Thematic Report 2009

Characteristics of the Employment Relationship

European Network of Legal Experts in the field of Labour Law,
dealing with both individual and collective rights/aspects

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(2) to support the development of statistical tools and methods and common indicators, where appropriate broken down by gender and age group, in the areas covered by the programme:

(3) to support and monitor the implementation of Community law, where applicable, and policy objectives in the Member States, and assess their effectiveness and impact:

(4) to promote networking, mutual learning, identification and dissemination of good practice and innovative approaches at EU level;

(5) to enhance the awareness of the stakeholders and the general public about the EU policies and objectives pursued under each of the policy Sections:

(6) to boost the capacity of key EU networks to promote, support and further develop EU policies and objectives, where applicable

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LIST OF ABBREVIATIONS

Art.	Article
CEO	Chief Executive Officer
co.co.co.	*Collaborazione coordinate e continativa*, i.e. the continuous coordinated cooperation
EC	European Community
ECJ	Court of Justice of the European Communities
EEA	European Economic Area
e.g.	for example (*exempli gratia*)
ELLN	European Labour Law Network
EP	European Parliament
EU	European Union
HR	Netherlands Supreme Court (*Hoge Raad*)
i.e.	that is (*id est*)
ILO	International Labour Organisation
No.	Number
OJ	Official Journal
v.	versus
VAT	Value Added Tax

EXECUTIVE SUMMARY

This Thematic Report examines several aspects of the employment relationship. In particular, it expands on how employment relationships are defined in the Member States of the EU and the European Economic Area countries, which specific categories are recognised in addition to the standard employment contract, and how countries deal with bogus self-employment.

Chapter 1: The Law and the Employment Relationship

In most countries, statutory definitions of either 'employment contract'/'employment relationship' or 'employee'/'employer' (or both) exist. In a minority of countries, the relevant definitions have been developed by the courts instead. Where statutory definitions do exist, these definitions are far from comprehensive and substantive. All countries, as far as statutory provisions are in place, at best fix certain criteria or indicators. As a consequence, court decisions play an important role in all countries relating to determining the existence of an 'employment relationship'. A 'flexible' approach is applied, for instance, in Ireland, where the relevant criteria have been fixed in a soft regulatory instrument.

In most countries, the existing definitions essentially apply throughout all areas of labour law. However, due to the fact that different labour law rules sometimes serve different purposes, variations are frequently in effect. In individual labour law, for instance, the underlying purpose of applying the relevant rules may be that an employee is subject to subordination and control of another. On the other hand, in certain sections of collective labour law (workers' participation at plant level, in particular), the underlying concept may be that the employee collaborates with others while forming part of a different work organisation. With regard to social security and tax law, definitions are largely uniform in many countries. However, in many other countries, the relevant definitions are different from the outset.

Social dialogue in general and collective bargaining in particular are of limited importance in most countries when determining the 'employee status'. In many countries, the social partners are even prevented from defining the relevant terms autonomously because the notion of 'employee' is regarded as a mandatory concept that cannot be deviated form by a collective agreement.

Chapter 2: Practical Methods for Recognising an Employment Relationship

Almost all countries adhere to the so-called 'principle of primacy of facts', according to which the courts are not bound by the description or definition of the relationship provided by the parties to the contract. This is partly due to the fact that the execution of a contract contrary to its terms may be regarded as an implied modification of the contract. Furthermore, it is partly due to the fact that many of the indicators and tests that are applied when determining the 'employee status' are aligned with the actual implementation of the employment contract, in particular, compliance with the employer's instructions and being at the employer's disposal. Finally, and most importantly, in almost all countries an employment contract is qualified by an independent overall assessment of the actual substance of the legal relationship. As a consequence, in most countries a contract automatically qualifies as a contract of employment if the practical implementation of the contract by the parties effectively suggests a contract of employment. Moreover, in some countries, labour law applies, even in the event where parties did not agree on fixed remuneration.

Differences seem to exist between the surveyed countries in respect of the question whether the principle of primacy of facts can only be applied in favour of an employee. If this is the case, a contract described as a contract of employment by its parties that would constitute a self-employment construction according to its substance, qualifies as an employment contract – irrespective of its practical implementation.
In some countries, (rebuttable) statutory presumptions in favour of the existence of an employment relationship exist and/or the burden of proof (to the detriment of the employment contract) has been shifted towards the employer. With regard to the assumption that an employment relationship exists, the relevant provisions partly tie in with the continuity of the service, as is the case in the Netherlands, and partly with elements of 'organisational subordination' (i.e. the place of work and working time determined by another person), integration (equipment and working tools belonging to the beneficiary of the activity) and periodicity of remuneration, as is the case in Portugal and, at least to a certain extent, in Spain. The rationale behind a (partial) shifting of the burden of proof with regard to an employment relationship partly seems to be that it is the employer who is responsible for establishing a relationship with an indisputable legal qualification.

Provisions according to which certain persons are legally deemed to be employees are few and far between in the countries covered by this study. They do play a certain role, however, merely with regard to small groups of working persons, for example travelling salesmen.

Chapter 3: Criteria for Identifying an Employment Relationship

In all surveyed countries, the notion of 'employee' is regarded as a mandatory concept in the sense that the parties to the contract are not allowed to simply 'un-contract' its existence. The basis of determining an employment relationship is an objective overall assessment of the facts in each individual case. A multi-faceted or typological approach is applied by all national courts with, in principle, each element allowed as a substitute for another (missing) element. The main indicator of an employment relationship in all countries, however, is subordination to or dependence on another person.

The key aspect of such subordination/dependence is classified as 'organisational subordination' in the sense that one person is assigned the power to direct another person. In a few countries, such 'organisational subordination' is paramount or even indispensable when determining an employment relationship. Where not expressly acknowledged by law, it is in any event the key criterion for the national courts. Some jurisdictions accept that the power to direct as such is sufficient, without any additional need for this power actually being exerted. In addition, it is widely acknowledged that an employer's power to direct with regard to how to do a certain job is not required if the other party to the contract has specific know-how.

Another important factor in most countries is control of the work by the employer. Again, it is widely acknowledged that the mere 'power of control' is sufficient.

Integration of the employee in the employer's work organisation is also among the factors determining an employment relationship in many countries as a primary or at least a subsidiary criterion. As a consequence, an employment relationship may be supported even if 'personal subordination' is not applied where an employee is an integral part of an employer's work organisation.

Other important elements of 'organisational subordination' are the provision of tools and materials by the person requesting the work and carrying out work within specific hours or at an agreed time.

With regard to economic factors, this study has shown that the existence of 'economic dependence' cannot replace a lack of 'organisational dependence' in any country. However,

whether and to what extent economic aspects can compensate for a lack of certain elements of 'organisational subordination' is another question. The fact that a person receives (periodical) payments is used as an indicator for the existence of an employment relationship in most countries. The absence of financial risks in most countries may indicate the existence of an employment relationship. Finally, most countries apply the criterion whether work is performed solely or at least mainly for the benefit of another.

Major differences exist regarding the significance of an obligation to personally carry out work. Some countries allow the employee, in principle, to partly delegate the performance of work to another (third) person. Accordingly, so-called delegation or substitution clauses may be perfectly admissible under the relevant national law. Even if delegation is allowed, some national courts regard actual substitution of the work obligation as an indicator for the non-existence of an employment relationship.

Major differences also exist with regard to the criterion 'mutuality of obligations'. This is mainly due to the fact that national laws differ when it comes to the question whether and to which extent an employer is obliged to provide work under a contract of employment.

In the surveyed countries, duration and continuity of the relationship play a limited role. Some of the other factors considered in some jurisdictions include: recognition of certain entitlements and, more generally, references to labour law in the contract; qualification under social security and tax law; nature of the work performed; business registration and membership in a trade union or employers' association. In Sweden, a so-called 'social criterion' is often applied, which means that the courts may evaluate whether the economic and social situation of the person concerned is equal to that of an ordinary employee.

Chapter 4: Specific Categories of Workers

Many countries are limited to the notion of 'employee' to the exclusion of other categories of workers, at least in the private sector. Other countries subdivide various types of workers:
White-collar and blue-collar employees: This traditional difference is only found in four countries, with different consequences. This distinction seems to lose its practical importance.
Executives: In a few countries, executives are not classified as employees and have a separate statute. Most countries have specific rules for employees in an executive position. The definition of 'executive', however, varies widely from country to country.
Trainees: Many countries have explicitly recognised trainees by law. Some classify trainees as employees under certain conditions, others have a special statute.

An important group are the so-called *'economically dependent workers'*: Workers who are merely economically dependent are not legally recognised as a separate employee category in most countries. This may be partly due to the fact that the notion of 'employee' is relatively inclusive in some countries and, as a consequence, there is no pressing need to expand labour law.

By contrast, in other countries, such workers form a defined group. In Austria and Germany, 'quasi workers' are legally acknowledged. While in Austria the primary criterion is 'economic dependence', Germany applies additional requirements stipulating that, firstly, work is performed in person and, secondly, the worker, as compared to an employee, is in equal need of social protection. In both countries, only certain parts of labour law are, in principle, applicable to 'quasi workers'. In particular, labour courts are competent and anti-discrimination law is applicable to this group. In Italy, so-called para-subordinated work is acknowledged, resulting in the necessity of salaries paid to such workers being proportional to the quantity and quality of the work performed. In Portugal, the legal rules regarding personal rights, equality and discrimination, health and safety at work, are applied to situations in which a

professional activity is performed by a person for another without legal subordination, where the provider must be considered economically dependent on the activity's beneficiary.
In Spain, a specific category of economically dependent workers was recently (in 2007) recognised by the legislator. The main features of these economically dependent self-employed workers are similar to those in Germany: direct and personal performance of a professional activity, mainly for a single customer, on a regular basis and in exchange for remuneration; an economic dependence of that customer, receiving from him or her at least 75 per cent of all income produced by their job, professional activity or business; in Germany the relevant proportion is 50 per cent.

In Sweden, a category of so-called (economically) dependent contractors exists. These contractors are defined as persons who perform work for another person and are not employed by that other person, but who occupy a position of essentially the same nature as that of an employee.
In the United Kingdom, the term 'worker' covers employees as well as those who work under a contract of personal service but who do not provide that service in the capacity of a professional or independent business. The principal rights enjoyed by workers are those under the National Minimum Wage legislation, the Working Time Regulations, the Public Interest Disclosure Act and the Part-time Work Regulations.
The extent of legal recognition of an 'intermediate' group of workers varies from country to country. The prerequisites of 'economic dependence' are far from uniform with considerable differences relating to the question to what extent the provisions of labour law are to be applied to 'economically' dependent persons. As to the requirements of 'economic dependence', there may be a certain common ground after all, in the sense that person-dependent work (without employing employees), working mainly for one customer on a regular basis and economic dependence on that customer are criteria, which are relatively widely shared between the countries concerned. As to the applicable provisions, anti-discrimination law and health and safety regulations may be part of a 'common denominator'.
Irrespective of what is mentioned above, the recognition of a category between employment and self-employment raises the question whether labour law should be expanded beyond a 'core' where its application is triggered by personal dependence or subordination on the possible ground that mere 'economic dependence' may justify the application of certain sections of labour law.

Besides the category of workers mentioned above, ten other categories of workers with either an employment contract or a different form of an employment relationship are distinguished:

Temporary Agency Workers: Many countries have particular statutes or provisions regarding temporary agency workers. The degree to which the assignment of temporary agency workers is restricted by these regulations differs highly from country to country.

Homeworkers: In some countries, the homeworker is subject to full application of labour law. Other countries have restricted this much more in accordance with specific needs of homeworkers.

Teleworkers: The European Framework Agreement on Telework has been implemented by various instruments in the Member States, sometimes within legislation, but mostly in the form of collective agreements or other agreements between social partners. The definition of telework is slightly modified in some cases. Teleworkers are generally entitled to the same rights as regular workers working in the company. Differentiations exist in certain respects, for instance, with regard to working hours.

(Short-term) casual workers: In some countries, short-term casual workers are recognised as a specific category. Some countries recognise this group in order to provide for exemptions from specific labour rights, due to the small proportion of their work. In other cases, special rules were created in order to protect, for instance, holiday rights.

Freelancers: The work of freelancers is usually not subject to legal regulations. In practical terms, 'freelance work' may often be restricted to certain sectors such as journalism and art. Normally, the applicability of labour law rules is based on the assessment whether the freelancer works under the authority of an employer (and therefore has an employment contract) or not.

Commercial agents: Some countries uphold specific provisions with regard to commercial representation by an employee (salesmen). In other countries it has to be determined from case to case whether the commercial agent is working in employment or as an independent party. The general criteria, as set out above, are usually applicable. A single country has implemented a rebuttable presumption that the 'commercial intermediary' has an employment contract.

Seamen: Some countries have a special regulation for seafarers. Usually seafarers are classified as employees subject to specific rules. Sometimes a specific maritime employment contract is available.

Household employees: Some countries have implemented specific legislation for this group. This usually concerns exemptions to regular labour legislation, for instance, regarding working hours.

Family workers: Some countries explicitly recognise this group, usually providing for exemptions to regular labour legislation, mostly regarding working hours.

Young workers: Some countries have a special regulation for this group, mostly in order to create some specific rules that deviate from ordinary labour law, for instance, regarding working times or training.

With regard to separate rules for specific sectors, this paper focuses on three sectors:

Entertainment sector: A few countries have specific provisions for this sector. Sometimes rules specify that artists are deemed to be self-employed, or sometimes the opposite, namely that artists are deemed to work on the basis of an employment contract. Also intellectual property rights may be governed by these rules.

Media: a few countries have specific rules for journalists. These rules are designed to protect the specific freedom of journalists. In some cases, limitations of fixed-term employment contracts are restricted in this branch.

Sports: Some countries have issued specific labour law rules for sportsmen. Usually, these rules aim to protect sportsmen working on the basis of an employment contract.

Chapter 5: Compliance and Enforcement with Regard to Employment Relationships

There are various options for investigating the true nature of an employment relationship. In several countries, certain administrative bodies are entitled to conduct such an investigation: the labour inspectorate, tax and/or social security authorities for example, and in some countries, specific administrative bodies are competent.
The competent courts are usually the courts that deal with regular labour law cases, which can be a labour court or an industrial tribunal in some countries, and civil courts in others. Administrative courts may be competent where the employment relationship is determined

through the tax or social security administration. In exceptional cases, a criminal court may be competent where a violation of labour legislation is covered by the criminal code.
In addition to adjudication by a court of law, mediation is provided as an option to settle disputes regarding the employment contract in several countries. Usually mediation is on a voluntary basis and often administrative bodies offer to help with mediation. Conciliation is also sometimes offered, but usually in cases of collective labour law. Arbitration is possible, but not often used. In some countries, conflicts are often settled by means of negotiations between employer and trade unions.
In a few countries, it is possible to request a declaration, decision or certification regarding the existence of an employment contract.
In a few countries, also social dialogue and collective bargaining may ascertain the employee status.

Chapter 6: Role of Social Dialogue and Collective Bargaining

Some countries have implemented a legal obstacle for representing workers without employee status, either because of union legislation or because of the rules on collective agreements. In other countries, unions are allowed to bargain on their behalf as well. A problem is that special categories of workers, such as freelancers, self-employed professionals and economically dependent workers are often not represented by the traditional trade unions.

Chapter 7: Bogus Self-Employment: the Risks of False Labelling

Bogus self-employment, also known as disguised or concealed employment, occurs when a person who is an employee is not classified as an employee in order to hide his or her true legal status and to avoid costs that may include taxes and social security contributions. Several definitions of this phenomenon are used. Bogus self-employment has two forms: by giving the employment relationship the appearance of a relationship with a different legal nature, or by repeatedly renewing contracts in order to avoid giving the employee the rights and benefits of regular employees. Often the qualification given to the contract by its parties is not decisive in deciding whether an employment contract has been concluded or not. The contract is qualified by an overall assessment of the actual substance of the relationship.
In a few countries, the legislator has attempted to combat bogus self-employment. Sometimes this is done in the perspective of combating illegal work. In a single country, the definition of ‘dependent work’ was introduced for this purpose.
In many countries, the employer can be forced to comply with labour legislation in a case of bogus self-employment with a civil procedure. It is also possible to apply administrative sanctions where social security contributions or taxes are not paid. This can imply retrospective payments as well as penalty fines.
Only in two countries, criminal sanctions are possible on the grounds of infringement of labour law. In a few other countries criminal sanctions are only possible in case of failure to comply with record-keeping requirements.

INTRODUCTION

The aim of the 2009 Thematic Report on the *Characteristics of the Employment Relationship* is to provide a comparative overview of the legal notion of the employment relationship, and of trends and problems encountered in the regulation of the employment relationship with regard to the scope of such a regulation, the impact of legislative provisions, the quality of enforcement and the experience of employer compliance in discharging employees' entitlements under national and Community law.

This study is based on contributions from the members of the European Labour Law Network (hereinafter referred to as: the ELLN), comprising the 27 European Union Member States (hereinafter referred to as: the Member States), as well as Iceland, Liechtenstein and Norway as European Economic Area countries (hereinafter referred to as: the EEA).

The output, *inter alia*, includes a review of the roles played by key actors (e.g. national policy makers, labour law administrators, adjudicators, social partners and industrial relations practitioners, individual employers and workers, labour law experts and academics). This provides useful information for policy makers at all levels with regard to the role and performance of the judicial authorities and labour/civil court systems, as well as the labour inspection services, social security administration, tax authorities and social partners, where appropriate. To the extent possible, the report identifies the contribution at national level of social dialogue mechanisms and collective bargaining in order to resolve difficulties that have an effect on the employment relationship, and examines the scope for achieving further improvements. In this respect, it considers legal obstacles encountered in some countries during efforts to exercise trade union representation and collective bargaining rights on behalf of workers' categories (freelance personnel and specific categories of self-employed professionals or 'economically dependent workers') other than those employed under traditional contracts of dependent employment.

The Thematic Report also assesses the extent to which national law, judicial rulings and social dialogue have sought to ensure that specific features of particular sectors, such as the entertainment, media and sport sectors, are covered by law and practice relating to employment status, and how these, in turn, can have an effect on social security rights. This assessment takes into account trends within such sectors whereby employers have unilaterally changed the status of individuals from a standard employment relationship to alternative contractual arrangements, such as self-employed professionals or economically dependent workers with a different set of employment rights.

This report provides information about the relevant legal rules of the countries covered by the underlying study. Specific features, as applicable in the relevant countries, are highlighted.

Leiden, November 2009

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CHAPTER I. THE LAW AND THE EMPLOYMENT RELATIONSHIP

1. Introductory Remarks

The first chapter of the report examines the different approaches within the legal systems of the Member States, as well as Iceland, Liechtenstein and Norway as EEA countries, to determine the existence of an employment relationship. In particular, it describes whether the employment relationship or the parties to an employment relationship are defined by statutory law, judge-made law or a combination of both. Furthermore, the chapter aims at giving information on the notion of 'employee' as it is used within different sections of labour law and within different areas of the law in the surveyed countries. Finally, reference is made to the role of social dialogue mechanisms and collective bargaining, indicating their minor role in the assessment of employment relationships.

2. Defining the Employment Contract and/or the Employment Relationship

2.1. Statutory Definitions

In many countries covered by this Thematic Report, statutory definitions of the employment relationship or the employment contract are in effect. This applies to **Austria**[1], **Belgium**[2], **Estonia**[3], **Finland**[4], **Greece**[5], **Hungary**[6], **Ireland**[7], **Liechtenstein**[8], **Lithuania**[9], **Malta**[10], the **Netherlands**[11], **Slovenia**[12], **Romania**[13] and **Spain**[14]. There is, however, a definition of 'dependent work' in **Czech** labour law[15].

In all these countries however, the definitions are fairly vague and far from exhaustive, although definitely substantive as opposed to merely descriptive. Many statutory provisions do not go beyond stating with regard to an employment relationship or an employment contract that personal work is to be carried out by the person who works for the contractual partner. In most countries, certain criteria are used to determine whether or not a contract is a contract of employment.

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1 § 1151 of the Austrian Civil Code *(Allgemeines Bürgerliches Gesetzbuch).*
2 Article 328 of the Belgian Labour Relations Act.
3 Article 1 of the Estonian Employment Contract Act.
4 Chapter 1, Section 1(1) of the Finnish Employment Contracts Act.
5 Article 648 of the Greek Civil Code.
6 Sections 102-104 of the Hungarian Labour Code.
7 The definition in the Irish Unfair Dismissals Act 1977 is *"a contract of service or of apprenticeship, whether it is express or implied and (if it is express) whether it is oral or in writing".* In the Irish Organisation of Working Time Act 1997 the previous definition is expanded upon to include *"any other contract whether an individual agrees with another person, who is carrying on the business of an employment agency within the meaning of the Employment Agency Act 1971, and is acting in the course of that business, to do or perform personally any work or service for a third person (whether or not the third person is a party to the contract)".* The Irish Employment Equality Act 1998 further expands the definition to include *"any other contract whereby an individual agrees with another person personally to execute any work or service for that person".*
8 § 1173 a Article 1 (1) of the Liechtenstein Civil Code *(Allgemeines Bürgerliches Gesetzbuch).*
9 Article 93 of the Lithuanian Labour Code *(Darbo kodeksas).*
10 Article 2 of the Maltese Employment and Industrial Relations Act 2002.
11 Article 7:610 of the Netherlands' Civil Code.
12 Article 4 of the Slovenian Employment Relationships Act (Ur.l.RS, No.42/2002, 193/2007).
13 Article 10 of the Romanian Labour Code.
14 Article 8.1 of the Spanish Labour Code.
15 § 2(4) of the Czech Labour Act No. 262/2006 Coll.

