

# The identification of the employer in the context of organisational fragmentation: the Italian legal framework

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## Abstract

This article analyses the switch of the Italian regulatory approach to subcontracting, from the “fordist” model based on a rigid coincidence between the formal employer (holder of the contract) and the user of the work performance, to the new models of production characterised by “organisational fragmentation”. To this purpose, it considers the evolution of the legislative discipline and jurisprudential elaboration concerning the “*appalto*” contract, the most common Italian commercial contract as for buying labour, goods or services, alongside that of some neighbouring legal instruments.

**Keywords:** Employer; Appalto; Subcontracting; Fraudulent interposition; Supply of labour; Transportation contract; Shipping contract.

## 1. Introduction.

The employment relationship setup and its regulation presuppose the coincidence between the formal employer (holder of the contract) and the user of the work performance.

It is a bilateral relation, designed by article 2094 of the civil code for a fordist organization of work, based on:

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- Centrality of the factory/undertaking;
- Concentration inside the factory/undertaking of manufacturing and services.

Competition requirements, especially on the global market, have thrown into crisis that model, allowing other models to emerge, characterised by “organisational fragmentation”<sup>1</sup>. The factory lost its centrality, sometimes even its materiality, by outsourcing its activities. They started with services (surveillance, cleanings, logistics), including later also segments of manufacture, offloading onto third parties the risks related to contraction of economic activity and impossibility of the work performance on the employee’s side (sickness, injury, pregnancy, etc).

Besides this phenomenon -often intersecting it- is that of offshoring towards countries with lower labour costs.

This different way of production disrupted the bilateral relation (employer-employee), providing a new one in which there is no coincidence between the holder of the employment relationship and the user of the work performance. This has opened up the question about who is the employer and if there are more than one (co-employership doctrine), who can be charged with employment protections toward workers. Workers are often (always, according to some) hindered by the organizational fragmentation, being the weak link in the chain.

Another phenomenon is that of temporary agency work and staff leasing, which represents a form of “internalized outsourcing”, where the interposition in the employment of labour is expressly admitted by the law.

The organizational fragmentation also concerns other important models of work, such as those included in the so-called platform economy, which can be evoked with the well-known expression “My boss is an algorithm”<sup>2</sup>. The work on digital platform, for which a specific regulation has been introduced by the law-decree no. 101/2019, converted into law no. 128/2019, is accompanied by that of small jobs (so-called gig economy), a kind of a “hymn” to job insecurity.

In those cases, it looks more appropriate to refer to “organizational dematerialization” rather than “organizational fragmentation”. The focus shifts on the employee and the classification of his/her relationship (subordinate work, dependent contractor, genuinely autonomous, small entrepreneur), recalling a traditional problem, in the face of a completely new phenomenology: the eternal dilemma of subordinate employment as a sort of “safe harbour”, to which should be ferried to receive protection as many workers as possible.

## 2. The approach of Italian labour law to organizational fragmentation.

Limiting our reflections to organizational fragmentation in the labour law perspective, the various expression of fragmentation all share the “interposition”, meaning that a third party (formal employer) is located in the middle between the employee and the one who takes advantage of his/her service. He holds an employment relationship with the employee and

<sup>1</sup> Garofalo D., *Lavoro, Impresa e Trasformazioni Organizzative*, in *Atti delle Giornate di Studi AIDLASS*, Cassino 18-19 May 2017, Giuffrè, Milano, 2018, 17 ff.

<sup>2</sup> O'Connor S., *Il mio capo è un algoritmo*, in *Internazionale*, 7 ottobre 2016, 44 ff.

a commercial relationship with the actual employer. A situation which is supposed to make that scheme legitimate.

This article will focus on the attitude of the Italian legal system towards this phenomenon. Before considering into detail the legislation, it might be useful a chronological scanning of it, supported by the consideration of case-law and administrative practice.

The starting point is 2003, the year in which the so-called Biagi reform was enacted (law no. 30/2003 and legislative decree no. 276/2003). It concluded a phase which lasted 60 years (1942-2002), characterised by the ban of interposition in the employment of labour, already mentioned in the civil code and eventually implemented by the law no. 1369/1960.

The Biagi reform opened a second phase (2003-2018), of “liberalisation”, in which the split between a formal and a substantial employer is permitted under certain conditions; in case those conditions are not met, the prohibition of interposition comes back into play (article 84, legislative decree no. 276/2003).

In every case, the split between formal employer and user undertaking is subjected to a joint liability: a protection mechanism for workers, highly dissuasive. A second question arises, whether joint liability responds to a remedial technique or rises to a general principle of the legal system.

As for the identification of the substantial employer, that is to say the one who should bear obligations toward employees, a complication is represented by the legal relationship between companies, sometimes contractual, other times corporate. It places a veil, as thin as impenetrable, between workers and the end user of their performances.

In the search of the appropriate tool to “pierce the veil” two ways have been followed:

- The first one is that of identifying the true employer (functionalistic technique), making use of the concept of “employee”;
- The second one is that of allocating the employment relationship on more than one employer, making use of the co-debtors’ scheme (co-employership technique).

Various legal institutions are attributable to this phenomenon:

- Subcontracting (*appalto*) and neighbouring legal instruments;
- Secondment;
- Group of companies;
- Temporary agency work and staff-leasing.

### 3. The *appalto* contract.

The *appalto* contract, regulated by article 1655 of the civil code<sup>3</sup>, is the most common commercial contract as for buying labour, goods or services functional to their productive cycles.

Labour law has always considered outsourcing practices suspicious, because of possible exploitation involved, taking place through an indirect use of the workforce, which allows the employer to get rid of employment protection.

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<sup>3</sup> *Appalto* is “a contract by which a party is engaged in the realization of a product or a service in exchange for a fee, assuming all the organization of the necessary means of production and all the related risks”.

This could explain why the civil code in the first place (article 2127<sup>4</sup>), then the law no. 1369 of 1960 and eventually the legislative decree no. 276 of 2003 decided to regulate the case of productive decentralization, providing employment protection to workers involved and, at the same time, preventing “pathological” fragmentation.

Leaving aside the article 2127 of the civil code, because of its scarce effectiveness, it is worth considering the extraordinary longevity of article 1, paragraphs 1<sup>5</sup> and 3<sup>6</sup>, law no. 1369 of 1960, providing an irrebuttable presumption of unlawful subcontracting for the case the means of production used by the contractor are propriety of the client.

However, this provision did not take into account the evolution of production process prompted by technological progress and market globalisation. For that reason, case-law tried an evolutionary interpretation of the rule, diminishing the rigour of the presumption, focusing on the existence, in the execution of the *appalto* contract, of the requirements set out in article 1655 of the civil code. To that end, labour courts investigated the elements characterizing the relationship between the client and the contractor, to understand whether the latter involved conditions of organizational and managerial autonomy.

As for labour intensive subcontracting, the subject matter of the contract ended up coinciding with the professionalism of contractor’s employees, and the entrepreneurship required by article 1655 essentially with the direction and organisation of work. Thus, case law concluded that subcontracting is lawful if know-how - namely, wealth of knowledge and practices of uncommon use, not patented, deriving from experiences and trials – is involved in the economic reality of the contract, playing a prominent role, adding something to the professional skills of employees. In short, what really matters for this jurisprudence is the existence of an added value which makes the subject of the contract different from the contractor’s supply of a mere aggregate of work performances.

The Biagi reform of 2003 moved definitely beyond the ban of fraudulent interposition provided by article 1 paragraph 1, law no. 1369 of 1960: on the one side, replacing the former rules on temporary agency work (articles 1-11, law no. 196 of 1997) with a brand new regulation of agency work; on the other side, repealing law no. 1369 of 1960 and admitting the use of subcontracting within certain limits (article 29, legislative decree no. 276 of 2003).

This last provision represented a turning point because:

- It specifies the requirements of subcontracting, already provided by article 1655 of the civil code, differentiating it from agency work, and codifying the indicators of genuine subcontracting: business risk and organization of the means of production.

