Employment Contract: Disputes on Definition in the Changing Italian Labour Law

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I. The Scope of Labour Law

Starting from the fact that legislative provisions and prevailing case law allow for any working activity to be carried out either as subordinate (i.e. salaried) employment or as self-employment, labour law provisions strictly speaking – the part of the legal system regulating the rights and obligations of the individual worker *vis-à-vis* the employer – are applied only in cases in which the working activity is characterised by the juridical element of "subordination," reflecting the fact that the worker is subject to the management and control of the employer with regard to the way in which the work is carried out.

The legislative provision for the identification of "subordinate" labour is Article 2094 of the Civil Code, which specifies that "a subordinate worker is one who agrees to collaborate with an enterprise for remuneration, carrying out intellectual or manual labour in the employment of and under the direction of the entrepreneur."

This Civil Code definition of subordinate labour, laying down a formulation that is extremely vague with regard to the numerous possible forms of employment contract, leaves a considerable margin of discretion for the courts to provide a clear definition of employment relations.

As a result, the classification of work as subordinate or self-employment is a problematic issue that is however fundamental for identifying the body of law to be applied in specific cases.

It should also be noted that the dividing line between the two types of contract (subordinate or self-employment) is not clear but represents a vast area of uncertainty (known as the 'grey area'): as a result in many cases it is extremely difficult to establish the exact nature of the employment relationship, and therefore of the applicable legal provisions.

Moreover, in recent years the concept of subordinate employment as defined in traditional legal provisions and case law has undergone profound changes.

These changes reflect changes in the Ford-Taylor model of production that have been taking place over the past 30 years, together with the progressive and unstoppable expansion of the tertiary sector, and more recently the advanced tertiary sector, that has made a major contribution to the considerable expansion of the grey area between subordinate employment and self-employment.

Legal scholars have increasingly made contributions aimed at providing materials and proposals for intervention by the legislator in relation to the fundamental categories of employment.

In this connection a proposal has been made to overcome the problem of how to classify employment contracts by removing the general and abstract definition of subordinate labour. The proposal aims to safeguard labour rights in a pragmatic manner, identifying the field of application of protective measures for the employee in various cases.

In particular, based on the view that the traditional legislative approach with its marked distinction between subordinated and self-employment is outdated, it is proposed to identify a set of fundamental rights for every worker, to be safeguarded both at individual and collective level. Alongside this bedrock of fundamental and inalienable rights, providing the basis for a modern Statute of Labour, there could be a series of additional variable rights, reflecting the degree of economic dependence of the employee. With regard to these additional rights, a

further option is the definition of a series of semi-negotiable rights to be determined by collective bargaining.

In this connection it is important to note that the recognition of these fundamental rights for all workers engaged in productive activities for third parties (employers, entrepreneurs, public bodies, clients and so on) does not respond solely to the need to safeguard the contractual position and person of the worker, based on considerations of social justice. Rather, the recognition of minimum levels of rights for all workers, today more than ever before, also safeguards fair competition between economic operators, combating 'social dumping' practices (that may take various forms, such as black-market labour, the exploitation of under-age labour, and so on).

In this way legal rights can be developed in keeping with the aims of labour law. In contrast with the traditional protection of subordinate or salaried employees, defined in an abstract manner by the law, this approach is a step towards safeguarding labour in all forms.

II. The Notion of Employee

It has already been noted that the notion of employee is laid down by Article 2094 of the Civil Code, which specifies that "a subordinate worker is one who agrees to collaborate with an enterprise for remuneration, carrying out intellectual or manual labour in the employment of and under the direction of the entrepreneur."

At the same time Article 2222 of the Civil Code defines the self-employed worker as a person "who agrees to carry out work or services for remuneration, mainly by means of his own labour and without a relationship of subordination in relation to the client." Self-employed work is therefore characterised essentially by the fact that it is carried out without a relationship of subordination.

However, the two different forms of work, subordinate labour and self-employment, do share certain characteristics. First of all there is a requirement for there to be **remuneration** for the work carried out in both employment types. The activity provided in the contract may be identical, based on the supposition that every kind of labour for which payment is calculated, whether intellectual or manual, may take the form either of self-employment or of subordinate employment. Therefore, as confirmed by recent case law, for the purposes of the distinction between subordinate and self-employment, the essential factor is not the type of work to be carried out but **the way in which it is carried out**.

With regard to collaboration, this simply means cooperation with the other party, in accordance with the normal parameters of diligence required by the nature of the obligation laid down in the contract, for the purposes of meeting the needs of the party making payment. As a result collaboration does not have any bearing on the classification of a particular activity.

In practice, case law has identified a series of characteristic features of subordinate labour, with reference to certain circumstances that take on a particular significance in terms of the classification of subordinate labour in specific cases. These circumstances are normally referred to with the term "indicators of subordinate employment," an open list that is liable to change in relation to changes in the processes of production.