According to the statutory definition in **Portugal**, for instance, an employment contract is an agreement by which a natural person undertakes to provide an activity to another or to others, within an organisation and under its authority[16], against remuneration. According to the law in **Poland**, establishing an employment relationship means that an employee undertakes to carry out a certain type of work for the benefit and under the supervision of an employer, whereas the latter undertakes to employ an employee in return for remuneration. In **Slovenia**, the employment relationship is defined as a relationship between the worker and the employer, whereby the worker is included in the employer's organised working process on a voluntarily basis, in which he or she continuously carries out work in person according to the instructions and under the control of the employer[17] in return for remuneration.

In all countries, except **Austria**, **Ireland** and the **United Kingdom**, the respective statutory provisions contain the additional requirement that work is carried out in return for a salary or remuneration.

Apart from that, the statutes of most countries require that the working person provides the service under the supervision or control of the other party to the contract and is subordinated to that other party or performs 'dependent' work. This is the case, for instance, in **Belgium**, **Estonia**, **Finland**, **Greece**, **Lithuania**, **Poland**, **Portugal**, **Romania**, **Slovakia** and **Slovenia**. In **Liechtenstein**, integration of a person in another's organisational structure is one of the statutory elements. The law in **Slovenia** requires both subordination and integration.

The law in **Hungary** provides a more detailed definition of the employment relationship: it explicitly describes the rights and obligations of the parties to an employment contract[18]. This implicitly fixes not only an 'obligation of availability' as the essential obligation of the employee, but also suggests the 'power of direction' of the employer as a prerequisite.

In **Ireland**[19], no uniform definition of the term 'employment contract' exists. It can only be established by a synopsis of different laws, because the term 'employment contract' is defined differently in different pieces of legislation. It is noteworthy that a group of experts appointed by the Irish government some years ago decided not to recommend enactment of legislation to further specify who is or who is not to be classified as an employee. Instead it recommended issuing a Code of Practice for determining employment or self-employment status. The purpose of this Code of Practice setting out criteria on whether an individual is an employee or not, is *"to eliminate misconceptions and provide clarity"*. The Code, though not legally binding, has legitimacy due to approval by consensus of the employers' and workers' representative bodies, as well as by the competent authorities.[20]

Because statutory definitions are incomplete, there is a huge body of additional case law in all countries that further substantiates the requirements of an employment relationship.

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16 Article 11 of the Portuguese Labour Code.

17 Article 4 of the Slovenian Employment Relationships Act (Ur.l.RS, No.42/2002, 193/2007).

18 Sections 102 to 104 of the Hungarian Labour Code.

19 The definition in the Irish Unfair Dismissals Act 1977 is *"a contract of service or of apprenticeship, whether it is express or implied and (if it is express) whether it is oral or in writing".* In the Organisation of Working Time Act 1997 the previous definition is expanded upon to include *"any other contract whereby an individual agrees with another person, who is carrying on the business of an employment agency within the meaning of the Employment Agency Act 1971, and is acting in the course of that business, to do or perform personally any work or service for a third person (whether or not the third person is a party to the contract)".* The Irish Employment Equality Act 1998 further expands the definition to include *"any other contract whereby an individual agrees with another person personally to execute any work or service for that person".*

20 See also ILO Report V(1), The employment relationship, International Labour Conference, 95th Session 2003, p. 33 f. and 40.

2.2. Judge-Made Law

The following countries do not provide a statutory definition of an employment relationship or a contract of employment: **Bulgaria**, **Cyprus**, the **Czech Republic**, **Denmark**, **France**, **Germany**, **Iceland**, **Italy**, **Latvia**, **Luxemburg**, **Norway**, **Slovakia** and **Spain**. At best some elements of what constitutes an employment relationship or an employment contract can be derived indirectly from other pieces of legislation. In **Germany**, for instance, a contract of employment is regarded as a specific category of a contract of service, which is statutorily defined.

In all abovementioned countries, the task of defining the employment relationship has essentially been left to the courts. As a result, national courts have developed various criteria, indicators or (in the case of the **United Kingdom**) tests in order to establish whether a contractual agreement can be qualified as an employment relationship or an employment contract. The main criteria that are used in this context are:

(1) the work has to be carried out personally;
(2) the working person is subordinated or dependent on the contractual partner requesting the work;
(3) the work is organised by the contractual partner;
(4) the work is carried out in return for remuneration;
(5) the working person is provided with tools and materials by the contracting partner;
(6) the work is performed during an agreed period of time.

3. Defining the Employee and the Employer

3.1. The Term Employee

Instead of definitions of the employment relationship or the employment contract respectively, statutory definitions of 'employee', explicit though not necessarily uniform, can be found in **Belgium**[21], **Italy**[22], **Latvia**[23], **Norway**[24] and **Slovakia**[25]. In these countries, definitions of the employment relationship or the employment contract can be derived from the definition of the term 'employee'.

In some countries (e.g. **Ireland**, **Liechtenstein**, **Lithuania**[26], **Malta**[27], **Poland**[28], **Slovakia**[29] and **Spain**[30]) independent but intertwined statutory definitions of employee and employment contract exist. In **Liechtenstein**, for instance, an employee performs work based on an employment contract for a given time against wages while being integrated in another's organisational structure.

In all other countries (e.g. **Finland**[31], **Portugal** or **Romania**) the definition of the term 'employee' is either conversely drawn from the statutory definition of the employment contract or (as is the case in **Greece** or **Sweden** for instance) has essentially been developed by the courts.

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21 Article 328 of the Belgian Labour Relations Act of 27 December 2006.
22 Article 2094 of the Italian Civil Code.
23 Article 3 of the Latvian Labour Code.
24 Section 1-8(1) of the Norwegian Working Environment Act of 17 June 2005 No. 62.
25 Article 11/1 of the Slovak Labour Code.
26 Article 15 of the Lithuanian Labour Code.
27 Article 2 of the Maltese Employment & Industrial Relations Act.
28 Article 2 of the Polish Labour Code.
29 Article 7(1) of the Slovak Labour Code.
30 Article 1.1 of the Spanish Labour Code.
31 Chapter 1, Section 1(1) of the Finnish Employment Contracts Act.

In **Italy**, the term 'employee' is defined as referring to an individual, serving under the control and at the instructions of the employer, receiving a salary to perform his or her duties. Under **Latvian** law, an employee is a natural person, who performs work under the supervision of an employer on the basis of an employment contract against remuneration. In **Slovakia**, an employee is a natural person who performs dependent work for the employer. With regard to 'dependent' work[32] the law further stipulates that such work is performed within a relationship where the employer is the superior and the employee the subordinate. Dependent work is defined solely as work performed personally as an employee for an employer, in accordance with the employer's instructions, on behalf of the employer, against a wage or commission, during working times, at the expense of the employer, using the employer's tools and under the employer's liability and also mainly consisting of certain repetitive activities.

In the **United Kingdom**, 'employee' is defined as an individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment. In addition, the statute recognises the category of 'workers'. 'Worker' is a broader category than 'employee'. The definition covers employees as well as those who work under a contract of personal service but do not provide that service in the capacity of a professional or as an independent business. Finally, 'dependent entrepreneurs' also enjoy certain rights, in particular under health and safety legislation.

3.2. The Term Employer

Statutory definitions of the term 'employer' can be found in many countries (**Belgium**[33], **Bulgaria**[34], the **Czech Republic**[35], **Cyprus**[36], **Finland**[37], **Ireland**[38], **Latvia**[39], **Liechtenstein**[40], **Lithuania**[41], **Malta**[42], **Norway**[43], **Poland**[44], **Portugal**[45], **Romania**[46], **Slovakia**[47], **Slovenia**[48] and the **United Kingdom**[49]). The definitions, however, are mostly indirect with relevant statutory provisions either referring to the term 'employee' or to the term 'employment relationship' or 'employment contract', or both. In **Liechtenstein**, for instance, an employer is a person who assigns work to his or her employees, who are employed for a fixed-term or for an indefinite period, and for which they receive remuneration.

In other countries, definitions of the term 'employer' exist on the basis of case law only (**Austria**, **Estonia**, **Denmark**, **Germany**, **Greece**, **Iceland**, **Luxemburg** and **Sweden**).

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32 Articles 1/2 and 2/3 of the Slovak Labour Code (Act No. 311/2001 Collection of Laws Coll.).
33 Section 230 (1) of the Belgian Employment Relations Act.
34 § 1 paragraph 1 AP of the Bulgarian Labour Code.
35 Article 7(1) of the Czech Labour Code.
36 Section 2 of the Cypriot Law 24/1967 on the Termination of Employment.
37 Chapter 1 Section 1, Paragraph 1 of the Finnish Employment Contracts Act.
38 Irish Unfair Dismissals Act 1977, Section 1(1).
39 Article 4 of the Latvian Labour Code.
40 § 1173a Article 1 paragraph 1 of the Liechtenstein Civil Code.
41 Article 15 of the Lithuanian Labour Code.
42 Article 2 of the Maltese Employment & Industrial Relations Act.
43 Section 1-8(2) of the Norwegian Working Environment Act.
44 Article 3 of Polish Labour Code.
45 Should the employer be an enterprise, Portuguese Labour Code defines what shall be considered, for the purposes of the Code, as 'micro', 'small', 'medium' and 'large' enterprise (Article 100/1 of the Portuguese Labour Code).
46 Article 14 of Romanian Labour Code.
47 Article 7/1 of the Slovak Labour Code.
48 Article 5/2 of the Slovenian Employment Relationships Act.
49 Section 203(4) of the United Kingdom Employment Relations Act.

4. Discrepancies and/or Uniformity

4.1. Labour Law

In most countries, the concepts 'employment relationship', 'employment contract' or 'employee' respectively have the same meaning in all areas of labour. This means that essentially the same notions apply throughout all areas of labour law (**Bulgaria**, **Cyprus**, the **Czech Republic**, **Denmark**, **Estonia**, **France**, **Finland**, **Greece**, **Iceland**, **Italy**, **Latvia**, **Liechtenstein**, **Lithuania**, **Luxemburg**, **Malta**, the **Netherlands**, **Norway**, **Poland**, **Portugal**, **Slovakia** and **Sweden**).

However, generally there are certain variations of the relevant terms. For instance, in **Austria** the focus with regard to workers' representation rights is on integration of the working person in the establishment, rather than the existence of a contract of employment. The same applies to **Germany**, where the term 'employee' that is used with regard to workers' co-determination at plant level is different from the term that applies in the context of individual employment law. With regard to health and safety legislation, legal protection is extended in many countries to all persons who are performing work, regardless of the nature of the legal relationship (e.g. in **Austria**, **Bulgaria**, **Romania**, **Slovenia** and **Spain**). In **Finland**, a broader notion of the employment relationship is applicable with regard to pensions. In **Ireland**, the definition of 'contract of employment' in the context of working time regulation is broader than the relevant definition in the area of dismissal protection.

4.2. Other Areas of the Law

In some countries, largely uniform notions of 'employee' can be found across different strands of law, in particular labour law, tax law and social security law (**Denmark**, **Estonia**, **Finland**, **Ireland**, the **Czech Republic**, **Estonia**, **France**, **Greece**, **Iceland**, **Ireland**, **Liechtenstein**, **Malta**, the **Netherlands** and **Portugal**). This does not, however, preclude slight differences when applying the relevant criteria.

In other countries, however, different notions exist from the outset with regard to either tax law and social security law or both acknowledging the different purposes of these legal areas (**Austria**, **Belgium**, **Bulgaria**, **Germany**, **Greece**, **Hungary**, **Italy**, **Latvia**, **Lithuania**, **Luxemburg**, **Norway**, **Poland**, **Romania**, **Slovakia**, **Slovenia**, **Spain**, **Sweden** and the **United Kingdom**). Different notions in different areas of law, however, do not necessarily result in major differences with regard to the content.

5. The Role of Social Dialogue and Collective Bargaining

Collective agreements play a role in defining an employment relationship or an employment contract in only a few countries (**Denmark**, the **Netherlands**, **Romania** and **Sweden**). In the **Netherlands**, social dialogue (mechanisms) and collective bargaining can play a role in defining employment relationships by setting out definitions of an employment relationship in collective agreements. In **Sweden**, modifications to and specifications of the general definition of the term 'employee', resulting from established customs in a certain sector or from regulations in collective agreements, are respected by the labour courts and often used to determine a person's status. In **Romania**, the parties to collective agreements at national or sector level are free to decide upon the area of application of their respective agreement, but mostly only statutory definitions are reproduced in the collective agreement. Social dialogue mechanisms and collective bargaining, however, play a particularly important role in **Denmark**. There it is left to the parties to a collective agreement to define the parties to the employment contract with regard to the working conditions laid down in the collective

agreement. Hence it is, in principle, possible for a person to be considered an employee with regard to a certain collective agreement, but not according to the employment legislation.

In the vast majority of countries, neither social dialogue mechanisms nor collective bargaining are relevant for determining whether an employment relationship or an employment contract exists (**Austria**, **Belgium**, **Bulgaria**, **Cyprus**, the **Czech Republic**, **Estonia**, **Finland**, **France**, **Germany**, **Iceland** with the exception of the entertainment industry and journalists, **Greece**, **Hungary**, **Ireland**, **Italy**, **Latvia**, **Liechtenstein**, **Lithuania**, **Luxemburg**, **Malta**, **Norway**, **Portugal**, **Romania**, **Slovakia**, **Slovenia**, **Spain** and the **United Kingdom**). With regard to the **United Kingdom** note that, although collective agreements have very little impact on defining an employment relationship, the trade unions have been active in securing employment rights for persons whose employment status is uncertain, e.g. in respect of temporary agency work.

In some countries, the parties to a collective agreement are prevented by law from determining the requirements of an employment relationship or an employment contract (**Austria**, **Bulgaria**, **France**, **Greece**, **Liechtenstein**, **Norway**, **Poland**, **Portugal** and **Spain**). The same applies to **Germany**, where the notion ‘employee’ is regarded as a mandatory concept, which neither the parties to the contract nor the parties to a collective agreement are allowed to remove.

In **Ireland**, employers’ and workers’ representatives participated in establishing a Code of Practice for determining employment or self-employment.

Independent of the direct role that the social partners may or may not (be legally able to) play in fixing the requirements of an employment relationship or an employment contract, in some countries (**Bulgaria** and **Slovenia** in particular) the social partners play a vital role through participating in law preparation procedures.

CHAPTER II. PRACTICAL METHODS FOR RECOGNISING AN EMPLOYMENT RELATIONSHIP

1. Introductory Remarks

This chapter focuses on practical methods for recognising an employment relationship. The second section examines whether an employment relationship is determined on the basis of the description of the parties to the contract or by their practical interpretation of the relationship. Subsequently, it is possible to determine whether the different legal systems established presumptions as to the existence or non-existence of an employment relationship (Section 3). The chapter ends with a reference to the question whether legal provisions exist within the different countries according to which certain groups of working persons are deemed employed or self-employed (Section 4).

2. Primacy of Facts

The ILO, in its Report V(1) 'The employment relationship', demanded that *"the determination of the existence of an employment relationship should be guided by the facts of what was actually agreed and performed by the parties, and not on how either or both of the parties describe the relationship"* (the so-called 'principle of primacy of facts').[50]

In almost all countries covered by this study, the practical interpretation of the employment relationship/contract is decisive for its legal classification. The designation of the contract by the parties is irrelevant when determining whether or not an employment contract has been concluded. The courts are not bound by the parties' description or definition of the relationship. Instead, the contract is qualified by an independent overall assessment of the actual substance of the relationship.[51] As a result, the parties to a contract cannot avoid the application of labour law by choosing another 'label' for their contract.

In some countries, the courts may conclude that a contract was implicitly modified by the parties if the practical implementation of the contract differs from the contractual stipulations used by the parties (**Austria** with regard to the criterion of 'subordination'). In some countries, the principle of primacy of facts is explicitly acknowledged as a general rule of interpreting contracts (**Bulgaria** and the **Czech Republic** for instance).

In addition, most countries use indicators. For instance, the **United Kingdom** applies tests to determine whether or not there is an employment relationship on the basis of an overall assessment. These indicators include compliance with the employer's instructions and being at the employer's disposal. As a consequence, in considering whether or not a person is employed under a contract of service, the decision maker is required to consider the facts and the realities of the situation, irrespective of what the actual contract states or specifies[52].

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50 ILO Report V(1), The employment relationship, International Labour Conference, 95th Session 2003, p. 24

51 For Ireland see, e.g., Henry Denny & Sons Ltd. v. Minister of Social Welfare [1998] 1 I.R.34.

52 *Henry Denny & Sons Ltd v Minister for Social Welfare* [1998] 1 I.R.34. Statements in contracts considered by the Supreme Court in the 'Denny' case such as *"You are deemed to be an independent contractor*", "it shall be your duty to pay and discharge such taxes and charges as may be payable out of such fees to the Revenue Commissioners or otherwise". *"It is agreed that the provisions of the Unfair Dismissals Act 1977 shall not apply etc.", "You will not be an employee of this company", "You will be responsible for your own tax affairs"* are not contractual terms and have little or no contractual validity. While they may express an opinion of the contracting parties, they are of minimal value in coming to a conclusion as to the work status of the person engaged.

Only if the employment contract has not yet been executed (for example in case of immediate dismissal or refusal of execution), the courts have formal elements only to rely upon.

Apart from that, in most countries, a contract automatically qualifies as a contract of employment if the practical implementation of the contract by the parties points to the existence of a contract of employment (**Cyprus**, **Denmark**, **Estonia**, **Finland**, **France**[53], **Germany**, **Greece**, **Hungary**, **Iceland**, **Ireland**, **Italy**[54], **Latvia**, **Lithuania**, **Liechtenstein**, **Luxemburg**, **Malta**, the **Netherlands**[55], **Norway**, **Poland**, **Portugal**, **Slovakia**, **Slovenia**, **Spain**, **Sweden** and the **United Kingdom**[56]). In **Poland**, the regulations explicitly stipulate that certain types of employment constitute employment under an employment relationship, regardless of the name of the contract concluded by the parties. Additionally, the regulations stipulate that parties are, in principle, not permitted to replace an employment contract with a civil law contract. The law in **Slovakia** expressly provides that dependent work may be performed only within the context of an employment relationship, a similar working relationship or, in exceptional cases, which are further described in the legal framework, within another form of 'labour law relationship'.

All abovementioned countries generally acknowledge the principle that the substance of the contract prevails over its form. As a consequence, the application of labour law cannot be evaded by merely using certain contractual language. **Luxemburg** goes so far as ruling a complete lack of contractual framework of a relationship as irrelevant.

In some countries, the principle of primacy of facts is applied in favour of the employee only (**Austria** and **Germany**). As a consequence, if the parties to a contract use the label 'employment contract', such a contract is assumed to exist, even if the practical implementation of the contract may point to the existence of a different type of relationship.

Apart from the crucial matter of determining the existence of an employment relationship, the facts are important in other aspects. This applies especially with specific regard to remuneration (which forms one of the key elements of the employment contract). The law in **Finland** applies regardless of the absence of any agreement between the parties on remuneration, if the facts indicate that the work was not intended to be performed without remuneration.[57] **German** law expressly rules that in the absence of a relevant agreement and if work performance by one of the parties according to the facts of the individual case could not be expected without remuneration, remuneration is deemed to be fixed by the parties. If the parties failed to fix the exact amount of remuneration the relevant 'tariff' applies or, in the absence of such 'tariff', the 'customary' remuneration is deemed to be fixed[58].

In **Liechtenstein**, an employment contract is presumed to be concluded in case the employer accepts a service from an employee and for which the latter expects to receive

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53 See, for instance, Cour de Cassation, Cass soc. 19 May 2009 No. 07-44.759

54 According to the prevailing case law, each form of work (and thus also self-employment/bogus self-employment) and its relevant protection (social security regime and work conditions regime) depends upon its own facts (Cassazione civile, sez. lav., 11 February 2004, No. 2622; Cassazione civile, sez. lav., 17 December 1999, No. 14248; Cassazione civile, sez. lav., 23 November 1998, No. 11885.

55 HR 8 April 1994, *NJ* 1994, 704, *JAR* 1994/94 (Agfa/Schoolderman) regarding a so-called zero-hours contract.

56 In the United Kingdom there is a relatively widespread use of several contractual devices, including 'relabelling clauses', aimed at excluding employee status. A clause may for instance state that *"for the avoidance of doubt, these terms shall not give rise to a contract of employment [...] and therefore the [worker] will not have the statutory rights accorded to employees".* This would have little effect in law, since the courts would view as simply stating the parties' view of the relationship.

57 Section 1 sentence 2 of the Finnish Employment Contracts Act.

58 Section 612 of the German Civil Code.

remuneration.[59] This provision primarily intends to relieve the employee from proving that a contractual consensus has been reached with the employer. The employee is entitled to remuneration even if he or she cannot prove a consensus on the conclusion of an employment contract and in particular on wages. This presumption is non-rebuttable. A legal relationship is deemed to be a valid employment relationship if work has been performed in good faith on the basis of an employment contract, even if it proves to be legally defective and as a consequence invalid[60] after its conclusion. This latter presumption also applies to **Estonia**.

No principle of primacy of facts exists in **Belgium**. As a consequence, qualification of the parties to the employment relationship prevails, except in cases where the facts absolutely contradict the parties' qualification. In **Romania**, the agreement of the parties may outweigh the practical implementation of the contract, as the existence of a written and registered employment contract cannot be overruled by the courts. However, the practical implementation of the relationship is decisive in cases where no contract document exists.

