Who is an Employer?*

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1. Introduction

The question "*Who is an Employer?*" is usually neglected in labor and employment law. On the contrary, the question "*Who is an Employee?*" and the problematic distinction between employees and independent contractors can be regarded as a cornerstone of labor and employment law.

However, in the last decades, the profound transformations economic organizations have been experiencing have led lawyers to face to new problems related to the "employing entity".[402] As a consequence, the concept of employer has played an increasing dominant role either on a theoretical or on a practical level.

The meaning of the concept of employer can be different among different contexts. The answer to the question "*Who is an employer?*" particularly varies according to the different scopes of statutory protections.

In a collective labor law perspective, for instance, the problem of who is the employer deals with the scope of collective bargaining and the definition of bargaining unit, thereby involving issues such as the boundaries of the economic activity, the business sector where the firm operates and the effective control of the firm on entrepreneurial strategies.

In employment law, the question "*Who is the Employer?*" affects the distribution of employer liabilities and obligations such as the duty to pay wages, the breach of minimum labor standards (e.g. health and safety protection), the prohibition of discrimination.

Furthermore, the concept of employer needs to be discussed also in a diachronic perspective. The employer is not a "static entity", but rather an entity that can experience a number of transformations through mergers, acquisitions, outsourcing or insourcing strategies.

The problem of defining who is an employer involves crucial economic issues, such as financial reliability of the firm, economic independency of businesses, boundaries of the firm, entrepreneurial strategies, national and international investments. Being employed by one firm or the other can make a significant difference for the status and the perspectives of the employee.

Moreover, by observing labor and employment law through the lens of the employer, several crucial issues concerning the role of labor and employment regulation arise, such as competitiveness, freedom of contract, productivity. The question "*Who is the employer?*" then leads to other questions; which is the role of labor and employment law with respect to economic development or whether employer's competitiveness should be a concern for labor lawyers.

The global perspective has further complicated the debate on the employer issue. Among different factors leading to firms' restructuring, delocalization has played an increasing dominant role in recent years. Firms are more and more organized in transnational structures, and employment seems to be a factor of production which is subject to contingent changes and replacement.

However, as the governments of Nations and even firms are under global economic pressure, national labor laws can hardly keep up with economic transformation. Besides, through the corporate structuring of how it will acquire and deploy its human resources "law shopping" and the

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[402] The concept of "employing entity" has been used by MARK FREEDLAND, *The Personal Employment Contract*, Oxford University Press, 2003, at 26 ff.

avoidance of national laws become a legal possibility for firms. For these reasons, nowadays, the issue "*who is the employer?*" plays a pivotal role.

The employer issue is usefully explored through the lenses of two legal doctrine: the single-employer model, which has played an important role in the Continental Europe for several decades, and the plural-employer one, mainly reflected in the common law. Indeed, most of regulatory techniques used by different countries can be connected to one or the other of these.

This chapter is focused on both the single and the plural-employer model. The aim is to demonstrate and describe the main characters of these two models, highlighting their divergences and convergences.

The first part (sections II-III) examines the single and the plural-employer models by analysing their historical roots and rationales. The second part (sec. IV) considers the convergence of the two models by taking into account the two cases of subcontracting and the grouping of companies. The conclusion is to observe a general global trend toward a plural employer model. In the final section, we suggest that legal systems are evolving from the traditional connection of the employment relationship to the fordist firm and its owner toward the connection of the employment relationship with network of economic organizations.

2. The Single Employer Model

The idea of the employer as a "single indivisible entity" is commonly accepted in Europe and in the US.[403] This idea appears to be rooted both in the economic phenomenon of the vertical fordist firm and in the legal development of the bilateral employment contract of the days of master and servant.

After the advent of the vertical employment firm, in several legal systems the boundaries of the legal concept of employer have been drawn as to coincide with the boundaries of the economic organization within which the work is performed.[404] Insofar as the fordist vertical firm consisted of expensive material infrastructures and other means of production, it represented the ideal "virtual place" for the allocation of employment costs and liabilities. The owner of the firm was then regarded as the most reliable employer, capable to bear and to fulfill employment costs and

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[403] *See*, among others, SIMON DEAKIN, *The Complexities of the Employing Enterprise*, in GUY DAVIDOV, BRIAN LAGILLE (eds.), *Boundaries and Frontiers of Labour Law*, Hart Publishing, Oxford and Portland Oregon, 2006, at 275.

[404] *See* for the UK perspective, HUGH COLLINS, *Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration*, in *Modern Law Review*, 1990, vol. 53, no. 6, 731 ff.; for the French perspective, ISABELLE VACARIE, *L'Employeur*, Sirey, 1979; FRANÇOIS GAUDU, *Entre concentration économique et externalisation: les nouvelles frontiers de l'entreprise*, *Droit Social*, 2001, no. 5, 471 ff.; MARIE-LAURE MORIN, *Le frontiers de l'etreprise et la responsabilité de l'emploi*, in *ibid.*, 478 where the A. observes that the employer and the firm are the two sides of the same coin; for the Spanish perspective, *see*, more recently, MARIA FERNANDA FERNÁNDEZ LÓPEZ (ed. by), *Empresario, contrato de trabajo y cooperación entre empresas*, Editorial Trotta, Madrid, 2004; for the Italian perspective, *see* PIETRO ICHINO, *Il diritto del lavoro e i confini dell'impresa*, in *Diritto del lavoro e nuove forme di decentramento produttivo*, Atti delle giornate di studio A.i.d.la.s.s., Trento 4-5 giugno 1999, Giuffrè, Milano, 2000.

liabilities. In the US, the Supreme Court held that, for the purpose of national wage and hour law, the employer is "the person or group of person who own and manage the enterprise".[405]

It is worth noting that it is not the identity of the employer/entrepreneur that matters, but rather the link of the employee to the impersonal employing entity.[406] The so-called principle of the "de-personalization of the employment relation" particularly emerges in the transfer of undertaking regulation: the changes in the employer's identity do not affect the continuity of the employment contract strictly linked to the employing entity.[407]

As a consequence, it is not surprising that one of the main tests used to identify the employer is the ownership of the firm, together with the exercise of the entrepreneurial powers of control, direction and coordination over the working activity. As Ronald Coase suggested in 1937, relying on Francis Batt's *The Law of the Master and Servant*, the "fact of direction" is the essence of the economic concept of firm as well as the essence of both legal and economic concepts of employer and employee.[408]

Particularly in the Continental European legal systems the following general principle obtains: if the legal entity that exercises the entrepreneurial power of control and direction over the working activity is different from the legal entity that is formally part of the employment contract, then it is the former and not the latter that must be regarded as the employer for the scope of the employment protection.

On the one hand, this principle is rooted in the rules governing contract interpretation based on the idea that substance prevails over the form, whereas in common law countries form usually prevails over substance.[409] On the other hand, in Continental European legal systems the prohibition of separation between the formal employer, who bears the employment risks and liabilities, and the employer who effectively owns the firm and exercises control and direction over the working activities, derives from the traditional hostility toward any form of labor intermediation (*merchandeur*, *meister*, *caporale*) whereas "a general acceptance of this phenomenon took place in the United Kingdom".[410]

This hostility is clearly stated by Article 43 of the Spanish *Estatuto de los Trabajadores* (Statute of Workers) which prohibits any labor intermediary, except for that provided through state licensed

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[405] *See Clackamas Gastroenterology Assoc. v. Wells*, 538US440, 450 [2003], quoted by MITCHELL H. RUBINSTEIN, *Employees, Employers and Quasi-Employers: an Analysis of Employees and Employers Who Operate in the Borderland Between Employer and Employee Relationship*, in *U. of Pennsylvania Journal of Business Law*, 14 (2012) at 633.