Among the various indicators provided by case law, mention should be made of the following:

- the **technical and functional integration** of the worker into the productive and organisational structure of the entrepreneur, that is the characteristic situation in which the subordinate worker is placed, whereas this is not true of the self-employed worker who makes use of his own organisational resources;
- the exercise of **managerial and disciplinary powers**, that is to be found, strictly speaking, only in subordinate employment. With regard in particular to disciplinary powers, they must be of a structural nature, presupposing a position of supremacy by one party to the employment contract over the other; they are therefore to be distinguished from the sanctions that may be applied in the case of self-employed labour, such as penalty clauses, provisions relating to non-compliance, termination of the contract for

non-compliance, and so on;

- the **commercial risk** relating to the productive activity specified in the contract. In fact, whereas the self-employed worker bears the risk relating to non-completion of the work to be carried out under contract, the subordinate worker is subject to obligations relating to the work itself rather than the final result, and the proper execution of the work depends on the degree of diligence observed;
- ownership of the **raw materials, equipment and tools**. The raw materials, equipment and tools utilised usually belong to the enterprise in the case of subordinate labour and to the worker in the case of self-employment;
- the **premises** where the work is carried out. Subordinate or salaried workers normally work on premises made available by the employer, whereas self-employed workers operate on their own premises;
- **working hours**. Subordinate employees are usually required to comply with working hours laid down by the employer, whereas self-employed workers are free to decide when the work is to be carried out;
- the form of **payment**. Remuneration tends to be fixed and paid at regular intervals for subordinate workers, whereas it is variable and depends on the results achieved and the deadlines laid down for completion of work in the case of self-employed workers.

III. Disputes on Definition

The problem of the exact classification of types of labour arises above all in cases on the border line or grey area between self-employment and subordinate employment. Classification continually gives rise to a considerable amount of litigation.

The number of cases is so extensive that it would be impossible to give an adequate account here. By way of example, however, mention should be made of certain types of employment contract that most often give rise to disputes and legal action about classification: motorcycle messengers who pick up and distribute mail in urban areas, meter readers, tax collectors, consultants, door-to-door vendors, sales representatives and business agents, freelance newspaper reporters, medical and scientific representatives, holiday club entertainment staff, part-time university language tutors, telephonists, hotline staff, nightclub dancers and television horoscope readers. The vast range of cases found in case law reports shows that the greatest problems in the classification of the employment relationship are related above all to new professional roles or those that cannot easily be fitted into organisational models and the division of labour of the traditional enterprise.

On the basis of the principle of *iura novit curia*, only the courts are competent to classify a contract as subordinate or self-employment. As a result the description or *nomen iuris* given by the parties during the negotiation of the contract is not decisive. However, mention should be made of a significant change in the orientation of case law, that has moved from largely disregarding the *nomen iuris* adopted by the parties, towards greater attention for their stated intentions, and the most recent tendency is to legitimate the *nomen iuris*, unless sufficient evidence is produced to nullify it.

However, the *nomen iuris* adopted by the parties is superseded by any agreement implemented after the signing of the contract. Therefore in clarifying the nature of the employment contract, the courts tend in any case to assess the way the contract has been implemented in practical terms, since changes may have modified the nature of the original agreements.

IV How to Avoid the Problem of Definition

With a view to reducing the amount of litigation arising from the classification of employment contracts, the Italian legislator, with the Biagi Law in 2003 (Legislative Decree no. 276/2003), introduced procedures for the “certification” of employment contracts. These procedures are intended to ascertain whether the intentions of the parties regarding the classification of the employment contract comply with the legal provisions. First of all the new

law assigns certification powers to bodies possessing a sufficient degree of competence and authority, namely:

a) bilateral or joint bodies consisting of workers' and employers' representatives;

b) provincial labour offices and the provincial authorities;

c) public and private universities, including University Foundations, registered for this purpose.

These certifying bodies carry out consultancy functions and actively assist the contracting parties. During the initial phase in which the terms and conditions of employment are laid down, an assessment is carried out of the rights to be negotiated, providing useful information about the most suitable and most appropriate contractual arrangements in legal terms for the type of work specified in the employment contract. In particular, the certification of the employment contract helps to redress the more limited access to information on the part of the employee.

The certification procedure for employment contracts is voluntary and must lead to a written agreement between the parties to the employment contract.

With reference to the judicial applicability and reliability of certification, provision is made for the effects of the procedure to stand, also *vis-à-vis* third parties, until a definitive ruling is handed down by the courts in cases initiated by either of the parties or by a third party (such as social insurance and social security bodies, or the Ministry of Finance) in relation to which the certification is to have some effect.

It is in fact possible for either of the parties to impugn the certification before the courts, by presenting a claim for the reclassification of the employment contract arising from a discrepancy between the certified employment contract and its implementation.

The certification procedure represents a significant innovation in the Italian system, and should have the effect of reducing the vast amount of litigation relating to employment contract classification. Clearly, however, the effectiveness of this measure can only be properly assessed when it has been in operation for a considerable period.

V. The Protection of Self-Employed Workers

The category of self-employment should be taken to include those employment relations known as quasi-subordinate, that is to say collaboration of a continuous and coordinated kind, mainly concerned with personal services though not of a subordinated nature.