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<sup>4</sup> “It is forbidden for the entrepreneur to entrust his employees with piecework to be performed by workers hired and paid directly by the former employees themselves. In case of violation of this prohibition, the entrepreneur is directly responsible, towards the workers hired by his employee, of the obligations deriving from the employment contracts they have entered into”.

<sup>5</sup> “It is forbidden for the entrepreneur to contract out in any possible form, even to cooperative companies, the execution of supply of workforce through the use of manpower hired and paid by the contractor or intermediary, whatever the nature of the work or service to which the services refer”.

<sup>6</sup> “Any form of contracting or subcontracting, also for the execution of works or services, where the contractor uses capital, machinery and equipment supplied by the client, even if a fee is paid for their use, is considered a subcontracting for the supply of workforce”.

- It codifies a “relativity criterion” according to which the lawfulness of the *appalto* contract should be evaluated on a case by case basis, considering the actual “requirements of the work and of the service considered in the contract”;
- It acknowledges the case law guidelines based on former law no. 1369 of 1960, considering the interpretative issues concerning *intra moenia* (internal) outsourcing – characterised by physical proximity of the client and the contractor’ productive organisations, substantial integration in the client’s productive cycle of the result of the activity outsourced, objective difficulty in distinguishing this result from the overall result pursued by the contractor – and the issues regarding dematerialized (or light) subcontracting, where labour plays a major role compared to material assets.

To sum up, outsourcing not matching the above-mentioned requirements is to be considered as illicit supply of labour.

### 3.1. Typical requirements of the *appalto* contract.

As discussed, lawfulness of subcontracting is subject to the existence of two requirements: contractor’s business risk-bearing and autonomous organization of the means needed for the execution of the contract.

As for the first requirement, the *appalto* contract creates an obligation of result, which should be granted by the contractor, even when he is not able to cover the costs with revenues.

With regard to the second requirement, article 29, paragraph 1 of the legislative decree no. 276/2003, specifies that the organization of the means can also result from the exercise of organizational and managerial powers over the workers employed in the framework of the outsourced activity, taking into consideration the nature of work or service involved. The legislator has here codified the case law elaboration according to which the material component in labour intensive contracts can be disregarded.

It competes to the contractor providing direction to his/her employees, without interference from the client on the way the activity should be carried out.

On the contrary, the use by contractor’s employees of tools which are the property of the client is not in itself incompatible with genuine subcontracting, on condition that the responsibility for their use remains totally on the contractor and that by the supply of these means the business risk is not reversed, which must in any case be borne by the contractor himself .

The relativity of the considered law provisions (lawfulness of subcontracting “may also result from”) and the functional criterion included (consideration for the “requirements of the work and of the service provided in the contract”) put on to the judge the duty to investigate the legitimacy of the contract, opening to possible interpretative oscillations.

In other words, the execution of work and service should be organized and managed by the contractor. This may result, on the one hand (especially for labour intensive activities), by the fact that workers employed in the outsourcing are actually organized and directed by the contractor and/or also from the ability of the contractor to achieve a productive result,

autonomous and “separable” from that of the client; on the other hand, from the contractor’s risk-bearing, related to the preparation, management and execution of the work or service.

### 3.2. Criteria and indicators of “genuine” subcontracting.

Since there is a very real chance that an *appalto* contract may conceal illicit forms of labour interposition, case law and administrative practice<sup>7</sup> have identified some criteria and indicators of “genuine” subcontracting. They provided, both under the provisions of the former law no. 1369/1960, and current legislative decree no. 276/2003, symptoms on the basis of which courts and administrative authorities can identify and sanction (illicit) subcontracting.

They can be summarised as follows:

- 1) lack of contractor’s entrepreneurial features, that is to say entrepreneurial (technical and economic) organization;
- 2) exercise of direction power by the client;
- 3) use of capital, machines and equipment supplied by the client;
- 4) nature of the service performed, which is not related to the *appalto* contract, but the same performed by client’s employees;
- 5) fees based on the actual hours of work and not on the work or the service performed; wage payed out directly by the client.

#### 3.2.1. The lack of contractor’s entrepreneurial organization.

Article 29 of the legislative decree no. 276/2003 allows subcontracting, aiming at the same time at contrasting “ghost” subcontracting firms (known as “teste di paglia”) created to cut business costs, evading and circumventing obligations, such as wages, taxes and social security contributions, through a fictitious contract for activities or mainly for services.

In this perspective, the lack of an autonomous functional and managerial organization is an indicator, perhaps the main one, of an illicit interposition, namely a “non-genuine” subcontracting.

In order to observe a genuine subcontracting is necessary that the contracted activities are performed by a firm which is formally and substantially an entrepreneur from the technical, economic and organizational perspective.

The evaluation of the effective existence of a genuine subcontracting firm, both under a legal and a material perspective, should be done through the analysis and consultation of the following business records:

- registration at Chamber of Commerce (*Camera di Commercio*);
- compulsory records and accounting documents;
- ledger and inventory register, records of capital and profit elements;
- warehouse logbooks;
- register of depreciable assets;

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<sup>7</sup> Circ. Min. lav. n. 5/2011.

- financial statements, balance sheets, income statements and explanatory notes;
- invoices and payments (F23 and F24).

Further indicia assessing the lack of the organizational autonomy are:

- lack of a significant experience in the subcontracting' sector;
- lack of any employment activity related to the one requested by the client;
- absence of workers technically educated for the contracted activity.

However, according to article 29 of the legislative decree no. 276/2003, a subcontracting is genuine when the contractor substantially coordinate his employees, mainly applying their know-how, specifically acquired or already possessed, without any physical means: the only differentiation criterion is the sufficiency of the intangible assets used for the execution of the contracted services. These apply to informatic and technological services in the first place, but also to cleaning services, in their polyhedral and multiple manifestations, where the explicit reference to the organization of the “necessary” means and the relation between “necessity-sufficiency” are clear indicators of the literal transposition - by the Legislator – of the progressive jurisprudence, more open to the post-industrial externalizations.

### 3.2.2. The exercise of managerial authority by the client.

The exercise of the managerial power by the client, typically performed by the employer and related to the substantial performance of the employment activity commissioned to the alleged contractor, is another symptomatic element of an illicit interposition in the employment of labour, as stated by articles 29 and 84 of the legislative decree no. 276/2003.

Lower Courts and Supreme Court jurisprudence and administrative practice identified symptomatic situations linked to this element:

- the alleged contractor's employees share a similar working time with the client's ones, without any particular difference;
- the contractor's employees report their absences from work to the client company;
- the alleged brokered employees work under the direct control of client's workers or under their supervisors, without any previous agreement with the contractor;
- the contractor imposes wage increases and manages holidays and leaves;
- the client determines how to manage workers;
- the client exercises his managerial, hierarchical and disciplinary power, even imposing layoffs in the contractor's premise.
- the client company manages industrial relations regarding the alleged contractor's workers.
- the workforce of the contracting firm is resized with regards to the possibility of using in a stable manner the workers offered by the presumed contractor.

In order to assess an illicit subcontracting, case law and legal scholarship consider insufficient a technical direction of activities by the client or by any appointee. This has nothing to do with the employer's control power, namely the legal subordination of the employee to the employer's direction and disciplinary power.

Furthermore, the managerial interference does not exist if the orders given by the client are seen in the light of an essential functional coordination of contractors, with no

implication on the effective primacy of the contractor's managerial power; a situation that is acceptable within the framework of a necessary harmonization of the different activities involved, especially when the contracted service requires a complex entrepreneurial structure.

Thus, the client's control over the overall compliance of the contractor's performance with the *appalto* contract is compatible, alongside with the other requirements stated by the law, with a genuine one. Likewise, an illicit interposition should be excluded if the client's instructions are addressed to the contractor, who subsequently gives orders to his employees.