[406] *See*, among others, MIGUEL RODRIGUEZ PIÑERO Y BRAVO-FERRER, Decentralización productiva y sucesión de empresas, in MARIA FERNANDA FERNÁNDEZ LÓPEZ (ed.), *Empresario, contrato de trabajo y cooperación entre empresas*, Editorial Trotta, Madrid, 2004, 211 ff.

[407] The transfer of undertaking European Directive no. 2001/23/EC is a forceful instance of this approach. The at-will employment rule in the United States renders the delegation of the employment contract a non-issue; but, whether an employee with a contract of fixed duration can be delegated – or her contract "assigned" to – the acquiring entity has received rather little legal attention. 1 Spector & Finkin, INDIVIDUAL EMPLOYMENT LAW & LITIGATION § 3.12 (1989).

[408] *See* RONALD COASE, *The Nature of the Firm*, *Economica*, 1937, Vol. 4, no. 16, at 403 ff.

[409] K.W. WEDDERBURN LORD OF CHARLETON, *The Worker and the Law*, Penguin Books, Harmondsworth, 1971, at 58. However, for a new trend in the UK *see Protectacoat Firthglow Ltd v. Szilagyi* [2009] IRLR 365 (CA).

[410] *See* LUCA RATTI, *Agency Work and the Idea of Dual Employership: a Comparative Perspective*, in *Comp. Labor Law & Pol'y J.*, 2009, at 835.

agencies (intermediaries). According to Article 43, there is an illicit form of labor supply whenever the object of the contract is a mere labor supply and/or the supplier is not accredited by the State, is not the owner of a firm and of the means of production and does not exercise any "entrepreneurial power". In this case, the "supplied" worker can be held to be the employee of the end-user. Broadly speaking, the labor supply is illegal if the provider is neither a state accredited agency nor a genuine entrepreneur/subcontractor. In turn, the *subcontratación* (or contract for provision of services) represents a licit form of outsourcing (Article 42 ET) that turns out to be illegal whenever the subcontractor (the service provider) appears to be neither a "genuine" entrepreneur nor a "real" employer and, at the same time, is not a licensed intermediary agency (Article 43 ET).[411]

Similarly, in Italy, labor supply can take place only through state accredited intermediaries. Agency work (*somministrazione di lavoro*), on the one hand, and contract for provision of services (*contratto di appalto*), on the other, represent the two sides of the licit outsourcing (Articles 21-29 of the legislative decree no. 276/2003, the so-called "Biagi reform"). According to Article 29, there is a prohibited form of labor supply or labor outsourcing whenever the service provider (the formal employer) is not a state accredited intermediary agency (Article 21 ff.) nor the owner of a genuine and real business organization. This has to be ascertained (particularly in knowledge intensive sectors) by taking into consideration factors such as the absence of both a real control and direction over the employees and the entrepreneurial risks.[412]

In France, the so-called *fourniture de main d'œvre à but non lucratif* (Article L. 8241-1, Article L. 1253-1 ff., Code du Travail) and the *travail temporaire* (Article L. 1251-1 ff., Article L. 8241-1 Code du Travail), two forms of labor supply, are admitted only within strict limits, as exceptions to the general prohibition of separation between the formal employer, who bears employment risks and liabilities, and the substantial employer (user) who effectively directs and controls the working activities. As in Italy and Spain, the boundary between licit and illicit outsourcing coincides with the boundary between the (licit) contract for provision of services (*contrat de soustraitance*) and the (illicit) *fourniture de main d'œvre lucratif* (labor supply) that falls outside of the strict boundaries of the *fourniture de main d'œvre non lucratif* (non profit labour supply) and *travail temporaire* (agency work).[413] Mainly, the *sous-traitance* is "genuine" whenever the subcontractor carries out a specific task by relying on its own business organization and workforce, bearing the risks and the responsibilities and exercising the employer's powers of control and direction.[414] If this is not the case, then the *soustraitance* turns out to be a mere form of labor supply for profit that is classified in terms of *délit de marchandage de main d'oeuvre*, a criminal offence. Exceptions are allowed only in case the subcontractor is an accredited intermediary (an *entreprise de travail temporaire*) or the economic operation as a whole is a non-profit form of labor supply (particularly admitted in the case of "*Goupement d'employeurs*").

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411 *See* MIGUEL RODRIGUEZ PIÑERO-ROYO, *Temporary Work and Employment Agencies in Spain*, in *Comp. Lab. Law and Pol'y J.*, 23(2001), 129.

412 For a detailed recent description of the Italian legal framework, *see*, in English language, LUCA RATTI, quoted above nt. 10; MARIA TERESA CARINCI, *Agency Work in Italy. Working Paper "Massimo D'Antona". Int.*, 2011.

413 *See* recently Cass. Soc., June 21, 2011, no. 10-14.362.

414 *See* JEAN PELISSIER, GILLES AUZERO, EMMANUEL DOCKES, *Droit du travail*, Dalloz, 2013, at 314.

Finally, in Germany, according to the first section of the *Arbeitnehmerüberlassungsgesetz* – AÜG of August 7, 1972 - labor intermediation is permitted only by licensed employment agencies (*Verleiher*); otherwise the worker is classified as an employee of the end-user.[415] In the meantime, German judges, like other Continental European judges, generally hold that the employment costs and responsibilities must remain with the one who exercises entrepreneurial powers of control and direction (doctrine of *Mittelbares Arbeitsverhältnis*).[416]

Consequently, the question emerges of whether the entrepreneurial powers of control and direction can be exercised by two or more distinct employing entities? The doctrine of the employer as a "single indivisible entity" clearly rejects this idea. The traditional link between the atomistic vertical fordist firm and the legal concepts of employer and employee has rendered it difficult to accept the idea that the entrepreneurial powers of control and direction could lie outside the boundaries of a discrete legal entity.[417]

The idea of the employer as a "single indivisible entity" is traditionally well established also in the British legal system. Notwithstanding, this perspective does not appear to be related to "hostility" toward any form of labor intermediation, which is largely accepted in the UK. It rather seems to come from the master and servant doctrine, *i.e.* to be rooted in the antecedent law of domestic service, of the analogy between the "master" – a male human employer – and the modern corporate "employer".[418] After the abandonment of the master and servant perspective,[419] the employment's characterization in terms of personal and bilateral contract has continued to support the identification of the employer as a single individual employing entity.[420]

In this context, the "mutuality of obligation test", according to which the finding in favor of an employment contract requires the existence of an exchange between the employer's contractual duty to continuously provide the work and the employee's duty to work when requested, has played an important role but has led to contradictory results.[421] For instance, under the mutuality of obligation test, agency workers, involved in a triangular relationship, can be found to have a contract of employment with neither the agency nor with the end-user.[422] This clearly shows the

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[415] *See* MANFRED WEISS, *Labour Law and Industrial Relations in Germany*, Wolters Kluwer, 2008, 64 ff.

