Is a commercial agent company a subcontractor of the principal company? Employment law implications

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As a matter of safeguards, employment legislation provides that a principal is jointly and severally liable for Social Security obligations incurred by contractors and subcontractors, during the validity period of a (sub)contractor agreement, in the three years following termination of said agreement. The conclusion between parties of an agency contract, under which a company undertakes to promote the sale or hire of products and services on behalf of the principal, is underscored by their independence from each other, and yet the aforementioned employment law provision on (sub)contracting may be imposed.

1. Under the Agency Contract Act 12/92 of 27 May[1], where the agent is a natural person, it must be determined whether an employment or business agreement is involved, the differentiating feature hinging on the worker's dependence. But where the agency contract is concluded between two companies, the relationship established by them affects, by extension, its employees, and calls into question whether or not art. 42 of the Workers' Statute Act[2] (LET) should, in practice, be applied.

   The starting premise cannot be other than the fact that an agency contract and an employment contract reflect two different arrangements and, a priori, a (sub)contractor agreement cannot absorb an agency contract. The essence of an agency contract is product placement mediation. This was the solution the Supreme Court elected for in its judgment of 15 December 2015, Ar. 6223, in connection with a case (marketing of mobile telephony) similar to that examined now, taking a stand different to that taken in its judgment of 21 July 2016, Ar. 4510. In the latter case, the Court concluded that "*in the present case the separation between production activity and mediation is clear and activity should not be confused with interest. It is in the interest of the principal to place its products on the market but it is not its activity as there are companies engaged, exclusively or not, in an activity of mediation that pertains to and is typical of them*" (2nd Point of Law). Or, as pointed out in the judgement of the Supreme

[1] *Ley 12/1992, de 27 de mayo, sobre Contrato de Agencia*.

[2] Translator's note: The "*Ley del Estatuto de los Trabajadores*" regulates the rights and responsibilities of employees, not workers as a whole.

Court of 20 July 2005, Ar. 5595, when differentiating the activities of development and construction, "*although there may be a connection or functional dependence, construction activity is not an activity inherent in the production cycle of real estate activity*" (3rd Point of Law).

Now, the judgment of the Supreme Court of 21 July 2016, Ar. 4510, highlights this relationship and modifies its earlier view to stress that the existence of an agency contract does not automatically and necessarily prevent the provisions of art. 42 LET from coming into play. If the agency contract serves to decentralize the performance of work or services falling within the principal's own activity, employee safeguards must operate. The formal information provided by the type of lawful business transacted between the companies does not suffice to exclude art. 42 LET. In fact, employment legislation provides safeguards for workers involved in certain intercompany collaborations, albeit without restricting or specifying the nature of the relationship between the principal and the agent. Such lawful business between the principal and the agent could be a private law or public law transaction; temporary or permanent; with or without consideration; encompassing work or services; statutorily defined or not; referred to a core element or a collateral issue of the production process; communicated or not to clients; etc. "*In short, attention must be paid to the type of activity assumed by the agent for the benefit of the principal in order to determine whether the circumstances described in art. 42 ET apply where it speaks of 'employers who hire others for the performance of work or services'. The conclusion of an agency contract, however much it meets the requirements of the Agency Contract Act, does not suffice to rule out such circumstances*" (3rd Point of Law).

The Supreme Court is of the opinion that the Agency Contract Act did not restrict either the operation of the safeguards the agent's employees are recognised, or the field of application of (sub)contractor agreements for employment law purposes. Its effect focuses on the relationship between the principal and the agent, which is neutral with regard to the rights of any of the agent's employees. What is relevant for the purposes of applying art. 42 LET is not the contract binding the principal to the contractor, which may very well be an agency contract underscored by mutual independence, because if this were the case "*to elude the application of art. 42 LET, principals would only have to formalise their relations under the Agency Contract Agent*" (3rd Point of Law).

2. In the case examined in the judgment of the Supreme Court of 21 July 2016, Ar. 4510, two telephony companies (Telefónica Móviles España, SAU and Telefónica de España, SAU) entrust different and numerous companies, by way of commercial agency, with the marketing of equipment, systems, devices and mobile telephony, mediation in the sale of telecommunications services and equipment and the promotion to use and consume said equipment and services. Faced with a dismissal claim from a worker of one of the agents, a debate arises on the joint and several liability of all companies and the finding of principals liable.