### **3.2.3. The use of client's capital, machineries and equipment.**

The repealed article 1, paragraph 3 of the law no. 1369/1960 contained an irreputable presumption of illicit interposition, based on the idea that if a given entrepreneur outsources the activity to another firm, notwithstanding the fact he had the means to execute the activity, he was just trying to achieve results forbidden by the law.

Nevertheless, legal scholarship and case law opted for a less strict application of this provision: they supported the idea that it is not sufficient to determine an illicit interposition a minimum allocation of financial resources and assets; on the contrary, they stressed the fact that the relevance of the client's contribution should be enough to marginalize the contractor's organizational involvement.

This case-law elaboration seems to meet the need of some specific sectors, such as that of "advanced service", where the contracted service is performed by making use of the client's assets, having a high economic value.

So, the case of a contractor that, to perform his autonomous activity, exploits client's equipment or involves predominantly capital and workforce, should not be seen as a fraudulent interposition. In these cases, what is legally pivotal is the contractor's management and organization, that should be characterized by an autonomous entrepreneurial structure, alongside with specialized workforce in a specific field developed during the business activity.

There is no fraudulent interposition even when the raw materials, provided by the client in order to guarantee the quality of the subcontracted activity, are transformed by the contractor.

Similarly, there is no fraudulent interposition when the contractor, performing the activity (data mining, data bases creation), works directly on the client's equipment and hardware, with his own workforce and digital know-how (immaterial good).

Based on what has been reported above, the adequacy, non-marginality and significance of the subcontractor's organizational contribution in terms of "necessary means" should be evaluated case by case, examining the object and the substantial and intrinsic content of the subcontracting. It should not be taken into consideration any contractual declaration of intents, only driven to underline the availability of capitals, equipment and machineries without their concrete use and their effective substitution with those belonging to the clients; a different case from the one related to "immaterial subcontracting", such as the one reported above, that could justify a lower organizational contribution, attributed to the sole exercise of the managerial power over the subcontracted workers.



### 3.2.4. The nature of the work performed.

A subcontracting should be assessed as a genuine one when:

- the contracted activity is one of those typically performed by the contractor;
- the work is temporary with a fixed duration;
- there is no stable integration of contracted workers in the client's organizational context;
- the activities performed by the contractor's workers are different from the ones carried out by client's workforce;
- the working activity performed by the workers involved in the contract is not linked with the client's corporate objectives.

### 3.2.5 The kind and the nature of the fees.

Lastly, it is necessary to evaluate, as a possible element of an illicit interposition, the way the subcontractor's fees are calculated. This criterion is strictly connected with the business risk requirement, as stated by article 29, paragraph 1 of the legislative decree np. 276/2003.

Case-law clarified that a subcontracting is an illicit interposition when the contractor's entrepreneurial contribution is neglectable, such as in the case where the capitals involved just cover wages or the overall labour costs, and contractor's managerial and organizational powers over the workers employed is lacking.

This could be the case of fees paid by the client which are strictly linked to the costs incurred by the alleged contractor, rather than being set in advance on the value of the result to be achieved. This could be also the case of the client directly remunerating himself subcontractor's employees or that of the client calculating contractors' fees on workers' hourly wage, their social contributions and the costs related to the certification of the *appalto* contract. It should also be considered as an illicit interposition of employment the situation in which the client determines the fee basing it on the hours effectively worked or on the number of working days.

It is worth mentioning that the illicit interposition does not need an actual provision of fees: it shall be punished even in case of a "free of charge interposition", since articles 18 and 28 of the legislative decree no. 276/2003 are aimed at sanctioning the supply of a simple aggregate of work performances.

### 3.3. Sanctioning regime.

The sanctioning regime provided by the legislator is particularly articulated with different levels of intervention.

The lack of the requirements of genuine subcontracting leads to illicit labour hire supply, sanctioned by the article 27, paragraph 3 bis of the legislative decree n. 276/2003 (introduced by the legislative decree no. 251/2004), formerly sanctioned in a rather similar way by the repealed article 27, paragraph 2. According to the mentioned provisions, the employment

relationship is placed on the client. Payments made by the sham contractor shall not be repeated.

Differently from the former Law no. 1369/1960 (article 1, section 5), the placement of the employment relation on the user undertaking is no more an automatic consequence of the legislative provision. It takes place by an action brought by the worker against the user, which effects are backdated to the beginning of subcontracting or, according to some commentators, to the date of the labour court sentence.

According to article 32, paragraph 4, law no. 183/2010, the worker shall denounce in writing the sham outsourcing within 60 days, and bring a claim in Court within the following 180 days, according to article 413 Code of Civil Procedure.

Furthermore, illicit subcontracting incurs in administrative sanctions.

According to art. 1, section 1 of the legislative decree no. 8/2016, the illicit subcontracting has been decriminalized and currently considered as an administrative offense, except where child exploitation is involved. In this case the illicit subcontracting has, still, a criminal relevance, and it is punished with the arrest up to 18 months and a pecuniary fine.

The administrative sanction applied in the case of unlawful outsourcing, charged to the sham contractor and the client, is up to 50 Euros for each worker employed and each day of employment (minimum 5.000 Euros – maximum 50.000 Euros).

The administrative sanction applied pursuant to art. 18 of the legislative decree no. 276/2003 excludes the application of the other sanctions for “black” work as well as the administrative sanctions in relation to the obligations of establishment and management of the employment relationship due its “traceability” and the related remuneration and social security obligations, even if they relate to an employer who is not a factual services user.<sup>8</sup>

As for the pay recovery deriving from the ascertainment of an illegal nature of subcontracting, it should be noted that the establishment of the employment relationship with the user - as mentioned - is not automatic, but requires the worker to request the verification. Therefore, in default the exercise of judicial action pursuant to art. 414 of the Italian Criminal Code, the formal notice can only be adopted against the alleged subcontractor in relation to remuneration not correctly paid as it should be according to the CCNL applied.

As for the social security contributions recovery, social security relationship is indifferent for the procedural choices made by the worker as it presupposes only the establishment of an employment relationship, and is completely subtracted from the parties’ will. Therefore, the recovery cannot be conditioned by the worker’s choice regarding the recognition of the employment relationship with the user. As a result, the obligations of a public nature in the field of social security, once it has been ascertained that the job had been rendered in favor of the user, being latter recognised as a *de facto* employer, should be born entirely by the latter, without prejudice to the payments already made by the alleged subcontractor. In any case, the alleged subcontractor may be involved in social security contributions recovery in case of the failure of the procedure against the user.

Special attention deserves the case of crimes under art. 603 bis of the Italian Criminal Code, concerning the exploitation of labour. This provision is aimed at the repression of the

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<sup>8</sup> Circ. Min. lav. n. 27/2014 e circ. INL n. 10/2018.

so-called "*caporalato*", especially in the construction and agro-industrial sector.<sup>9</sup> It requires generic fraud against those who recruit labour for the purpose of assigning it to the third parties under the conditions of exploitation, taking advantage of their needy situation, and those who use, hire and employ labour under the same conditions.

Finally, art. 2, paragraph 1 bis of the law- decree no. 87/2018 (so-called *Decreto Dignità*) has reintroduced with the art. 38 bis, legislative decree no. 81/2015, the crime of fraudulent temporary work supply, already provided for by the art. 28 of the legislative decree no. 276/2003 and then repealed by the art. 55 of the legislative decree no. 81/2015. This occurs in all the cases where "temporary work supply is carried out with the specific purpose of circumventing mandatory legal provisions or collective agreement applied to the worker", without prejudice to the application of the sanctions referred to in the art. 18, of the legislative decree no. 276/2003, in the case of abusive staff leasing and its illegal use.

The legislator configures a multi-subjective offense, of a contraventional and unitary nature, which considers both the staffing agency and the user as two active subjects of the only type of offense, responsible under the Criminal Code for a specific elusive conduct deliberately carried out in violation of the existing legal norms.

