative scheme operate as one entity towards third parties, they could be seen, according to the lines set out in Merci, as one single economic entity. Depending on the intensity of the contractual links between the participants, such schemes could be compared to partnerships.[10] This implies that agreements concluded between that entity and other undertakings may be caught by

[8] See The Guardian, 11 September 2015. A Boston law firm also constituted a class of Uber drivers (www.uberlawsuitcom).
[9] Le Point 2 November 2015.
[10] See Case IV/M.1016 – Price Waterhouse/Coopers&Lybrand of 20 May 1998; Case COMP/M.2824 – Ernst & Young/ Andersen Germany of 27 August 2002.

Article 101 TFEU and that, in situations where the entity holds a dominant position, its conduct could fall within the scope of Article 102 TFEU.

In parallel, Article 101(1) TFEU could possibly apply to the relationship between the members of the cooperative scheme. Applying the Pavlov case law a contrario, one could argue that this prohibition applies to such schemes where, taking account of the economic context, they affect a significant cost component of the price of the goods and services offered by these members and therefore restrict competition in an appreciable manner. But even if collective schemes between self-employed entrepreneurs do have appreciable affects, the competition law analysis must be pursued one step further before one may conclude that Article 101(1) TFEU applies. The Court's case law indeed accepts that the commercial freedom of the participants in a common scheme may be restricted in so far as this is required for the success of common entreprise work. In a case involving Danish cooperative societies, for example, the Court considered that a clause prohibiting its members to participate in competing buying groups did not necessarily constitute a restriction of competition and could even have beneficial effects on competition, because it allowed the buying group to concentrate the buying power of its members and, hence, to obtain more favourable conditions from their suppliers.[11] Post-term non-compete clauses could be assessed in a similar way: departing partners could eventually be prohibited to serve the clients of the partnership for a certain duration after their departure, in so far is this is needed for the protection of the jointly developed goodwill.[12] So, in so far as the clauses underlying horizontal forms of cooperation are necessary to achieve the legitimate aims of that cooperation, Article 101 TFEU does not apply. By contrast, clauses going beyond this condition should be assessed under Article 101 TFEU. More delicate are pricing conditions. But even there, it could be argued that setting a common price is acceptable under Article 101(1) TFEU, in so far as that price relates to a jointly developed product or service, i. e. a product or a service that would not have existed in the absence of the cooperation. And, last but not least; even if the cartel prohibition applies to a scheme concluded by self-employed entrepreneurs, they may invoke the exception of Article 101(3) TFEU. It should be recalled that, according to the case law of the Court, improvements within the meaning of this provision may include social considerations.[13]

To conclude, it is indeed no, so easy to draw the line between employers and employees and to define the precise boundaries of undertakings composed of members. Today's economy sees an increasing number of self-employed individuals to which their former employers or other undertakings outsource work or which cooperate together to offer products and services which each of them could not offer independently. My intuition is that these phenomena are more difficult to apprehend in terms of labour law than under the competition rules.

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[11] DLG, C-250/92, EU:C:1994:413

[12] See by analogy Commission decision Reuters/BASF, OJ 1976 L 254/40 and Notice on ancillary restraints OJ 2005 C 56/24.

[13] Metro SB-Großmärkte/Commission, 26/76, EU:C:1977:167, ground 29.

III. Antitrust liabilities: a matter for the undertaking and its employees

The fact that a company, its workers and, eventually, its false self-employed, constitute one undertaking in competition law terms and that, as a result, the competition rules do not apply to the relations between these operators, does not mean that antitrust issues do not play a role in these relations.

First, antitrust infringements expose the undertaking to very high fines, which undermine its profitability and which may, in certain cases, compromise its economic viability. Companies increasingly seek to avoid committing such infringements by putting into place antitrust compliance programmes which impact the way employees can behave in the professional and even in the private sphere. In addition, they often require employees to report incidents which could eventually trigger antitrust liabilities.

Second, increasingly, competition law rules throughout the world are not only sanctioned by the imposition of fines on undertakings, but may also target corporate officers, such as directors and senior management and, in some cases, even supervisory board members for their involvement in antitrust infringements.[14] In some jurisdictions, such as the USA and the UK, corporate officers even incur criminal liability which may lead to imprisonment.[15] Third, on top of these publicly imposed sanctions, undertakings and corporate officers incur civil liabilities. Victims of antitrust infringements may seek a compensation for the damages suffered as a result from these infringements. Although they will usually sue the companies concerned, it cannot be excluded that they will go after the directors in charge of the infringements.

These external risks, which occur as a result of violations of the competition rules, affect the relations within the undertaking. They may give rise to tensions and conflicts of interests between the undertaking and their employer. Although undertakings can operate on the market only through their directors and employees, their behaviour is imputed to the undertaking, because they are supposed to be an integral part of it, as the Court observed in the Becu case discussed above. Even so, top management is not always aware of the conduct of their subordinates.[16] In order to meet their targets and/or to obtain special bonuses, lower raking corporate officers of competing firms may have an interest in colluding against the will or the specific instructions of senior management.[17] Under such circumstances, the involvement of employees in antitrust infringements may be a reason for immediate dismissal.

