is concluded; and, second, a contract of employment (a temporary contract) between the independent contractor and the umbrella company is signed. The umbrella company is obliged to provide the employee with work. The latter has the competence, qualification and autonomy to identify clients and negotiate the performance of work tasks with them.

In *Italy*, no statutory definition of the term 'employer' exists. More recently, the legislator has acknowledged some new forms of work. A so-called network contract was introduced that provides companies with a mechanism to bring about better cooperation. Specific rules apply to the secondment of workers linked to such network contracts. 'Joint employership' of workers hired within the framework of provisions defined by the network contract is permitted among companies that are part of that network. Finally, 'joint hiring' is admissible to a certain extent. In that case, employers are jointly and severally liable to fulfil the requirements of all labour and social security provisions that apply to regular employment relationships.

It seems that in most countries, persons who are not party to the employment contract but could be regarded as 'functional employers' are hardly considered. In *Austria*, for instance, only the temporary work agency is seen as the employer. The user undertaking does, however, have certain employer-like statutory obligations. Nonetheless, the courts have not yet explored the modern notion of 'employer', especially when connected to new forms of employment.

III. SUB-TYPES OF EMPLOYEES AND WORKERS

A. Distinct Groups of 'Employees'

Typically, distinct groups of 'employees' exist, though how these groups are defined varies from one country to another.

i. Terminological Questions

As was already indicated, there is no uniform terminology in the different countries as far as persons who form the subject of employment or labour law are concerned. In *Sweden*, for instance, no legal definition of 'worker' exists, even though the term 'worker' is commonly used to describe blue-collar employees. In *Spain*, labour law does not entail a differentiation of 'workers' and 'employees', and both terms can be used interchangeably. In *Serbia*, a category of 'workers' does not formally exist. However, while elaborating upon the protection of certain work categories, labour legislation uses the term 'work engagement' in addition to the already-known term of employment relationship. The term 'work engagement/performance' is considered to be broader than the term 'employment

relationship' (a person engaged to perform work could, in some countries, be considered a 'worker').

It seems that in most countries, the notion of 'employee' is fairly comprehensive. In the *UK*, whilst the workforce continues to be made up of many different types of personal work relationships, the question as to their legal classification continues to hinge on employee status (as well as the more recently introduced notion of 'worker'). Similarly, in the *Netherlands*, the definition of employment is meant to be useful for every type of employee (and employer): the principle it builds on is that 'one size fits all'. Nevertheless, in recent years, there has also been a tendency to differentiate and create deviating rules for specific groups of employees (as well as employers).

In *Slovenia*, the term 'worker' is used as a uniform legal term that applies to all persons who are in an employment relationship on the basis of an employment contract. In accordance with this concept, home workers, teleworkers, persons employed by close relatives, temporary agency workers, posted workers and workers in cooperatives may not be treated as sub-types of workers. They also conclude employment contracts which may contain special features, but all hold the status of 'worker'. In the *Former Yugoslav Republic of Macedonia*, too, legislation stipulates a single and generic term, namely 'worker', which comprises all natural persons who have entered into an employment relationship on the basis of a contract of employment. The position is similar, for instance, in *Hungary*, *Poland* and *Serbia*.

ii. The Existence of 'Sub-types'

In some countries, the labour market seems more fragmented. For instance, in *Spain*, the Labour Code includes a list of 'employment relationships of a special nature'. Those employment relationships cover senior management, domestic servants, convicts in penitentiaries, professional athletes, artists involved in public performances, persons involved in trade operations on behalf of one or more entrepreneurs without assuming full risk (commercial employees/agents), persons with disabilities employed in special centres of employment, dockers, lawyers working for law firms, juveniles in detention centres and young medical doctors in their final training stage at public hospitals. Each 'special relationship' entails its own rules, but references to the Labour Code are frequent.