Please note that in some countries, state institutions such as labour inspectorates or tax authorities investigate the true nature of the contract based on the facts of its practical implementation and may impose administrative sanctions for non-compliance with labour legislation (e.g. **Bulgaria**).

3. Legal Presumptions

The ILO stated that *"some legal systems […] describe certain potentially ambiguous or controversial situations as employment relationships, either in general or under certain conditions, or at least presume they are employment relationships"*.[61]

3.1. Statutory Presumptions

In some countries, statutory presumptions exist in favour of an employment relationship. A particularly far-reaching presumption to this effect applies in the **Netherlands**. There, a person performing work for the benefit of another person against remuneration for at least three consecutive months, on a weekly basis, or for no less than twenty hours per month is presumed to perform such work pursuant to a contract of employment. The Netherlands' statutes also provide that, where a contract of employment has continued for at least three months, the contracted work in any month is presumed to amount to the average working period per month over the three preceding months. Both legal presumptions can be rebutted.[62] It is up to the person who provides the individual with work to state and prove that it was not the parties' intention to have an employment relationship. Additionally, the person concerned must prove that parties have not actually performed the contract in such a way that one could assume the existence of an employment relationship.

In **Portugal**, a statutory presumption exists, according to which the existence of an employment contract is presumed when some of the following elements can be found in the relationship between the person that provides an activity and the other who benefits from it:

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59 § 1173a Article 2(2) of the Liechtenstein Civil Code.

60 § 1173a Article 2(3) of the Liechtenstein Civil Code.

61 ILO Report V(1), The employment relationship, International Labour Conference, 95th Session 2003, p. 26.

62 It is for the person who provides the 'employee' with work to state and to prove that it was not the intention of the parties to have an employment relationship; HR 14 November 1997, *NJ* 1998, 149, *JAR* 1997, 263 (Groen/Schoevers). See also ILO Report V(1), The employment relationship, International Labour Conference, 95th Session 2003, p. 29 and following.

(1) the activity is conducted in a place that belongs to or in a place determined by the beneficiary of the activity;
(2) the equipment and working tools belong to the beneficiary of the activity;
(3) the person that provides the activity complies with a specific time to start and finish the supply, as determined by the beneficiary;
(4) an amount is paid to the provider, with a certain frequency, in return for the activity performed;
(5) the provider performs management or leadership functions in the company.

This legal presumption is, however, rebuttable[63].

In **Italy**, an employment relationship is presumed to exist if the parties to the contract conclude a contract for services but fail to define a project in their contract. In **Spain**, a rebuttable presumption applies as to the employee status of a person who provides a service in exchange for remuneration at the risk of and under the management and within the organisational area of another person, who receives the service.

In some cases, national legislation specifies whether a given type of work is excluded from its scope, or whether or not it gives rise to a contact of employment, depending on the conditions under which it is performed. In **Finland**, for instance, certain provisions of labour law may apply in spite of the fact that the work is performed at the employee's home or a place chosen by the employee, or that it is performed using the employee's implements or machinery[64].

Some countries apply statutory presumptions as to the non-existence of an employment contract. This is the case in **France**, where law rules that a contract of employment cannot apply to those who are listed on the trade and industry register. This presumption can be overruled if the worker proves that he or she is in a situation of permanent subordination to his or her employer. In **Greece** it is presumed that there is no employment contract, if the contract is in written form and if it has been lodged with the competent Labour inspectorate within 15 days. This presumption, however, is not applicable if the worker concerned either exclusively or mainly works for the same person, i.e. when he or she is economically dependent upon the other person. The presumption can also be rebutted by proving that the work is performed under the subordination of the employer. In **Romania**, a person registered with the so-called Trade Registry is rebuttably presumed to carry out the activity for which he or she has received the authorisation as a self-employed person. If, on the other hand, a written employment contract was concluded and registered, the person who has undertaken to perform work under such contract is considered to be an employee, without exception. In **Italy**, work performed by close family members is not considered as being based on a contract of employment (but on a moral obligation instead).

In **Iceland**, if it is plausible that an employment relationship exists and the person therefore qualifies as an employee, the burden of proof shifts to the employer, who then has to prove that this is not the case. In **Estonia**, if there is an employment contract according to the contract definitions used by the parties concerned and the employee has performed work and received remuneration, it is up to the employer to prove that no employment contract was concluded. In **Slovenia**, is the law expressly stipulates that in the case of a dispute relating to the existence of an employment relationship between the worker and the employer, the relationship is presumed to constitute an employment relationship, if it features the (basic) elements of an employment relationship.

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63 Please note that the wording used in the ILO Report V(1) corresponds to the former Article 12 of the Portuguese Labour Code, approved by Law No. 99/2003 of August 27 which is no longer in force. The new wording, referred to above, corresponds to Article 12 of the Portuguese Labour Code, approved by Law No. 7/2009.

64 Section 1 sentence 3 of the Finnish Employment Contracts Act.

In some countries (for instance **Hungary**), the labour inspectorates have been assigned far-reaching powers to class a legal relationship as an employment relationship/employment contract. In this context, it is up to the employer to provide all the evidence on the basis that allows for concluding that the work was carried out for the employer under a legal relationship that does not constitute an employment contract. In addition, the law presumes that the employer of the employees concerned is the party that actually controls the activity at the place of work if employees working for various employers are employed simultaneously and the identity of an employer cannot be established as a result of the labour inspection.

It should be added that *"an important element of certainty, which also makes it easier to prove the existence of an employment contract, is the obligation on the employer to inform employees of the conditions applicable to the contract by providing a written contract, a letter of engagement or other documents indicating the essential aspects of the employment contract or relationship"*.[65] This obligation is also explicitly laid down in the Community legislation.[66]

3.2. Judge-Made Law

In many countries, however, no statutory presumptions whatsoever exist with regard to classing an employment relationship or an employment contract, nor is there a (partial) shifting of the burden of proof if a person tries to ascertain his or her employee status (**Austria**, **Bulgaria**, **Cyprus**, the **Czech Republic**, **Finland**, **Germany**, **Ireland**, **Latvia**, **Malta**, **Norway**, **Poland**, **Slovakia**, **Slovenia**[67], **Sweden** and the **United Kingdom**).

Even if statutory presumptions do not exist, it must be noted that the existence of certain facts may prompt national courts to decide that a relationship is deemed to be employment. For example: if a contract is treated by its parties as an employment contract with regard to income tax, in **Denmark** such a contract is also presumed to be an employment contract with regard to labour law by the courts. In **Luxemburg**, a written employment contract creates the appearance of an employment relationship and it will be up to the employer to prove that a contract of employment does not exist. As a consequence, a written contract eventually leads to a shifting of the burden of proof. In **Spain**, the courts presume that there is a contract of employment between someone who provides a service at someone else's risk within his or her management and organisation area, and someone who receives that service in exchange for remuneration to the person who provides it. Additionally in some countries the courts seem generally inclined to consider relieving the burden of proof under certain circumstances in order to improve the legal position of persons who claim to be employees. In **Iceland** and **Lithuania**, for instance, the courts often presume that it is the employer's duty to ensure proper conclusion of an employment contract.

In other countries, the existence of certain facts may lead the courts to assume that no employment contract exists. If, for instance, a person is treated as self-employed with regard to taxation, courts in **Romania** are unlikely to class the underlying legal relationship as an employment contract.

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65 ILO Report V(1), The employment relationship, International Labour Conference, 95th Session 2003, p. 29.

66 Articles 2 and 3 of Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, *OJ* L 288, 18.10.1991, p. 32-35.

67 ILO Report V(1) states that *"in Slovenia, in the event of a dispute as to the existence of an employment relationship between the worker and the employer, it shall be presumed that an employment relationship exists if certain indicators are present".*

4. Persons Legally Deemed to be Either Employees or Self-Employed

Most of the countries do not have any provisions according to which certain persons are deemed either employed or self-employed.

In many countries, the mere fact that a certain activity is typically performed by employees does not lead to the underlying legal relationship automatically being qualified as an employment relationship or an employment contract (**Austria**) and the mere fact that an activity is normally or typically performed by self-employed persons does not lead to the underlying legal relationship automatically being qualified as a contract of service. As a consequence, a solicitor or doctor may equally be regarded as being employed or self-employed. The same applies, for instance, to **Spain**, **Portugal** and **Germany**.

In many countries, however, the courts are often prepared to deduce that an employment relationship/employment contract exists or not merely from the type of work performed. (**Luxemburg**: cleaning; in other sectors, however, the law explicitly states that work can be executed either as a self-employed person or as an employee implying that no conclusion can be made from the type of work in this regard).

In many countries, temporary agency workers who are part of a 'triangular' employment relationship[68] are explicitly deemed to be employees (**Belgium**[69], the **Czech Republic**[70], **Estonia**, **Finland**[71], **Ireland**[72], **Luxemburg**[73], **Poland**[74], **Portugal**[75], **Romania**[76] and **Slovenia**[77]). The same applies to **Denmark**, although such workers are exempted from key pieces of labour legislation.[78] In **Hungary**, temporary agency workers and teleworkers are deemed to be (atypical) employees[79].

In **France**, the Labour Code includes certain assumptions in favour of an employment contract. This results in the application of Labour Code provisions to workers other than those with an employment contract. The Labour Code explicitly defines any agreement under which professional journalists, performing artists, fashion models or sales representatives supply their services as a contract of employment. For instance, agreements between sales representatives (freelance workers) and their 'clients' are considered contracts of employment if certain conditions relative to their activity are met (exclusive and constant activity, absence of commercial operation for their own interests, determination of an area of activity). The contract, or each of these contracts, between the sales representative and one or several organisations in compliance with the latter requirements, is deemed to be a contract of employment. There is no room for reversing this presumption by proving that there was no subordination. In **Luxemburg**, non-rebuttable presumptions exist for sportsmen and artists. In **Belgium**, such presumptions apply to commercial travellers, pharmacists, students and temporary workers. In **Spain**[80], commercial agents may be deemed to be employees while the laws in **Iceland**[81] and **Liechtenstein**[82] regulate that posted workers are

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68 See ILO Report V(1), The employment relationship, International Labour Conference, 95th Session 2003, p. 13.
69 Articles 7 and 8 of the Belgian Act on Temporary work and Temporary agency work.
70 Article 2 (5) of the Czech Labour Code.
71 Chapter 1 Section 7(3) of the Finnish Employment Contracts Act.
72 Section 13 of the Irish Unfair Dismissal Act of 1993.
73 Article L. 131-6 of the Luxemburg Labour Code.
74 Articles 2 and 7 of the Polish Law on Employment of Temporary Workers of 9 July 2003.
75 Articles 172 to 192 of the Portuguese Labour Code.
76 Article 87 of the Romanian Labour Code.
77 Article 57 of the Slovenian Employment Relationships Act.
78 The Danish White-Collar Workers Act in particular.
79 Section 193/B and Section 192/C of the Hungarian Labour Code.
80 Spanish Royal Decree 1438/1985.
81 Article 1(2) of the Icelandic Act No. 45/2007.

deemed to be employees. Tourist guides and technicians in cinema and broadcasting are deemed to be employees according to the law in **Greece**.[83] In **Liechtenstein**, apprentices[84], travelling salesmen[85] and homeworkers[86] are legally deemed to be employees. **Latvian** law expressly states that a legal counsellor (solicitor/barrister) can perform his or her duties as a self-employed professional only. Another principle in this country holds that qualification of a relationship under labour law may not differ from qualification under social security and tax law.

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82 § 2 of Liechtenstein Act on Posting of Workers (*Entsendegesetz*).

83 Article 37 of the Greek Act 1545/1985, Article 2(1) of the Greek Act 358/1976 and Article 6(5) of the Greek Act 1597/1986.

84 Article 17(2) of the Liechtenstein Act on Traineeships (*Berufsbildungsgesetz*).

85 § 1173 a Article 78 of the Liechtenstein Civil Code.

86 § 1173 a Article 91 of the Liechtenstein Civil Code.

CHAPTER III. CRITERIA FOR IDENTIFYING AN EMPLOYMENT RELATIONSHIP

1. Introductory Remarks

In all surveyed countries, the notion 'employee' is a mandatory concept in the sense that determination of a contract of employment/employment relationship is dependent on objective criteria. In order to determine whether a specific person is an employee, the courts – whose rulings at least supplement existing statutory definitions (*supra*) – make an overall (objective) assessment of the situation, considering all the relevant factors of the individual case. In most of the surveyed countries, legal systems rely on certain indicators to determine whether or not there is an employment contract/employment relationship. In common-law countries, *"judges base their rulings on certain tests developed by case law, for example the tests of control, integration in the enterprise, economic reality (who bears the financial risk?) and mutuality of obligation"*.[87]

Both perspectives use a multi-faceted approach. This may be illustrated by referring to the situation in the **United Kingdom**. With regard to, for instance, 'economic reality', this includes looking 'beyond and through' the documents into the words and actions of the parties, both at the time when they entered into the relationship and subsequently. This includes evidence as to how the relationship had been understood.[88] The approach shows the extent to which the courts will not just look at one single factor, instead taking a multiple or 'pragmatic' approach, weighing up all the factors for and against a contract of employment and determining on which side the scales will settle.

In **Germany**, the term 'employee' is deemed to refer to a so-called type only. As a consequence, the law assumes that the requirements to an 'employment relationship' must not necessarily all be met in each individual case. On the basis of the 'typological method' the courts even have been known to go so far as to stating that there is simply no single key criterion among the many criteria to be applied in the process that could be called indispensable. Instead, an 'evaluating general assessment' takes place meaning that the courts take a 'holistic perspective' on each individual case.

Another example is **Italy**, where the courts apply various criteria; every criterion is open-ended in its application, freely incorporating all factors related to the (i) integration into the employer's business and relevant employer control, (ii) duration of relationship, (iii) work scheduling and relevant employer control, (iv) work location, (v) skills degree and empowerment, (vi) freedom to serve other employers, (vii) investment in business, (viii) whether the 'worker' employs any employees[89].

In **Greece**, the courts stress the importance of a 'qualitative' rather than 'quantitative' assessment. By doing so, the quality of the worker's engagement and dependence that necessitates protection by the rules of labour law is highlighted.[90] This is an example of an 'evaluating' assessment that can also be found in most other countries.

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87 ILO Report V(1), The employment relationship, International Labour Conference, 95th Session 2003, p. 25.

88 *Raymond Franks v. Reuters Limited* [2003] IRLR 423, paragraph 12 (Per Mummery LJ).

89 See Italian Supreme Court, see Cassazione civile, sez. lav., 1 February 2006, No. 2249; Cassazione civile, sez. lav., 10 February 2006, No. 2904; Cassazione civile, sez. lav., 9 October 2006, No. 21646.

90 Supreme Court 28/2005 (Plen) and Supreme Court 1688/2007.

The following section takes a closer look at the various factors and indicators for assessing whether a working person can be qualified as employed or self-employed.

In particular the key criterion of subordination or dependence will be elaborated by examining which requirements have to be fulfilled in order to establish dependent work. This makes a subdivision of dependence/subordination into organisational and economic aspects (sections 2.1 and 2.2). The chapter ends with an overview of various additional criteria that may play a role in the different legal systems for identifying the employee status.

2. Subordination and Dependency as the Main Indicator

In all countries, the main criterion for establishing an employment relationship or an employment contract is that one person is subordinated to or dependent on another person. In many countries (e.g. **Austria**, **Denmark** and **Germany**), the term 'personal dependence' is used, whereas others use the term 'legal dependence' (**Bulgaria**, **France** and to some extent **Luxemburg**). Other countries prefer the term 'subordination' (**Italy** and **Portugal**, in particular).

2.1. Organisational Subordination

The primary aspect of dependence or subordination in all countries is that the employee is subjected to supervisory power exercised by the employer (**Austria**, **Belgium**, **Bulgaria**, **Cyprus**, the **Czech Republic**[91], **Denmark**, **Estonia**, **Finland**[92], **France**[93], **Germany**, **Greece**, **Hungary**[94], **Iceland**, **Ireland**, **Italy**, **Latvia**[95], **Liechtenstein**[96], **Lithuania**, **Luxemburg**, **Malta**, the **Netherlands**, **Norway**, **Poland**[97], **Portugal**, **Romania**[98], **Slovakia**[99], **Slovenia**, **Spain**, **Sweden** and the **United Kingdom**). This can be referred to as organisational subordination.

In some countries (e.g. **Cyprus** and **Italy**), organisational subordination is regarded as a *conditio sine qua non* requirement. **Italy** takes the view that organisational subordination is an inevitable element of the employment relationship. Accordingly, other possible factors (such as collaboration, observance of a certain working time, continuity of the services rendered, inclusion of the same services in the business organisation and coordination with entrepreneurial activities, elimination of risk for workers and salary) are regarded as merely incidental, to be taken into consideration as a whole and in any case in relation to subordination only.[100]

2.1.1. Work Instructions

The requirement of organisational subordination regularly discerns between what can be called 'personal instructions' and 'functional instructions'. The primary aim of the former is to

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91 Statutory definition of dependent work in Article § 2(4) and (5) of the Czech Labour Code.

92 Statutory approach in Chapter 1 Section 1 of Finnish Employment Contracts Act.

93 Cass. Soc. 19 May 2009 No. 07-44.759; see also Cour de Cassation 16 November 1996 in which subordination is characterised by the *"execution of work under the authority of an employer who has the power to give orders and directives, to control their execution, and to sanction the breaches of his subordinated".*

94 Criterions determined by Common Directive of Ministry of Labour and Ministry of Finance of 2005 [7001/2005 (MK. 170.)].

95 Statutory approach in Article 3 of the Latvian Labour Law

96 Statutory approach in § 1173a Article 7 of the Liechtenstein Civil Code.

97 Statutory approach in Article 22(1) of the Polish Labour Code.

98 Statutory approach in Article 40(1)(d) of the Romanian Labour Code.

99 Statutory approach in Article 1/2 of the Slovak Labour Code (Act No. 348/2007 Coll.).

100 Supreme Court, Cassazione Civile, sez. lav., 1 December 2008, No. 28525.

fix the place where the work has to be performed, to determine working time and, possibly, even to regulate the employee's behaviour at the workplace. The primary aim of functional instructions is to further substantiate the content of the work duties and to instruct the worker relating to how the work has to be performed.

The power of the employer to issue both personal and functional instructions (and to do so continuously) is a key element in determining an employment relationship in almost all surveyed countries. Only in **Hungary**, the power of the employer to give instructions, although seen as relevant, forms rather a subsidiary criterion.

The power to direct, however, may be limited with the content of the work and working time specified in detail in the contract. This may lead the courts to negate the existence of an employment relationship (for instance, **Germany**[101]).

Some countries acknowledge the relevance of personal instructions (at least to some extent) under statutory provisions (**Bulgaria**, the **Czech Republic**, **Latvia**, **Liechtenstein**, the **Netherlands**, **Romania**, **Slovakia** and **Slovenia**).

In many countries (e.g. **Finland**, **Germany**, the **Netherlands**[102] and **Portugal**), the mere existence of legal power to direct is regarded as sufficient, irrespective of whether or not this power is actually used by the employer.[103] In **Luxemburg**, some decisions require effective and permanent[104] control; other decisions consider that the employer's control does not necessarily have to be effective and continuous[105]. The fact that the employer is not present most of the time and does not systemically give orders[106], that the employee has some freedom to organise his or her work[107] or that there is no regular control[108], does not imply that there is no subordination.

In respect of highly-skilled individuals, the problem arises that functional instructions – how to perform the job – is not a reliable or even practical indicator[109]. This is acknowledged in many countries (**Luxemburg**, the **Netherlands** and **Spain**). In **Luxemburg**, for instance, the Courts agree that subordination does not require any rigid or fixed criteria and depends on the type of work[110]. In **Ireland**, the relevant Code of Practice expressly states as an *"additional factor to be considered"* that an employee with specialist knowledge may or may not be directed as to how the work is carried out. In the **United Kingdom** the so-called 'control test' (testing whether a person is subjected to another's control to a sufficient degree) has been subject to certain modifications by the courts, reflecting the changing nature of control from 'how to', to 'what to'. The current emphasis is on the presence of a duty to obey orders[111].

More generally, it can be said that all countries wish an answer to the question: How far can the absence of a person's subordination in one respect are compensated by the subordination of that person in another respect?

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101 Federal Labour Court 30 October 1991 – 7 ABR 19/91.
102 HR 17 June 1994, *NJ* 1994, 757, *JAR* 1994/152 (Iman); HR 28 September 1983, *NJ* 1984, 92.
103 See also ILO Report V(1), The employment relationship, International Labour Conference, 95th Session 2003, p. 39.
104 CAAS, 18 October 2004; CSJ, cassation (social), 9 May 1974, No. 206.
105 TA Lux, 26 March 1974, No. 14329; CSJ, IIIe, 24 October 1996, No. 18511.
106 CSJ, VIIIe, 27 November 2008, No. 32887.
107 CSJ, IIIe, 27 February 2003, No. 26541; CSJ, IIIe, 1 March 2007, No. 31354.
108 CSJ, IIIe, 17 April 2008, No. 32969.
109 See also ILO, The employment relationship: An annotated guide to ILO Recommendation No. 198, 2008, p. 29.
110 CSJ, IIIe, 26 March 1998, No. 21131; CSJ, IIIe, 28 January 1999, No. 22192; CSJ, VIIIe, 25 March 2004, No. 28212; CSJ, VIIIe, 6 January 2005, No. 28778; and CSJ, VIIIe, 14 June 2007, No. 31341.
111 Court of Appeal [1995] IRLR 493, 495 (Henry LJ) – *Lane v. Shire Roofing.*

2.1.2. Control of the Work

Control of the work and the employers' power to supervise the employee also play a vital role in most countries (**Austria**, **Belgium**, **Bulgaria**, **Cyprus**, the **Czech Republic**, **Denmark**, **Finland**, **France**, **Germany**, **Greece**, **Iceland**, **Italy**, **Latvia**, **Liechtenstein**, **Lithuania**, **Luxemburg**, **Malta**, the **Netherlands**, **Norway**, **Poland**, **Portugal**, **Romania**, **Slovakia**, **Slovenia**, **Spain**, **Sweden** and the **United Kingdom**).