The question also arises as to whether the undertaking employing the employees in question can sue these employees if and when their wrongdoings lead to the imposition of fines on the undertaking. In the UK for example, Safeway, a supermarket sought to recover a

[14] See as regards the latter, the Wegener case (district Court of Rotterdam of 27 September 2012, ECLI:NL:RBROT: 2012:BX8528) concerning the integration of two newspaper boards without prior approval by the Dutch competition agency

[15] See for the various regimes in the EU, Commission Staff Working Document of 9.7.2014 SWD (2014) 231 final, Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues.

[16] See on this issue WOUTER WILS: *Antitrust Compliance Programmes and Optimal Antitrust Enforcement*, *Journal of Antitrust Enforcement*, 2013. pp. 52–81.

[17] Such collusion is facilitated where the remuneration packages of the competing firms have common features. This risk is enhanced by the fact that these packages are often developed by the same external consultants. See also Judgment of the Bundesgerichtshof of 18 June 2014, case no I ZR 242/12, excluding the personal liability of the managing director in situations, even where he was aware of antitrust infringements.

fine payable to the UK competition authority from former directors and officers who had allegedly been involved in a dairy products cartel. The High Court rejected the defendants' argument according to which Safeway could not bring an action relying on its own illegal conduct. This court thus opened the possibility that the former employees could be liable.[18] On appeal, the Court of appeal excluded liability on the basis that the relevant provisions of the Competition Act only foresaw the liability of undertakings. In paragraph 23 Lord Justice Longmore held that "(n)o one is liable for the penalty imposed by the Competition Act except the relevant undertaking. The liability is therefore personal to the undertaking. If there is a liability it cannot be imposed on any person other than the undertaking and the undertaking is personally liable for the infringement. If a penalty is imposed, it will only be because the undertaking itself has intentionally or negligently committed the infringement. In those circumstances it is the undertaking which is personally at fault (there can be no one else who is) and, once the maxim is engaged, the undertaking cannot say that it was not personally at fault in order to defeat the application of the maxim. The whole hypothesis of the undertaking's liability is that it is personally at fault'"[19]

Similar issues have arisen before German courts. After having been fined 88 million euros by the German cartel office for its participation in a train-tracks cartel, ThyssenKrupp fired the employee involved. This person contested this dismissal as unfair before the Labour court of Düsseldorf. In this context ThyssenKrupp not only defended itself, but also brought a counterclaim against the former employee, requesting the court to order that employee to pay an amount of 300,000 euros.[20] The Düsseldorf Labour court dismissed the counterclaim, because the company had not proven that the individual in question actually participated in the cartel. In addition, it held that ThyssenKrupp bore the main responsibility for having set up the cartel system. This reasoning is less categorical than the one from the Court of appeal in the Safeway case. It does not exclude, as a matter of principle, the possibility that a company can seek compensation from their employees.

The two examples cited above dealt with fines imposed by national competition authorities. The question as to whether an undertaking which has been fined by the European Commission can seek partial compensation from its employees has not yet arisen. Possibly, the case X v. the Dutch tax inspector may offer some guidance.[21] It concerned a dispute between the Dutch subsidiary of an undertaking that had participated in the plasterboard cartel, on the one hand, and the Dutch tax authorities, on the other hand. The company argued that it could deduct, at least in part, the fine imposed by the Commission from the corporate tax. Having heard about the case and fearing that tax deductibility could undermine the effectiveness of its fines, the Commission sought to intervene in the dispute before the Court of Appeal as amicus curiae within the meaning of Article 15 of Regulation

[18] *Safeway Stores Limited, Safeway Limited and Stores Group Limited v Twigger and Others* judgment of 15 January 2010 of Mr Justice Flaux, Commercial Court 2009 FOLIO 881; [2010] EWHC 11 (Comm)

[19] *Safeway Stores Limited and Others v Twigger and Others*, 21 December 2010, Court of Appeal, [2010] EWCA 1472 (Civ), [2011] 1 Lloyd's Rep 462.

[20] *ThyssenKrupp v Uwe Sehlbach*, Landesarbeitsgericht (State Labour Court) Düsseldorf, 20 January 2015, Cases 16 Sa 458/14, 16 Sa 459/14, 16 Sa 460/14. Landesarbeitsgericht Düsseldorf, 2. November 2015, Az: 14 Sa 800/15. See comment by Prof. Dr. F. Bayreuther in NZA 2015, 1239: "Haftung von Organen und Arbeitnehmern für Unternehmensgeldbussen".

[21] X BV, C-429/07, EU:C:2009:359.