[416] *See* LUCA NOGLER, *The concept of "subordination" in European and Comparative Law*, University of Trento, 2009, 60 ff.

[417] *See* the Italian decision of Cass., S.U., No. 22910/2006.

[418] *See* SIMON DEAKIN, *The Complexities of the Employing Enterprise*, quoted above nt. 3, at 274 ff. The A. observes that this metaphor is so powerful that "*the employer is still usually designated as 'he' in legislation and in case law, although that attribution of single male human personality is usually as fictitious as is John Doe, the non-existent actor in common law litigation*"; *see* also JUDY FUGE, *The Legal Boundaries of the Employer, Precarious Workers, and Labour Protection*, in *ibid.*, at 298 ff.; MARK FREEDLAND, NICOLA KOUNTOURIS, *The Legal Construction of Personal Work Relations*, Oxford Univerisity Press, 2011, at 162 ff.

[419] *See*, with regard to this evolution, SIMON DEAKIN, FRANK WILKINSON, *The Law of the Labour Market. Industrialization, Employment and Legal Evolution*, Oxford University Press, 2005, chap. 2.

[420] SIMON DEAKIN, *The Changing Concept of the Employer in* Labour *Law*, in *Ind. L.J.*, 2001, vol. 30, no. 1, 72 ff. who stresses to need to go beyond a mere contractual analysis to identify who is the employer.

[421] *See* MICHAEL WYNN, PATRICIA LEIGHTON, *Will the Real Employer Please Stand Up? Agencies, Client Companies and The Employment Status of Temporary Agency Worker,* in *Ind. L. J.*, 2006, vol. 35, 301 ff.

[422] *See*, for instance, *Montgomery v. Johnson Underwood* [2001] I.R.L.R. 264, analyzed by LUCA RATTI, quoted above nt. 10, at 851.

problems posed by the individual and bilateral construction of the contract of employment in situations where the employment is organized between employing entities.[423]

At the same time, this explains why the idea of dual employership can be founded not on contract law, but rather on the tort law of vicarious liability governed by the *respondeat superior* rule. In *Viasystem (Tyneside) Ltd v Thermal Transfer (Northern) Ltd,*[424] the Court of Appeal, relying on the "borrowed servant" rule[425], observed that "*it is strange that the courts have never countenanced what might be an obvious solution in some cases, namely holding both the general and the temporary employer vicariously liable for an employee's negligence*".[426] It would appear that in British tort law, a dual vicarious liability is a legal possibility when the right to control the working activity is shared by two legal entities. Moreover, insofar as it is possible and conceivable that the right to control is shared by two or more legal entities, dual vicarious liability must be a legal possibility. As we will see, this insight plays an interesting role today even in Continental Europe, in the context of group of companies.

3. The Plural-Employer Model

As opposed to the single-employer model, some common law countries have developed a different approach to the regulation of employer's responsibilities. We may refer to this approach in term of a "plural-employer model". A leading example of this conception can be found in the United States which countenances a "joint employment" relationship. This allows judges to consider as the employer two or more firms that share or co-determine those matters governing the essential terms and condition of employment.

The joint employment doctrine is rooted, firstly, in the common-law. It allows judges to determine that more than one employing entity must be recognized as jointly liable toward the employee by applying one of four tests to each of the entities: the common law right-of-control test, the economic reality test, the interference test, and the hybrid tests. (The common law right-of-control test can be defined by the agency principles focused on the right to control the manner and method in which work is performed.) The economic realities test which takes into account the totality of the economic circumstances of the employment. The interference test which examines the company's ability to interfere with or to affect access to employment opportunities of workers. And a hybrid test that combines elements of both the right-to-control and the economic realities tests.[427] It is worth noting that, as observed by a number of scholars, the tests used to identify the employer or the joint-employers significantly converge with the tests used to identify who is an employee.[428]

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[423] *See* MARK FREEDLAND, *The Personal Employment Contract*, Oxford University Press, 2003, at 40 ff.

[424] *Viasystem (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] IRLR 983. *See* also *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH* [2008] EWCA Civ 1257; [2009] B.L.R. 1; 122 Con. L.R. 1; [2009] P.N.L.R. 12; (2008) 152(45) S.J.L.B. 25.

[425] *See* P.S. ATIYAH, *Vicarious Liability in the Law of Torts*, Butterworths, 1967, chap. 3.

[426] Para. 12.

[427] Vernon v. State, 116 Cal. App. 4th 114, 125 n.7 (2004).

[428] *See* Simon Deakin, above nt. 3.

Whether two or more entities are joint employers depends on the purpose for which the question is asked. In the U.S. the answer to the question "Who is the employer?" largely depends either on the scope of the particular statute under which the question is raised. This is consistent with the so-called "targeted approach" to the problem of defining either who is the employee or who is the employer.[429] If a joint-employment relationship is found to exist, both employers are jointly liable with respect to minimum wages and overtime pay under the Federal Labor Standard Act[430], or for adherence to the Occupational Safety and Health Act[431], the Family and Medical Leave Act[432], and non-discrimination laws.[433]

The National Labor Relations Board (NLRB) has used a similar approach in finding indicia of a joint management of the firm. When both employers co-determine working condition, meaningfully affecting matters relating to the employment relationship, such as hiring, firing, discipline, supervision and direction, they are defined as joint-employers for the purpose of collective bargaining.[434]

There is a related but more complicated question under U.S. law involving the employment of agency workers. One has to understand the law of union representation of employees who work for separate employers in a common service or industry. In that case, a union may wish to bargain with all those employers together. Such multi-employer bargaining can be agreed to by the employers, but it cannot be imposed by the Labor Board. When employees who work for an agency are seconded to a variety of employers – janitorial staff assigned by an agency to work for a number of buildings each operated by a separate company or nurses assigned by an agency to work for a variety of hospitals – each separate group of employees can be in a joint employment relationship with the agency and each of these employers. Consequently, they cannot require the agency to bargain with them as a whole as each joint employer would have to consent; nor could they bargain separately with their joint employers as part of these employers' complements of employees.[435]

At one point the Labor Board, then under Democratic control, tried to allow them to bargain with their joint employers alone, as part of those employers' workforces.[436] But the Labor Board, then under Republican control, later reversed that decision.[437] As a result, it is now virtually impossible for agency workers who are seconded into joint employment relationships to bargain collectively with the employing agency.

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[429] *See* Silvana Sciarra, *The Evolution of Labour Law (1992–2003)*, 30-34 (European Communities General Report, 2005)I.

[430] Falk v. Brennan, 414 U.S. 190, 195 (1973); Antenor v. D & S Farms, 88 F.3d 925 (11th Cir. 1996).

[431] Sam Hall & Sons, Inc., 8 OSHC (BNA) 2176, 1980 OSHD (CCH) P 24, 927 (No. 76-4988, 1980); Baker Tank Co./Altech, 17 OSHC (BNA) 1177, 1995 OSHD (CCH) P 30,734 (No. 90-1786-S, 1995).

[432] Harbert v. Healthcare Servs. Group, Inc., 391 F.3d 1140, 1148 (10th Cir. 2004).

[433] Baker Tank Co./Altech, 17 OSHC (BNA) 1177, 1995 OSHD (CCH) P 30,734 (No. 90-1786-S, 1995).