   Well, for the employment law provision at issue to apply, it must be determined whether the contractor, regardless of the type of contract signed with the principal, provides services that fall within the principal's "own activity" ["companies who hire others for the performance of work or services that fall within their own activity ..."]. As stated in the judgment in question, the use of a deliquescent and circumstantial concept such as "own activity" has led to constructions from multiple parameters: the essential nature of the activities, their regularity, complementarity, marginalization, inclusion in the ordinary production cycle, etc. But what makes an activity the "own" activity of a company is the quality of being inherent in its production cycle, which includes the principal's core work and services. They are the work or services pertaining to the company's productive cycle, that is, those that are part of the company's main activities. This means that, "*if the contractor agreement had not been concluded, the work and services would have had to be performed by the principal himself as otherwise its business*

would be substantially harmed" [judgments of the Supreme Court of 22 November 2002, Ar 510/2003, and 11 May 2005, Ar. 6026, 6th Point of Law].

On these lines and based on the consideration that "own activity" is just that inherent in and absolutely indispensable to the pursuance of the principal's company object, now the judgment of the Supreme Court of 21 July 2016, Ar. 4510, concludes that the telephony marketing activity is, considering the service provided and the circumstances in which said service is performed, inherent in and absolutely indispensable to the carrying out of the telephone company's business. This is not an activity similar to the manufacturing of finished products that can be manufactured even if there are no buyers at the time of manufacture - without prejudice to the commencement of their marketing when manufactured, or even of accumulating stock - but, in this case, an activity that depends on the existence of a sufficient number of clients who maintain the operational requirements for the provision of the service. In other words, if such activity were not carried out by the subcontractor, the principal would have to carry it out with its own staff.

For this reason, the judgment concludes that neither on the basis of the characteristics of the telephony business, nor on the basis of the circumstances in which the telephony marketing service is performed, could it be held that the marketing activity is not inherent in the carrying out of telephony business, whereby art. 42 LET applies. So much so that principals also conduct directly and on their own this activity (the marketing of their products), even if in this case another commercial company was entrusted with the same under an agency contract. The contractor's employees act on behalf of the principal, foster loyalty within the public as clients of the latter, enter their operating systems, answer queries raised regarding the services offered by the principals, act on their behalf. In conclusion, *"there is no doubt, therefore, that it is activity inherent in the production cycle of a telephone company that provides services to end clients"* (4th Point of Law).

3. Although a controverted decision, judging by the dissenting opinion accompanying it, and despite admitting that it departs from the view taken in previous judgments only "on the basis of facts as found in the proceedings" and not in any case, the truth is that this is a decisive pronouncement. That companies with independent activity can be affected by the chain of liabilities set out in art. 42 LET is its own subject matter. In the employment law branch of the judiciary it has been found that a principal is liable for what happens throughout the whole chain of decentralization because, following a maxim of private law, whoever is able to make a profit must be held accountable for the damage that can arise from it. But with this decision, the scope of the provision is overblown, with the principal answering for the employees of those companies that do not produce but rather market its products.

   It is true that here the contractor conducts itself on behalf of the principals, but to consider marketing as the producer's "own activity" - and admitting and stressing caution regarding the need to frame this solution for these particular circumstances - means potentially extrapolating the scope of the provision to all those production activities that need to be marketed by the manufacturing company or a third party. Simply indicating that marketing constitutes a "core" element of the principal's activity would introduce a limit to such a broad spectrum of action.

   When it is in the "interest" of the principal to place its products on the market but it is not its "activity", then it shall be understood that there is a distinction between commercial agency and employment outsourcing. But if, as stated in the judgment analysed in relation to mobile telephony, the marketing of the service is deemed to be inherent in and absolutely indispensable to the pursuance of the principal's business, the decentralization of an activity that is the principal's "own activity" shall necessarily lead to the application of the employment law provision. A highly tenuous line of differentiation in a technological, globalized, services market as complex as the current one.