1/2003. This court wondered, however, whether Article 15 of Regulation 1/2003 allows for such intervention. The Court of Justice replied that Article 15 should be interpreted in a manner that ensures an effective application of the Commission's fining policy and, hence, a coherent application of Articles 101 and 102 TFEU. It observed that the future decision which the Court of Appeal will take is capable of impairing the effectiveness of those penalties and therefore might compromise such coherent application. In the circumstances of the action in the main proceedings, it is quite clear that the outcome of the dispute relating to the tax deductibility of part of a fine imposed by the Commission is capable of impairing the effectiveness of the penalty imposed by the Community competition authority. The effectiveness of the Commission's decision by which it imposed a fine on a company might be significantly reduced if the company concerned, or at least a company linked to that company, were allowed to deduct fully or in part the amount of that fine from the amount of its taxable profits, since such a possibility would have the effect of offsetting the burden of that fine with a reduction of the tax burden. This reasoning resounds like the one held by Lord justice Longmore in Safeway.[22] Under EU law the fine is imposed on the undertaking and it is supposed to prevent the latter and other undertakings from committing similar infringements. If undertakings could recoup a part of the fine from their employees, that deterrent effect would, at least in part, be undermined.

Another source of possible tensions between undertakings and their employees concern the effectiveness of internal whistle blowing schemes and external leniency programmes. The personal liability of corporate officers, in addition to the liability of the firm, may be a reason for the persons concerned to apply for leniency on their own personal behalf, if and where this is possible according to the applicable competition rules. By doing so, the persons reduce their own personal exposure to publicly imposed sanctions but increase the risk that their employer will be targeted by antitrust investigations. From its side, the undertaking may be tempted to discourage its employees from disclosing inappropriate conduct to the authorities before having made use of internal whistle blowing systems. Also, undertakings who are concerned about their employees may refrain from making leniency applications if there is no guarantee that this application also protects the individuals who were actually involved in the infringing conduct. [23]

Final observations

The FNV case which is at the core of this essay is not interesting by its result. Ever since Pavlov, it was clear that collective agreements concluded on behalf of independent self-employed do not benefit from the so called Albany exception pursuant to which agreements with a social aim resulting from collective bargaining between associations of undertakings and trade unions are, as a rule, not caught by Article 101 TFEU. It could even be said that the FNV judgment is a disappointing one in the sense that it answers to a question which was not raised: do false self-employed have to be

[22] The Dutch courts ultimately held that the fines were not tax deductible. The Belgian constitutional court in a similar way Judgement *nr. 161/2012 of 20 December 2012*.

[23] See paragraphs 96 to 102 of Commission Staff Working Document of 9.7.2014 SWD(2014) 231 final on the interaction between leniency applications made by individuals and those made on behalf of undertakings (footnote 14 above).

considered as workers for the purposes of the Albany exception? The FNV ruling is also disappointing because it dodges the answer to the second question of the referring court, which wanted to know whether an agreement involving self-employed could nevertheless benefit from the Albany exception if the agreement protected employees' interests. Rather, the interest of the FNV case lies in its reasoning and the way it summarized previous case law on the relationship between the undertaking and its employees, in particular against the backdrop of changing societal circumstances. The undertaking and its workers are seen as one and the same entity.

As regards these changing circumstances, the Court essentially referred to outsourcing. In my view, labour conditions also change by the massive arrival of self-employed entrepreneurs which increasingly work together on electronic platforms. From a labour law perspective, this new category of auto-entrepreneurs is not always easy to qualify. From a competition law perspective, the existing case law, in particular Pavlov and the case law on cooperative societies, already offers some guidance as regards the assessment of cooperation between self-employed. It is submitted in particular that cooperation between self-employed with a social protection objectives is not necessarily caught by Article 101(1) TFEU and, if it is, that Article 101(3) TFEU could be interpreted in a manner that warrants such protection.

Finally, the idea underlying the Court's reasoning in FNV that undertakings and their workers form one entity for competition law purposes, is called into question by recent societal trends. The risks brought about by an increasingly severe enforcement of antitrust rules worldwide, have repercussions on the relationship between the undertakings and their employees. Some undertakings are trying to pass on some of these risks to their employees, whereas the latter may be tempted to place their own personal interest before those of their employer. It is too soon to assess how these emerging conflicts of interests will crystallize in future case law. Whatever these developments may be, I would like to underline that an undertaking is more than a sterile combination of assets and workers producing goods or services. It is a form of cooperation of human beings that has a social and societal purpose, which the case law should not lose out of sight.

MARC VAN DER WOUDE

THE UNDERTAKING AND ITS EMPLOYEES; SOME REFLECTIONS ON AN AMBIGUOUS RELATIONSHIP

(Summary)

The concept of undertaking within the meaning of the EU competition rules is relatively broad. As a rule, the undertaking is responsible for the conduct of its employees. Conversely, a self-employed person may be seen as an undertaking in its own right. It becomes increasingly difficult in today's economy to differentiate employees from self-employed and, hence, to define the concept of undertaking and its responsibilities under EU competition rules. The present article discusses these difficulties in the light of the recent ruling of the European Court of Justice in the FNV case (C-413/13).