In some countries, control of the work and the employers' power to supervise are acknowledged (at least to a certain extent) by the relevant statutory provisions (**Bulgaria**, the **Czech Republic**, **Finland**, **Latvia**, **Liechtenstein**, **Portugal**[112], **Slovakia** and **Slovenia**).

As is the case with regard to the power to direct, the assignment of such power to the employer suffices for the definition of the relationship in many countries (e.g. **Finland**, **Germany**, the **Netherlands** and **Portugal**). As a consequence, actual exertion of this power is not relevant.

2.1.3. Integration of the Employee

In addition to the employers' power to direct and control the employee, the integration of the employee in the employers' work organisation is relevant in many countries (**Austria**, **Bulgaria**, **Cyprus**, **Finland**, **France**, **Germany**, **Iceland**, **Italy**, **Liechtenstein**, **Malta**, **Norway**, **Portugal**, **Slovenia**, **Sweden** and the **United Kingdom**). On the other hand, it is widely acknowledged that this test may be less useful in situations where the boundaries of the organisation are diffuse or unclear). In conducting the 'integration test', the courts in the **United Kingdom** assess whether *"a person is employed as part of the business and his work is done as an integral part of the business. Under a contract for services, on the other hand, his work, although done for the business, is not integrated into it, but is only an accessory to it".*[113] In **Germany**, when examining 'integration', the courts may even ask whether in one particular undertaking similar work is performed by employees. In any event, the criterion of integration or the relevant 'integration test' places less emphasis on the personal 'subordination' of the employee and more upon the way in which the work is organised.

In some countries (e.g. **France**), the criterion of integration was for some time relatively generously applied by the courts[114] resulting in a certain expansion of the notion of employee. In **Hungary**, integration is regarded as a primary criterion when deciding upon the existence of an employment relationship. In **Norway**, too, integration of a person in another person's business organisation plays a vital role.

In some countries, the importance of integration is acknowledged by statutory provisions (**Latvia**, **Liechtenstein** and **Slovenia**). By contrast, in other countries, integration of the employee is insignificant (**Belgium**, the **Czech Republic**, the **Netherlands**, **Poland** and **Slovakia**). In other countries, it is of limited relevance only and is regarded only as a subsidiary criterion (**Estonia**, **Finland**, **Greece**, **Romania** and **Spain**). In still other countries, details have not yet been specified by the courts so far (**Lithuania** and **Luxemburg**).

2.1.4. Other Elements of Organisational Subordination

The provision of tools and materials by the person requesting the work is one of the indicators of organisational (and sometimes also economic) dependence in most of the

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112 Article 97 of the Portuguese Labour Code.
113 Denning LJ [1952] 1 TLR 101, 111 – *Stevenson, Jordan & Harrison Ltd v. Macdonald & Evans.*
114 Cass soc. 19 May 2009 No. 02-31.203.

countries surveyed (**Austria**, **Belgium**, **Bulgaria**, **Cyprus**, the **Czech Republic**, **Finland**, **Germany**, **Greece**, **Hungary**, **Iceland**, **Ireland**, **Italy**, **Liechtenstein**, **Luxemburg**, the **Netherlands**, **Norway**, **Poland**, **Portugal**, **Romania**, **Slovakia**, **Spain**, **Sweden** and the **United Kingdom**). In all these countries, however, the relevance of this criterion seems to be rather limited.

In some countries it is also among the indicators acknowledged in the relevant statutory provisions (**Bulgaria** and **Liechtenstein**). The relevant provisions are, however, regarded as out-dated and, accordingly, are no longer applied in practice[115]. On the other hand, some countries expressly acknowledge that work performed using one's own tools or machinery forms no obstacle for assuming that there is an employment relationship (**Finland**[116]). In **Ireland**, using one's own tools and materials serves as a criterion indicating that a person is self-employed. Where the tools of the trade or equipment are of minor importance, however, this would not be an indicator of a person with his or her own independent business.

The fact that work is carried out within specific hours or at an agreed time is also among the indicators of organisational subordination in most countries (**Austria**, **Belgium**, **Bulgaria**, **Cyprus**, the **Czech Republic**, **Estonia**, **Finland**, **France**, **Greece**, **Hungary**, **Iceland**, **Ireland**, **Italy**, **Liechtenstein**, **Luxemburg**, **Norway**, **Poland**, **Portugal**, **Romania**, **Slovenia**, **Spain**, and **Sweden**).

Bulgarian legislation acknowledges this with a statutory provision. **German** statutory provisions hold that a person is self-employed if he or she may arrange professional activities at his or her own discretion and decide when he or she performs the work[117]. This provision forms the basis of defining an 'employee' – *e contrario* – as a person who is not free to arrange his or her professional activities at his or her own discretion and not allowed to decide when he or she performs the work.

In general, the relevance of work being carried out within specific hours or at an agreed time seems to be limited, however. This may be due to two facts. First, the power of the employer to issue personal instructions as to the working time to be obeyed by the employee is restricted in many countries to a varying degree. And second, the relevance of control of working times has been reduced with the rise of new working time models.

2.2. Economic Criteria and Indicators

In addition to organisational subordination, economic factors play a certain role in most countries when it comes to deciding whether someone is to be regarded as an employee. In no country, however, mere 'economic dependence' is sufficient. In particular, the existence of 'economic dependence' cannot substitute a lack of 'organisational dependence' in any country. This point can be illustrated by referring to the legal situation in **Germany**, where 'economic dependence' is regarded as neither required nor by itself sufficient when determining 'employee status'.[118]

Another question is whether and to what extent economic aspects can compensate for a lack of certain elements of 'organisational subordination'. It seems that in some countries, the courts are more inclined to allow for such compensation than in others. In **Sweden**, for instance, the courts take, *inter alia*, the following factors into consideration when making their

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115 In Liechtenstein, though the employer must generally equip the employee with the tools and materials required to perform work, according to the relevant statute the employer is required to do so only unless otherwise agreed upon or customary (§ 1173a Article 23(1) of the Liechtenstein Civil Code).

116 Chapter 1 Section 1(3) of the Finnish Employment Contracts Act.

117 Section 84 of the German Commercial Code.

118 Federal Labour Court 27 June 2001 – 5 AZR 561/99 and 20 September 2000 – 5 AZR 61/99.

overall assessment: a personal duty to perform work according to the contract; a lasting relationship between the parties; the worker is prevented from performing similar work of any significance for someone else; the worker is supposed to use machinery, tools and raw materials provided by the principal or the employer; the worker is compensated for his or her expenses; the remuneration is paid, at least in part, as a guaranteed salary. Additionally, the courts regularly examine whether or not the economic and social situation of the worker is equal to that of an ordinary employee.

2.2.1. Remuneration

The most important economic indicator in this regard is probably (periodic) payment of remuneration. Most countries require that the working person is entitled to remuneration in order to classify a working relationship as an employment relationship or an employment contract. Accordingly, the fact that a person receives (periodic) payments is widely used as an indicator for an employment relationship (**Austria**, **Bulgaria**, **Cyprus**, the **Czech Republic**, **Estonia**, **Finland**, **Greece**, **Hungary**, **Iceland**, **Ireland**, **Italy**, **Latvia** [119], **Lithuania**, **Luxemburg**, **Malta**, **Norway**, **Poland**, **Portugal**, **Romania**, **Slovakia**, **Slovenia**, **Sweden** and the **United Kingdom**). In **Austria**, on the other hand, the relevant statute explicitly acknowledges that unpaid work is possible within an employment relationship. **German** law acknowledges that the modalities of remuneration (as opposed to the modalities of work performance) do not play an important role.[120]

The fact that remuneration forms the sole, or at least the principal, source of income of a person is not among the requirements that are applied in the countries covered by this study.

2.2.2. Bearing Financial Risks

The financial risks involved in performing work form another economic aspect that may be taken into consideration when deciding upon the existence of an employment relationship.

It is acknowledged in most countries that the absence of financial risks may indicate the existence of an employment relationship and that the existence of financial risks may on the contrary be counter-indicative (in particular **Austria**, **Belgium**, **Bulgaria**, **Cyprus**, the **Czech Republic**, **Denmark**, **Finland**, **Germany**, **Greece** [121], **Iceland**, **Italy** [122], **Latvia**, **Liechtenstein**, **Lithuania**, **Luxemburg**, the **Netherlands**, **Norway**, **Poland**, **Romania**, **Spain**, **Sweden** and the **United Kingdom**). **German** law states that a clause according to which a person is expressly allowed to compete with the other party to the contract is atypical and as a consequence indicates self-employment.[123]

In some countries, this is among the criteria identified in legislation (**Finland**[124], **Latvia**, **Liechtenstein** and in particular **Spain**). In **Ireland**, one of the criteria laid down in the Code of Practice states that an employee is not exposed to personal financial risk in carrying out the work. In addition, the Code of Practice stipulates as one of the relevant criteria that an employee does not assume any responsibility for investment and management in the

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119 Decision of the Latvian Administrative Regional Court in case No. A42 4680 05, 27 June 2008.

120 Federal Labour Court 16 March 1994 – 5 AZR 447/92.

121 See, however, *Prikis v. Filiki Insurance Company Ltd*, 31 March 2002 (existence of an employment relationship bearing of financial risks on the part of the employee notwithstanding).

122 Pursuant to the Italian Supreme Court *"to exclude the subordination in the employment relationship performed on an ongoing continuous basis with another subject, it is necessary that the Court ascertains the financial risk for the worker; for example, that the purchase or use of materials required to work remains to the charge of the same worker, or that the relationship with third users is created and managed by the same worker"*; see Cassazione civile, sez. lav, 8 August 2008, No. 21380.

123 Federal Labour Court 13 March 2008 – 2 AZR 1037/06.

124 This prevailing opinion is drawn from the criterion 'perform work for an employer' in the definition of the employment contract, Chapter 1 Section 1(1) of the Finnish Employment Contracts Act.

business and does not have the opportunity to profit from sound management in scheduling of engagements or in performance of tasks arising from the engagements.
In fact, 'bearing financial risks' is not a relevant criterion under **Portuguese** law. Nevertheless, a relevant criterion may be determining whether the 'risk of performance' (i.e., if the task is accomplished) is supported by the worker. The absence of risk of performance may indicate the existence of an employment contract.

2.2.3. Work Performed Solely or Mainly for the Benefit of Another

An additional indication of the existence of an employment relationship is that work is performed solely or at least mainly for the benefit of another. This criterion is used in most countries, although to a varying degree (**Austria**, **Bulgaria**, **Cyprus**, the **Czech Republic**, **Denmark**, **Finland**, **Germany**, **Greece**, **Iceland**, **Italy**, **Latvia**, **Liechtenstein**, **Luxemburg**, **Malta**, **Norway**, **Poland**, **Portugal**, **Slovakia**, **Spain**, **Sweden** and the **United Kingdom**)

In some countries, this is even acknowledged by the relevant legislation (**Finland**, **Liechtenstein**, **Luxemburg** and in particular **Spain**).

2.3. Obligation to Carry out Work Personally

An employee is, in general, obliged to work. Whether he or she is required to carry out the work personally may be among the criteria to determine whether or not an employment contract exists. The issue has become of particular importance against the background of the fact that people are increasingly hired on the basis of a relatively loosely-knit framework, global or umbrella agreements that often contain the right to reject specific assignments (so-called regular or permanent casual workers).

Another – and possibly even more relevant – area of concern is the increasing use of delegation or substitution clauses. In some countries, a person's option to nominate a substitute under certain circumstances does not necessarily stand in the way of assuming that an employment relationship exists if such power is acknowledged by the relevant legislation (**Austria**, **Estonia**, **Germany**, **Iceland**, **Liechtenstein** and the **Netherlands**[125]). It may, however, be indicative of self-employment (for instance **Germany**[126]), because delegation, even if admissible, is in any event atypical.

Most jurisdictions seem to be more rigid in this regard, however (**Belgium**, **Bulgaria**, the **Czech Republic**, **Denmark**, **Finland**, **France**, **Greece**, **Hungary**, **Italy** and **Latvia**), where an employee is expressly prevented by law from involving other staff or sub-contractors in the performance of his or her work. In **Lithuania** and **Luxemburg**, it is regarded as forbidden for an employee to delegate his or her work to another person or even to be assisted in the execution of his or her task[127] (**Malta**, **Norway**, **Poland**, **Portugal**, **Slovakia**, **Slovenia** and **Spain**). In **Iceland**, if the worker has his or her own employees working directly for him or her in the execution of the work, he or she would be considered to be self-employed. Moreover, if the worker is required under the contract to provide a replacement in the case of illness or

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125 HR 13 December 1957, *NJ* 1958, 35 (Zwarthoofd/Het Parool); HR 21 March 1969, *NJ* 1969, 321; HR 17 November 1978, *NJ* 1979, 140 (IVA/Queijssen). According to Article 7:659 of the Netherlands Civil Code, the work must be performed by the employee himself. It is possible, however, that the employee can be replaced by another employee provided that the employer agrees.

126 Federal Labour Court 13 March 2008 – 2 AZR 1037/06 on the ground that substitution is 'atypical'. See also Federal Labour Court 12 December 2001 – 5 AZR 253/00 according to which it indicates self-employment if work which is due under a contract cannot be performed without involving third persons.

127 The simple fact that the contract allows the 'employee' to hire his own employees is insufficient to say that it is not an employment contract; this clause can also be considered as invalid because other criteria show that in fact an employment relationship is given; CSJ, IIIe, 6 November 2003, No. 26971; and CSJ III, 24 May 2007, 31536.

other similar reasons, he or she would also be considered to be self-employed. If the employee is legally prevented from (partly) delegating his or her job duties, but does so anyway, a court may not refute the existence of an employment contract but rather only find the employee in breach of contract (**Romania**). In **Ireland**, one of the criteria established in the relevant Code of Practice states that an employee cannot sub-contract the work.

In the **United Kingdom** employers have been increasingly using 'substitution clauses'. Under such clauses it is stipulated that the worker is not required to provide a personal service him- or herself but can nominate a substitute. Originally, such clauses were regarded by the courts as deflecting employee status[128]. In more recent cases, however, the courts have checked to see whether the substitution clause genuinely reflects the reality of the situation[129].

2.4. Mutuality of Obligations

A number of jurisdictions use a 'mutuality of obligations' as an additional criterion when assessing an employment relationship. This is a complex concept, but in essence it means that the employee is obliged to accept work as offered and the employer is at least to a certain extent obliged to provide work. In many countries, an obligation to provide work is legally acknowledged only to the extent that providing actual work is key to maintaining the employee's qualifications, e.g. **Austria**, the **Czech Republic**, **Bulgaria**, **Estonia**, **Hungary**, **Italy**, the **Netherlands**[130], **Norway**, **Poland** and **Sweden**. This is also one of the factors to be considered in **Slovenia** and **Spain**.

In the **United Kingdom**, the 'mutuality of obligation test' is key with regard to 'atypical workers' such as homeworkers[131], temporary agency workers[132], zero-hour contract workers[133] and casual workers: under normal employment conditions, mutuality of obligation exists in the sense that the employer is obliged to provide work for the employee while the employee is obliged to accept it. However, for atypical workers, employers often insert a clause to determine that the employer is not obliged to provide work for the individual and/or that the individual is not obliged to accept it. This way, there is no contract of employment and thus the individual is denied most employment rights. The increasing importance of the mutuality test as applied by the courts leaves ample freedom for the parties to decide upon the nature of their relationship. The courts do not quite go so far as to say that the parties to the employment contract had a choice about whether protective statutes should apply, in the sense of a right to opt out of labour legislation, but they have come close. This position reflects the traditional view of labour legislation in the United Kingdom: that it is superimposed on the contractual relationship of the parties – imposing extra-contractual obligations – and, as such, to be construed as narrowly as possible, so as not to infringe on their common law right of freedom of contract.

2.5. Duration and Continuity of the Employment Relationship

A certain duration and continuity of the employment contract is not among the indicators of an employment relationship in most countries. It seems, however, to play a limited role when deciding whether an employment contract exists in **Slovakia**, **Slovenia** and **Spain**.
In **Bulgaria**, the law expressly allows an employment contract being concluded for a job only performed on pre-defined days of the month only. In the **Netherlands**, on the other hand, the

128 Court of Appeal [1999] IRLR 367 – *Echo Publications Ltd*. v. *Tanton.*
129 Court of Appeal [2007] IRLR 560 – *Consistent v. Kalwak.*
130 HR 25 January 1980, *NJ* 1980, 264 (Possemis/Hoogenboom's Bewakingsdienst).
131 *Nethermere (St.Neots) Ltd v. Taverna and Gardiner* [1984] IRLR 240.
132 *Wickens v. Champion Employment Agency* [1984] ICR 365.
133 *Clark v. Oxfordshire Health Authority* [1998] IRLR 125.

relevant statute provides that the employee works during a given period.[134] However, it is safe to assume, that it is possible to fulfil this requirement even if the parties have agreed on only a couple of hours of work per week. **Romanian** law originally stipulated that for an employment contract to exist, daily work had to exceed two hours. In 2006, however, this provision was amended, allowing for concluding employment contracts for any number of daily working hours.
In terms of continuity, legislation in some countries expressly acknowledges that several employment contracts may exist, even where the work is intermittent (**Finland**[135]).

2.6. Other criteria

Various other criteria/indicators were found in the countries covered by this study. However, these are at best of minor importance. These include: the availability of the person who has to provide work, travel payments by the person requesting the work, or payment in kind.

Recognition of entitlements that are typical for an employment relationship is regarded as indicating the actual existence of such a relationship in most countries. Whether a person is entitled to certain allowances (for example Christmas or holiday allowances) is, for instance, among the factors to be weighed in **Portugal**. Whether a person is entitled to extra pay or time in lieu is of some importance in **Ireland**. The same applies in **Luxemburg** with regard to the use of payslips. In general, if references are made to labour law in a contract, this strongly points to the existence of an employment relationship.
The nature of the work performed under a contract seems to play a role in **Hungary**, where this criterion has been implemented by ministerial directive.

The tax law perspective is taken into account in **Denmark**, **Luxemburg**, **Portugal** and **Sweden** whereas the position under social security law is taken into consideration in countries such as **Cyprus**, **Estonia**, **Hungary**, **Luxemburg** and **Portugal**[136]. Here, the level of paid taxes or social security contributions may serve as formal evidence of the nature of the agreed relationship.

Membership in either a trade union or an employers' association may play a role in determining the existence of an employment relationship in **Iceland**. In **Sweden**, a so-called 'social criterion' is often applied. This requires answering the question whether the economic and social situation of the worker is equal to that of an ordinary employee.

Formal requirements, like the obligation to be included in a specific register (e.g. business register), may play a certain role. Business registration is taken into account, for instance, in **Finland**, **Italy**, **Luxemburg**, the **Netherlands** and, in particular, in **Romania**. In other countries (for instance **Germany**[137]) formal registration of a business, on the other hand, is irrelevant.

134 Article 7:610 of the Netherlands' Civil Code.
135 Finnish Supreme Court 1995:159.
136 However, in Portugal the incorrect inscription as self-employed person remains a subsidiary element.
137 Federal Labour Court 19 November 1997 – 5 AZR 653/96.

CHAPTER IV. SPECIFIC CATEGORIES OF WORKERS

1. Introductory Remarks

This chapter provides an overview of specific categories of workers that are available in the different countries. A general overview (Section 2) is followed by a description of particular sub-groups of workers and the legal consequences of falling within a certain group (Section 3). Sub-groups of workers that are further specified include: white- and blue-collar employees, executives, and trainees or apprentices. Subsequently, the particularities of so-called 'economically dependent workers' are explained (Section 4), followed by a review of specific legal provisions for particular categories of workers, showing the differences that exist across the countries (Section 5). The described categories include: temporary agency workers, homeworkers, teleworkers, (short-term) casual workers, freelancers, commercial agents, seamen, household employees, family workers, young workers as well as some other special legal provisions for categories of workers that are defined only in a few countries. The above mentioned categories can either be classified as 'employees' or 'self-employed' persons, depending on whether the criteria for being an employee are fulfilled. Finally, this chapter refers to the peculiarities of the entertainment industry, the media and sport, taking a closer look at the national laws of the countries, case law and social dialogue (Section 6).

2. Different Sub-groups of Workers

Many countries only have the notion of 'employee', omitting any other worker categories, at least within the private sector (**Belgium**, **Bulgaria**, **Cyprus**, the **Czech Republic**, **Ireland**, **Latvia**, **Lithuania**, **Luxemburg**, **Romania**, **Norway** (where even CEO's fall within the definition of employee) and **Poland** (with the exception of homework in the cottage industry [138])). What could be called a 'binary approach', i.e. differentiating between employees and self-employed persons, is also applied, in principle, in **Finland**. Various sub-groups of workers (e.g. temporary agency workers, family workers etc.) are defined in the other countries, some of which are specifically regulated. Moreover, many 'economically dependent' or 'own-account workers' might be classified as employees by the courts when investigating the existence of an employment relationship.