The multi-subjective nature of the crime covers all the actors involved in the staff leasing activity. In this way both a subject exercising staff leasing without the required requisites (absence of the prior ministerial authorization and the necessary registration in the Register) and the agency formally authorized and registered as well as the user of the temporary workers will be considered responsible for a committed crime.

To be recognised as a crime, a specific intent and the awareness of the labour illegal use by the perpetrators of the offense is required, while the avoidance of the mandatory provisions of the law or collective agreement applicable to the worker represents an objective element. The contiguity of the crime of the fraudulent staff leasing with the phenomenon of labour interposition poses the problem of the identification of the appropriate sanctioning regime<sup>10</sup>.

The Ministry of Labor, already in time of the application of the art. 28 of the legislative decree no. 276/2003, considered the crime of fraudulent staff leasing applicable also in cases of illicit subcontracting and therefore of temporary work supply in the absence of the required requisites, which in itself constituted a symptomatic element of the fraudulent purpose of circumventing "mandatory legal or collective agreement provisions applied to the worker."<sup>11</sup>

The crime of fraudulent staff leasing is not limited to the cases of illegal subcontracting as it may also involve authorised temporary work agencies, or cases of workers posting in violation of the art. 30 of the legislative decree no. 276/2003 as well as the cases of non-genuine transnational workers posting pursuant to art. 3 of the legislative decree no. 136/2016.

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<sup>9</sup> Garofalo D., *Il contrasto al fenomeno dello sfruttamento del lavoro (non solo in agricoltura)*, in *Rivista di Diritto della Sicurezza Sociale*, 2018, n. 2, 229 ff.

<sup>10</sup> See circ. INL 3/2019.

<sup>11</sup> See circ. Min. lav. 5/2011.

As for the sanctioning regime in the case of fraudulent staff leasing, a fine of 20 Euros is envisaged for each worker involved for each day of use, with the proportional and progressive application of the penalty.

The offense ends by oblation, pursuant to art. 162 of the Criminal Code and is subject to the mandatory prescription carried out by the labour inspectors (art. 15, Legislative Decree no. 124/2004), which "minimum" contents is aimed at the interruption of the illegal staff leasing carried out by the fraudulent subcontractor. Compliance with the mandatory prescription determines the decriminalization of the crime and its extinction with transformation into an administrative sanction, but only on condition that the user hires illegally supplied workers. Consequently, in cases of illegal subcontracting or illegal posting, the inspection staff should ascertain the violation of art. 18 Legislative Decree no. 276/2003 ("without prejudice to the sanctions referred to in art. 18, Legislative Decree no. 276/2003") and apply a mandatory prescription aimed at putting an end to the illegal conduct by means of the hiring of the illegally supplied workers by the user for the entire duration of the contract.

Finally, it will be possible to adopt the provision of the formal notice, pursuant to art. 12 of the legislative decree no. 124/2004, towards the user on the basis of the CCNL applied by the latter.

The functions of judicial police, conferred by law to the inspection staff, allow the latter to be able (perhaps obliged?) to order to the fraudulent user the immediate regularization (hiring) of the illegally employed workers, highlighting that the same result could also derive from the nullity of the temporary staff supply contract (as *in fraudem legis*), with the extension of art. 38, paragraph 1, Legislative Decree no. 81/2015, which considers these workers to be directly employed by the user.

In case of staff leasing compliant with regulatory provisions, but where the fraudulent intent is found, only art. 38-bis is applied.

### 3.4. Does the ban of fraudulent interposition still exist?

The predominant opinion is in favour of the continued validity of the ban, deriving from the art. 29 of the legislative decree no. 276/2003, which codifies the distinction between subcontracting and staff leasing, and the sanctioning regime provided for in the paragraph 3-bis of the same provision in the case of a non-genuine subcontracting, as well as the provision pursuant to art. 84, paragraph 2 of the legislative decree no. 276/2003 distinguishing between the "illegal interposition" and the "genuine subcontracting".<sup>12</sup>

In fact, art. 84 provides for the adoption by the Ministry of Labor of the codes of good practices and presumptive indices regarding illicit interposition and genuine subcontracting taking into account rigorous verification of the real organization of the labour means and the effective assumption by subcontractor of the entrepreneurial risks.

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<sup>12</sup> Garofalo D., *Il perdurante divieto di intermediazione*, in Garofalo D. (ed.), *Appalti e lavoro. Disciplina lavoristica*, Giappichelli, Torino, 2017, 3 ff.

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## 4. Joint and Several Liability

### 4.1. A Troubled Regulatory Framework

With the dual purpose of preventing abuse and protecting the claims of workers employed in subcontracting, articles 1676 c.c. and 29, paragraph 2, of Legislative Decree no. 276/2003, provide a double guarantee<sup>13</sup>.

The provision in the civil code grants workers the right to act directly against the client company "to achieve what is due to them up to the amount of the debt that the client has towards the contractor in the time in which they propose the claim". As a consequence of such action, a joint and several obligations operates pursuant to article 1292 c.c.<sup>14</sup>.

The entitlement to bring proceedings is attributed only to the contractor's employees (unlike article 29, paragraph 2, Legislative Decree No. 276/2003 - below) who have been involved in the execution of the subcontracted work or service (a consolidated judicial strand acknowledges the same entitlement also to the subcontractor's employees against the contractor / sub-client, but not also towards the lead client).

From an objective point of view, the protection concerns only pay claims, while other kind of claims are excluded as well as, due to the consolidated standing of the Supreme Court, the contractor's debts towards social security and insurance agencies.

The application is not subject to forfeiture term, unlike the provisions of article 29, paragraph 2, Legislative Decree no. 276/2003, and has the effect of making the contractor's claim against the client unavailable, with the consequence that where the client proceeds to satisfy the former, he is not released from the obligation towards the workers.

The second guarantee, of joint and several liability, is regulated by article 29, paragraph 2, Legislative Decree no. 276/2003. It operates as a means of interference with the use of subcontracting, now "liberalized" in comparison to the abolished 1960 regime. Against this guarantee, article 1676 c.c. has maintained a space of operation limited to public procurement and subcontracting with public administrations, pursuant to article 1, paragraph 2, Legislative Decree n. 165/2001 (the application of article 29, paragraph 2 to such situation is expressly excluded), and with natural persons who do not carry out business or professional activities (article 29, paragraph 3-ter), as well as for those workers who have allowed the expiry of the forfeiture term to benefit from the regime pursuant to article 29, paragraph 2.

The guarantee of joint and several liability, indeed, is not new since it was already enshrined in Law n. 1369/1960, although only for to the so-called "internal" subcontracting and with a forfeiture term of one year (articles 3-4-5). The novelty of the 2003 regulations lies in the generalization of the guarantee and the doubling of the forfeiture term.

The relevance of the provision for the outsourcing phenomenon helps to understand why the legislative interventions have been reiterated any time the political landscape has changed, which resulted in a complex regulatory framework not exempt from critical aspects.

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<sup>13</sup> Garofalo D., *La responsabilità solidale*, in Garofalo D. (ed.), *Appalti e lavoro. Disciplina lavoristica*, Giappichelli, Torino, 2017, 119 ff.

<sup>14</sup> V. App. Lecce – Section Lav., February 23, 2017, n. 527; in doctrine see Carabelli U., *La responsabilità del datore di lavoro nelle organizzazioni di impresa complesse*, in *Diritto delle Relazioni Industriali*. 2009, 91 ff., § 3.

In the 2003 text, the provision stated that in the case of subcontracting, the client company or employer was obliged jointly and severally with the contractor, within the limit of one year from the termination of the contract, to pay workers the due remuneration and social security contribution.