a. Blue-Collar and White-Collar Workers

National systems differ as far as differentiation between blue-collar and white-collar workers is concerned. In *Germany*, the historical differentiation between blue-collar and white-collar workers has almost fully lost significance. The same applies in *Belgium*, where this distinction was ruled

to be discriminatory by the Constitutional Court in 2011. In *Luxembourg*, the differentiation between blue-collar and white-collar workers was replaced by a single social status. In *Italy*, too, the historical differentiation between blue-collar and white-collar workers has lost significance almost entirely. In *Bulgaria*, legislation uses the collective phrase 'factory or office worker'. 'Factory worker' refers to a natural person who is primarily engaged in manual labour. An 'office worker' is considered a natural person who primarily performs intellectual activities. There is no difference in the legal status of these workers in practice. The same applies, for instance, in the *Czech Republic* and *Latvia*, which both do not distinguish between 'white-collar workers' and 'blue-collar workers'.

However, in many other countries, the classic dichotomy of blue-collar and white-collar workers is still relevant. A case in point is *Sweden*, where the application of collective agreements in major sectors still depends on the categorisation of blue-collar and white-collar workers. The differentiation also still exists in *France* and *Greece*.

b. 'Managerial' Employees

In many countries (*Austria*, *Belgium*, *Italy*, *Greece* and *Luxembourg*), specific rules apply to 'managerial' employees, though the notion differs from one country to another.

In *Portugal*, a so-called 'temporary special arrangement' may be applied to management or equivalent functions, directors or leadership positions that directly report to management, general directors or equivalent functions and secretariat positions of those posts, all of which are characterised by a special bond of trust between the parties. In *Germany*, the legal position of a managerial employee is determined by the fact that although he or she is personally dependent upon the employer, his or her tasks are characteristic of an employer's tasks, such as workforce planning, recruitment and giving notice. In *Switzerland*, some specific judge-made rules apply to managerial employees. According to the case law, managerial employees may generally not claim payment or compensation time off for overtime work. In *Sweden*, 'executives' and persons in high managerial positions are explicitly excluded from the Employment Protection Act, even though they fall under the concept of 'employee'. In *Turkey*, employees in high managerial positions are excluded from the job security provisions of the Employment Act. In *Poland*, managerial employees do not constitute a separate legal group with a comprehensive set of rights, but several Labour Code provisions have been expressly modified in respect to them. In *France*, there is a distinction between executives (*cadres*) and senior executives (*cadres supérieurs*) which is important in terms of working time, election of work representatives, collective bargaining and industrial tribunal rules. In *Montenegro*, on the other hand, managers have the status of 'employee'.

c. Employees in the Public Sector

In some countries, workers in the public sector are employees in the 'classical sense', while in others, they form a distinct group. In *Germany*, the position of employees in the public sector does not, in principle, differ from that of employees who work in the private sector. However, collective agreements that apply to them regularly contain specific provisions. In *Sweden*, too, there are no major legal differences between public and private sector employees. Although additional provisions are applicable to public sector employees, they are also subject to ordinary labour legislation. In any event, labour law does not (any longer) include a specific sub-type of 'public employee'.

In *France*, on the other hand, contract employees who form part of the civil service are governed by public law. In *Austria*, too, the position of public sector employees differs significantly from that of employees in the private sector. As their employment relationship is regulated in detail by statutes, the room for contractual agreements is limited and there is virtually no room for collective bargaining. Similarly, in *Hungary*, specific provisions exist for employment relationships with public employers. The rules are generally stricter than for other employment relationships. Thus, in the collective agreement or in the contract of employment, no derogation from the regulations provided for in the Labour Code on the duration of the notice period and severance pay is permitted.