For instance, law in **Denmark** considers a person to be either an employee or a self-employed, in accordance with the binary approach that is taken in almost all countries covered by this study. The notion of 'employee' is very broad and the task of defining the employee in a specific legal context is essentially left to the social partners to collective agreements. Consequently, both legislation and collective agreements cover most new forms of work, including temporary agency workers and persons working as freelancers. In general, these groups are considered to be regular employees covered by the same labour law rules applicable to employees in standard employment relationships. **Sweden** has taken a similar position. However, the personal scope of labour law can be extended to different categories of intermediate forms between employees and self-employed workers with statutory recognition for a specific category of so-called '(economically) dependent contractors'. However, as the range of 'employee' has been expanded, the importance of this 'dependent contractor' category has diminished.

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[138] A contract concluded for homework is a civil law contract to which some provisions of Polish labour law apply.

The **United Kingdom** differentiates between five categories: (a) employees, (b) workers, (c) professionals, (d) dependent entrepreneurs and (e) self-employed persons. The legal definition of a 'worker' is a broader category than 'employee', also covering those who work under a contract of personal service but do not provide that service in the capacity of a professional or independent business. Such workers are often referred to as 'dependent self-employed', a category that may include freelance workers, sole traders, home-workers and casual workers. The principal rights enjoyed by 'workers' are those under the minimum wage, working time and part-time work whistle blowing legislation. The definition of a 'professional' includes employees, workers and those providing a personal service as a professional (e.g. solicitors). In principle, professionals have rights under the equality legislation. 'Dependent entrepreneurs' also have certain rights, in particular relating to health and safety legislation, according to which dependent entrepreneurs are defined as individuals who work for gain or reward otherwise than under a contract of employment, whether or not he or she employs others. While employees are defined by reference to the fact that they are employed under a contract of service, the self-employed have a contract for providing services.

Another differentiation that is made in some countries is between blue collar and white collar workers, and within the latter group, between employees performing managerial and executive tasks and those who do not (e.g. **Belgium**, **France** and **Germany**).

In **Slovakia**, employers can conclude so-called 'agreements on work performed outside an employment relationship'. Such contracts are designed for work that is limited in its results (task contracts) or occasional activities limited by the type of work (agreement on work activities, agreement on temporary work for students).

Homeworkers are a widely known sub-group of workers in a few countries (**Austria**, **Belgium**, **Germany**, **Hungary**, **Portugal** and **Romania**). **Austria**, for instance, has a statute regulating some features of home-based work. This Act, however, only applies to manual work. As a consequence, teleworkers do not fall within the scope of that statute. Moreover, application of general labour law to homeworkers is not affected by the Act. In **Hungary**, homeworkers are legally recognised; such relationships, although similar, are not regarded as 'typical' employment relationships. **Finland** explicitly states that application of the Employment Contracts Act is not precluded by the fact that the work is performed at the employee's home. In **Ireland**, the Labour Relations Commission issued a Code of Practice on Protecting Persons Employed in Other People's Homes in 2007. This clearly states that employees working in other people's homes are equally entitled to the employment rights and protections available to any other employees. **Hungary** applies specific rules on working times.

However, please note that in **Germany**, some legislation, for example relating to health and safety, is applicable to all workers, largely irrespective of the existence of an employment relationship.

3. Different Sub-groups of Workers: Legal Distinctions and the Ensuing Consequences

This Section provides an overview of specific categories of workers that are recognised, by law or by common practice, across the countries, and how countries deal with different categories of workers and/or self-employed persons.

Most countries have implemented legal distinctions between different sub-groups of workers or self-employed persons, except for **Estonia**, **Iceland**, **Latvia**, **Malta**[139], **Poland**, **Slovakia** and the **United Kingdom**. As a consequence, these countries generally categorise different sub-groups as employees and not as a special group. That means that those individuals are entitled to the same rights as regular employees.

3.1. White-Collar and Blue-Collar Employees

The difference between white- and blue-collar employees is only applied in a few countries (**Austria**, **Belgium**, **France**, and **Germany**). The distinction between white- and blue-collar employees was abolished in **Luxemburg** in May 2008.[140] Although, in principle, **Germany** distinguishes between blue- and white-collar workers, the difference between those two types of employees has almost lost its practical importance. In particular, different periods of notice that existed in the past were abolished on the grounds that the differentiation between the two groups was not in line with the German Constitution. Interestingly, there is an ongoing discussion in **Belgium**, especially among academics, with regard to the legality of the distinction between white- and blue-collar workers. However, in its decision of 8 July 1993, the Belgian Constitutional Court ruled that the legal distinction between white- and blue-collar workers does not constitute a form of discrimination.[141]

A white-collar employee in **Austria** is defined as an individual who is, under an employment contract, required to perform predominantly non-manual, commercial, technical, administrative non-technical or office work.[142] In **Bulgaria**, the term 'employee' includes those who perform predominantly intellectual work. Those who perform physical work are classified as 'workers'. But there are no differences in the legal status of both sub-groups. In **Denmark**, white-collar employees (e.g. shop assistants, clerks, technical and clinical assistants) are covered by special legislative protection through the Danish White-Collar Workers Act, e.g. on sickness payment and notice of termination of the employment. The White-Collar Workers Act, however, does not lay down any rules on, for instance, wages, working times and pension/retirement.

The distinction between white- and blue-collar employees is important for the following reasons. Legal protection for white-collar employees in **Belgium**[143] is more extensive than legal protection of blue-collar employees. Within the category of white-collar employees, a distinction is made based on hierarchical positions. Employment of a hierarchically higher white-collar employee entails a longer notice period than employment of a hierarchically lower white-collar employee. Such a distinction is made on the basis of actual annual wage, with the threshold currently set at a gross annual amount of approximately 28.000 EUR. Some countries apply different notice periods for white- and blue-collar employees, (**Austria**, **Belgium** relating to contracts for an indefinite period, and **Greece**). In other countries, the distinction is relevant only for determining remuneration (**Bulgaria**) or for determining

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139 Maltese legislation does not make a distinction between blue collar and white-collar workers or between different levels of employees. However, employment contracts for technical, administrative, executive and managerial staff may have different terms and conditions.

140 It was politically considered to be outdated as well as unconstitutional because it violated the principle of equal treatment. See the Luxemburg Act of 13 May 2008, introducing a single social statute for the employees of the private sector and modifying the Luxemburg Labour Code, the Luxemburg Social Insurance Code; the Amended Act of 8 June 1999 concerning complimentary retirement pension schemes; the Amended Act of 4 April 1924 creating elected professional chambers, the Chapter VI of title I of the amended Act of 7 March 1980 concerning the judicial system, the Amended Act of 4 December 1967 concerning the income tax, the Amended Act of 22 June 1963 fixing public servants' revenue.

141 Arbitragehof, No. 56/93, 8 July 1993, Rechtskundig Weekblad 1987-1988, 395.

142 See the Austrian White Collar Workers Act (*Angestelltengesetz*).

143 Article 47 and following of the Belgian Act of 3 July 1978 governing Individual Labour Contracts (Blue-Collar Employees) and Article 66 and following of the Belgian Act of 3 July 1978 governing Individual Labour Contracts (White-Collar Employees).

severance payments (**Greece**). Additionally, **Austria** applies different grounds for immediate dismissal, sick payments and the works council structure. There are special rules for specific groups of white-[144] as well as blue-collar employees[145], but these are of diminishing importance.

3.2. Executives

The notion 'executives' in this study is understood to cover all forms of executives that exist in the countries. In this study, taking the different laws and practices of the countries into account, executives may include: CEO's, managers, (statutory) directors, top rank executives, managerial staff, senior executives and other executives. 'Executives' are, in general, deemed to perform tasks and make decisions vital to the continuity and development of a company, requiring certain know-how and expertise. On one hand, an 'executive' is subordinated, like regular employees, and on the other hand, an 'executive' performs tasks that are typically within the employer's scope.

Most countries do not have a legal definition of the term 'executive'. Defining who is an 'executive' is different in the various countries. An explanation follows below.

3.2.1. The Classification of Executives

Most of the countries covered by this study have special legal provisions for executives (**Austria**, **Belgium**[146], **Bulgaria**, **Cyprus**, **Finland**, **France**, **Germany**, **Greece**, **Hungary**, **Italy**, **Lithuania**, **Luxemburg**, **Malta**, the **Netherlands**, **Norway**, **Portugal**[147], **Slovenia**, **Spain** and **Sweden**).

Most countries classify executives as employees with an employment contract, as long as the criteria for being an employee are fulfilled (**Austria**[148], **Belgium**, **Bulgaria**, **Cyprus**, **Denmark**, **France**, **Germany**, **Hungary**, **Greece**, **Italy**, **Lithuania**, **Luxemburg**, **Malta**, the **Netherlands**, **Norway**, **Portugal**, **Slovenia**, **Spain**, **Sweden** and the **United Kingdom**). Some countries do not (**Finland**[149], **France** and **Romania**). As a consequence, executives classified as employees have the same rights as regular employees, except when otherwise stipulated, i.e. by law, collective agreement or individual employment contract. Where the criteria are not fulfilled, executives cannot be classified as employees. With regard to executives not classified as employees, the following should be mentioned. A CEO in **Finland** falls outside the scope of the application of labour law, since a CEO is an 'organ' according to the Finnish Companies Act. **[150]** This fact is supported by the Finnish Supreme

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144 The Austrian *Schauspielergesetz*, *Journalistengesetz*, *Gutsangestelltengesetz*, *Gehaltskassengesetz*, *Hausgehilfen* und *Hausangestelltengesetz.*

145 The Austrian *Bauarbeiter-Schlechtwetterentschädigungsgesetz*, *Bauarbeiter-Urlaubs- und Abfertigungsgesetz*, *Heimarbeitsgesetz*, *Hausgehilfen- und Hausangestelltengesetz*, *Landarbeitsgrundgesetz*, *Bergarbeitergesetz*, *Hausbesorgergesetz and Bäckereiarbeiter/innengesetz.*

146 Belgian Royal Decree of 10 February 1965.

147 The Portuguese labour Code is generally applied to executives. Executives may be qualified as employees depending on whether legal subordination exists, since the qualification of an employee as an 'executive' does not exist in the Portuguese Labour Code. However, similar references may be identified in the Labour Code to employees that perform functions that demand a 'high degree of responsibility', as those that carry out duties dependent on trust, 'management functions', 'directors' or 'leadership positions that directly report to management', 'general directors'.

148 Executives in Austria have a personal employment contract for a leading position in an undertaking, but do not represent legal entities. There are different definitions of this term, which can be found in some Austrian labour acts: § 1(2) *Arbeitszeitgesetz*, § 36(2) *Arbeitsverfassungsgesetz* or § 1(2) Z 5 *Arbeitsruhegesetz*.

149 This concerns CEOs.

150 This is established practice since long and has been confirmed in the preparatory works to the new legislation on limited companies. The CEO is regarded as a corporate body. Some examples can be found in Supreme Court 1983 II 68 and 2002:73. However the Labour Council has consider the position of a CEO with

Court that considered that the position of a CEO does not reflect 'subordination' corresponding to the status of an employee. Executives in **Romania** are also not considered to be employees, as follows from the provisions in the Romanian Undertaking Law No. 31/1990.

In **France**, a distinction is made between executives and so-called senior executives.[151] Whether one can be classified as a senior executive depends on the executive's degree of responsibilities and autonomous decision-making power.[152] Similar to France, **Italy** recognises two types of 'executives', namely so-called *dirigenti* and *quadri*. *Dirigenti* are employees carrying out duties with a high degree of autonomy and relevant discretionary power. Q*uadri* are also employees, except for managers who always carry out executive tasks assigned to them that are significant for the development and the implementation of the company goals within the defined company strategies and plans, in organisations of an adequate size and structure and therefore, fall into the category of middle managers/quadri.[153] A similar situation can be found in **Belgium**, where a distinction is made between 'executives' (i.e. employees carrying out duties with a high degree of autonomy and discretionary power) and 'cadres' (i.e. employees, except executives or managers carrying out executive tasks assigned to them that are significant for the company and therefore fall into the category of higher employees). However, this distinction is applied only for the purpose of participation in social elections for membership of the works councils.

In **Spain** the situation of so-called 'high executives' is somewhat different compared to the situation of executives in other countries. High executives are covered by 'special labour relationships'[154] meaning that individual labour law, as defined in the Spanish Statute on Employees, can be applied through specific provisions or in a supplementary way. Each 'special employment relationship' has its own rules depending on the special situation. Collective agreements do not apply, nor most of the ordinary labour law rules. The employment contract is one of the basic sources to regulate their employment terms and conditions. The managers and board members of a company are not considered employees and therefore, general labour law in principle does not apply to them. However, if they provide their management tasks personally and on a regular and direct basis, in exchange for remuneration, and they do not have control over the company (for instance as major shareholders), they are treated similar to the employees, in particular regarding social security.

In **Portugal**, it is possible to conclude a special services contract with an 'executive', i.e. an individual with a management, director or leadership position directly reporting to the management, general directors, and secretarial positions to these officers and, where collective agreements provide this option, to employees that perform a position with a special position of trust to the relevant categories.[155]

In **Slovenia**, 'executives' (i.e. managers) may either conclude an employment contract or may perform their job on the basis of a civil law contract. The latter is not possible with

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a case by case approach considering the aspects of subordination when giving its opinion of the applicability of the Finnish Annual Holidays Act, 1189-86 and 1223-88 (paragraph 6-3).

151 The French Supreme Court reminded that *"a senior executive is defined by Article L. 212-15-1, becoming L. 3111-2 of the French Employment Code, as the one who is entrusted with responsibilities which involves a huge independence in his timetable organisation, who is able to decide in a broad autonomous way and who receives a wage situated at the highest level of the wage system practiced in the undertaking or the establishment".* See Cass. Soc. 18 June 2008 No. 07-40.427.

152 In case there is a dispute the French court will look at the actual duties performed by the employee rather than the professional category mentioned on his or her payslip.

153 See the Italian Act No. 190 of 1985.

154 Article 2 of the Spanish Statute on Employees (*Estatuto de los Trabajadores*) and Royal Decree 1482/1985.

155 An employment contract as 'special services regime' or 'temporary service commission' is foreseen in Article 161 of the Portuguese Labour Code.

employees as these would then be classified as self-employed persons. Parties to a management staff employment contract may agree on different provisions with regard to their rights, obligations and responsibilities arising from the employment relationship relating to conditions and limitations of a fixed-term employment contract, working hours, breaks and rests, remuneration, disciplinary responsibility and termination of employment.

3.2.2. The Differences between Regular Employees and Executives

In most countries, 'executives' can be classified as employees in the sense that almost all provisions applicable to regular employees may also be applied to them. However, different provisions, deviating from general labour law, may be applicable to them. In some respects there are differences between regular employees and executives. For example, different rules on dismissal or the termination of the employment relationship and different employment conditions apply. There are also other legal provisions that apply to executives and not to regular employees, as explained below.

3.2.2.1. End of the Employment Relationship

Executives sometimes enjoy a lower level of protection in the event of dismissal compared to regular employees (**Germany**, **Hungary**, **Italy**, **Lithuania**, the **Netherlands**, **Slovenia** and **Sweden**), or their dismissal does not need to be justified by the employer (**Hungary**, **Lithuania**[156] and **Sweden**[157]). This is due to the fact that 'executives' are not in a 'weak position' as regular employees are; there is simply less need for protection.
In **Italy**, where *dirigenti* are dismissed *ad nutum*[158], the employer must issue a notice in advance in accordance with the period as defined in the collective agreement.[159] Otherwise, the employer has to pay compensation for early termination of the contract.[160] If the employer does not justify the dismissal, a supplementary indemnity for unfair dismissal must be paid.[161] In the event of legal proceedings before the Italian Labour Court, it is important that this action is preceded by an extrajudicial appeal to the dismissal and a mandatory attempt to reach a settlement before the local labour office.[162] In **Norway**, executives may enter into a written agreement to the effect that disputes in relation with the termination of the employment relationship shall be settled by means of arbitration.[163]

With regard to the public law employment protection, the **Liechtenstein** Employment Act does not generally apply to executives, whereas the Liechtenstein Civil Code does. The latter stipulates that executives are entitled to protection from unfair dismissal.
The Civil Code of the **Netherlands** contains some provisions concerning the relationship of an 'executive', i.e. a statutory director with the legal entity. Dismissal of a statutory director involves two legal acts, i.e. dismissal of the person as a statutory director and dismissal as an employee. The dismissal of a statutory director as an employee must be in compliance with the provisions of law governing dismissal. This means that consent of the Netherlands Employee Insurance Agency is not required for dismissal of the employee as a statutory director. That implies that a statutory director is less protected than a regular employee. The

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156 Case No. 3k-3-760/2001.
157 Section 1(2) of the Swedish (1982:80) Employment Protection Act.
158 I.e. that a decision always and in principle is reversible without any preceding motivation and without any reasons.
159 Article 2118 of the Italian Civil Code.
160 This compensation is equal to the monthly salary at the notice period and is paid on the basis of the salary earned by *dirigenti* along with the severance payments (i.e. thirteenth and fourteenth month salary, unpaid vacations, and unpaid leaves and the severance compensation due until the date of the termination of the employment relationship).
161 Article 2119 of the Italian Civil Code.
162 Within 60 days of the dismissal.
163 Section 15-16 of the Norwegian Working Environment Act of 17 June 2005 No. 62.

provisions concerning dismissal limitations are, however, applicable in this case.[164] The statutory director can also contest the dismissal as apparently unreasonable. Reemployment as a statutory director is, however, not possible.
The special services scheme in **Portugal** may be terminated following an easier and simpler process (compared to the general rules of dismissal and termination of an employment contract): either party may terminate the special services scheme, in writing subject to a 30 or 60 day advance notice, depending on the duration of the contract. Where termination is at the employer's initiative, payment of indemnity is due to the 'executive'.
Romania distinguishes between managers and executives. When concluding an employment contract, there is a trial period of thirty days for employees and of ninety days for management positions. The notice period for resignation is a maximum of fifteen days for executives and thirty calendar days for managers. Some of the disciplinary sanctions may be applied exclusively to managers, such as reduction of management indemnity[165] by 5 to 10% during a period of one to three months, or demotion. Under the Collective Labour Contract concluded at national level, effective during 2007-2010, the termination pay of managers cannot be lower than the sum of the basic wage, experience bonus and indemnity for the managing position. According to the Act on Trade Unions, managers cannot be represented by a trade union.

3.2.2.2. Working Conditions

Compared to regular employees, the working conditions that apply to 'executives' may differ on some points. In some countries, the provisions on maximum working hours, for example, do not apply to executives (**France**[166] , **Germany**, **Greece**, **Italy**[167], **Liechtenstein**[168], **Luxemburg**[169] and the **Netherlands**). In **Finland**, both CEOs and top rank executives are excluded from the scope of the Finnish Working Hours Act.[170] The laws in **Austria**[171] and **Greece** exclude executives from protective restrictions pertaining to working times (rest day, pay for overtime and night work, pay for working on Sundays and annual leave). In **Norway**[172], **Romania**[173] and **Slovenia**, employers may also conclude (in **Lithuania** this is mandatory[174]) employment contracts with their executives for a fixed-term. In **Lithuania**, executives [175] (and in **Italy** *dirigenti* and *quadri)* are not entitled to receive any additional compensation for overtime. In **Liechtenstein**, the provisions on working nights and Sundays in the Liechtenstein Employment Act, do not apply to executives. In **Portugal** and **Slovenia**, specific provisions refer to daily rest, working time limits and timetable exemption.

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164 HR 13 November 1992, *NJ* 1993, 265 (Levison/MAB groep).
165 I.e. benefits representing percentages from the salary in case of employees with managing position.
166 Article L. 3111-1 of the French Labour Code.
167 Those provisions are not applicable for *dirigenti* in Italy.
168 Article 3(c) of the Liechtenstein Employment Act (*Arbeitsgesetz*).
169 Moreover, an executive is not obliged to be present at fixed hours and he is never entitled to payments for overtime.
170 Section 2(1)(1) of the Finnish Working Hours Act.
171 § 1(2) Z 8 of the Austrian *Arbeitszeitgesetz* and § 1(2) Z 5 of the Austrian *Arbeitsruhegesetz*.
172 Section 10-14(1) of the Norwegian Working Environment Act. Fixed-term employment contracts may, generally, not be concluded with regular employees. The only possibility for fixed-term employment contracts are where the conditions apply for temporary appointment according to Section 14-9 of the Norwegian Working Environment, Act of 17 June 2005 No. 62.
173 There are no special provisions regarding the possibility of concluding fixed-term employment contracts with executives. The particularity is that, if such a fixed-term employment contract was concluded, the probation period cannot exceed 45 days (as opposed to only 30 days, in case of other employees).
174 Article 109(3) of the Lithuanian Labour Code.
175 Article 150(5) of the Lithuanian Labour Code.

3.2.2.3. Other Differences

The distinction between employees and executives is important in **Belgium**[176] and **France** with regard to election of employee representatives, collective bargaining and industrial tribunal rules. Regarding elections of employees' representatives in **France**, the law provides for a first council consisting of workers and a second college consisting of supervisors, technicians and executives.[177] Executives and senior executives have their own Section in the industrial tribunal. In **Austria**, employees with a substantial influence on the management of the organisation are excluded from elections to represent employees.[178]

In **Hungary**, special rules apply to executive employees[179]: collective agreements do not apply to executives (this is, in principle, also the case in **Luxemburg**, unless the collective agreement determines otherwise) and their deputies; and the general rules governing fixed-term employment contracts do not apply (the latter is also the case in **Sweden**). Executives and their deputies are personally liable for any damage and losses caused in their official capacity, as well as for violating the provisions of Hungarian civil law. In other cases of damage and loss liability, general provisions on liability for loss damages are applied, whereby the executive employee is liable for an amount up to twelve months of his or her average wages in the event of causing damage or losses due to negligence.