Legislative Decree n. 251/2004 (art. 6, paragraph 1) amended the Legislative Decree n. 276/2003, and provided that, except for different provisions of the national collective labor agreements stipulated by the comparatively most representative associations of employers and by associations of workers, in the case of subcontracting for works or services, the client company or employer is obliged jointly and severally within the limit of one year from the termination of the contract, to pay workers the due remuneration and social security contribution. Therefore, a double significant change was introduced, consisting, on the one hand, in the derogation from the joint liability regime by national collective bargaining, and on the other hand by the extension of the scope of the joint liability regime to all kind of subcontracting (no longer only to those of services).

Article 6, paragraph 2, Legislative Decree no. 251/2004 added to article 29 the paragraph 3-ter which, as already mentioned above, excludes clients who are natural persons and who do not carry out entrepreneurial or professional activities from the scope of the joint and several liability regimes.

With a further intervention in 2006 (article 1, paragraph 911, Law 27 December 2006, n. 296) on the one hand, the joint and several liability was extended to “second-degree” subcontracting, providing that in the case of works or services contracts the client company or employer is jointly and severally liable with the principal contractor as well as with any of the possible subcontractors; on the other hand, the forfeiture term has been doubled, increasing it from one to two years.

The 2006 regulation (paragraph 910) also added paragraph 3-bis to article 7, Legislative Decree no. 626/1994, extending joint and several liability to damages for which the worker, employee of the contractor or subcontractor, is not compensated by the national institute for the insurance of occupational injuries (*INAIL*).

In 2012, joint and several liability was extended to the severance pay (*TFR*) accrued during the execution of the contract. With reference to the unfulfilled payments of social security contributions and insurance premiums for period in which the contract was executed, any obligation on the part of the client company for civil penalties is excluded, and it is charged only on the person responsible for the non-compliance<sup>15</sup>.

When converting into law the Law Decree n. 5/2012, the benefit of the pre-emptive seizure of the contractor and any subcontractors’ assets has been introduced for the client<sup>16</sup>.

We return to this topic on the occasion of the 2012 Fornero reform which (compared to the 2004 formulation) makes the possibility of collective autonomy to exempt from the joint and several liability regime conditional on the introduction of methods and procedures for checking and verifying the overall compliance of contracts<sup>17</sup>.

In 2013 joint and several liability was extended to remuneration and social security and insurance obligations due to workers employed with a self-employment contract. The public

<sup>15</sup> Reference is made to art. 21, paragraph 1, d. L. February 9, 2012, n. 5, converted to Law April 4, 2012, n. 35.

<sup>16</sup> See art. 21, comma 1, Law Decree, 9 february 2012, n. 5, cit.

<sup>17</sup> See art. 4, paragraph 31, lett. a) and b), l. June 28, 2012, n. 92.

administration was expressly excluded from the scope of the regime. It should be noted that any exceptions to the liability regime introduced by collective bargaining cannot concern social security contributions and insurance premiums<sup>18</sup>.

Furthermore, in 2014 it was established that the client who makes the payment of the credits, must also fulfill the related tax obligations as withholding agent<sup>19</sup>.

Finally, in 2017, in order to avoid a repeal referendum, the possibility of derogation by collective bargaining as well as the benefit of the prior enforcement of the contractor's assets have been suppressed<sup>20</sup>.

## 4.2. The Current Regulation of Joint and Several Liability.

The joint and several liability remedial technique applies to all contractors (of works and services) involved in the supply chain from which the credit claim originates, regardless of whether the contract is "internal" (a necessary condition according to article 3 ln 1369/1960) or "external".

The client must be an entity who carries out an entrepreneurial or professional activity ("entrepreneur or employer"). The joint and several liability therefore rests on anyone who qualifies as an entrepreneur, but also on employers who are not entrepreneurs as long as they have an organization (e.g. ideologically oriented organizations) as well as professionals.

About the categories of workers who are beneficiaries of the protection, since 2013, the employees were also joined by the self-employed workers within the limits of the social security and insurance payments and obligations imposed on the client, which restricts the target to the quasi-subordinated employees (*parasubordinati*).

In addition to remuneration and social security contributions, the emoluments covered by the protection also include the severance pay and the insurance premiums, although already before 2012 those protections were extended by means of interpretation (by the jurisprudence for severance pay and by administrative practice for the insurance premiums).

On the other hand, the payments due in terms of indemnity (e.g. indemnity for failure to give notice) and reparation are excluded as article 29, paragraph 2, refers exclusively to remuneration treatments. Likewise, as of 2012 the amounts due as civil penalties for the contributory and insurance failures of the contractor remain excluded. This confirms that the object of the joint and several obligation can only be the remuneration, contributions and insurance premiums accrued in the period of execution of the contract.

Therefore since 2012 it has become clear that joint and several liability covers only workers concretely and directly employed in the performance of the contract, excluding those whose activities are purely ancillary (e.g. administrative management of employees assigned to perform the contract).

Unlike the joint and several liability provided by article 2112 of the civil code in the context of transfer of undertakings (*cessione di azienda*), which operates regardless of the transferee being aware of the credit has at the time of the operation, in the event of

<sup>18</sup> See art. 9, paragraph 1, d. L. June 28, 2013, n. 76, converted with modifications in l. August 9, 2013, n. 99.

<sup>19</sup> See art. 28, paragraph 2, d. lgs. November 21, 2014, n. 175.

<sup>20</sup> See art. 2, paragraph 1, lett. a) and b), d. L. March 17, 2017, n. 25, converted into l. April 20, 2017 n. 49.

subcontracting the client is only liable for "known" credits. However, the client can accede to the information written in the pay slips drawn up by the contractor, while he may be unaware of workers' claims related to the performance of higher duties or overtime work. This often causes collusive behaviors between the contractor and the worker to the detriment of the client. Those collusive behaviours can be countered only by charging the worker of the burden to sue the contractor, so that he can verify and contrast the worker's claims. It is not possible on the other hand to admit that the worker claims the responsibility of the former after a trial concluded in the absence of any defensive activity.

Important in matters of joint and several liability is the discipline of the forfeiture term, originally set for one year and then extended to two years from the termination of the contract. The term is to be understood as the effective date of cessation of the activity, hence neither the date indicated in the contract, nor that of issuance of the last invoice, pursuant to article 1, paragraph 911, Law n. 296/2006.

The identification of the *dies a quo* in the case of subcontracting or multiple subcontracting can be more difficult, as it may be referred either to the subcontractor whom the worker is employed with, or to the contract from which the subcontracting originates<sup>21</sup>.

Doubts persist on the possibility that the forfeiture is also prevented by means of an out-of-court act, given that this hypothesis must be expressly provided for by law. Failing this condition, it will be necessary to resort to judicial action<sup>22</sup>.

There has been much discussion about the applicability of the forfeiture term also to social security and insurance agencies. The Supreme Court excluded this option while Law n. n. 1369/1960 was in force, but also with reference to current regulations<sup>23</sup>, considering that the two-year term works exclusively for the worker, and not also for social security bodies, as the latter are deemed to be subject only to the five-year limitation period<sup>24</sup>, on the basis of various arguments.

In the first place, the employment relationship and the social security relationship, insofar as they are connected, are distinct from each other, given that the contributory obligation towards the National institute for social security (INPS), unlike the remuneration obligation, stems from the law, has a public nature and is therefore undisposable. In fact, the object of the contribution obligation coincides with the minimum contribution structured by law in an imperative way, with the effect that the application of the forfeiture term would be in contrast with this regulatory framework. Furthermore, it is argued, it is not acceptable that upon payment of the remuneration following the action promptly filed by the worker, the fulfillment of the contribution obligation cannot follow only because the social security

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<sup>21</sup> See question Min. Work prot. 37/0007140 of 13 April 2013, according to which the deadline can only start from the date of termination of the subcontracting, since a different interpretation would mean, especially in the case of long-term contracts, that the client remains tied to all subcontracting companies (also those that have ceased their contracted activity for many years) until the end of the contract, aiming for the rule to set a time limit aimed at ensuring the certainty of legal relationships.

<sup>22</sup> Izzi D., *Appalti e responsabilità solidale*, in Aimo M., Izzi D. (eds.), *Esternalizzazioni e tutela dei lavoratori*, Utet, Torino, 2014, 52 ff., 87.