These employment relations, though classified as self-employment, are characterised by elements, such as coordination with the client's organisation and continuity of employment over time, that to a significant extend bring them close to being subordinate or salaried employment. Above all in recent years quasi-subordinate contracts have undergone a huge expansion, in many cases for the purposes of avoiding the employer's responsibilities in relation to what should be salaried workers. Since these positions are classified as self-employment, quasi-subordinate workers are not subject to the main provisions of labour law.

This has given rise to a debate in the field of labour law aimed at introducing substantial safeguards also for quasi-subordinate workers, reflecting the finding reported by numerous empirical research projects that some 90 per cent of the two and a half million quasi-subordinate workers actually work for just one "client," and of these some 66% carry out their work on the client's premises, often with working hours and conditions that are no different to those of company employees working alongside them.

The recent pension reform law provided for the extension to these workers of obligatory general insurance contributions for invalidity, retirement and survivors' benefits, as well as health insurance and industrial injury insurance.

With the Biagi Reform of 2003, the legislator drew a clear line between subordinate and quasi-subordinate work, providing particular forms of protection for the latter category.

The choice made by the legislator was not to extend the protection afforded to subordinate workers also to quasi-subordinate workers, but on the one hand to bring continuous and coordinated contracts back into a sphere of autonomy from the employer/client, and on the other hand to make specific provision for taking into account the imbalance of contractual power

between the employer and the employee.

As a result, quasi-subordinate employment contracts can now be stipulated only for the purposes of a specific project, programme or phase of production. For this reason the old continuous and coordinated collaboration contracts have now been replaced by "project work."

The project work employment contract must clearly specify the remuneration. The amount paid to project workers must be proportionate to the quantity and quality of the work performed, and must take account of the rates normally paid to self-employed workers in the areas where the work is carried out.

Project workers are protected by health and safety at work provisions, when the work is carried out on the employer's premises, as well as provisions relating to industrial accidents and occupational diseases.

For project workers pregnancy, illness and injury do not lead to the termination of the contract, which is suspended in a similar way to that of subordinate or salaried workers, though no remuneration is paid for leave for these reasons. Project workers also have the right to recognition as the inventors of any new products developed in the course of their contracts.

The collaboration comes to an end upon conclusion of the project for which the contract was signed. Termination of the contract prior to its expiry is possible only in the presence of a justified reason or on the basis of the procedures, including the giving of notice, established between the parties in the individual employment contract.

VI. The Notion of Employee in Social Security Law and Tax Law

With regard to social security and tax law, the concept of subordinate employment is broader than that of labour law. Indeed, on the basis of the "Tax Annex" of the Budget legislation for 2000 (Article 34, Act no. 342, 21 November 2000), income from continuous and coordinated collaboration contracts (so-called quasi-subordinate employment) is treated as equivalent to income from salaried employment.

This assimilation of the two kinds of income, by express legislative provision, is valid only for tax purposes. The placing of income from quasi-subordinate work in the same category as salaried work (Article 47, Act no. 917/1986) does not have, and could not have, any effect on the classification of the employment relations under examination with regard to the application of labour law. From this point of view, the presence of a tax classification for this type of employment (that of Article 34(1), Act no. 342/2000) that is partially incongruent with the labour law classification does not give rise to any particular problems of interpretation, since the two sets of laws were enacted for different purposes. It must therefore be noted that whereas the tax provisions assimilate these two employment types, labour law continues to treat them as separate entities.

With regard to the concept of subordinate employment in social insurance legislation, it should be noted that European Union law adopts a broader concept than the one found in the Italian system. In fact, in EU law, due to the effect of the case law of the European Court of Justice, and EC Regulation 1408/1971, for social insurance purposes subordinate and assimilated workers are those covered by compulsory or optional insurance in a Member State, as long as this insurance is linked to a social security system set up for the benefit of subordinate workers, or to which the individual concerned is obliged to make contributions in his or her capacity as a subordinate worker.

In the Italian social security system, on the other hand, the concept of subordinate worker coincides with that adopted in labour law, though insurance and social security provisions are extended in certain cases also to self-employed and to unemployed workers.

VII. Protection for People Working for Non-Profit Organisations

The expansion and the increasing social importance of the voluntary sector, that is to say of unpaid employment for non-profit organisations, has led the legislator to lay down a minimum framework of legal protection to safeguard the social value and work function of voluntary work.

Voluntary work is considered to be any activity carried out for the purposes of solidarity in a spontaneous, personal and unpaid capacity, through an organisation that operates on a non-profit basis. In this sense, the activity identified by the law excludes any activity for which remuneration is paid, as well as any position of subordination of a hierarchical or functional nature in relation to the organisation concerned.

The voluntary work framework legislation (Act no. 266, 11 August 1991) introduced significant tax concessions and economic incentives of various kinds in favour of voluntary work where the work is carried out for a voluntary organisation recognised at a regional level. Moreover, the legislator also provided for supplementary pension and supplementary health insurance funds to be set up under the regulations of non-profit organisations.