In the *Netherlands*, the Civil Code contains a general exception of applicability to contracts of employment with public authorities. This implies that public authorities that conclude contracts of employment must specify their own rules for this category of employees. However, they can choose to apply the Civil Code or parts thereof. As is the case in *Austria* and *Germany*, for instance, civil servants enjoy a special statute under public law. However, a proposal has been initiated by Members of Parliament to amend this. According to the proposal, civil servants would conclude contracts of employment under civil law.

d. Employees in Church Service

In many countries, specific rules apply to employees who are in the service of the church. In *Montenegro*, employees in church service also represent a distinct category. In principle, labour law fully applies to them. However, churches can determine specific loyalty duties due to their right to self-determination which is guaranteed under the Constitution. The position in *Germany* is similar. In *Latvia*, the courts have held that churches have discretion under labour law to request certain categories of employees to hold certain religious beliefs and to act in conformity with the ethos of

the given religious organisation. In *Austria*, employees in church service do not represent a distinct category, as (individual) employment law is fully applicable to them. However, co-determination at the workplace level is restricted, as those undertakings that directly serve confessional/religious purposes are considered ideological establishments.

B. 'Workers' as a Separate Category

In the *UK*, in addition to the concept of 'employee', the law has increasingly provided a number of secondary gateways into (a smaller set of) basic employment rights, including, notably, the worker concept as laid down in the Employment Rights Act, which was introduced to broaden the scope of basic labour standards. 'Worker' means:

> [A]n individual who has entered into or works under … (a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

In a few other countries, a separate category of 'workers' is also acknowledged. This is the case, to a certain extent, in *Ireland*. In *Malta*, the category of 'workers' exists in the area of industrial disputes (only).

However, in most countries (*Austria*, *Belgium*, *Croatia*, the *Czech Republic*, *Denmark*, *Estonia*, *Finland*, *France*, the *Former Yugoslav Republic of Macedonia*, *Germany*, *Greece*, *Hungary*, *Iceland*, *Italy*, *Latvia*, *Lithuania*, *Luxembourg*, *Montenegro*, the *Netherlands*, *Norway*, *Poland*, *Portugal*, *Russia*, *Slovakia* and *Switzerland*), no separate category of 'workers' exists. This means that in principle, no group of persons is acknowledged who would be entitled to certain employment rights, albeit not qualifying as employees. In *Romania*, specific categories of staff are considered in the law who are party to an employment relationship without being employees, such as clerical staff, casual workers, members of cooperatives or salaried lawyers.

IV. SUBORDINATION: CRITERIA AND INDICATORS

A. Subordination

Typically, 'subordination' represents the key requirement when determining whether a legal relationship between two parties qualifies as an 'employment relationship'.

i. The Relevance and Meaning of 'Subordination'

In all countries, several criteria are applied when assessing a legal relationship. In the *Czech Republic*, for instance, the Labour Code describes four characteristics of dependent work: (1) subordination of the employee; (2) performance of work in the name of the employer; (3) performance of work in accordance with the employer's instructions; and (4) personal performance of work by the employee. In *Italy*, the Civil Code recognises the following as the main elements of employment: (1) payment of a wage; (2) cooperation; (3) subordination (ie, subjection to the power of direction of the employer); and (4) dependency. However, the third element is the most characterising element of the employment relationship, identifying the employee's duty to comply with the employer's power of instruction. It represents the technical and functional integration of the employee into the productive and organisational structure of the entrepreneur, who exercises his or her directive power through orders, control and disciplinary sanctions. In light of the above, the Supreme Court has held that:

> [O]ne unfailing element of the employment relationship is subordination, intended as a lien of personal submission of the employee to the employer's management power, which relates more to how the employee performs work rather than to the result of that work; on the contrary, the other elements of the employment relationship … are incidental. These factors should be taken into consideration as a whole and, in any case, in relation to subordination.

Indeed, it seems that subordination represents the key criterion in all countries, though its weight varies from one country to another. Apart from that, subordination is a concept that is understood differently from country to country.