3.3. Trainees

In many countries, trainees are explicitly recognised by law (**Austria**[180], **Belgium**[181], the **Czech Republic**, **Finland**[182], **Germany**, **Liechtenstein**[183], **Luxemburg**, **Malta**, **Portugal**[184], **Romania** and **Slovakia**).

Trainees may be classified as employees (**Austria**[185], **Belgium**[186], **Cyprus**, the **Czech Republic**, **Denmark**[187], **Estonia**, **Finland**, **Germany**, **Greece**[188], **Italy**[189], **Latvia**, **Liechtenstein**[190], **Malta**[191], the **Netherlands**[192], **Norway**, **Romania**, **Slovakia**[193], **Sweden**

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176 Article 14 and the following of the Belgian Act of 20 September 1948. Collective labour agreements may exclude executives from their scope of application.

177 Collective agreements may provide for amendments and a third college consisting of executives.

178 § 36(2) of the Austrian *Arbeitsverfassungsgesetz.*

179 Section 188-192/B of the Hungarian Labour Code.

180 The Austrian *Berufsausbildungsgesetz*.

181 Belgian Act of 19 July 1983.

182 Finnish Act on Vocational Education. (1998/63).

183 See Article 18 of the Liechtenstein Act on Traineeships (*Berufsbildungsgesetz*).

184 Although excluded from the scope of Portuguese Labour Code, Article 4 of Law No. 7/2009 extends the scope of labour accidents and professional diseases' rules, set forth in Articles 283 and 284 of the Portuguese Labour Code to apprentices, trainees and other situations considered as professional training.

185 Based on the general criteria for the qualification as employee.

186 Trainees in Belgium are only categorised as employees when the work element prevails and the traineeship is of importance.

187 Danish Vocational Education and Training Act. The Act obliges the employer to pay wages and to comply with the working conditions laid down in the collective agreement in the specific sector.

188 Greek Ministerial Decision 40011/1995. Trainees are deemed to be manual workers concerning the provisions on the termination of the contract of employment

189 A trainee is defined as a 'lower ranking employee'.

190 A Statutory approach in Article 17(2) and Article 18 of the Liechtenstein Act on Traineeships.

191 Trainees are treated as employees with regard to the terms and conditions (Article 2 of the Maltese Employment and Industrial Relations Act). The definition of a contract of employment or a contract of service also includes a contract of apprenticeship.

192 Trainees are only categorised as employees when the work element prevails or if the trainee gets remuneration according to the economic standards. In that case, the traineeship contract may be an employment contract.

193 Article 53 of the Slovak Labour Code. According to that provision, the employer may not conclude an employment contract including a probation period for the trainee.

and the **United Kingdom**[194]), provided that the conditions for being classified as an employee are fulfilled. However, that does not mean that trainees have exactly the same rights as regular employees, since trainees have a 'special' position that sometimes requires special protection. However, some countries do not class trainees as employees (**Bulgaria**, **Hungary**, **Ireland**, **Luxemburg**, the **Netherlands**, **Portugal**[195] and **Slovenia**). With regard to the latter group of countries, the main difference lies in the fact that the educational and training process is prioritised. If the traineeship is the main reason for employing a trainee then there is no personal subordination and as a result there is no employment relationship (**Austria**, **Greece** and the **Netherlands**). A traineeship covers both theoretical education and practical work (**Finland** and **Greece**). In **France**, **Latvia**, **Norway**, **Slovakia**, and **Spain**, trainees are not classified as a special group of workers.

Austria has a specific statute[196] regulating the training relationship with regard to teaching professions, which are included in a special list[197] based on an apprenticeship contract concluded between the trainee and an accredited training enterprise. Such a training relationship is in fact the equivalent of an employment relationship.[198] The venues of apprenticeship training are the training enterprise and the vocational school providing training for the respective occupation. Specific occupational knowledge and skills are imparted by the enterprise. The vocational school provides the basic theory and general education. There are also other forms of traineeship, such as *Volontariat* or *Praktikum*; these trainees are, in general, not regarded as employees, but they may be classified as employees if the practical implementation demonstrates 'personal subordination'.

In **Finland,** the Act on Vocational Education (1998/63) determines that the trainee has an employment relationship, excluding the application of some sections in the Employment Contracts Act. There are, *inter alia*, no restrictions regarding the conclusion of a fixed-term employment contract with the trainee and there is no obligation to offer a full-time job to a part-time trainee.

The relationship of trainees is regulated in **Hungary** by Act LXXVI of 1993 on Vocational Training. Vocational training is realised within the school system and consists of two parts: theory and practical vocational training. The contractual basis of the training consists of two agreements. While the theoretical part is based on the cooperation agreement concluded between the institute providing vocational training and the organisation, the practical training is based on the student contract concluded between the organisation and the student.

In some countries, trainees have a so-called traineeship contract (**Belgium**[199], **Cyprus**, **Finland**[200], **Greece**, **Liechtenstein**[201], **Lithuania**, **Luxemburg**[202], **Portugal**, **Romania** (type

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194 Section 230(1) of the Employment Relations Act 1996 explains that an 'employee' is *"An individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment"*. A 'contract of employment' is defined by Section 230(2) of the Employment Relations Act 1996 as *"a contract of service or apprenticeship, whether express or implied, and, (if it is express) whether oral or in writing".* Thus apprentices do have a contract of employment. Other trainees who are not apprentices will be employees if they satisfy the usual tests.

195 A special regime 'work in apprenticeship regime', approved by Law No. 205/96 of 25 October 1996 is applied. Instead of an employment contract, a trainee or apprenticeship contract is entered into.

196 *Berufsausbildungsgesetz.*

197 *Lehrberufsliste.*

198 Austrian Supreme Court 9 January 1973, 4 Ob 97/72, Zeitschrift für Arbeits- und Sozialrecht 1975/6.

199 See the Belgian Act of 19 July 1983.

200 A traineeship contract should be concluded in accordance with the Vocational Education Act. The structure of a traineeship contract is triangular, meaning that there is a contract between the establishment of education and the employer as well as a contract between the employer and the trainee.

201 Article 18(1) of the Liechtenstein Act on Traineeships (*Berufsbildungsgesetz*). The traineeship contract determines that the offerer of the vocational training is obliged to train the trainee in the required manner for a specific trade. The trainee, in return, is obliged to perform work in the offerer's service and to attend a vocational school as well as special courses.

of employment contract) and **Slovenia**) concluded for a defined period (in **Romania** with a minimum of six months and a maximum of three years). For instance, the duration of training in **Greece** may vary depending on the type of traineeship.

There are countries where some of the labour law provisions apply only to trainees (**Cyprus**[203], **Liechtenstein**[204] and **Hungary**), whereas in other countries trainees are expressly excluded from some of the labour law provisions (**Belgium**, **Finland**[205], **Luxemburg**[206], **Slovenia**[207] and **Portugal**[208]). For example, **Czech** labour law applies only to employment relationships of judicial trainees, and trainees preparing for a civil service post, as officials of the local self-governing areas, university teachers, directors of public research institutions and employees of the Probation and Mediation Service and the Ombudsman's office, unless other statutory provisions stipulate otherwise. Other trainees are not recognised by Czech labour law.

There is an interesting case in **Ireland**[209], where the courts have considered the question whether an employment contract is defined as a contract of service or of traineeship. In *Fitzpatrick v. Whelan*[210], the Irish Labour Court had to consider whether time spent on 'off-the-job training' by a trainee could be considered as working time. The Irish Labour Court ruled that such training was an integral part of traineeship and that, during this period, the trainee was *"at a place determined by the employer, carrying out the instructions of the employer and fulfilling the employer's obligations under the rules of the scheme"*. However, the definition of a contract of employment in the Irish Protection of Employees (Fixed-Term Work) Act 2003 is a contract of service and does not include a contract of traineeship. Accordingly, the Irish Labour Court ruled that, as *"a matter of statutory interpretation"*, a contract of traineeship is not an employment contract for the purposes of the Irish Protection of Employees (Fixed-Term Work) Act 2003.[211] The essential purpose of a traineeship contract is to provide the trainee with *"the training and skills necessary for him or her to qualify in a trade or profession"*.[212]
Trainees in **Poland** are not explicitly recognised by Polish labour law. Instead, young people who carry out work in order to obtain professional qualifications are treated as young

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202 Article L. 111-3(1) of the Luxemburg Labour Code. The contract of traineeship is an autonomous contract, governed by its own rules on contracting, execution and termination.

203 Section 2 of the Cypriot Law 24/1967 and Cypriot Law 490/1966. See for the laws that only apply to trainees Cypriot Law 24/1967 on the maximum period that a traineeship can take and the Cypriot Law 490/1966.

204 Article 17(2) of the Liechtenstein Act on Traineeships (*Berufsbildungsgesetz*). The main consequence of belonging to this group is that special provisions of the Act on Traineeships are applicable. General provisions on employees apply subsidiary.

205 In general, the Employment Contracts Act is applicable to a traineeship relation. Nevertheless, many provisions are expressly excluded from the scope of application the Finnish Act on Vocational Education and Training Section 18.

206 Article L. 111-3(2) of the Luxemburg Labour Code. For many aspects the general rules for employment contracts apply, such as recreational leave, annual holiday, protection of young workers, occupational health, protection in case of pregnancy and protection against dismissal in case of sickness.

207 The provisions on health and safety at work, working time, breaks, and weekly rest periods, unpaid leave due to personal reasons and health reasons, liability for damages, judicial protection and/or alternative dispute resolution are applicable to trainees.

208 Article 4 of the Portuguese Law No. 7/2009 extends the application to trainees of Articles 283 and 284 of the Portuguese Labour Code. Although trainees are, in principle, excluded from the scope of the Portuguese Labour Code, the Code extends the scope with regard to labour accidents and professional diseases to trainees.

209 See, e.g., Section1(1) of the Irish Unfair Dismissals Act 1977.

210 DWT36/2005.

211 *Kingham v ESB Networks* FTD8/2005, reported at [2006] ELR 181.

212 See Section 2(1) of the Irish Unfair Dismissals Act 1977. Section 4 of the Irish Unfair Dismissals Act 1977 provides that, except insofar as any provision of the Act otherwise provides, the Act *"shall not apply in relation to the dismissal of a person who is or was employed under a statutory apprenticeship if the dismissal takes place within six months after the commencement of the apprenticeship or within one month after the completion of the apprenticeship*".

workers, i.e. they are employed under an employment contract for vocational training.[213] This concerns persons of at least 16 and less than 18 years of age. This scheme is restricted to persons who have completed at least basic secondary school, produce a medical certificate stating that work of a given type does not present a hazard to their health. A young person without any vocational qualifications may be employed only to receive vocational training.[214] Employers have particular duties with regard to protecting the health and safety of young workers and their education.

4. The Recognition of Economically Dependent Workers

As the ILO noted in its Report: *"midway between the employment relationship and self-employment, there are 'economically dependent workers' who are formally self-employed but depend on one or a few 'clients' for their income".* The report added that *"they are not easy to describe, let alone quantify, because of the heterogeneous nature of the situations involved and the lack of a definition or statistical tool"*.[215]

Workers who are merely economically dependent are not legally recognised in most countries (**Belgium**, **Bulgaria**, **Cyprus**, the **Czech Republic**, **Denmark**, **Estonia**, **Finland**, **Hungary**, **Iceland**, **Ireland**, **Latvia**, **Lithuania**, **Luxemburg**, **Malta**, **Norway**, **Poland**, **Romania**, **Slovakia** and **Slovenia**). The **Czech Republic** issued legislation stipulating that 'dependent work' can be performed only within the context of an employment relationship.[216] On the basis of this definition, the courts or state authorities (i.e. the labour office, the state inspection or the financial office) decide whether the relationship can be classified as an employment relationship or as a relationship based on self-employment.

A specific category of economically dependent workers, so-called 'employee-like persons', is defined in **Austria**. The relevant statutory provisions apply to persons who perform work or services by order and on account of another person without an employment contract, if they should be considered as employee-like persons because of their economic dependence. Criteria on the basis of which such economic dependence can be established include: work performed for a single or very limited number of contracting parties, using no relevant own operating resources, and dependence on the earnings for the person's livelihood. The person in question is not required to be in equal need of social protection as a 'true employee'. A limited number of provisions of labour law apply to employee-like persons by explicit decree, e.g. those about Labour Courts[217], temporary agency work[218], employees' liability[219] and anti-discrimination. Others are applied by the courts, as far as they do not demand personal subordination, e.g. work place security. As a consequence, important parts of labour law (in particular on dismissal protection, paid holidays, sickness benefits) are not applicable to employee-like persons.

'Employee-like persons' (or quasi workers) are also acknowledged in **Germany**. These persons are not as 'personally dependent' or 'subordinated' as 'employees' but 'economically dependent' only[220]. Persons who belong to this group are considered to form a sub-category in need of stronger protection than that provided to most self-employed persons. Some of the legal protection afforded to employees is extended accordingly to these employee-like

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213 Articles 194-206 of the Polish Labour Code.
214 Articles 190 and 191 of the Polish Labour Code.
215 ILO Report V(1), The employment relationship, International Labour Conference, 95th Session 2003, p. 12.
216 Article 2(4) and (5) of the Czech Labour Code.
217 Section 51 of the Austrian Act on Labour Courts.
218 Section 3 of the Austrian Act on Agency Work.
219 Section 1 of the Austrian Employees' Liability Act.
220 Federal Labour Court 15 November 2005 – 9 AZR 626/04.

persons. Employee-like persons, in particular, are entitled to an annual holiday.[221] The rules on prevention of discrimination are applicable to this sub-group[222]. Labour courts are competent to deal with cases of this sub-group.[223] Their contracts are subject to judicial supervision of general terms and conditions. Finally, they are entitled to collective bargaining.[224] The essential characteristics of this category of employee-like persons are statutorily fixed.[225] The criteria enumerated in the relevant provision are:
(1) economic dependence (as opposed to personal dependence or subordination);
(2) the need for social protection; because of
(3) work performed personally without the aid of subordinate employees and because
(4) either work is done mainly for one person or the worker relies on a single entity for more than half of his or her total income.
However, it should be noted that the term 'employee-like person' (slightly) differs from one statute to another and that only single rules and provisions of labour law are (by way of an analogy) made applicable to quasi workers. As a consequence, in principle, labour law is not applicable to them[226]. In particular, neither statutory dismissal protection nor legal protection in the case of a business transfer can be applied[227].

Mere economic dependence is applied (at least up to a point) in **France** as well. Under the relevant provisions, some individuals in charge of an individual enterprise benefit from the rules of the labour code. The criteria are mainly economic: exclusive or quasi exclusive activity for a dominant company and prices imposed by this company. These provisions enable application of the French Labour Code in the absence of unambiguous subordination. Examples of application include managers of petrol stations, licensees, exclusive distributors and, more recently, franchisees.[228]

Greece does not recognise economically dependent workers except in two cases. First, such workers have the possibility to conclude collective agreements (this possibility, however, has not been used so far in reality). Second, the presumption of independent work is not applicable if a person works only or mainly for the same employer, that is to say when he or she is economically dependent.

Another country where economically dependent workers are recognised is **Italy**. This group is essentially composed of co-operative relationships that may be implemented in a continuous supply of services (so-called para-subordinated work)[229] and so-called project work that is a continuous supply of services related to a specific project. Italian law defines such work arrangements as 'disguised work' due to the fact that the distinction between employee and self-employed is currently regarded as obsolete to a certain extent. The law states that salaries paid to workers must be proportional to the quantity and quality of the work performed and reflect the salaries usually paid for similar services, also according to the reference national collective agreements.[230]

Economically dependent workers are also defined in the **Netherlands'** (labour) law. For instance, the Extraordinary Labour Relations Decree governing dismissal law is also applicable in cases where no employment contract was concluded, but where the individual

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221 Section 2 sentence 2 of the German Federal Holidays Act.
222 Section 6(1) No. 3 of the German General Act on Non-Discrimination.
223 Section 5(1) sentence 2 of the German Labour Courts Act.
224 Section 12a of the Act on Collective Bargaining Agreements.
225 Section 12a of the Act on Collective Bargaining Agreements.
226 Federal Labour Court 8 May 2007 – 9 AZR 777/06.
227 In addition to that specific provision is made (in Section 92a of the Commercial Code) for so-called 'single firm representatives'.
228 See also ILO Report V(1), The employment relationship, International Labour Conference, 95th Session 2003, p. 40 referring to case law.
229 Article 409 of the Italian Code of Civil Procedure.
230 Article 1, paragraph 772 of the Italian Act No. 296 of 2006.

personally carries out work for someone else, unless he or she works for two or more persons or is assisted by two or more persons, is not the spouse or registered partner, or resident relative by blood or by marriage, or when this work is not secondary. Comparable definitions are used in Dutch social security legislation.

In **Portugal**, certain sections of labour law (in particular health and safety provisions) apply to workers who are not classified as 'true employees', provided that the worker is considered to be in a situation of economic dependence on the beneficiary.[231] Portuguese law provides specific rules to situations equivalent to employment contracts. Regarding economically dependent workers, it states that *"the legal rules regarding personality rights, equality and non-discrimination, labour health and safety, shall apply to situations in which professional activity is performed by a person for another without legal subordination, where the provider should be considered economically dependent from the activity's beneficiary".*[232] These rules are applied to contracts under which the activity is performed without legal subordination, at the workers' residence or establishment, and to contracts under which the worker buys raw materials and provides the final product to the seller, at a certain price. In this respect, the worker must be under the beneficiary's economic dependence in both cases.[233]

In **Spain**, a specific category of economically dependent workers was recently (in 2007) recognised by the legislator.[234] The main features of these economically dependent self-employed are: to perform a professional activity directly and personally, mainly for just one customer, on a regular basis and in exchange for remuneration; economic dependence of that customer, receiving at least 75 per cent of all the income produced by their job or professional activity or business from the client. In order to be recognised as economically dependent a worker must not engage employees, nor contract or sub-contract the activity to third parties; must not provide his or her services in exactly the same way as the customer's employees; must have his or her own productive structures, equipment and materials; must develop the activity under his or her own management criteria; must receive economic remuneration depending on the results achieved by their activity and bearing the relevant risks; must not have his or her offices or premises open to the public nor develop the activity as a corporation. In cases where workers are regarded as 'economically dependent' in this sense, they are entitled to some of the protection offered to 'employees'.

Also in **Sweden** the category of so-called (economically) dependent contractors has been statutorily recognised. It expressly states that *"the term 'employee' […] shall also include any person who performs work for another and is not thereby employed by that other person but who occupies a position of essentially the same nature as that of an employee. In such circumstances, the person for whose benefit the work is performed shall be deemed to be an employer".*[235] The importance of that, however, is diminishing due to the fact that the notion of 'employee' is relatively extensive.

In the **United Kingdom**, economically dependent workers are explicitly recognised within the notion of 'worker'. In Section 230(3) of the Employment Relations Act 'workers' are defined to include employees (i.e. those working under a contract of employment) but also *"an individual who has entered into or works under (or where the employment has ceased,*

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231 Also ILO Report V(1), The employment relationship, International Labour Conference, 95th Session 2003, p. 38.

232 Article 10 of the Portuguese Labour Code.

233 Article 14(2) of the Portuguese Labour Code. Among others, special rules as mentioned in Law No. 101/2009, are provided about privacy and rest of the worker (Article 4), safety and health (Article 5), professional training (Article 6), remuneration (Article 7), right to annual allowance (Article 8), rules on suspension, reduction or termination of the contract (Articles 9 to 11). The worker and the beneficiary of the activity are submitted, as beneficiary and contributor, respectively, to the general social security regime of dependent employees, set forth in special legislation (Article 15).

234 The Autonomous Spanish Labour Satute of 2007.

235 Section 1 subsection 2 of the Swedish (1976:580) Co-determination Act.

worked under) or 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 other words, 'worker' is a broader category than employees. The definition covers employees as well as those working under a contract of personal service but not providing that service in the capacity of a professional or independent business. The principal rights enjoyed by workers are those under the National Minimum Wage legislation, the Working Time Regulations, the Public Interest Disclosure Act and the Part-time Work Regulations.

5. Specific Legal Provisions for Particular Categories of Workers

The following paragraph deals with a variety of specific legal provisions for special categories of workers, taking into account whether the workers in those special categories have an employment relationship, an employment contract or neither. As a whole, a distinction is made between ten categories of workers. Additionally, there is a separate paragraph for particular categories of workers/employees not found in more than one country. The following categories of workers are mentioned below: temporary agency workers (5.1), teleworkers (5.2), homeworkers (5.3), short-term casual workers (5.4), freelancers (5.5), commercial agents (5.6), seamen (5.7), household employees (5.8), family workers (5.9) and young workers (5.10). Finally, reference is made to other categories of workers that are only regulated in a few countries (5.11).

