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**COOPERATION BETWEEN ENTERPRISES
AND INCOME TAX:
PROSPECTIVES ON THE NETWORK CONTRACT**

English summary

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PERSPECTIVES ON THE NETWORK CONTRACT**

English summary

Nowadays, the new economy offers companies the opportunity to expand their business range but, at the same time, it forces them to face the competition of new “aggressive” international companies.

This new reality requires businesses to become larger, so that they can offer competitive goods and services, especially in production systems, which are characterized by the presence of many small and medium-sized enterprises (SMEs).

In order to become larger, these enterprises can either merge to form a new structure, whose activity is held under one single leader, or they can cooperate thanks to agreements which do not affect their autonomy.

However, companies willing to cooperate are challenged by an ambivalent legal framework: on the one hand, there are many benefits showing the political will to encourage and support their cooperation through public resources, especially when small and medium enterprises want to invest in research and innovation or expand their business abroad; on the other hand, there is an incomplete, unsystematic and changing legislative framework raising several interpretation issues, which cannot be easily solved, especially in the taxation field: the personal nature of taxation makes indeed a clear distinction between association and exchange agreements and it rises the problem of imputation of incomes coming from a common project.

Although the legal framework offers a variety of regulations which can apply to the various forms of collaboration, none of them can totally regulate this matter.

The Italian consortium (artt. 2602 and following - Codice Civile) is the preferred institution for collaboration between firms, since it represents a means businesses can use to achieve goals which cannot be reached individually.

However, the consortium works in the interest of its associated companies, thus raising fiscal issues. Even though sometimes it has been considered as a transparent organization and its incomes have been imputed to the associated enterprises, this approach undervalues the role of the consortium. In fact, the consortium has an autonomous ability to pay, as it is demonstrated by the legislator’s choice to consider it as a subject of the corporate income tax (IRES).

The instrumental function of the consortium is a direct consequence of its mutual purpose and it cannot affect the imputation of income coming from transactions carried out by the consortium.

In order to impute consortium's incomes correctly, companies must refer to the activity that has produced these incomes. Thus, if the activity is done by the consortium using its means and according to the consortium bodies orders, incomes are to be imputed to the consortium, which is the subject that produced these incomes and "owns" them (according to the terminology of the Italian Tax Code - TUIR). On the other hand, when the activity is done according to the associated companies guidelines, incomes are produced by them.

However, the regulation of the consortium contract requires the creation of a common organization, which concerns the regulation or the performance of some of the steps undertaken by the companies' activities. In other words, the consortium cannot be used in all those cases in which the parties intend to create synergies that do not require a common organization.

Therefore, the legal framework offers companies willing to cooperate in a "softer" way some solutions which, however, do not provide a complete regulation.

Rules on subcontracting and franchising, for example, are mostly descriptive and intend to protect the weak party from stronger company's possible abuses.

Companies have thus made an extensive use of contract freedom in order to create kinds of agreements and pacts called "joint ventures".

Even without a common organization, the "joint" profile of these agreements has been enhanced in the context of temporary partnerships between companies aiming to take part in tenders for the award of public contracts (ATI). In these temporary partnerships, these companies give a collective mandate to one of them called the "leader" (*capofila*).

In tax law, the problem of the proper imputation of the representative's income must be solved according to the solution previously suggested: income is imputed to the subject who carried out the activity.

Basically, when the representative performs a function of mere representation and coordination, incomes should be imputed to each associated company, according to the way the activity has been shared, which is determined in the agreement. However, when the mandate is concerned not with the management of a single transaction, but with a larger affair characterized by the discretion of the representative, incomes are to be imputed to the latter.

Moreover, joint venture agreements may also create an atypical subject which is not regulated by the legal framework. The organization originated from the agreement is subject to corporate income tax (IRES) and is obliged to liquidate and pay the income tax and also to fulfill all the formal requirements provided for these subjects (tax compliance). Only in extraordinary cases, joint venture agreements may be classified as partnerships: the transparency principle of art. 5 of the Income Tax Code (TUIR) applies to joint venture agreements, in compliance with the derogatory nature of this regulation.

Even “district” law applies only to certain forms of cooperation. This law introduces a form of direct taxation in which the ability to pay is related to the districts and production chains. However, the difficulty of identifying the degrees and forms of inter-enterprise cooperation through certain legal parameters leads to the conclusion that implementing a “unitary” form of taxation is too complicated to put into practice.

For companies groups based on law control it is indeed possible to identify a collective ability to pay, which can be related to the leadership of the holding company.

This argument cannot be applied to the districts, since legal references in districts do not exist: synergy between companies is based upon contractual agreements or social contexts and leadership does not exist.

As we underlined before, a general regulation concerning cooperation between companies (especially for contractual joint ventures) does not exist in the Italian legal framework, but there are several State aids in favor of company aggregation. This framework justifies the choice of the network contract (Decreto legge 5/2009).

However, the current regulation of the network contract and its numerous changes over the last five years confirm an ambiguous and sometimes contradictory approach of the legislator.

When companies decide to set up a common fund and appoint a common office, the network contract regulation suggests the idea of a contract intended to create an independent organization, according to a model similar to the consortium’s.

Therefore, this approach hardly reconciles with the choice of giving “legal subjectivity” to the network only when specific formal procedures are fulfilled. However, the “legal subjectivity” does not lead to any consequence in terms of applicable rules. In other words, network contract regulation is the same for both the “subject” and the “contract” networks.

This ambiguity and the broad freedom granted to the parties to define management and representative common office power, its composition and the rules for the taking decisions, they all lead to the same conclusion concerning the contractual joint venture agreements.

Businesses entering into a network contract may indeed provide for the establishment of a proper corporate structure typical of associations, but they may not register such a contract in accordance with the procedure enabling them to acquire subjectivity. In this case, the network does not obtain the subjectivity through the special procedure provided by Dl . 5/2009, but it becomes a subject anyway “*ex contractu*”.

Companies willing to cooperate through the network contract and trusting in the wording of the Dl. 5/2009 may inadvertently give life to an association which is subject to tax, since it is included in the art. 73, para. 2 Corporate Income Tax Code residual clause. This association is obliged to comply with all the obligations provided.

Finally, the study of cooperation between companies shows the existence of a "magmatic" regulatory context.

Even though the regulation of the consortium shows some constancy concerning both the rules of the civil law and fiscal State aids, the tax regime, which is applicable to other institutions (especially the new ones), is characterized by a civil law regulation, which has been amended several times (sometimes never implemented), and by favorable measures limited in time, which cannot be quantified in advance by the taxpayer.

The Dl. 5/2009 establishing the network contract has been modified eight times over the past five years, while the State aid provided by Dl. 78/2010 has been applied only for three years; taxpayers became aware of the exact amount of the State aid only afterward.

In conclusion, it is difficult to reconcile these ambiguities with the political will to facilitate companies and ensure them greater stability and legal certainty.