In *Germany*, a contract of employment is characterised by a relationship of personal dependency or subordination between the parties. According to the case law, the essential feature of employment is that the individual, the employee, is directed by another. Hence, the existence of work instructions is the main indicator of subordination. In *Spain*, subordination means functional dependence, ie, the employee's integration in the company's supervision, management, organisation and power. In *Switzerland*, the crucial criteria to assess whether the work being carried out is dependent work are integration in another's organisational structure and subordination (in the sense of being subject to work instructions and work control). Subordination is also the key criterion in *Bulgaria*. An employee's two major obligations under an employment relationship pursuant to the Labour Code are to perform the work that is the subject matter of the employment relationship and to observe the established work principles. Other specific provisions of the Labour Code highlight and specify the employee's subordination under an employment relationship. Thus, the employee shall be required to: (1) carry out the lawful instructions of the employer; (2) observe the

internal rules adopted in the enterprise; and (3) coordinate his or her work with the other employees in conformity with the employer's instructions. In *Luxembourg*, on the other hand, integration is not typically referred to as a criterion defining an employment relationship. Court decisions use the concept of 'legal subordination' or 'legal dependence', referring to the employee's obligation to execute orders, even if he or she does not receive any on a given day. In the *UK*, the contract of employment is typified by a range of qualities including subordination, business integration and mutuality of obligation. The greater the degree of control or superintendence, the greater the likelihood that the worker will be deemed an employee. However, there is no fixed extent to which control is required as it only exists within a broader matrix of relevant factors.

Moreover, the courts have fleshed out the concept of 'subordination' differently when facing specific problems. A case in point is *Poland*. There, case law has introduced the concept of 'autonomous subordination'. It refers to situations in which an employer determines the duration of working time and the tasks to be completed, but does not directly interfere in the employee's mode of work performance. In other words, the employee is required to achieve the results requested by the employer, but has a relatively broad scope of discretion with regard to the method of work performance. In practice, this concept relates to employees with high-level skills or autonomy.

'Control' also plays a key role. In *Italy* and *Russia*, for example, it is part of the statutory definition of 'employment contract'. The same is true in *Malta*. In *Norway*, it is taken into consideration when deciding whether a person is the (functional) employer of another person. In *Switzerland*, too, 'control' is an important factor when assessing whether the work being carried out is dependent work. In the *UK*, the greater the degree of control, the greater the likelihood that a person is considered to be an employee. In *Austria*, according to the case law, the notion of employee is interpreted as referring to a person who is in a position of 'personal subordination', ie, under the command, authority and control of another person. This is, for instance, the case if the employer can monitor the work flow on a virtual platform.

Next to 'subordination' and 'control', the courts often refer to 'integration'. In *Germany*, in addition to assessing the extent of another person's power to direct, the courts often use the 'integration test' by asking whether a person forms part of the organisational structure of an undertaking. The question then is whether work is performed within the framework of an organisation that was constituted by another. In this context, one question occasionally asked by the courts is whether similar work is performed in the undertaking by persons who undoubtedly qualify as employees, and whether the employer generally does not differentiate between persons who are employees and the person whose legal qualification is being examined. In *Spain*, too, integration of the worker into the company (meaning, inter

alia, compliance with work schedules) is a relevant factor. In *Slovenia*, 'integration into the organised working process' is one of the basic (statutory) components of the employment contract. In the *Former Yugoslav Republic of Macedonia*, the law emphasises the following two criteria of subordination: the performance of work according to the instructions and under the supervision of the employer, and the participation of the worker in the employer's organised work process. In *Italy*, as has already been mentioned, the Civil Code recognises three other elements of employment next to 'subordination': 'payment of a wage', 'cooperation' and 'dependency'. While 'dependency' refers to the employee's economic and social vulnerability in the sense that labour is a unique means for earning a living, 'cooperation' is a technical and organisational element of subordination that is recognised in the cooperation of the employee with other employees and the employer.