[434] Boire v. Greyhound Corp., 376 U.S. 473 (1964); NLRB v. Browning-Ferries Indus., 691 F.2d 1117 (3d Cir.1982). As this goes to press the NLRB has called for public comment on whether it should adhere to its current standard to terminate joint employment or adopt a different one. Browning Ferris Indus., Case No. 32-RC-109684 (May 12, 2014).

[435] Lee Hospital, 300 N.L.R.B. 947 (1990).

[436] M.B. Sturgis, Inc., 331 N.L.R.B. 1298 (2000).

[437] H.S. Care L.L.C., 334 N.L.R.B. 659 (2004).

With respect to different business sectors, the increase of service contracts within the public sector has led to an extensive application of the joint employment doctrine to government service contracts.[438] Since the mid-1990s, the joint-employment doctrine involves also the public administration.[439]

In a comparative perspective, it is important to stress that the U.S. "plural-employer model" has grown in response to the variety in the form of labor organization. Due, possibly, to the absence of a prohibition on agencies for the supply of labor, in contrast to European law discussed above, in the U.S., the organization of employment between various legal entities has not distinguished between agency work, labor supply, or subcontracting. The general and common principle is that whenever two or more firms influence an employment relationship, both can be involved in employer liabilities.[440] Agency work, employee leasing, subcontracting, service contracts, and business outsourcing are only some examples of the different organizational environment where the joint employment doctrine has been implemented.[441]

Whilst this issue is not developed as extensively in Canada as it is in the U.S., a similar doctrine, the so-called "related employer", is spreading in Canadian jurisdictions. When two or more employers can be considered as "related", they can be treated as one single employer for different purposes.[442] Originally rooted in the "piercing the corporate veil" doctrine, this doctrine is now assuming a "regulatory" rather than a "sanctioning" content. Particularly, this technique is becoming a tool which measures the degree of integration among firms. In a 2001 decision of the Ontario Court of Appeal, *Downtown Eatery (1993) Ltd. v. Ontario*, the Court focused on integration of the companies themselves and on the existence of a single control, rather than on the role each of the four corporations played in relation to the employment.[443]

Interestingly, the British concept of "associated employer" can echo the American doctrine of joint employment. As noted previously, English law is strictly based on the principle of formal separation of legal personality and responsibility between distinct legal entities. In recent times, this has led to the so-called "capital boundary problem".[444] Broadly speaking, since firms enjoy considerable discretion in manipulating their boundaries, they also enjoy a considerable discretion in manipulating the boundaries of their legal responsibilities.[445] This explains why it has been recently stressed the need to focus on economic activities rather than on discrete legal entities.[446]

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[438] For a recent survey, see Steven L. Schooner & Collin D. Swan, *Suing the Governement as a 'Joint Employer' – Evolving Pathologies of the Blended Workforce,* 52 Government Contractor, 341 (2010).

[439] King v. Dalton, 895 F.Supp. 831, 834-35 (E.D. Va. 1995).

[440] CRAIG BECKER, *Labor Law Outside the Employment Relation,* 74, *Texas Law Review,* 1527 (1996).

[441] KATHERINE V.W. STONE, *Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers*, 27 Berkeley J. Emp. & Lab. L. 251 (2006).

[442] Judy Fudge & Kate Zavitz, *Vertical Disintegration and Related Employers: Attributing Employment-Related Obligations in Ontario*, (2007) 13 C.LE.L.J 107.

[443] [2001] O.J. No. 1879 (Ont.C.A.).

[444] *See* HUGH COLLINS, quoted above nt. 4, at 736.

[445] *Ibid.*

[446] *See* DOUGLAS BAIRD, *In Coase's Footsteps*, Chicago John M. Olin Law & Economics Working Paper No. 175, 2003.

In the UK, the principle of formal separation of legal personality and responsibility can be usually overcome only in the event of the allegation of a fraud, through the common-law doctrine of piercing the corporate veil.[447] In addition, statutory law provides for a limited lifting of the corporate veil in a number of cases, the most important of which relates to continuity of employment.[448] According to the Employment Rights Act (ERA) 1996, section 231, two or more employers are to be treated as "associated": "if – (a) one is a company of which the other (directly or indirectly) has control, or (b) both are companies of which a third person (directly or indirectly) has control (...)". The control is usually exercised through the ownership of shares (usually at least the 51%), although a "contractual control" is also possible.

As said above, the doctrine of associated employer is usually invoked to ascertain the continuity of employment for the scope of dismissal protection. According to section 108 of ERA, after one and, since 2012, two years of a qualifying period of continuous employment an employee may bring a claim for unfair dismissal. However, according to the doctrine of associated employment, a qualifying period of employer is recognized to exist even in cases in which the employee has worked less than two years for two different employers who can be classified as "associated" within the meaning of statutory and common law.[449]

4. Convergences and Divergences between the Single and the Plural-Employer Models

Since the 1990s, after the advent of the so-called "vertical disintegration",[450] the doctrine of the employer as a "single indivisible entity" and the reluctance towards the idea that the entrepreneurial powers of control and direction could lie outside the boundaries of a discrete legal entity seem to be in tension. In the past two decades, global competition and IT revolution have led to firms' restructuring. Particularly, there has been a movement from centralized decision-making toward decentralized structures and production networks. Either in the manufacturing or in the service sector, vertical disintegration and outsourcing have enabled firms to make their operations leaner and more flexible.[451] Outsourcing and subcontracting activities, as market forms of governance which replace hierarchy, have increased in North America and in Europe.[452]

In the face of multi-polar and multi-segmented economic organizations, it has become more and more clear that the boundaries of the economic activity and entrepreneurial powers no longer coincide with the boundaries of the firm. In this context, by retracing Coase's footsteps, Douglas Baird has warned us about the need to resist the general idea that "*the locus of economic activity*

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[447] HUGH COLLINS, quoted above nt. 4, at 740 ff.

[448] *See*, for instance, SIMON DEAKIN, *Labour Law. Fourth Edition*, Hart Publishing, 2005, at 213 ff.

[449] *Pickney v. Sandpiper Drilling Ltd and other trading in partnership as KCA Offshore Drilling Services* [1989] I.R.L.R., 425; *Hancill v. Marcon Engineering Ltd* [1990] I.R.L.R., 51.

[450] HUGH COLLINS, *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws*, Oxford Journal of Legal Studies, 1990, vol. 10, 353 ff.; more recently, *see* Raffaele De Luca-Tamajo, Adalberto Perulli. *Productive Decentralisation and Labour Law (Individual and Collective Dimensions). World Congress of the ISLLSS, Paris, 5–8 September 2006, General Report.*

[451] BENNETT HARRISON, *Lean and mean: the Changing Landscape of Corporate Power in the Age of Flexibility,* New York, 1994; WALTER W. POWELL, *Neither Market nor Hierarchy: Network Forms of Organisation,* 12, *Reasearch in Organisational Behavior,* 295 (1990).