<sup>23</sup> See Cass., Section lav. January 17, 2007, n. 996, in *Lavoro nella Giurisprudenza* 2007, 571, ff., as well as Cass. March 20, 2014, n. 6532 in *Diritto e Giustizia*. Contra, in the sense of considering the expiry date applicable to social security / insurance bodies, Trib. Milan, 19 March 2015, no. 204, in *Lavorofisco.it*. For administrative practice see Circ. Min. Work n. 5/2011; ruling Min. n. 29/2015; INL note 19 November 2019, no. 9943.

<sup>24</sup> Cass. no. 22110/2019, 18004/2019 and 29618/2019, the latter commented by Capurso P., *L'appalto e le tre obbligazioni solidali*, in *Rivista di Diritto della Sicurezza Sociale*, 2020, 227 ff.



institution has not acted on its claim within two years from the termination of the contract, with a consequent breach of the insurance protection of the worker.

Finally, the contribution claim is aimed at satisfying an indirect interest of the worker which is also a direct interest by the community to finance the social security system.

Therefore the INL (italian labour inspectorate) invites its peripheral structures, for the purpose of the correct performance of the inspection activity, to ensure the maximum timeliness in the transmission of the inspection reports to the INPS, in order to allow the activation of the recovery procedures within the terms prudently suitable to guarantee their success.

The involvement of multiple actors, underlying the joint and several liability, requires a reflection on the necessary litigation consortium and on the benefit of the contractor's pre-emptive seizure.

Before 2012, workers could take legal action directly against the client. Vice versa with the Fornero law, the effectiveness of joint and several liability was subject to the fact that the worker also sued the contractor and each subcontractor, in order to avoid excessive exposure of the lead client (usually with high solvency).

However for a part of the doctrine the necessary litigation consortium on the one hand loosens the client's accountability for the choice of contractors, on the other it excessively burdens the worker by forcing him to sue all the co-obliged actors and to bear the costs of long, and sometimes unsuccessful, executive procedures if the client had availed himself of the benefit of the pre-emptive seizure<sup>25</sup>.

Another part of the doctrine has positively assessed the intervention of 2012 from the triple point of view a) of the simplification and clarification of the discipline, b) of the greater accountability placed on the employer / contractor c) of overcoming the difficulties that the client would meet in defense of his position if he were the only defendant in court, because of his extraneity to the employment relationships established by contractors and subcontractors.

On the procedural level, the effect of the failure to summon the contractor and subcontractors together with the client, caused in the first instance the application of article 102 of the civil procedural code with the consequent integration of the trial; in the second instance, the nullity of the ruling resulting in the remittance of the case to the first judge.

The necessary litigation consortium, with the related negative effects on workers and social security agencies, was accompanied by the introduction of the benefit of the pre-emptive seizure of the contractor's (and of the possible subcontractor's) assets that could be claimed by the client in the first defense. In this case, the executive action could be brought by the worker against the client only after the unsuccessful enforcement of the assets of the contractor and subcontractors.

Article 2, Law Decree n. 25/2017, converted into Law n. 49/2017, in order to avoid the referendum initiative promoted by the CGIL (Italian General Work Confederation), expunged from article 29 both the rule on the necessary litigation consortium and the benefit of pre-emptive seizure and the one which allowed the collective bargaining exemption from joint and several liability, which fueled a very tight policy debate, as evidenced by the

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<sup>25</sup> In this sense, Bizzarro C., *Le misure di contrasto al lavoro «nero» tra nuovo regime degli appalti e procedure di certificazione*, in *Diritto delle Relazioni Industriali*, 2007, n. 2, 519.

tormented regulatory path that accompanied it: introduced with the legislative decree n. 251/2004, then repealed by Law n. 296/2006, reintroduced with article 4, paragraph 31, Law n. 92/2012 and definitively canceled (for now) by article 2, lett. o. Law. n. 25/2017. At the bottom of this legislative twist lie politically antithetical regulatory choices.

In fact, the 2004 provisions, which gave a real blank delegation to the national collective bargaining stipulated by the comparatively most representative organizations of employers and workers, were repealed in 2006 and reinstated in 2012, however, making the derogation subject to the identification, in authorized collective agreements, of "methods and procedures for checking and verifying the overall compliance of the contracts".

This is a model inspired by the due diligence schemes, based on the selection, by the social partners, of suitable behaviors to qualify the conduct of the client / jointly and severally liable subject as "diligent". Such mechanism entails an exemption from liability for unlawful behavior of other subjects with whom the client has entertained a business relationship if his action has been in compliance with what was established in collective agreements<sup>26</sup>.

The reference to collective bargaining, in the presence of two or more economic actors, posed the issue of the applicable national collective agreement, that is, whether it should be that of the client or that of the contractor.

The prevailing doctrine was oriented towards the qualification of the collective contract applicable in the contracting company's sector, given that its employees are subject to the effects of the derogation<sup>27</sup>.

The scant catalogue of collective agreement provisions shows two intervention patterns.

The first is limited to the provision of general clauses that charge on the client companies the duty to demand from the contractors the application of the sectoral agreement as well as the obligation to carry out checks (without specifying the nature and methods thereof), to ascertain the business partner's compliance with the legal and contractual regulations<sup>28</sup>. It is required to acknowledge the aforementioned obligations by inserting specific clauses in the contracts, with the possibility of automatic termination of the contract in the event of failure.

In the second case, the contractual provisions, in addition to the general clauses, regulate the matter into more detail, thereby listing the client's methods, procedures and control instruments to ascertain the contractor's compliance with the obligations towards workers and social security institutions<sup>29</sup>.

The elimination, in 2007, of the derogation power by collective bargaining<sup>30</sup> could reinvigorate the "proximity contract" instrument which, however, is subject to conditions

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<sup>26</sup> See Assologistica national collective bargaining agreement of January 26, 2011, which provided for preventive control mechanisms at the signing of the contract, as well as monitoring during the execution, based on documentary checks certifying compliance with all legal obligations, including those relating to the payment of withholding tax and social security contributions, insurance premiums, payment of wages, regularity of workers employed in the contract.

<sup>27</sup> See Gamberini G., Venturi D., *La responsabilità solidale nel settore dei trasporti: commento alla circolare del Ministero del lavoro n. 17/2012*, in *Diritto delle Relazioni Industriali*, 2012, 859 ff.

<sup>28</sup> See Metalworking and plant installation SMEs National Collective Bargaining Agreement.

<sup>29</sup> See Mobility / contractual area of railway activities National Collective Bargaining Agreement; Car rental and garages National Collective Bargaining Agreement; Telecommunications national collective bargaining agreement; Tourism CNAI National Collective Bargaining Agreement; Trade up to 14 employees National Collective Bargaining Agreement; Freight Transport and Logistics National Collective Bargaining Agreement.

<sup>30</sup> See question Min. Work 5/2018 which, on the regulation of the effects of the repeal of the derogation also in light of the principle of non-retroactivity, specifies that the new rule operates with respect to the new collective agreements, precluding for the future the possibility of inserting contract verification procedures in derogation

and functional constraints, having to be aimed at the goals indicated in paragraph 1 of article 8, Law n. 148/2011.

The law governing joint and several liability for differential damage has a different scope (article 26, paragraph 4, Legislative Decree no. 81/2008), providing joint and several liability of the client with the contractor and with each of the possible subcontractors for damages suffered by employees of the foster companies, not compensated by INAIL or by the equivalent agency for the maritime sector (IPSEMA)<sup>31</sup>.

This provision applies only to subcontracting and not also to staff leasing and concerns only entrepreneur clients, excluding public law bodies and those that do not carry out an economic activity.