ii. The Need for an Overall Assessment

In all countries, qualification of a relationship is far from clear-cut and requires comprehensive assessment. In *Austria*, *Germany* and *Switzerland*, the courts apply the so-called 'typological method' when determining whether a person is (sufficiently) subordinated in order to justify the relationship with another person being qualified as an employment relationship. The starting point of the legal analysis is that the term 'employee' refers to a mere 'type', meaning that all of the decisive criteria must not necessarily be met in individual cases. Nor is there a feature of dependent work that is not also occasionally found among self-employed persons. The courts even deny the possibility of fixing abstract criteria in advance that must be met in individual cases. Instead, various criteria are used indicating the existence of an employment relationship. The basis of the corresponding legal qualification of the contract is in any event an 'evaluation of a general assessment', meaning that the courts—when deciding individual cases—take a 'holistic view' in order to determine whether a person qualifies as an 'employee'. The criteria for determining personal subordination vary from one case to another. Since the courts hold the view that the existence of an employment relationship is dependent on the 'degree' of personal subordination, the only thing that can safely be said is that the more far-reaching the power of one entity to direct a person, the more likely the contract with that person will be considered a contract of employment.

Similarly, in *Spain*, there is no decisive criterion, and thus a comprehensive and holistic assessment of each individual case must be conducted. In *Norway*, the courts carry out a 'discretionary overall assessment' based on the relationship between the parties as a whole. In *Greece*, in 'measuring' whether a person is sufficiently subordinated to justify qualification of the relationship as one of employment, the courts apply the co-called 'qualitative' criterion. Accordingly, the courts put aside the quantity of the relevant

criteria ascertained in each case and highlight the 'qualitative' element, that is, the quality of the worker's engagement and dependence which 'necessitate protection according to the rules of labour law'. This qualitative appreciation of the criteria may differ depending on the given case, and takes the type and nature of the work into account.

It seems that in some countries, there is less leeway for the courts. For instance, in *Sweden*, a multi-factor test is applied by the courts, though a general assessment of all factors in the individual case is suggested in leading doctrines.

B. Indicators

In all countries, various indicators are used when determining whether a relationship between two parties qualifies as an employment relationship.

In *Sweden*, the multi-factor-test that applies in this context comprises the following: a person is likely to be an employee if he or she is personally obliged to perform the work that is stated in either a (written or oral) contract or could be presumed by the parties to the contract; personally or practically personally performs the work; is at the disposal (of the employer) continuously for work arising within the business of the employer; the relationship between the parties has continuous or, in any event, a 'lasting' character; is prohibited under the contractual arrangement or as a consequence of the conditions of work (time or capacity for other work), from undertaking similar work on behalf of someone else; is, for the performance of the work, subject to the employer's instructions or control in relation to how, where and when to carry out the work; must use the machinery, tools or material provided for by the other party (the employer); is compensated for direct expenses such as travel costs; is remunerated for the work effort, at least partially, through a guaranteed salary; or is economically and socially in a similar position as an employee.

In *Ireland*, the government established the Employment Status Group in 2000, consisting of social partner representatives and representatives of various government departments, including the Revenue Commissioners. The Group issued a Code of Practice for Determining Employment or Self-Employment Status of Individuals, which was later updated in 2007. The Code provides as follows: while all of the following factors may not apply, an individual would normally be an employee if he or she: (1) is under the control of another person who directs as to how, when and where the work is to be carried out; (2) supplies labour only; (3) receives a fixed hourly/weekly/monthly wage; (4) cannot sub-contract the work; (5) does not supply materials for the job; (6) does not provide equipment other than the small tools of the trade; (7) is not exposed to personal financial risk in carrying out the work; (8) Does not assume any responsibility for investment

in and management of the business; (9) does not have the opportunity to profit from sound management in the scheduling of engagements or in the performance of tasks arising from the engagements; (10) works set hours or a given number of hours per week or month; (11) works for one person or for one business; (12) receives expense payments to cover subsistence and/or travel expenses; (13) is entitled to extra pay or time off for overtime. Additional factors are to be considered. While all of the following factors may not apply to the job, the Code provides that an individual would normally be self-employed if he or she: (1) owns his or her business; (2) is exposed to financial risk by having to bear the cost of making good faulty or substandard work carried out under the contract; (3) assumes responsibility for investment and management in the enterprise; (4) has the opportunity to profit from sound management in the scheduling and performance of engagements and tasks; (5) has control over what is done, how it is done, when and where it is done, and whether he or she does it personally; (6) is free to hire other people, on his or her terms, to do the work which has been agreed to be undertaken; (7) can provide the same services to more than one person or business at the same time; (8) provides the materials for the job; (9) provides the equipment and machinery necessary for the job other than the small tools of the trade or equipment which in an overall context would not be an indicator of a person in business on their own account; (10) has a fixed place of business where materials, equipment, etc can be stored; (11) costs and agrees a price for the job; (12) provides his or her own insurance coverage, eg, public liability coverage; and (13) controls the hours of work to fulfil the job obligations.