[452] For a comparative study, see ULRIKE MUEHLBERGER, *Hierarchies, Relational Contracts and New Forms of Outsourcing, (September 2005). ICER Working Paper No. 22/2005.*

rests with a discrete legal entity (…) In a world in which the boundaries of the firm become less clear and the identity of those who control the firm becomes more fluid, regulations that focus on the conduct of specific firms is at best incomplete and often misguided".[453] In this respect, legal rules should be focused in the future on regulating economic activity, "*rather than on regulating discrete legal entities*".[454]

Together with the trend toward decentralization, other changes have occurred in employment practices so that the portrait of the employer has been shaped differently. Firms have increased temporary and contingent employment. Contracting-out has become a common practice, either to staff agencies or to smaller supplying firms. Work has become even more contingent.[455]

In this framework, the line drawn between the single-employer and the plural-employer model has been evolving. Particularly, the concept of "joint employer" and "associated employer", which traditionally did not have a counterpart on the Continental Europe, have been gradually accepted in the Continental European legal systems. Broadly speaking, the shift from a single towards a plural employer model in countries such as France, Spain, Italy and Germany is clearly shown by the progressive erosion of the prohibition of labor supply, on the one hand, and the admittance of triangular employment relations, on the other.

The next two sections are designed to illustrate as, together with agency work, the case of subcontracting (*see infra* section 4.1) and the one of group of companies (*see infra* section 4.2) may be regarded as paradigmatic examples of a convergence towards a plural employer pattern.

4.1 The case of Subcontracting

Subcontracting challenged the legal doctrine of employer as a single indivisible entity. In several legal systems, the idea of employer as the one who exercises the entrepreneurial powers of control, direction and coordination over the working activity has been questioned by new forms of governance that seem to replace hierarchical structures by market ones, through an increasing recourse to outsourcing and subcontracting activities. New forms of organization, based on different techniques, have been used to keep a direct or indirect control over contractual relationships.[456] "Hybrid" forms of organization challenge the legal paradigm of employment relationship. As a consequence, the nature of the employer's power needs to be reassessed in order to align the legal framework to the changes worked by economic reality.[457]

Moreover, the practice of outsourcing and subcontracting engages firms not only within national borders, but also with foreign firms. Transnational contracting-out leads to complex legal issues concerning private international law, international labor standards, the supranational role of

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[453] DOUGLAS G. BAIRD, quoted above nt. 47, at 14.

[454] *Ibid.*

[455] GILIAN LESTER, *Careers and Contingency,* 51 Stanford Law review, 73 (1998).

[456] OLIVER E. WILLIAMSON, *Markets and hierarchies: analysis and antitrust implications. A study in the economics of internal organization*, New York: The Free Press, 1975; OLIVER E. WILLIAMSON, *The Economic institutions of capitalism: firms, markets, relational contracting*, New York: The Free Press, 1985.

[457] Hugh Collins, *Independent contractors and the challenge of vertical integration to employment protection laws*, Oxford Journal of Legal Studies, 10: 353-380 (1990); ALAIN SUPIOT, *Au-delà de l'emploi. Transformations du travail et devenir du droit du travail en Europe,* Flammarion, Paris, 1999; Id., *Le nouveaux visages de la subordination*, Droit Social, 2000, 2, 131 ff.

trade unions, international regulatory competition, and, more generally, the enforcement of labor law outside the national context.[458]

Subcontracting weakens the capacity for collective action. From France to Venezuela, unions are ill-prepared to deal with it,[459] to identify a common union strategy. Transnational collective action is still far from playing any role.[460]

At the national level, the approach toward subcontracting varies among different legal systems. One difference concerns the sources of law. On the one hand, we may find countries – such as the U.S.[461] – where subcontracting has been traditionally left to collective bargaining, with relevant consequences due to the near disappearance of unionized workplaces.[462] On the other hand, there are countries – such as most of continental European legal systems – where outsourcing has been mainly tackled by statutory law.[463]

A second important issue relates to the ideological approach adopted with regard to the new forms of economic organization. The law can either facilitate or regulate – indeed, obstruct – outsourcing and contracting out. Even within one single legal system, one can find conflicting approaches to outsourcing processes; some regulation can facilitate firm's recourse to decentralization, while others seem to have been introduced to inhibit or restrain de-verticalization processes. A clear example of the different impact of employment policies on firm strategies is provided by the European debate on the regulation of undertaking transfer (European Directive 2001/123/CE), where legal approaches to the transfer of enterprise can either facilitate or introduce obstacles to business outsourcing.[464]

However, these choices have not yet been carved in stone. An evolution from the single to the plural-employer model, and *vice versa*, is frequent. An example of the swinging movement from one to the other is provided by Italy. Here, the firms' increasing recourse to subcontracting strategies has led the Italian legislature to rely more and more on the joint-liabilities model as a tool to protect employees from negative externalities associated with de-verticalization processes.[465]

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[458] BOB A. HEPPLE, *Labour laws and global trade*, Hart Publishing, 2005.

[459] Raffaele De Luca-Tamajo, Adalberto Perulli, *Productive Decentralisation and Labour Law (Individual and Collective Dimensions). World Congress of the ISLLSS, Paris, 5–8 September 2006, General Report.*

[460] See, for the experience of International Framework agreements and its impact on subcontracting, PAPADAKIS K., CASALE G., TSOTROUDI K. (2008), *International Framework Agreement as Elements of Cross-Border Industrial Relations Framework*, in PAPADAKIS K., ed., *Cross-Border Social Dialogue and Agreements: an Emerging Global Industrial Relations Framework*?, Ilo-Iils, Ginevra; STEVIS D. (2010), *International Framework Agreements and Global Social Dialogue: Parameters and Prospects*, ILO, Ginevra.

[461] DAVID ALLEN LARSON, *Subcontracting and the duty to bargain,* 17 N.Y.U. Rev. L. & Soc. Change, 255 (1989-1990).

[462] According to recent Bureau of Labor Statistic's data, union density in the private sector in the U.S. is below 7%. *See*, recently, JOEL CUTCHER-GERSHENFELD, *Prospects for US Collective Bargaining in a Post-Crisis, Global, Knowledge-Driven Economy*, paper presented at the Annual Meeting of the International Association of Labour Law Journals held in Sidney on August 30-31, 2009.

[463] For Spain, see Valdés dal-Ré R., *La externalizaciòn de actividaeds laborales: un fenomeno complex,* in AA. VV, *La externalizaciòn de actividaeds laborales (outsourcing): una visiòn interdisciplinar,* Lex Nova, Valladolid, 2002.

[464] PAUL DAVIES, *Taken to the cleaners? Contracting out of services yet again,* (1997) 26 *Industrial law journal* 193.

[465] LUISA CORAZZA, "*Contractual integration" e rapporti di lavoro. Uno studio sulle tecniche di tutela del lavoratore,* Cedam, Padova, 2004.

A forceful instance of this trend is also provided by the European Commission's recent investigations about the new role played by labor and employment law in "*advancing a 'flexicurity' agenda in support of a labour market which is fairer, more responsive, more inclusive, and which contributes to make Europe more competitive*".[466] On the one hand, the European Commission considers outsourcing, subcontracting and the de-verticalization of production as new licit and even fundamental forms of economic organization which allow firms to achieve new needs of flexibility. On the other hand, the system of joint and several liabilities among business contractors and subcontractors is regarded as the most efficient technique of protection of workers involved in outsourcing, subcontracting and agency work.