The tax levy has also recently been brought into the joint and several liability scheme. Indeed, a joint and several liability regime in tax matters was provided for by article 35, paragraph 28 et seq., of the Law Decree n. 223/2006, converted into Law 248/2006 (so-called *Bersani Decree*), which introduced a joint and several liability rule between the contractor and subcontractor concerning the payment of tax deductions on employee income, as well as social security contributions and insurance premiums for work accidents relating to employees of the subcontractor. This provision was repealed in 2014<sup>32</sup> but, unaware of the arrival of the pandemic from Covid-19, has been reintroduced, with significant differences starting from 2020<sup>33</sup>.

The obligation arises with reference to the deductions made from January 2020 (and therefore on payments made in February 2020), with regard to subcontracting or sub-subcontracting<sup>34</sup>.

Obligated clients are public administrations, businesses and commercial companies, natural persons who exercise deeds and professions, resident in Italy for taxation purposes.

There are different conditions for joint and several liability to operate.

Firstly, the awarding of one or more works or services must have a total annual amount of more than € 200,000 (if the contracting company has multiple of such contracts, to ascertain whether it exceeds the € 200,000 threshold the overall value of the contracts relating to the reference year must be calculated). The relevant contracts are procurement, subcontracting, entrust to consortia, as well as other contractual relationships, however named (but with the exception of self-employment contracts as defined in article 2222 of the Civil Code), characterized by the prevalent use of labor (labor intensive) at the client's business premises, with the use of capital goods owned by the latter or referable to him in any form.

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from the solidarity regime. With regard to collective agreements that are valid as of 17 March 2017, the exceptions cannot be applied to subcontracting signed after that date. The contractual provision can only be applied to credits accrued during the period preceding the entry into force of the d. L. n. 25/2017.

<sup>31</sup> With circ. Min. Work n. 5/2011, the expression "damages for which the worker (...) is not compensated" has been interpreted, referring to damages resulting from injuries of lesser amount than those eligible for compensation or higher (so-called differential damage) than the maximum amount recognized by the institutes insurers.

<sup>32</sup> See art. 28, paragraph 1, d. lgs. November 21, 2014, n. 175.

<sup>33</sup> See art. 4, d. L. n. 124/2019, converted into l. n. 157/2019 (tax decree 2020), which inserted art. 17 bis in Legislative Decree no. 241/1997.

<sup>34</sup> Ris. AE n. 108/E/2019.

In addition, the clients are bound to request the companies in the supply chain (which are obliged to release them) copies of the proxies for the payment of the personal income tax (including the additional fares established at the municipal and regional levels) relating to the workers directly employed in the execution of the work and the service.

The payment is made by the companies in the supply chain (contractors, subcontractors) with separate formalities for each client.

As for the procedural profile, it should be noted that at least 5 working days before the monthly deadline, subcontracting and contracting companies must pay the amounts due to the Treasury on a specific bank or post office account communicated by the client.

The client who received the amounts necessary for the payment, makes the payment (usually by the 16th of the following month) but cannot use those sums as compensation.

Within 5 working days pursuant to the expiry of the deadline for the payment, the contracting company must also transmit to the client, and for the subcontracting companies, also to the contracting company: the payment proxies relating to the payment of the tax deductions of the workers directly employed in the execution of the work and service; a name list of all the workers employed in the previous month directly for the execution of works and services entrusted by the client, with indication of the tax code as well as with the detail, for the reference month, of the hours worked by each worker for the execution of the contract. If the worker in the reference month has operated on different contracts, the employer will have to communicate only the hours worked for each client. In addition, he must report the amount of remuneration paid to the employee for the service and the detail of the tax deductions made in the previous month for this worker, with a separate indication of those relating to the service entrusted to the client.

In the event that the contracting company does not comply with the obligation to transmit to the client the payment proxies and the information relating to the workers employed, or the payment of the tax deductions is omitted or insufficient in the light of the provided documentation, the client has to suspend, as long as the non-compliance persists, the payment of the compensation due to the contracting company, up to 20% of the overall worth of the work or service or for an amount equal to the tax deductions not paid in the light of the provided documentation. In addition, the client must notify within 90 days the Revenue Agency, whereas the contractor will be prevented from any executive action against the client until the payment of the deduction has been made.

If the client pays the compensation to the contractor lacking any communication from the latter of the payment proxies or any information regarding the workers employed in the contract, or despite having ascertained the omitted or insufficient payment of the tax deductions, he will be obliged to pay an amount equal to the sanction imposed on the contractor for the violation of the obligations of correct determination and payment of the deduction, as well as of timely payment, without the possibility of compensation.

The procedure illustrated above does not apply if the contracting company (or subcontractor) communicates to the client, enclosing a certification by the Revenue Agency effective for the 4 months following the date of issue, the existence of a series of conditions, on the last day of the month prior to the deadline for notification of payment<sup>35</sup>.

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<sup>35</sup> The contracting company must have been in business for at least 3 years (therefore those entrepreneurs who "born and die" specifically within this period, as often happens, are excluded) and must have performed during

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If the certification just mentioned is missing, contracting or subcontracting companies will be prevented from availing themselves of the compensation as a method for extinguishing the obligations relating to social security and welfare contributions and mandatory insurance premiums, with reference to the employees who have been employed for the execution of the contract.

## **5. Transportation contracts, shipping contracts and subcontracting of transportation services.**

The interest for the transportation contract (*contratto di trasporto*), governed by article 1678 of the Italian Civil Code, stems from the growing spread of commercial practices that integrate the typical contractual content (i.e. the transportation) with additional or instrumental services usually provided for by the carrier: boarding and landing of passengers, loading and unloading of goods, supply of food and accommodation, handling of luggage and the like.

Although these services sometimes correspond to the content of other typical or atypical contracts, they do not present an autonomous contractual meaning. In fact, they have an ancillary or instrumental character which binds them to the scheme of the transportation contract by virtue of the absorption principle.

Similar or complementary to the main model are other contractual schemes such as shipping (*spedizione*), subcontracting of transportation services (*appalto di servizi di trasporto*), contracts for logistics and sub-transportation operations, rental (*noleggio*), travel or tourist cruise contracts, etc .

The subcontracting of transportation services, introduced by article 6 of the Royal Law Decree n. 1924/1937, was characterized by the existence of an organization administered by the carrier for the execution of the contract. The existence of such organization could be inferred from a set of presumptive indicators, like: the provision of services in a multiple and systematic manner, the stipulation of a single compensation, the bearing of economic risks by the carrier itself.

At the same time, in case the parties had agreed on a continuous series of transport services to be performed over a certain period of time, at a short distance from each other, all concerning the same object, the rules on subcontracting were deemed to be applicable (prevalence theory).

At a later stage, a growing consensus was reached on the existence of an atypical “mixed” contract, encompassing elements of subcontracting and transportation contracts alike. As a result, the provisions on each contract were deemed to be applicable depending on the actual

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the tax periods to which the declarations refer of the income presented in the last three years, total payments to the tax account of not less than 10% with respect to the amount of the declared revenues or fees. In addition, they must be in compliance with the declaratory obligations and must not have role registrations or executive assessments or debit notices entrusted to collection agents relating to IRPEF, IRAP, withholdings and social security contributions for amounts exceeding € 50,000 for which the payment terms have expired and payments are still due or no suspension measures are in place. This does not apply to the sums subject to installment plans for which lapse has not occurred.

linkage between every single element of the contractual relationship and the service to be performed, in accordance with an “intermediate category” approach (*tertium genus*).

At a closer look, the difference between the subcontracting of transportation services and transportation contract consist in the fact that, in the former, a contractor undertakes to fulfill a work or a service for a client against payment, by means of an entrepreneurial organization of its own, for which it bears the business risk. On the other hand, in a transportation contract a carrier undertakes the obligation to transfer persons or goods from one place to another, through its own organization of means and personal activities and with the assumption of the risk for the transport and its technical management.

Distinct from the case examined above is the handling/delivery contract (*contratto di distribuzione*). Its distinctive feature is the existence of a set of activities performed by the carrier in addition to the transportation. Such additional and complementary activities bear the same value as the transportation under the scheme of this contract and form part of the main service, whereas the merely preparatory ones are excluded.