In *Germany*, the courts apply a range of indicators for the existence of an employment relationship. Among these are periodic payments or otherwise, payments in kind, recognition of entitlements that are typical for an employment relationship, travel payments by the person requesting the work, granting of annual leave, payment of income tax and social security contributions, and keeping and retaining social documents at the place of work. An indication of an employment relationship may also be when a person places his or her entire working abilities at the disposal of another person, while any secondary activities are prohibited under the contract. Another indication may be the provision of tools or materials by the person requesting the work. Business registration, on the other hand, has not been considered to be of relevance by the courts.

In *Switzerland*, the courts apply the following indicators: commitment to mandatory working hours and control thereof, allocation of a workplace in an enterprise; no bearing of a business risk; provision of tools and materials for work; fixed and/or periodic payments; an obligation to perform duties personally; payment or compensation for overtime; a commitment to a non-competition clause or the prohibition of secondary employment; labelling of the agreement by the parties; payment of social security contributions

by an employer; qualification as an employment relationship according to social security and tax law; the person performing the work has no personal presence in the market; the taking of holidays; acting in a third party's name and for a third account; full-time activity for part of the contract; the existence of a probation period; agreement on a long notice period or fixed-term work of at least one year; the way in which the contract is executed by the parties; subordination to persons who themselves work in the service of the employer (superiors); dependence on an external organisational structure (whereas self-employed persons have their own organisational structure).

In *Finland*, the courts also apply a range of indicators. Among the questions asked are the following: who dictates when the work is performed, ie, the working hours? Who dictates where the work is done—in the premises of the employer or in a place the employee has chosen? Who owns the machines or equipment used to perform the work? Who owns the space where the work is done? Who dictates how the work is carried out/work methods? Who dictates who is in charge of supervising the work? Who observes the quality of the work performance? Who sets the objectives of the work? Is income tax withheld from the payment? Who is in charge of making social security payments, employment pension contributions and accident insurance? Who carries the financial risk of the business?

In *Turkey*, the Obligations Act provides various indicators of subordinate employment: in principle, the work must be carried out personally by the worker; the worker shall use machinery, tools, technical equipment, facilities and vehicles provided by the employer; the worker is subject to obligations related to the work itself rather than the final result and provides the employer with the work rather than the result; the worker is prevented from performing paid work for someone else in the case of subordinate employment and specific work that is 'in competition with his/her employer'. Other indicators relate to the form of payment and the bearing of financial risks.

In *Latvia*, the Law on Personal Income Tax contains a list of indicators for the purpose of distinguishing between employed and self-employed persons. The indicators included in the tax law fully coincide with those the courts have defined in the case law on employment disputes. In *Romania*, until 2015, tax law stipulated the right of tax authorities to requalify a contract as one of employment on the identification of fixed criteria. This approach has recently been reversed: the Fiscal Code specifies the criteria for identifying independent work.

C. 'Economic Dependence'

In no country does the qualification of a legal relationship seem to depend exclusively on 'economic dependence'. To be more precise, in no country

does 'economic dependence' seem to be able to substitute for a lack of dependence or subordination. That said, the weight of 'economic dependence' as a factor to be taken into account seems to vary from one country to another.