The idea that a "plurality of employers" may incentive and improve employment opportunities and that joint and several liabilities may effectively protect workers has been embraced by European Institutions in two more recent occasions. The first one is the European Directive 2008/104/EC, where agency work is regarded as an instrument to enhance occupational opportunities. In this perspective, the plural-employer pattern is considered as a chance to revitalize labor market.[467] The second one is the European Commission communication of March 21, 2012 about the amendment of the posting of workers Directive 96/71/EC.[468] Here the introduction of a system of joint and several liabilities in the field of subcontracting in the construction sector is considered to be fundamental to ensure the compliance of subcontractors with legal and contractual obligations.

A third distinguishing line can be drawn by taking into consideration the regulation of agency work and, particularly, the prescription of temporariness. Countries where only temporary agency work is admitted – such as France – tend to conceive joint-employer responsibilities as an exception to the doctrine of privity of employment contract. For example, according to the French Labor Code (Article L. 1251-39 Cd. Tr.), a worker is considered as an employee of the user firm, on the basis of an indefinite employment contract from the first day of assignment, if she/he continues to work for the user firm even after the end of the assignment, which usually cannot last for more 18 months. Other countries that admit long-term staff leasing – such as the U.S. and, since 2003, Italy – are more open to the idea of multilateral employer liability.

However, not even this distinction can be taken as irreversible or *in rerum natura*. It has been noted that temporary work tends to evolve towards a more complex provision of services, where the supplying of temporary labor is followed by additional and longer services.[469]

Last, since the idea of control lies at the core of both the single and the plural-employer patterns, it is possible to conclude that the caesura between these two regulatory approaches particularly emerges by focusing on remedies rather than on the theoretical construction of the concept of

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[466] Green Paper 2006 "*Modernising Labour Law to Meet the Challenges of the 21st Century*", at 4; see also Communication of the EU Commission "Towards Common Principles of Flexicurity", (24/10/2007 COM (2007), 627). With regard to the concept of *flexicurity*, see T. Wilthagen and F. Tros, *The Concept of "Flexicurity": A New Approach to Regulating Employment and Labour Markets*, (2004) 2 *Transfer* 169.

[467] For a critical perspective, see Nicola Countouris, Rachel Horton, *The Temporary Agency Work Directive: Another Broken Promise?* 38 Industrial Law Journal (2009) 329.

[468] Brussels, 21.3.2012, COM (2012) 131 final.

[469] For a focus on risks of "long-term temps", Guy Davidov, *Joint Employment Status in triangular Employment relationships*, British Journal of Industrial Relations, Vol. 42, No. 4, 727-746 (2004).

employer. In fact, in both models, judges tend to investigate how the entrepreneurial powers have been exercised by contracting firms. What is profoundly different is that, according to the single employer model, the firm which turns out to be *the* employer is the only one that bears all the employment risks and liabilities. On the other hand, according to a plural-employer model, the involvement of both employers in a joint-liability scheme leads to the creation of a system of incentives for employers to contract out the economic activities only to reliable partners.

4.2 The case of Group of Companies

In recent years, a plural-employer perspective has been particularly developed in the context of group of companies. While outsourcing processes and vertical disintegration reflect a process of "de-composition" or "dissolution" of the firm the grouping of companies reflect its "re-composition".[470] In fact, group of companies usually refers to a situation in which several companies, although formally separated, are managed under the unified direction and coordination of the holding as a single economic entity. A multiplicity of companies thus coexist with the unity of the group.[471]

From a labor law perspective, in the case of subcontracting there is the need to re-draw the boundaries of the legal concept of employer and of employment responsibilities by focusing on the economic activity rather than on discrete legal entities.[472] In the case of group of companies, the link between the concept of employer and the firm can be maintained, but the boundaries of the firm have to be re-drawn as to represent the situation in which the firm and the employment are shared by a number of separate legal entities. Here, the separate personalities of companies do not coincide with the real boundaries of the firm as an individual employer. The group overcomes the boundaries of the legal person as well as the boundaries of the unitary concept of employer.

According to German (§ 18 AktG) and Italian corporate law (Article 2497 Codice civile) a group of companies requires an "effective unified direction" to exist.[473] The direct or indirect control of a corporation over other corporations by means of a number of shares as to achieve the right to a majority of votes (*de jure* control) or by means of contracts as to achieve a "dominant influence" (*de facto* or contractual control) is a *condicio sine qua non* for the existence of a group of company. However, in addition, the subsidiaries must be managed under the unified direction of the holding company. Spanish judges consider the *dirección unitaria* an essential element of group of companies,[474] while French judges usually require the existence of a condition of "economic and juridical dependence" between the companies.[475]

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[470] *See* François Gaudu, *Entre concentration économique et externalisation: les nouvelles frontières de l'entreprise*, Droit Social, 2001, at 474.

[471] *See* GUNTHER TEUBNER, *Unitas Multiplex: Corporate Governance in Group Enterprises*, Bremen/Firenze, 1988, at 67.

[472] *See supra* para 4.1.

[473] *See*, for instance, Patrick Remy, *Le groupe, l'entreprise et l'établissement: une approche en droit compare*, Droit Social, 2001, at 509.

[474] TS (Sala de la Social), December 26, 2001, RJ/2002/5292; TS (Sala de lo Social), January 20, 2003, RJ/2004/1825; TS, Setpember 16, 2010, RJ 2010/8441.

[475] *See* Cour d'Appel Rouen, Chambre Social, May 4 2010, no. 09/00946, 09/00975, 09/01450.

The unified direction usually denotes the existence of a group of companies that is significant form a corporate law perspective, but not necessarily from a labor law perspective.[476] Spanish, Italian and French judges carry out a fact intensive inquiry by placing weight on the following factors: *a)* the existence of unified direction; *b)* the existence of common goals and strategy; *c)* the joint-exercise of a unified economic activity.[477] A common establishment or business undertaking is also considered of great significance. The abovementioned factors are used to ascertain that a single business undertaking, a single economic activity and business strategy are shared by a number of companies. Then, there is a last factor which is regarded as the most relevant from a labor law perspective; namely, the fact that the employee, despite having a formal employment contract with only one corporation, works under the direct or indirect control and direction of the other subsidiaries. It is worth emphasizing that to the extent a link of juridical subordination can be established with both the formal employer and the other subsidiaries, this situation differs from the (illicit) case of labor supply, where the formal employer is only an apparent one, deprived of any control and direction over the working activity.

In presence of all the above mentioned factors, French judges ascertain the existence of *co-employeurs* (joint-employers) who become jointly liable for the employment obligations and, particularly, for the *obligation de reclassement.*[478] Under the *obligation de reclassement* the employer is bound to verify, before dismissing the employee on the ground of economic reasons, the possibility to redeploy the worker within the economic organization. In the case of an employee working for a number of subsidiaries, the obligation of redeployment is extended to the group as a whole. An economic dismissal is considered to be unfair if possibilities of redeployment in the holding or in the other subsidiaries have not been taken into account.[479]

Spanish judges rule similarly in favor of the existence of a joint liability and solidarity between all the companies.[480] In a recent judgment, the Audiencia Nacional, Sala de lo Social, Madrid held

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[476] *See* TS (Sala de la Social), December 26, 2001, RJ/2002/5292.