Therefore, the difference between the two schemes stands in the ordinary vs. extraordinary nature of the activities brought into the contract along with the principal obligation.

Mere ordinary activities, such as the accommodation of the shipment on board, the deployment of goods by place of destination, the filling of transport documents, should be brought back to the transportation contract. Vice versa, in the event that extraordinary activities are provided for, such as storage, cataloguing of goods, handling of goods on the warehouse’s premises, promotion, sale, marketing of the transported products, a complex pattern would emerge that can be qualified as subcontracting of transportation services.

The two schemes have several elements in common (organization of means, allocation of risk, responsibility for the direction of the activities) that make the classification of each contractual relationship, and thus the identification of the applicable provisions, particularly problematic. For instance, article 29, paragraph 2, of the Legislative Decree n. 276/03, which mandates the joint and several liability of client and contractor, is applicable in case of a subcontracting, whereas a different regime of joint liability is in force for transportation contracts. In fact, Law n. 190/2014 (article 1, paragraphs 247-248), amending article 83-bis of the Law Decree n. 112/2008, has put in charge of the client a joint and several liability with the carrier and with each sub-carrier for the credits to be paid to the workers under the transportation contract.

In the transportation contract, the client or the carrier that do not check the regular payment of social contributions by the carrier or the sub-carrier remains jointly and severally liable with the carrier, as well as with each of the sub-carriers, for the payment of wages to the workers as well as for the payment of contributions and insurance premiums to the competent bodies, within the limit of one year since the termination of the transportation contract. Such liability shall not exceed the amounts paid for the services received during the execution of the transportation contract.

However, the joint liability regime does not apply to the administrative sanctions, which are charged only on the subject responsible for non-compliance.

The client is jointly and severally liable only in the event of non-compliance with the obligations charged upon him prior to the stipulation of the transportation contract. If such

obligations are duly fulfilled the joint liability regime does not operate, unless the client fails to check the documentation which demonstrates that the carrier and the sub-carriers pay wages and social contributions for their employees on a regular basis. This check must be carried out before the signature of the contract. For this purpose the client can obtain a certificate issued by the social security agencies, showing that the company has complied with its insurance and social security obligations. Such bureaucratic operation will cease to be necessary by the time that access to a specific section of the web portal of the Central Committee for the register of natural and legal persons who carry out the transportation of goods for third parties will be made possible.

Unlike under the regime of article 29, paragraph 2 of the Legislative Decree n. 276/03, in this case the client may also be a government body or another agency of the public administration.

The term for activating this protection is one year from the termination of the transportation contract (and not two years, as in article 29, paragraph 2);

Self-employed and quasi-subordinate workers (*parasubordinati*) are exempted from this form of liability.

There are no procedural provisions that allow for a pre-emptive seizure of the defaulting carrier's assets (the *beneficium excussionis* has also ceased to operate under article 29, paragraph 2).

The Law n. 190/2014 provides that in the absence of a written contract or in the event the client fails to ascertain the subcontractors' compliance, either through a direct access to the web portal of the Central Committee or, pending its activation, through the acquisition of the single tax and wage compliance certificate (*Documento Unico di Regolarità Contributiva - DURC*), he will not only be considered as jointly and severally liable. The client shall also bear the costs incurred by the carrier for the infringement of his tax obligations and for any breach of the traffic laws committed while carrying out the transportation service performed on behalf of the client.

Collective agreements at the sectoral and company (proximity bargaining) levels are prevented from derogating the joint and severe liability rule in transportation services, even for the sole wage-related aspects.

## 6. Outsourcing.

Special attention should be paid to the contract of outsourcing regulated by law no. 192/1998 which may regard either a manufacturing process or a product.

In the former case an entrepreneur (subcontractor) commits himself on behalf of the client/user company to carry out work using semi-finished products or raw materials supplied by the client.

Contrary, in the latter case of product outsourcing, the subcontractor undertakes to provide products or services intended to be incorporated or used in the client's activity, in accordance with executive projects, technical and technological knowledge, models and prototypes, provided by the client company ("technical specifications").

The outsourcing contract, therefore, presupposes relationships characterized by the design and technical subalternity of the outsourcer and therefore a technological subjection with respect to the client, which takes the form of transferring to the latter of so-called *know-how* intended as the entire knowledge on how to produce a certain good or service.

Two theories have been advanced in relation to the qualification of the outsourcing contract.

According to a first theory, it would not be possible to qualify outsourcing under the law no. 192/1998 as a different and alien contractual type compared to the subcontracting contracts (or sales or temporary work supply/ staff leasing), opting for the existence of a relationship of *species a genus*, in the sense that outsourcing constitutes a "subtype", if not equivalent, of the subcontracting, or a general protection scheme which may include multiple negotiating figures including the subcontract.

According to the other theory, the outsourcing contract, under the law no. 192/1998, would represent an autonomous and distinct contractual type if compared to the subcontracting due to specific substantial differences which must be identified, as regards the former, in direct and integral control over the execution of the works by the client (technological dependence) in relation to the transfer of *know-how* or all the knowledge necessary for the production of a specific good or service; this is contrary to what happens in the subcontracting which essential and characterizing element is the executive and managerial autonomy of the subcontractor by virtue of a contractual obligation of the supply of the final result which implies the only downstream client's control over the execution of the work or service.

### **6.1. Joint and several liability in case of outsourcing.**

The qualification issue is very important as it determines the kind of protection applied the workers employed under outsourcing contract. If the latter is considered to be an independent contract respect to the subcontracting, pursuant to art. 29, paragraph 2, the principle of joint and several liability could not be applied.

The Constitutional Court intervened on this issue with the interpretative rejection sentence no. 254/2017, following a referral judgment and a question of constitutional legitimacy raised by the Venice Court of Appeal (ord. of 13 July 2016) on art. 29, paragraph 2, Legislative Decree no. 276/2003, providing joint and several liability only for the case of the subcontracting, but not for similar contracts (in the specific case of outsourcing referred to in Law 192/1998), hoping for its extensive application in favor of workers different from the subcontractor's employees, but who may be qualified as indirect workers.

The Constitutional Court has excluded an unconstitutional nature of the joint and several liability provision reasoning that since its purpose is to prevent that decentralization and dissociation between the holder of the employment contract and the user of the service would damage the workers involved in the contract execution, the effects of the provision could be extended also to the outsourcing not only because of the assimilation of this contract to subcontracting, but also by virtue of the art. 3 of the Constitution, and thus the worker's protection must be extended to all levels of decentralization.



This "constitutionally oriented" reading was followed by the administrative practice which a few years earlier supported the extension of joint and several liability also for the cases outsourcing where forms of direct and integral control over the execution of the works by the client were manifested<sup>36</sup>, assuming the existence of joint and several liability also in the relations between the subcontracting consortium and the associated consortium companies, in order to ensure substantive guarantee of the joint and several liability regime in spite of the formally attributed to the legal transaction name<sup>37</sup>.

Therefore, administrative practice, referring to the clarification provided by the Constitutional Court, considers that, unless there is a specific discipline, as in the case of the transport or temporary agency work supply contract, joint and several liability should be applied in all the cases of decentralization, including workers posting pursuant to art. 30 of the Legislative Decree no. 276/2003<sup>38</sup>.

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<sup>36</sup> See Circ. INL n. 6/2018, and the Labour Ministry note no. 5508/2012.

<sup>37</sup> See Interpello Min. lav. no. 2/2012.

<sup>38</sup> See Circ. INL n. 6/2018 in this sense, even before Constitutional Court intervention, Carinci M.T., *Processi di ricomposizione e di scomposizione dell'organizzazione: verso un datore di lavoro "à la carte"?*, in *Giornale di Diritto del Lavoro e delle Relazioni Industriali*, 2016, 733 ff., 739, n. (17).