In some countries (*Croatia*, *Estonia*, *Lithuania*, *Montenegro* and *Romania*), 'economic dependence' (as such) seems not to play any role when determining whether a relationship is an employment relationship. In *France*, the courts have explicitly ruled that the legal relationship of workers with the person for whom they work cannot be determined by their weakness or economic dependence, but only by a contract between the parties; the status of employee requires the existence of a legal relationship of subordination between the worker and the employer. In *Russia*, no case law exists on the economic dependence of the employee as an indicator of the existence of an employment relationship. This seems to be irrelevant for the courts from the point of view of qualifying the specific type of relationship.

In some countries, however, 'economic dependence' does have a bearing. In *Bulgaria*, economic dependence of the person who provides labour services is one of the characteristic elements of the employment relationship. Consequently, such dependence is fundamental for determining the employee's status. In the *Czech Republic*, the case law states that economic dependence is a common feature of dependent work and differentiates dependent work from other types of work. In *Ireland*, the overriding consideration will always be whether the individual performing the work or providing the service does so 'as a person in business on their own account'. Consequently, the extent to which an individual has the opportunity to benefit financially from the work or to be exposed to financial risk or loss is paramount.

In any event, 'economic dependence' is neither required in all countries nor in itself sufficient when determining 'employee status'. In *Sweden*, even though 'economic dependence' is one of the more significant parameters for establishing whether an employment relationship exists, it does not suffice on its own to determine the existence of such a relationship. In *Finland*, the higher the economic dependence of a person on the employer, the more probable it is that an employment relationship exists. In *Italy*, economic dependence, generally speaking, does not play a crucial role in determining subordination, because this element may be present in certain self-employment relationships as well. This notwithstanding, the Constitutional Court has emphasised the condition of economic and social dependence of the employee to distinguish between subordination and self-employment. In *Malta*, economic dependence is one factor that must by law be taken into consideration for a self-employed person to be deemed employed, but it is by no means mandatory or, indeed, exclusive.

V. THE PRINCIPLE OF PRIMACY OF FACTS

In (almost) all countries, the principle of 'primacy of facts' seems to apply, although, as is the case for instance in the *Netherlands*, it may be termed differently.

In *Poland*, the Labour Code explicitly provides that an employment relationship shall be considered valid, regardless of the label the parties concluding the contract gave it. According to the law, it is not permissible to replace an employment contract with a civil law contract where the terms upon which the work to be provided derive from the provisions laid down in the Act. In *Slovenia*, too, the primacy of facts is laid down in the law. The Employment Relationships Act provides that if the components of an employment relationship exist, work may, in principle, not be performed on the basis of a civil law contract. In *Turkey*, the 'primacy of facts' is a general principle of contractual law. The Obligations Act provides that:

> [I]f a person performs work in a particular period that would only be performed in exchange for a wage and if that work is accepted by the employer, it is deemed that an individual employment contract has been concluded between them.

In *France*, acknowledgement of the principle by the courts resulted in franchise contracts being requalified as contracts of employment. In *Italy*, the Constitutional Court stressed that:

> [W]hen the concrete relationship and the modalities of work performance—eventually in contrast to the conditions agreed by the parties to the contract—are those typical of an employment relationship, only the latter can be the qualification of the contract.

In *Germany*, the principle of 'primacy of facts' is acknowledged in the sense that the 'true nature' of the contract, irrespective of its 'labelling' by the parties, is the determining factor when legally assessing the relationship between the parties. In the courts' view, the basic idea of employment law as an instrument of protecting employees from the (usually economically more powerful) employer would be impaired if the latter could set aside this protection by simply using contractual language that points in the direction of a 'free service contract'. In *Russia*, the principle of 'primacy of facts' has not been explicitly affirmed in law, but applies in practice.

The exact content of the principle of 'primacy of facts' may vary from one country to another. In *Malta*, the law makes sufficiently clear that regardless of the form of the relationship between the principal and the service provider, if five out of the eight criteria fixed in the law are fulfilled, the relationship in question is one of employment. In *Belgium*, the principle of 'primacy of facts' applies in the sense that the qualification of the employment relationship by the parties prevails, except in cases in which the facts clearly preclude the qualification of the relationship by the parties. In the

UK, on the other hand, an express provision that a contract is a contract of employment cannot conclusively determine whether it is such a contract.