[477] *See*, with regard to France, BERNARD TEYSSIÉ, *Les groupes de sociétés et le droit du travail*, in *Droit Social*, 2010, 735 ff.; FRANÇOISE FAVENNEC-HÉNRY, *L'extinction de la relation de travail dans les groupes*, in *Droit Social*, 2010, 762 ff.; with regard to Spain, *see* JESÚS BAZ-RODRÍGUEZ, *Las relaciones de trabajo en la empresa de grupo*, Granada, Editorial Comares, 2002, at 64 ff. ; María Fernanda Fernández López, *El empresario como parte del contrato de trabajo : una aproximación preliminar*, in Ead. (ed.), *Empresario, contrato de trabajo y cooperación entre empresas*, quoted above nt., at 30 ff.; with regard to Italy, *see* GISELLA DE SIMONE, *Titolarità dei rapporti di lavoro e regole di trasparenza*, Franco Angeli, 1995; more recently Orsola Razzolini, *Contitolarità del rapporto di lavoro nel gruppo caratterizzato da "unicità d'impresa"*, in *Giornale di diritto del lavoro e delle relazioni industriali*, 2009, 263 ff. and contributions recently published in the journal *Rivista giuridica del lavoro*, 2013, 1 ff.

[478] *See*, recently, Cass. Soc., September 9, 2012, no. 11-12.845; Cass. Soc., September 28, 2011, no. 10-12.278; Cour d'appel Rouen, Chambre Social, May 4 2010, no. 09/00946, 09/00975, 09/01450. *See* BERNARD TEYSSIE, *Les groupes de sociétés et le droit du travail*, quoted above nt. 77, at 736.

[479] *See* Article L-1233.4, Code du Travail, according to which "the economic dismissal is possible only after the employer has done everything possible with regard to the ri-qualification and the training of the employee as well as with regard to his redeployment within the company or within the group of companies". See also Cour d'appel Rouen, Chambre Social, May 4 2010, no. 09/00946, 09/00975, 09/01450. Here, the holding was a Finnish corporation. A similar statutory provision is provided in Germany by § 1.2 KSchG. *See* recently Luca Nogler, *La nuova disciplina dei licenziamenti ingiustificati alla prova del diritto comparato*, in *Giornale di diritto del lavoro e delle relazioni industriali*, 2012, 661, here at 677.

[480] *See*, TS (Sala de la Social), December 26, 2001, RJ/2002/5292; TS (Sala de lo Social), March 6, 2002, RJ/2002/4659; TS (Sala de lo Social), January 20, 2003, RJ/2004/1825; TS, September 16, 2010, RJ 2010/8441.

that the group can be regarded as a single employing entity for the scope of collective dismissal.[481] Consequently, and importantly, the existence of a crisis or of a negative economic situation that justifies economic dismissals must be ascertained with regard to the group as a whole.[482]

German and Italian judges can also ascertain the existence of a single business undertaking (rather than of a single employer) for the scope of individual and collective dismissal protection, but they tend to be hostile to the extension of employment liabilities which lead to infringe the "sanctity" of formal separation between the corporations.[483] However, in recent Italian judgments, a co-employership situation has been recognized to exist also for the purpose of joint-liability.[484] Likewise, German judges have occasionally admitted the *Verdoppelung auf Arbeitgeberseite* (the double employer) where an employee has worked for a number of firms integrated to such extent that it is possible to consider the existence of a single employment relationship, rather than a number of separated employment relationships, with a plural employing entity (*Einheitliches Arbeitsverhältnis*).[485]

Despite these developments there is scant evidence that judges are willing broadly to redefine the boundaries of the employment protection and of the concept of employer so as to coincide with the actual economic boundaries. In most cases, judges continue to place weight on the "*utilización abusive de la personalidad juridica en prejudicio de los trabajadores*" (an abuse of the corporate veil to the detriment of the employees),[486] on the "*confusion d'activité, d'intérêt et de direction*" (a confusion of activity, interests and direction),[487] on the holding's interference in the human resources management (*immixtion dans la gestion du personnel*) at such point and at such level as to determine a "contractual confusion" or a mixed and indistinct use of the workforce within the group.[488]

Insofar as judges found the joint-liability regime on the piercing of the corporate veil,[489] these novel judicial approaches may be seen as an application of the *fraus legis – of a fraud upon the law* – as a response to a phenomenon that justifies the infringement of the principle of formal separation between different legal entities. Furthermore, these judicial approaches remain wedded to a "single employer" perspective by considering the group as a whole as the "real single employer" upon which employment costs and liabilities should be allocated.

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[481] Audiencia Nacional, Sala de lo Social, Madrid, No. 106/2012.

[482] *Id.*

[483] *See*, for instance, PATRICK REMY, *Le groupe, l'entreprise et l'établissement: une approche en droit comparé*, quoted above nt. 69; for Italy, GISELLA DE SIMONE, *Gruppi di imprese*, in M. BROLLO (edited by), *Il mercato del lavoro. Trattato di diritto del lavoro diretto da Mattia Persiani e Franco Carinci*, vol. VI, Cedam, Padova, 2012, 1509 ff.

[484] *See* Cass., March 24, 2003, no. 4274, *Rivista italiana di diritto del lavoro*, 2003, II, 746; Tribunale di Monza, April 28, 2004, *Rivista italiana di diritto del lavoro*, 2004, II, 540; Cass., November 29, 2011, no. 25270, *Rivista italiana di diritto del lavoro*, 2012, II, 375.

[485] *See* LUCA NOGLER, *Gruppo di imprese e diritto del lavoro*, in *Lavoro e diritto*, 1992, 304 ff.

[486] *See* JESÚS BAZ-RODRÍGUEZ, quoted above nt. 79, at 64 ff.; TS (Sala de lo Social), January 20, 2003, RJ/2004/1825.

[487] *See* Cass. Soc., September 9, 2012, no. 11-12.845 and, for Spain, *see* TS, September 16, 2010, RJ 2010/8441.

[488] *See* Cass., November 29, 2011, no. 25270; Cass., September 28, 2011, no. 10-12.278; *see* also, in Spain, TS (Sala de la Social), December 26, 2001, RJ/2002/5292; TS (Sala de lo Social), January 20, 2003, RJ/2004/1825 where judges place weight on the fact that the work is simultaneously performed by the employee in the behalf of all the parent companies.

[489] This clearly emerges in TS (Sala de la Social), December 26, 2001, RJ/2002/5292; TS (Sala de lo Social), January 20, 2003, RJ/2004/1825.

Only on a few occasions, judges have started to regard joint-liability and joint-employership as a "regulatory" response to the situation in which the firm, the economic activity, the employment are *physiologically* shared by a number of corporations belonging to the same group. French judges, for instance, appear to be open to the possibility of recognizing a single employment contract between one employee and a number of *co-employeurs* to exist whenever, despite the words used in the formal arrangement, in substance a situation of *subordination juridique* can be ascertained with more than one single employer.[490] Here, piercing the corporate veil plays no role.