No special legal provisions for particular categories of workers can be found in **Estonia** (where the only obligation that must be fulfilled in case of a temporary agency worker or a teleworker is that the work is specified in a contract), **Latvia** and **Norway**. **Bulgaria** only has special legal provisions for employees in the State Administration. Those provisions are related to the conditions for concluding an employment contract, remuneration and assessment of their work.[236] In **Denmark**, the particular categories of workers are mainly regulated by collective agreements. There are, however, a few exemptions, e.g. sailing seamen. **Liechtenstein** applies the Act concerning Employment in Industry and Commerce (Employee Protection Act) to housekeeping personnel and employees in agriculture and forestry.[237]

5.1. Temporary Agency Workers

Before elaborating on the differences with respect to temporary agency workers, a reference to Directive 2008/104/EC on temporary agency work[238] is necessary. The purpose of Directive 2008/104/EC is to ensure protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment is applied to those workers. Establishing a suitable framework for temporary agency work with a view to effectively contributing to the creation of jobs and to the development of flexible employment forms is taken into account.[239]

Directive 2008/104/EC defines a temporary work agency (interim agency) as any natural or legal person who, in compliance with national law, concludes employment contracts or has

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236 Article 107a of the Bulgarian Labour Code.
237 Article 109 and following of the Liechtenstein Employee Protection Act.
238 Directive 2008/104/EC of the European Parliament and of the Council on temporary agency work, *OJ* L 327, 05.12.2008 p. 9-14. Hereinafter referred to as Directive 2008/104/EC.
239 Article 2 of Directive 2008/104/EC.

employment relationships with temporary agency workers[240] in order to assign[241] those workers to client organisations (referred to as 'user undertakings') to work there on a temporary basis under the user undertakings' supervision and direction. The Directive defines a temporary agency worker as a worker with an employment contract or an employment relationship with a temporary work agency with a view to being assigned to an undertaking to work under its supervision and direction for a specific period of time. A user undertaking is defined as any natural person for whom a temporary agency worker works temporarily under its supervision and direction. The basic working and employment conditions, i.e. working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays, or pay, of temporary agency workers must be, for the duration of their assignment at a user undertaking, applied as if they had been employed directly by that undertaking to carry out the same job.[242] This Directive is, as all other Community Directives, without prejudice to national law with regard to the definitions of pay, contract of employment, employment relationship or worker. Member States must not exclude workers, contracts of employment or employment relationships solely because these relate to part-time workers, fixed-term contract workers or persons with a contract of employment or employment relationship with a temporary work agency within the scope of this Directive. Until 5 December 2011, the Member States are obliged to transpose the Directive into their national law(s). Some countries, however, already apply some of the above mentioned rights.

Many countries have particular statutes and/or other provisions on temporary agency workers (**Austria**[243], **Belgium**[244], **Finland**, **France**, **Germany**, **Greece**, **Hungary**[245], **Iceland**[246], **Liechtenstein**[247], **Luxemburg**[248], the **Netherlands**[249], **Poland**[250], **Portugal**, **Romania**, **Slovenia**[251], **Sweden**[252] and the **United Kingdom**), whereas there are also a few countries that have no regulations pertaining to this subject matter (**Lithuania** and **Bulgaria**).

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240 A worker within the meaning of that Directive means any person who, in the Member State concerned, is protected as a worker under national employment law. See Article 3(1)(a) of Directive 2008/104/EC.

241 Assignment within the meaning of that Directive means the period during which the temporary agency worker is placed at the user undertaking to work temporarily under its supervision and direction.

242 Articles 5(1) and 3(1)(f) of Directive 2008/104/EC.

243 Austrian *Arbeitskräfteüberlassungsgesetz*.

244 Belgian Act of 24 July 1987 on Temporary Agency Work.

245 Section 193/B of the Hungarian Labour Code.

246 The Icelandic Act on Temporary Employment Agencies includes provisions on the registration and notification of those wishing to provide temporary work agency services in Iceland, on special representatives, on the obligation of temporary work agencies to provide information to the Icelandic Directorate of Labour, on obligations of user undertakings, on prohibition on charging fees and restriction on hiring out employees

247 The Liechtenstein Employment and Hiring of Services Act applies particular provisions on the employment contract to temporary agency workers. Other issues are regulated by the general provisions on the employment contract in the Liechtenstein Civil Code.

248 Article L. 131-1 and following of the Luxemburg Labour Code. Luxemburg Labour law does contain rules concerning the form and duration of the contract, the cases in which temporary agency workers can be hired, and the shared responsibilities between the employer and the user undertaking.

249 The Netherlands Placement of Personnel by Intermediaries Act (*Wet allocatie arbeidskrachten door intermediairs*) regulates matters with regard to temporary work- agencies and articles 7:690 and 7:691 of the Netherlands' Civil Code.

250 The Polish Law on Employment of Temporary Agency Workers introduces rights and duties for the temporary agency worker, the temporary work agency and the user undertaking. Article 7 of the Polish Law on Employment of Temporary Agency Workers explicitly provides that it should be an employment contract for a fixed-term needed to perform certain work. A civil law contract with a temporary work agency is not excluded, but its conclusion may not lead to an abuse of labour law.

251 Articles 57 to 62 of the Slovenian Employment Relationships Act.

252 Swedish (1993:440) Private Employment Agencies and Temporary Labour Act. Sweden recognises special rules for temporary agency workers, however, they are generally covered by Swedish labour law. Additionally, the temporary work agency branch and its workers are covered by collective bargaining and collective agreements.

In **Bulgaria**, three draft bills on temporary agency work have been prepared and proposed to the National Assembly during the last two years, but none of the drafts has as yet been adopted. The main reason was a lack of adequate guarantees for the rights of temporary agency workers. In **Cyprus**, temporary agency work is almost non-existent.

In **Romania**, temporary agency work is only allowed in three cases, whereas in **Slovenia**, assignment of temporary agency workers is not allowed in some situations. The **Romanian** Labour Code provides three situations in which a user undertaking may resort to a temporary agency worker, namely (a) temporary replacement of another employee, (b) seasonal activities and (c) occasional or specialised activities.

Regarding the social dialogue at the user undertaking's level, legal provisions and the clauses of collective agreements that are applicable to employees assigned to the user undertaking under standard employment contracts are equally applicable to temporary workers during their time in the user undertaking. In **Slovenia**, in order to protect workers against abuse, the Employment Relationships Act describes situations where the worker may not be assigned to a user undertaking, i.e. in cases of replacement of workers employed by the user undertaking who are on strike; in cases when the user undertaking has, during the past twelve months, terminated employment contracts of a large number of workers; in cases of workplaces for which the user's risk assessment shows that workers are exposed to dangers and risks; in cases laid down by collective agreements for the sector, if these enhance protection of workers or are required for the health and safety reasons. [253]

A temporary agency worker is an employee with an employment contract or an employment relationship with the temporary work agency in: **Austria**, **Belgium**, the **Czech Republic**, **Denmark**, **Finland**[254], **Germany**, **Greece**, **Hungary**, **Iceland**[255], **Ireland**[256], **Liechtenstein**, **Luxemburg**, the **Netherlands**[257], **Romania**, **Slovakia**, **Slovenia** and **Sweden**. This is not the case in the **United Kingdom**, where a temporary agency worker is not an employee (or a worker) of either the temporary work agency or the user undertaking since the contract with the temporary work agency often specifies that it is not a contract of employment. To address some of the difficulties this creates, certain legislation makes specific provisions for temporary agency workers. For example, the Working Time Regulations 1998 provides that the provisions of these Regulations *"shall have effect as if there were a worker's contract for the doing of the work by the temporary agency worker made between the temporary agency worker and – whichever of the agent and the principal is responsible for paying the*

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253 In case this would represent replacement of workers employed by the user undertaking who are on strike; in cases when the user has terminated employment contracts during the period of the past twelve months to a large number of workers; in cases of workplaces for which the user's risk assessment shows that workers working there are exposed to dangers and risks; in cases which can be laid down by branch collective agreements, if they ensure greater protection of workers or are required for health and safety reasons. See Article 57(2) of the Slovenian Employment Relationships Act.

254 Chapter 1 Section 7(3) of the Finnish Employment Contracts Act. The definition of an employee shall be met – taking the triangular relationship into consideration. The term 'temporary agency work' is defined in the following way: *"If, with the employee's consent, the employer assigns an employee for use by another user undertaking, the right to direct and supervise the work is transferred to the user undertaking together with the obligations stipulated for the employer directly related to the performance of the work and its arrangement"*.

255 Article 8 of the Icelandic Act on Temporary Employment Agencies, No. 139/2005.

256 The relevant employment legislation in Ireland deems temporary agency workers to be employees, either of the agency or of the client: contrast Section 2(1) of the Irish Organisation of Working Time Act 1997 (person liable to pay the wages is deemed to be employer) and Section 13 of the Irish Unfair Dismissals (Amendment) Act 1993 (person hiring the worker from agency is deemed to be employer). Rulings of the Social Welfare Appeals Office are that temporary agency workers are employees of the temporary-work agency.

257 Article 7:610 of the Netherlands Civil Code. Temporary agency workers have an employment contract whereby, within the frame of the conduct of a profession or business of the employer, the employee is placed by the employer (the temporary work agency) at the disposal of the user undertaking in order to perform work under the latter's supervision and direction by virtue of a contract for services granted by the latter to the employer. See Article 7:690 of the Netherlands Civil Code.

temporary agency worker in respect of the temporary agency work, or if neither the agent nor the principal is so responsible, whichever of them pays the temporary agency worker in respect of the work, and as if that person were the temporary agency worker's employer".

Temporary agency workers are subject to some particular labour law provisions in: the **Czech Republic**, **Hungary**, **Liechtenstein**, **Luxemburg**, the **Netherlands**, **Portugal**[258], **Romania** and **Slovakia**. As a consequence, the labour law provisions, e.g. working time and remuneration, as well as social security law, that apply to regular employees also apply to temporary agency workers.

The *Arbeitskräfteüberlassungsgesetz* in **Austria**, the **Belgian** Act of 24 July 1987 on Temporary Agency Work[259] and the **Netherlands** Placement of Personnel by Intermediaries Act determine that the employer must pay remuneration to the temporary agency worker at the same level as remuneration normally paid to employees in the same sector or for the same work. This is to a certain extent different in **Finland**, where the temporary agency workers' remuneration is regulated by a special provision determining which collective agreement is applicable. If the user undertaking is not bound by a (generally binding) collective agreement, then at least the provisions of the collective agreement applicable to the user undertaking shall be applied to the relationship to the temporary agency worker. If no collective agreement is applicable, then a reasonable normal remuneration as agreed upon in the employment contract prevails.[260] In **Slovakia**, the employee must be paid wages and travelling expenses by the user undertaking or by the temporary work agency.[261] Pay does not need to be as favourable for a worker employed by a temporary work agency working for the user undertaking for less than three months. [262]

Temporary agency workers are included for the purpose of electing employee representatives.[263] In **Denmark**, the work carried out by temporary agency workers is regulated by collective agreements and case law. As a main principle, and similar to what is the case in countries where labour law provisions are applicable to temporary agency workers, the collective agreements state that the basic working conditions of a temporary agency worker are equivalent to what would apply if the worker had been employed directly by the user undertaking itself. The latter can also be said for **Slovenia**, where the law on employment and unemployment insurance requires that the temporary work agency apply the same employment conditions that are applicable to the employees of the user undertaking.

The assignment of a temporary agency worker by a user undertaking requires the worker's consent (**Austria** and **Finland**). The user undertaking is responsible for the labour conditions and bears (joint) liability concerning payment of salary and social security contributions (**Greece** and **Romania**).
In **Iceland**, a temporary work agency may not restrict the right of an employee assigned to a user undertaking to enter into a contractual relationship with that undertaking. [264] Furthermore, before the work commences, written information is to be provided on the tasks to be carried out by the employee in each individual case.[265]
In **Italy**, parties are allowed to agree, from time to time, on a special guarantee[266] by the temporary work agency, provided that it occurs with regard to business of a special nature

[258] A special regime is foreseen in Articles 172 to 192 of the Portuguese Labour Code.
[259] Article 10 of the Belgian Act 24 July 1987 on Temporary Agency Work.
[260] Chapter 1 Section 9 in the Finnish Employment Contracts Act.
[261] Article 58 of the Slovak Labour law.
[262] According to Article 58/5 of the Slovak Labour Code.
[263] Articles 233/2 and 233/3 of the Slovak Labour Code.
[264] Article 7 of the Icelandic Act on Temporary Employment Agencies, No. 139/2005.
[265] Icelandic Act on Temporary Employment Agencies, No. 139/2005.
[266] The guarantee, i.e. a special agent's liability, consisting of an amount of money agreed by the parties. The agent undertakes to pay said amount in case of non-fulfilment by any third party of the obligations arising

and amount, determined case by case; the duty of guarantee undertaken by the agent must not exceed the commission that the same agent would be entitled to for that business; the temporary work agency must be entitled to a special consideration.

Temporary employment contracts in **Portugal** that are concluded for a fixed term need to be justified by law. Justification grounds may include replacement of an absent employee, the need to fill vacancies when a recruitment process has been started, and temporary or exceptional increases in work. These grounds generally relate to transitory and/or unpredictable situations.

5.2. Homeworkers

The ILO defined 'homework' as: *"[…] the production of a good or provision of a service for an employer or a contractor under an arrangement whereby the work is carried out at a place of the worker's own choosing, often the worker's own home, where there normally is no direct supervision by the employer or contractor*".[267] This definition does not automatically mean that the homeworker is an employee in the strict sense of the word; according to this definition, other types of workers may also fall within this scope. In contrast to the ILO definition, the Council of Europe defines a homeworker (also referred to as outworker) *"[…] as a person performing manual or intellectual work at a stable place and in a situation of subordination to but outside the control of the employer".*[268] The latter definition refers to homeworkers as 'employees' since it is assumed that subordination applies to homework.[269]

Two aspects characterise 'homework': the location where homework is performed and, as a consequence, the different relationship with the employer or contractor.[270] The difference of the relationship lies in the fact that there is, as ILO stated above, no 'direct supervision'.

Homework is not a new phenomenon in many countries (**Austria**, **Belgium**[271], the **Czech Republic**, **Finland**, **France**, **Germany**, **Greece**, **Italy**, **Liechtenstein**[272], **Lithuania**, **Malta**, the **Netherlands**, **Norway**, **Romania**, **Slovakia** and **Slovenia**[273]). Some countries have particular provisions or laws for homeworkers (**Austria**[274], the **Czech Republic**, **Finland**, **Germany**[275], **Greece**, **Lithuania**, the **Netherlands** and **Slovenia**).

Although homeworkers have some characteristics of an employee, not all countries classify them as employees (**Hungary** and **Poland**). In other countries, however, they are in a comparable position as regular employees and are therefore entitled to some of the rights extended to employees (**Finland**, **Greece**, **Italy**, **Lithuania**, the **Netherlands**, **Norway**, **Romania** and **Slovakia**). Interestingly, in **Greece**, labour law only applies to homeworkers with an employment relationship with the person to whom they supply work listing the same characteristics of work as an employee under an employment contract. Homeworkers residing in small towns with fewer than 6,000 inhabitants do not fall within the scope of labour legislation concerning working time, remuneration and termination of the contract.[276] With

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from the contract. The guarantee shall be effective when there are the following three conditions: (a) the guarantee regards a specific business (i.e. targeted liability); (b) the guarantee does not exceed the commission to which the agent is entitled (i.e. proportionate liability); (c) a consideration is defined by the parties, i.e. rational liability.

267 See International Labour Organisation, *Social protection of homeworkers*, Geneva 1990, p. 3.

268 Council of Europe, *The protection of persons working at home*, Strasbourg 1989.

269 European Parliament, Working Paper, *Atypical Work*, SOCI 106 EN, 3-2000, p. 113.

270 European Parliament, Working Paper, *Atypical Work*, SOCI 106 EN, 3-2000, p. 113.

271 Article 119.1 and following of the Act of 3 July 1987 governing Individual Labour Contracts.

272 § 1173a Article 91 and following of the Liechtenstein Civil Code.

273 Articles 67 to 71 of the Slovenian Employment Relationships Act.

274 *Heimarbeitsgesetz*.

275 German Homeworking Act.

276 Article 44 of the Greek Law 2628/1953.

regard to the applicability of employment rights in the **Netherlands** (provided that the homeworker is not self-employed) and **Romania**, a homeworker is entitled to all rights provided by law and by collective labour agreements applicable to employees whose work site is on the employer's premises. In order to fulfil their job duties, homeworkers determine their own working hours (**Lithuania**, the **Netherlands** and **Romania**). The employer has the right to inspect the activity of the homeworker according to the terms laid down in the employment contract.

In contrast to what is determined in the **Netherlands** and **Romania**, other countries do not provide full applicability of labour law to homeworkers. In many countries, the provisions on, for example, working time are not applicable to homeworkers. This is due to the fact that homeworkers can determine their own working time (**Austria**, the **Czech Republic**, **Finland**[277] and **Lithuania**). If, however, the employer (as in **Finland**), has the possibility of imposing working time, e.g. by means of IT solutions, then the Finnish Act on Working Hours should be applied. Some support can be found in the interpretation of the Finnish Labour Council[278].

A homeworker in **Italy** performs a job under an employment contract, on behalf of one or more entrepreneurs, also with the incidental help of dependent members of his or her family living in the same house (this does not include wage-workers and trainees), by using raw or secondary materials and their own equipment or equipment belonging to the same entrepreneur, although these may be provided by third parties.[279] A similar definition can be found in **Malta**. In **Liechtenstein**, a homeworker undertakes to work for an employer against remuneration, alone or together with family members, at his or her home or at a place assigned by a homework contract.[280] The foremost consequence of belonging to this sub-group is that primarily, the special provisions of the Liechtenstein Civil Code apply to homeworkers and that the general provisions on employees apply only secondarily.[281] The public law employment protection of the Employment Act does not generally apply to them.[282] The definition of homework is similar in **Slovakia** [283] and **Slovenia**.

The Statute on Homework in **Austria** regulates homework for those with manual work. In particular, it contains provisions on work place security, holidays, termination of the employment contract and severance payments. Labour law is in general not applicable to homeworkers.

In **Belgium**, the Contract of Employment Act of 3 July 1978 stipulates that the employment contract for a homeworker must be prepared in writing and must include a specific provision for reimbursement of costs inherent to homework (the latter is also the case in **Slovenia**[284]). If such a specific provision is not in place, the homeworker is entitled to ten per cent of his or her salary to compensate for these costs.[285] In the event of a vacancy at the undertaking that employs the homeworker, the homeworker must be given priority in the selection process for that position.[286] The **Czech** Labour Code contains provisions on personal obstacles to

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277 Section 2(1)(3) of the Finnish Working Hours Act. The Act does not apply to *"work performed by an employee at home or otherwise in conditions where it cannot be considered a duty of the employer to monitor arrangement of the time spent on said work"*.

278 The Finnish Employment Contracts Act Chapter 1 Section 1(3), the Finnish Working Hours Act Section 2(1) Subparagraph 3 and the *travaux préparatoires* to the latter act, *Hallituksen esitys* 34/1996.

279 Italian collective bargaining agreements or soft law. See Article 1 of the Italian Act No. 877 of 1973.

280 § 1173a Article 91 of the Liechtenstein Civil Code (*Allgemeines Bürgerliches Gesetzbuch*).

281 § 1173a Article 100 of the Liechtenstein Civil Code (*Allgemeines Bürgerliches Gesetzbuch*).

282 Article 3e of the Liechtenstein Employment Act (*Arbeitsgesetz*).

283 Article 52 of the Slovak Labour Code.

284 Article 69 of the Slovenian Labour Code.

285 Articles 119.4 and 119.6 of the Belgian Contract of Employment Act of 3 July 1978.

286 Article 6 of the Belgian Act of 6 December 1996.

work[287], on working on public holidays or on other wage components determined in the provisions on wages. Moreover, the Labour Code states that homeworkers are not entitled to receive a bonus for overtime. The position of homeworkers therefore differs from the position of regular employees.

An employment contract in **Lithuania** may establish that an employee will perform the agreed job tasks at home.[288] The characteristics of employment contracts with homeworkers are established by the Lithuanian Resolution No. 1043[289] and can be regulated additionally by collective agreements. Another part of the regulation deals with health and safety issues of the homeworker.[290]

The **Netherlands'** legislation has not provided a statutory definition for homeworkers.[291] Only with regard to social insurance for employees, the Decree on Employment Relationships[292] states that someone not working on the basis of an employment contract, provided that his or her working situation fulfils certain conditions, may be regarded as if there would be an employment contract. Article 1 of the Netherlands' Decree on Employment Relationships states that as an employment relationship within the context of the Netherlands' social insurance legislation for employees[293] will be regarded the employment relationship of the person who works as a homeworker and the person who helps him, provided that the work is carried out personally. The employment relationship must have a minimum duration of 30 days and the gross income should be at least 40% of the statutory minimum hourly wage. The legal status of the homeworker can take one of two forms: either a form of self-employment or employment in subordination. The chosen form depends upon the statutory definition of the employment contract. The decisive factor is whether or not the relationship is based on authority ('in service'). The criterion 'in service' is understood to maintain the employment relationship. It is important whether there are one or more clients and whether the realisation of the work is determined by the undertaking. The case *IVA/Queijssen* is interesting in that respect. The employer IVA denied the existence of an employment contract with the home working Queijssen, since Queijssen was free to arrange her work and working time, as long as the work would be done in time. According to the Netherlands´ Supreme Court however, Queijssen was obliged to work for a certain time per day and the work done by Queijssen was in the scope of IVA's regular activities, in the same way as work done by regular IVA employees. Accordingly, the conclusion was that there was an employment relationship and Queijssen was entitled to dismissal protection.[294]

In **Norway**, some additional regulations and Acts may apply in addition to the Working Environment Act to homeworkers, e.g. those working in telecommuting. These individuals are covered by the regulations in the Working Environment Act as far as these are applicable.[295] In addition, a central regulation[296] decrees which additional information needs to be included in the work contract as well as regulations regarding the working environment and working hours.