The principle of 'primacy of facts' may also be more significant in one country than in another. In *Belgium*, for instance, although the principle is acknowledged, its significance is limited due to the application of some regulations on evidence.

In the *Former Yugoslav Republic of Macedonia*, the labour law system does not contain provisions that can be considered as forming the basis for the principle of primacy of facts. According to case law, contracts for services are considered valid if they are concluded in accordance with the provisions of general contract law. Moreover, case law does not provide the possibility of bringing a legal dispute before the court to determine the legal status of the subject of the service contract, particularly when it effectively meets the 'factual' assumptions associated with an employment contract.

VI. QUALIFICATION IN FULL

A. Comprehensive Qualification

In most countries (*Austria*, *Belgium*, *Croatia*, *Cyprus*, *Denmark*, the *Former Yugoslav Republic of Macedonia*, *Greece*, *Iceland*, *Ireland*, *Italy*, *Latvia*, *Lithuania*, *Luxembourg*, *Montenegro*, *Norway*, *Poland*, *Portugal*, *Romania*, *Serbia*, *Spain* and the *UK*), a contract between two parties can only either be a contract of employment or any other contract. In other words, there is no third option according to which only part of a contract can be qualified as a contract of employment.

In *Bulgaria*, the Labour Code explicitly provides that relationships for the provision of labour services can only be employment relationships. It is prohibited to include rules that go beyond employment-related regulations in contracts of employment. According to the law, such rules will be null and void.

In *Turkey*, there are no legal provisions on hybrid contracts. The solution suggested by the case law includes the following: if a hybrid contract resembles an employment contract, the regulations governing employment contracts shall govern the entire contract. In *Switzerland*, the courts have held that in the field of service contracts, so-called innominate contracts and mixed contracts are admissible. Thus, legal relationships which result in the dependence of one party and which do not qualify as a contract of employment as a whole are subject to specifically adapted legal consequences. Dependence must reach a significant degree of intensity to justify the application of certain protective employment law provisions.

In *Finland*, the concept of hybrid or mixed-type employment contracts is recognised. This concept refers to a contract of employment that fulfils the elements of another type of contract as well. As a main rule, several different regulations can be applied to this relationship.

B. Additional Contracts and the Existence of Non-contractual Legal Relationships

In all countries, the parties to an employment contract are perfectly free to conclude an additional contract, which as such does not qualify as a contract of employment. The parties can conclude such a contract at any time. Apart from contractual relationships, non-contractual legal relationships between parties often exist. For instance, the parties may be liable under tort law in the event that damage is caused to the other party. However, the application of tort law may be restricted by the courts. A case in point is *Germany*, where the limitation of liability of employees as developed by the courts is not restricted to liability arising from the contract, but applies to liability under tort law as well.

In the *Czech Republic*, other contractual relationships between the employee and the employer must take the existing employment relationship into consideration. That said, the so-called principle of subsidiarity applies. This means that the Civil Code always also applies to employment relationships if the provisions of the Labour Code themselves cannot be applied. In *Romania*, the parties may conclude additional contracts during the performance of the contract of employment if the conclusion of another contract does not lead to legal provisions being evaded. In *Estonia*, the courts have stated that agreements on non-competition clauses are considered independent contracts under civil law. In *Hungary*, the Labour Code itself has identified two agreements ('non-competition agreements' and so-called 'study contracts') that are closely linked to the employment relationship. These agreements are not regarded as contracts of employment, but are subject to different rules.

VII. LIMITS TO THE FREEDOM OF CONTRACT

A. 'Contract of Employment' as a Mandatory Concept

As the principle of 'primacy of facts' applies in (almost) all countries, it does not come as a surprise that freedom of contract is restricted in the sphere of employment law: the legal concept of 'employee' is mandatory and cannot be disposed of by the parties to the contract. If a person on the basis of