The same result could be achieved in Italy, Spain, Germany and in other Continental European legal systems where the prevailing of substance over form is a dominant principle in contractual interpretation. Particularly, Continental European legal systems, where the concept of "contract of long term duration" as well as that one of "contractual relationship" have been analyzed for a long time, assess that in long-term contract the day to day facts of the relationship and the parties' behavior reflect what the parties have stated to be its nature much more than the *nomen iuris* and the written document.[491]

The European Court of Justice has recently upheld the idea of multi-employership as a legal possibility. In the *Heineken* case, an employee, formally hired by one company, had been assigned on a permanent basis to another company that had then transferred its business undertaking to a third company. The question was whether the second and the third companies could be respectively regarded as "transferor" and "transferee" for the scope of the Transfer of Undertaking Directive. The ECJ rules that "*within a group of companies, there are two employers, one having contractual relations with the employees of that group and the other non-contractual relations with them*".[492] In this perspective, it is possible to regard as a "transferor", within the meaning of the Transfer of Underdaking Directive 2001/23, "*the employer responsible for the economic activity of the entity transferred which, in that capacity, establishes working relations with the staff of that entity, despite the absence of contractual relations with those staff*".[493]

By stressing the legal possibility for an employee to have a contractual relation with a formal employer and a non-contractual relation with a substantial employer to which the employee is permanently assigned, the ECJ's approach comes closer to the British perspective, rather than to the Continental European perspective. In fact, beside the statutory concept of "associated-employer", in the UK a multi-employership has been recently recognized to exist by combining contract law with common law. Yet we have seen that British judges hold that a dual vicarious liability

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[490] Cass. Soc., January 22, 1997, no. 93-43742 and 93-43743.

[491] Consider the Italian Civil Code, Article 1362, 2, which establishes that, after that the written agreement has been concluded between the parties, in order to understand what the parties have stated to be its real nature, it is also necessary to take into consideration the *ex post* facts of the relationships. For French legislation, consider the CODE DU TRAVAIL (Fr.), Article L. 781-2, 2° and Article L. 120-3. For a recent interpretative reconstruction of regulatory co-employership in the context of strong contractual integration between business undertakings constituting a single economic entity (rather than in the context of the group of companies) *see* Valerio Speziale, *Il datore di lavoro nell'impresa integrata*, in *Giornale dir. lav. e relazioni ind.*, 2010, p. 1 ff.

[492] ECJ, *Albron Catering BV v. FNV Bondgenoten, John Roest*, October 21, 2010, C-242/09.

[493] *Ibid.*

is a legal possibility when the right to control the working activity is shared by two legal entities.[494] Here, the bilateral construction of the employment contract is combined with the tort law of vicarious liability.

In this context, a similar conclusion has been reached with regard to the common law duty of care. In *Newton-Sealey v. Armor Group Services Ltd*, a worker, formally hired by one company belonging to the Armor Group, was seriously injured while he was working in Iraq under the control and the direction of a subsidiary. The question is "*whether, despite a person having contractual relations with only one member of a corporate group, other corporate members have acted in such a way as to be under a duty of care to him*".[495] According to the High Court of Justice, Queen's Bench Division, notwithstanding the employee had an employment contract with one corporation, the other parts of the Armor Group had behaved in such a way as to voluntarily enter into a special "non-contractual" relation of "proximity" with the employee whereby they owe to the employee a duty of care.[496]

5. The New Concept of the Employer in a Flexicurity perspective

In the previous sections we have tried to underline recent convergences towards more general acceptance of a plural employer model.

In a broader perspective, it is worth noting that the rationale underpinning these new legal trends appears to be that the best protection for workers is no longer to remain "attached" to a single business undertaking, as it was in the past.[497] Rather, the best protection for workers derives from splitting the employment risks and costs among different employing entities. In this respect, different employing entities, strongly integrated via contracts or shares ownership, can be regarded as "internal labor markets"[498] which increase and safeguard the employee's expectations about security in income.

Since a labor market perspective is nowadays at the core of employment protection, the interaction between the employee and multiples employers can be regarded as an opportunity, rather than as a risk. An example of this different approach is offered by the recent Italian case of the "network contract" (art. 3, comma 4 *ter* d.l. no. 5/2009), whereby two or more firms are connected in a contract, in order to improve integration and share the challenge of global competitiveness.[499] By adopting a plural-employer approach, the network of firms can be conceived as a

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[494] *See supra* § 2.

[495] High Court of Justice, Queen's bench Division, February 14, 2008, *Newton-Sealey v. ArmorGroup Services Ltd.* [2008] EWHC 233 (QB).

[496] In Italian private law, a similar perspective has been developed by Carlo Castronovo, *La nuova responsabilità civile*, Giuffrè, now 2006, at 122 ff. who identify the concept of "responsabilità da contatto sociale" (liability deriving by social contact) later employed, in the specific context of group of companies, by Enrico Raimondi, *Il datore di lavoro nei gruppi imprenditoriali*, in *Giornale di diritto del lavoro e delle relazioni industriali*, 2012, 287, here at 307 ff.

[497] *See supra* § 2.

[498] *See* MARZIA BARBERA, *Trasformazioni della figura del datore di lavoro e flessibilizzazione delle regole del diritto*, in *La figura del datore di lavoro. Articolazioni e trasformazioni*, Giuffrè, Milano, 2010, at 55 ff.; *see* also Tiziano Treu, *Trasformazioni delle imprese: reti di imprese e regolazione del lavoro*, in *Merc. Conc. Reg.*, 2012, at 20.

[499] *See*, recently, ILARIO ALVINO, *Il lavoro nelle reti di imprese: profili giuridici*, Giuffrè, Milano, 2014.

net of protection, which offers to employees a number of employment opportunities. The same idea is at the basis of the French experiment of the "*contract d'activité*", suggested by the Boissonnat Commission, where the employment contract is organized between a number of employers, each one sharing the need for the same employee's job and tasks.

From a law and economic perspective, the option for a plural-employer model testifies to the need to fit legal techniques to the changing use of relational contracts among firms. Whilst the single-employer model reflects an idea of employment relationship relying on the ownership of the firm, the plural-employer one enables us to conceive of the employer as a network of relational contracts.[500]

The case of a group of companies is another example of how the plural employer model can turn out to be a labor market outcome for the employee. In fact, in the case of group of companies, where the integration is so deep as to give rise to a single economic entity, the "securization" of employee's expectations can be even stronger. Particularly, the employee could be safeguarded not only about income, but even about job stability – or job opportunity.

The French and the Italian trend towards the enlargement of the boundaries of the duty of redeployment (*obligation de reclassement* or *dovere di ripescaggio*) to the group of companies as a whole should be taken as such a work in progress. This new approach can be explained in terms of counterbalance to the intensification of work and the flexibility required for a "flexible employee",[501] working within a group of companies. In other words, to the extent that a greater degree of flexibility is demanded of employees to perform different tasks and jobs, in favor of the group as a whole, formal and substantial employers may be required to guarantee the employee her job, by providing her with re-qualification, training and redeployment within the group.

From this perspective, the group of companies can be regarded itself as an "internal labor market" or as a "market of flexicurity" capable of supplying flexible labor, on the one hand, and safeguarding employee's expectations about stability in income and job, on the other. This is the "modern" compromise found between the businesses' need to enhance competitiveness and the employee's need for employment security and income.

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[500] GEORGE BAKER, ROBERT GIBBONS, & KEVIN J. MURPHY, *Relational contracts and the theory of the firm*, *Quarterly Journal of Economics*, 117: 39-84 (2001).

[501] For this concept, *see* HUGH COLLINS, *Regulating the Employment Relation for Competitiveness*, in *Ind. L. J.*, 2001, vol. 30, 17 ff.