In **Slovenia**, the homeworker has the same rights as a worker who works in the premises of employer.[297] Any rights, obligations and conditions which depend on the nature of homework

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287 In the case of *force majeure*, home workers are not entitled to compensatory wages from the employer.
288 Article 115 of the Lithuanian Labour Code.
289 Lithuanian Resolution No. 1043 of 19 August 2003 of the Government.
290 Homeworkers cannot be assigned to work in hazardous or dangerous conditions of work.
291 See e.g. Article 4 of the Netherlands Unemployment Insurance Act.
292 *Besluit aanwijzing gevallen waarin arbeidsverhouding als dienstbetrekking wordt beschouwd*, also called the *Rariteitenbesluit*.
293 Regarding insurance for disability, sickness and unemployment
294 HR 17 November 1979, *NJ* 1979, 140 (IVA/Queijssen).
295 See Section 1-5 of the Norwegian Working Environment Act.
296 FOR 2002-07-05 No. 715.
297 Article 68 of the Slovenian Labour Code.

must be regulated in the employment contract. The law, or any other regulations, may determine the types of work that may not be carried out at home.[298] The labour inspector will prohibit the organisation or performance of homework if this is harmful to the worker and/or if there is a risk of future hazard to the workers.[299]

5.3. Teleworkers

Telework can in some respects be seen as a form of homework and is described in paragraph 5.2. of this Section. The main difference between homework and telework is that the final product of the homeworker is usually of a material nature that cannot be transferred by means of electronic information, as is the case with telework.

Telework has been implemented in the national laws of the countries included in this report by various instruments: social partner agreements (**Austria**, **Finland**, **Germany**, **Latvia**, the **Netherlands**, **Norway**, **Poland** and **Sweden**), national or sectoral level collective agreements (**Belgium**[300], **France**[301], **Denmark**, **Greece**[302], **Iceland**[303], **Italy**[304], **Luxemburg**[305], **Spain**[306] and **Sweden**), standard company and sector agreement models (**Germany**), guides and codes of good practice (**Ireland**[307] and the **United Kingdom**), national legislation (**Belgium**, the **Czech Republic**, **Hungary**[308], **Luxemburg**, **Poland**[309], **Portugal**[310] and **Slovakia**[311]), other tripartite activities (**Latvia**, **Malta** and the **United Kingdom**).[312] No regulation of telework is currently in place in **Estonia**, **Lithuania**[313], **Romania** and **Slovenia**.
According to the Framework Agreement on Telework[314], telework is a form of organising and/or performing work, using information technology, where work that could also be performed at the employer's premises is carried out away from those premises on a regular basis. A teleworker is any person carrying out telework based on an employment contract; telework performed by an individual as a self-employed person is therefore excluded. The definition of telework as defined by the Framework Agreement on Telework is sometimes used in a similar way (**Germany**, **Ireland** and **Spain**). Other countries modified the definition, as is the case in e.g. **Hungary**, where a teleworker is defined as an individual who communicates the result of his or her work via electronic devices. Social partners have deviated slightly from the definition in the Framework Agreement. The notion of teleworker in

298 Article 71 of the Slovenian Labour Code.
299 Article 70 of the Slovenian Labour Code.
300 Belgian Collective Bargaining Agreement concluded in the National Labour Council No. 85 of 9 November 2005.
301 On 19 July 2005 the French trade union confederations and employers' associations reached a draft agreement on telework that they had until the end of September 2005 to endorse. The agreement is a first in terms of national intersectoral accords in France, as it transposes the EU-level telework agreement into French law through collective bargaining.
302 Greek National collective agreement signed on 21 April 2006.
303 Icelandic Collective framework agreements signed on 5 May 2006.
304 Italian Inter-confederal agreement agreed on 9 June 2004, which is binding for the entire private sector and for local public services in Italy.
305 Luxemburg National collective agreement adopted on 21 February 2006.
306 The Framework Agreement on Telework has been transposed by collective agreements that were signed in 2003 and 2004 and which are applicable all over in the country and in all areas.
307 Irish Code of Good Practice on Teleworking finalised on 15 December 2004.
308 Section 192/C of the Hungarian Labour Code.
309 Articles 67(5) to 67(17) of the Polish Labour Code.
310 Law 99/2003 from 27 August 2003 and Articles 233 to 243 of the Portuguese Labour Code.
311 Article 52 of the Slovak Labour Code.
312 For more details on the implementation see: Implementation of the European Framework Agreement on Telework, Report by the European Social Partners, Adopted by the Social Dialogue Committee on 28 June 2006.
313 See http://www.eurofound.europa.eu/eiro/2007/12/articles/lt0712019i.htm
314 Framework Agreement on Telework of 16 July 2002.

France, for instance, also includes 'ambulant workers'. **Italy** defines two types of telework: (a) the teleworker who works from home and (b) the remote teleworker.

Telework has to be voluntary and the employer has to provide the teleworker with all relevant information in writing in accordance with Directive 91/533/EEC (for instance **Austria**, the **Czech Republic**, **Estonia**, **Finland**, **Germany**, **Hungary**, **Italy**, **Lithuania**, **Luxemburg**, **Portugal**, **Romania** and **Poland**). Moreover, the refusal to take up telework by a regular employee may not justify dismissal. According to law in **Poland**, telework must always be based on mutual agreement. An employee may be entrusted a different type of work for three months per year. However, telework may not be entrusted to a regular employee on the basis of a unilateral instruction of an employer, even for this three months period.

Regarding employment conditions, teleworkers benefit from the same rights, guaranteed by applicable legislation and collective agreements, as comparable workers at the employers' premises (for example in **Belgium**[315], **France**, **Ireland**, the **Netherlands**, **Poland**, **Portugal** and **Sweden**). However, in order to take into account the particularities of telework, specific complementary collective and/or individual agreements may be applied. According to the Code of Practice in **Ireland**, any changes to regular work practices or to the terms and conditions that apply to the individual due to telework must be agreed upon in either a collective or individual agreement. The **Luxemburg** national collective agreement takes this one step further by determining that when transferring to telework implies loss of an existing benefit in kind for the worker, or that the worker will no longer be able to make use of this benefit in kind in the same way as comparable workers at the employer's premises, the employee must be granted compensation.[316] In addition, some specific measures were set up concerning, for example, the way telework can be introduced in an organisation, and how (social) contact between teleworkers and their colleagues is maintained.

Within the framework of applicable legislation, collective agreements and company rules, the teleworker manages and plans his or her working time. The employer must ensure that appropriate measures are taken in order to ensure protection of data used and processed. All countries have explicitly included the subject of working time. For instance in **Portugal**, teleworkers are bound by maximum working time limits. [317]

With regard to training and career development opportunities, teleworkers enjoy the same right as comparable workers who work at the employer's premises (for instance **Luxemburg** [318]); they are also subject to the same appraisal policies. Moreover, the Framework Agreement stipulates that teleworkers must receive appropriate training targeted at the technical equipment at their disposal and the characteristics of this form of work organisation (for instance **Luxemburg**[319], **Portugal** and **Slovakia**[320]).

Teleworkers have the same collective rights as workers at the employer's premises. The same conditions for participating in and standing for elections to bodies representing workers or providing worker representation apply to teleworkers. Worker representatives are informed and consulted on the introduction of telework in accordance with Community and national legislations, collective agreements and practices. Special rules apply regarding the

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315 Articles 7 and 8 of the Belgian Collective Labour Agreement No. 85 concluded in the National Labour Council of 9 November 2005.

316 Implementation of the European Framework Agreement on Telework, Report by the European Social Partners, Adopted by the Social Dialogue Committee on 28 June 2006, p. 20.

317 Daily and weekly limits, as foreseen in the Portuguese Labour Code which are also applied to teleworkers.

318 Article 14(1) of the Luxemburg Labour Code.

319 Article 11 of the Luxemburg Convention.

320 Article 52/2 of the Slovak Labour Code.

employee's privacy (for instance **Germany**[321], **Luxemburg**[322] and **Portugal**[323]) (such as health and safety at work and labour accidents or professional diseases' damages repair[324]).

In **Slovakia**, the following exceptions with regard to telework apply[325]: (a) provisions on the arrangement of determined weekly working time and on stoppage do not apply to such employees; (b) in cases of *force majeure*, the employee is not entitled to wage compensation from the employer, except in the event of death of a family member; and (c) such employees are not entitled to allowances for overtime, to allowances for a work on a public holiday, to allowances for a period of night work and to allowances for work in constrained working environments.

5.4. (Short-Term) Casual Workers

Casual work, whether for a short term or not, is recognised in some countries (**Bulgaria**, **Cyprus**, the **Czech Republic**, **Denmark**, **Finland**[326], **Hungary**, **Italy**[327], **Portugal** and **Slovakia**).
Short-term casual workers in **Bulgaria** are described as individuals who work for an employer for not more than five working days or forty hours a month[328]. In **Cyprus**, 'part-time casual work' is described as employment by one employer for more than eight weeks per year and with a maximum continuous employment of three weeks or five hours per week. In **Hungary**, the maximum number of working days may not exceed 200 days per year for three or more employers. The maximum in **Slovakia** is 350 working hours per year or ten hours per week. There are three different so-called 'agreements for work outside employment relationships'. One of these was created specifically for students with a maximum working week of 20 hours.

In **Bulgaria**, the **Czech Republic** and **Denmark**, short-term casual workers are considered to be employees and have almost the same rights as regular employees, although they might be exempted from some labour law provisions, e.g. due to a very low amount of work on an average weekly basis. The **Czech** Labour Code determines that where short-term casual work is performed on the basis of an agreement for the performance of a work assignment or an agreement on working activity, the Czech Labour Code is fully applicable to that relationship, except for provisions of severance payments, obstacles to work on the part of employee, termination of employment contract and remuneration. Casual workers are also exempted from the provisions on working time in **Bulgaria** and the **Czech Republic**. This is different in **Finland**, where provisions in the Annual Holidays Act also cover short-term casual workers with a small amount of work.[329] The underlying concept of special provisions is to ensure that short-term casual workers can, on occasion, benefit from the holiday system.
Casual work in **Italy** may take various forms including: domestic work; gardening, cleaning and maintenance of buildings; supplementary private teaching; sporting, cultural and charitable events, fairs, solidarity work also for public principals; seasonal farming activities

321 Article 13 of the German Basic Law.
322 Article 10 of the Luxemburg Convention.
323 Articles 170 and 171 of the Portuguese Labour Code.
324 I.e. if a teleworker has an occupational disease he or she is entitled to the same protection granted, in such cases, to other employees (as the right to a compensation for the damage). See Articles 165 and 169(1) of the Portuguese Labour Code.
325 Article 52 of the Slovak Labour Code.
326 In the statutory definition of an employment contract time is not a visible element. In a decision of the Supreme Court concerning on call workers each employee was considered to have separate employment contracts for each job period. The interpretation was made using the statutory definition of the employment contract. See Supreme Court 1995:159.
327 Italian Act No. 30 of 2003.
328 Article 114 of Bulgarian Labour Code.
329 Finnish Annual Holidays Act (162/2005).

carried out by retired persons, housewives and young people; family business (pursuant to Article 230bis of the Italian Civil Code), to the extent of trade, tourism and services; door-to-door delivery and street trade sale of newspapers and magazines.[330] As from 2009, casual work can also be performed by unemployed persons.[331] Work can also be performed for several principals, if the work is of a casual and accessory nature, provided that such activities do not imply an overall annual remuneration exceeding 5.000 EUR. The family businesses may benefit from casual work for a total amount not exceeding 10.000 EUR during a tax year. Occasional work may not exceed thirty days per year for the same principal.

The Labour Code in **Portugal** admits short-term employment contracts in order to satisfy transitory needs of a company, but only for the required period of time to fulfil those specific needs.[332] These employment contracts are considered as an exception to the principle of stability and continuity of the employment relationship. Those employment contracts may only be entered into if justified on grounds expressly provided by law.[333] Since the labour reform of 2009, employment contracts relating to seasonal agricultural activities or tourist events with a duration of not more than one week do not have to be entered in writing. The 'agreement' is automatically transformed into a permanent employment contract if it is concluded on a different basis. This also occurs when the precise circumstances justifying those grounds are not specified. On completion of the expected duration, the employer may terminate the contract, in writing, subject to prior notice. However, the employee is entitled to compensation equal to three or two days of base remuneration and seniority per month of service, whether the contract continued for up to six months or for a longer period.[334]

5.5. Freelancers

Freelancers are recognised in some countries (**Austria**, **Belgium**, **Denmark**[335], **Hungary**, **Italy**, **Luxemburg**, the **Netherlands**, **Portugal** and **Romania**). However, 'freelance work' as such is not always regulated by law. While freelance work used to be associated with creative jobs, like journalists and photographers, nowadays freelancers also work in the construction or IT sector. Freelancers may either be employed or self-employed. In **Finland**, a freelancer is considered to be a special kind of entrepreneur and not an employee who might, however, in some rare cases have an employment contract. Freelance contracts are used in practice in **Belgium** and **Luxemburg**, but do not correspond with a specific legal scheme. A person working on the basis of a freelance contract will be regarded as a self-employed person, unless the criteria of an employment relationship are fulfilled.

Freelance work can either take place on the basis of an employment relationship or on the basis of self-employed work, depending on whether there is subordination or not (e.g. in **Denmark**, the **Netherlands**, **Portugal** and **Romania**[336]).

In **Hungary**, a healthcare worker can perform healthcare activities as a freelance worker.[337] The legal status of a freelancer does not fall within the scope of Hungarian labour law, since

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330 Article 70 of the Italian Decree No. 30 of 2003.

331 Maximum threshold of 3.000 EUR per year.

332 Articles 139 to 149 of the Portuguese Labour Code.

333 These grounds are generally related to situations which are transitory and/or unpredictable, such as replacement of a sick employee, sudden increase of work, etc.

334 Articles 344(2) and 345(4) of the Portuguese Labour Code.

335 Freelance work is regulated by collective agreements in certain sectors, e.g. the media sector.

336 E.g.: Solicitors: Law No. 51/1995; Medics and Chemists: Law No. 95/2006 regarding the reform of health field; Architects: Law No. 184/2001; Private detectives: Law No. 329/2003; Psychologists: Law No. 213/2004; Dentists: Law No. 308/2004; Social assistants: Law No. 466/2004; Dental technicians: Law No. 96/2007, etc.

337 Hungarian Act LXXXIV of 2003 on Performing of Healthcare Activities contains provisions on freelance workers.

the legal basis of this activity is the contract of services, which is regulated by the Hungarian Civil Code. This relationship shows certain particularities. The contract of services is concluded between the healthcare service undertaking and the healthcare freelancer. But since the healthcare freelancer performs his or her activity on behalf of the healthcare service undertaking, the healthcare freelancer is not regarded as an independent healthcare service provider, i.e. self-employed person. The legal status of healthcare freelancer can be qualified as between an employee and a self-employed person. Act LXXXIV of 2003 on Certain Aspects of Performing Healthcare Activity lays down basic rules governing the pattern of work of persons performing healthcare activities. The overall working time for these persons is calculated on the basis of a six-month reference period and may not exceed 48 hours per week on average. However, the law allows a healthcare employee to do voluntary overtime work to be agreed in advance with the employer. However, the duration of working time including the voluntary work may not exceed 60 hours per week.

In the **Netherlands**, the notion of 'freelancer' is not defined by law. In practice, the courts as well as the social security authorities and the Tax and Customs Administration will evaluate the independence of freelancers on the basis of the actual circumstances. The following grounds will be taken into consideration: the scope of the work, the number of clients, the level of the turnover, and the presentation to the outside world. Freelancers who are self-employed are liable to paying company and income tax. Anyone practising a profession independently is considered to be self-employed for the purposes of company tax. If the freelancer is not sure whether to charge VAT on the products or services provided, he or she must confer with the Netherlands Tax and Customs Administration. With regard to income tax, the Netherlands Tax and Customs Administration uses four criteria to determine whether a freelancer is self-employed or not: independence, sustainability, profit aim and the number of clients.[338]

In **Italy**, co-operation relationships may be implemented in the form of ongoing continuous supply of services, mainly personal, without subordinate status.[339] By means of this rule, practitioners and labour courts define this type of self-employment as para-subordinate work. Ongoing continuous collaborations, mainly personal services without subordinate status, must apply within one or more specific projects, works or phases determined by the principal and autonomously managed by the collaborator according to the result.[340] This must be performed observing the principal's coordination, independently of the working time. This regime is designed to limit the use of co.co.co.[341]. The salaries paid to the workers must be proportionate to the quantity and quality of the work performed and must consider salaries usually paid for similar services, also according to the relevant national collective agreements.[342]

In **Austria**, **Portugal** and **Romania**[343], there are certain professions (e.g. doctors, solicitors, engineers, journalists, architects) that are traditionally regarded as activities performed

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338 There are three categories of income tax in the Netherlands: (1) Business profits: if the Netherlands Tax and Customs Administration consider one to be self-employed, one can declare the freelance income as business profits. The freelancer is eligible for self-employed persons' tax allowances. (2) Salary from employment contract: if one has an employment contract, the client (actually the employer) deducts income tax from the freelancer's salary and pays this to the Netherlands Tax and Customs Administration. (3) Freelancing as a secondary activity: income from work which cannot be considered either as salary or as business profits is known as income from other activities.

339 Italian Act No. 30 of 2003 and Article 409 of the Italian Civil Procedural Code.

340 Article 61 of the Italian Decree No. 276 of 2003 and as per Article 409, No. 3 of the Italian Code of Civil Procedure.

341 *Collaborazione coordinate e continativa.*

342 Article 1(772) of the Italian Act No. 296 of 2006 on Collective bargaining and *Lavoro a progetto*.

343 In total 26 professions. E.g.: Solicitors: Law No. 51/1995; Medics and Chemists: Law No. 95/2006 regarding the reform of health field; Architects: Law No. 184/2001; Private detectives: Law No. 329/2003; Psychologists: Law No. 213/2004; Dentists: Law No. 308/2004; Social assistants: Law No. 466/2004; Dental technicians: Law No. 96/2007, etc.

independently, without legal subordination. However, legal subordination in **Portugal** does not need to be effective, but merely potentially applicable, consistent with technical autonomy of employees.[344] Therefore, it is also recognised that a significant number of professionals undertake these positions with legal subordination, performing their work on the basis of an employment contract. Thus, the same professional groups may be included in different statutory schemes[345], depending on the characteristics of each case.

5.6. Commercial Agents

In all countries, commercial agents or representatives are recognised (e.g. in civil law legislation), but some countries impose rules additional or supplementary to labour law or labour law regulations (**Austria**, **Finland**, **Germany**, **Hungary**, **Liechtenstein**, the **Netherlands** and **Spain**). Commercial agents may be either employed or self-employed, or both.

A contract of commercial representation in the **Netherlands** is a contract of employment under which one party (the commercial representative) concludes a contract with another party (the principal) for remuneration that consists wholly or partly of commission, to act as an intermediary in the conclusion of contracts and possibly to conclude these in the name of the principal.[346] A commercial agent in **Spain** can act under an employment contract, provided that he or she does not bear the entrepreneurial risks. Where the commercial agent has an employment contract, this might be categorised as a special employment relationship with its own specific provisions.[347] In that case, general labour law applies to the agent. A commercial agent with a service contract cannot be considered to be an employee. Thus, Spanish labour law does not apply in that case.

In **Finland**, a commercial representative is identified through criteria indicating relative independence in relation to his or her principal. A commercial representative is an entrepreneur. A salesman is identified as an employee and accordingly has a markedly less independent status. There are special provisions for salesmen. Additionally, the Employment Contracts Act is applied *"where appropriate"*.[348] In **Germany**, the differentiation between employed and self-employed commercial agents is based on general criteria (though there is a provision in the German Commercial Code that specifically aims at commercial agents).

A contract of an independent commercial agency does not fall within the labour law system (**Austria**[349], **Belgium**[350] and **Hungary**[351]). In **Belgium**[352] and **Hungary**, a commercial agent is an intermediary acting on the basis of remuneration, with continuing authority to negotiate the sale or the purchase of goods on behalf of another person, or to negotiate and conclude such transactions, whether in the name of the principal or in his or her own name on behalf of that principal. A commercial agent is categorised as self-employed when the intermediary pursues commercial agency activities without being bound by an employment relationship. Self-employed commercial agents can engage in such activities only on the basis of a commercial agency contract. Protection against dismissal covers the self-employed commercial agent. Nevertheless, it is necessary to make a distinction between protection of an employee and of a self-employed commercial agent. The protection against dismissal or

344 Article 116 of Portuguese Labour Code.
345 General provision of services agreements, Articles 1154 to 1156 of the Civil Code or the Labour Code.
346 Article 7:687 of the Netherlands Civil Code.
347 Spanish Royal Decree 1438/1985.
348 The Finnish Act on Commercial Representatives and Salesmen 471/1992.
349 Austrian *Handelsvertretergesetz*.
350 The Belgian Act of 13 April 1995 concerning Commercial Agency Contracts.
351 Hungarian Act CXVII of 2000 on Commercial Representation Contracts of Self-Employed Commercial Agent (a contract of independent commercial agency).
352 Article 87-107 of the Belgian Contract of Employment Act of 3 July 1978.

termination is regulated by the mutual stability of the business. Where an agency contract is concluded for an indefinite period either party may terminate it by notice.[353]
Belgium has a legal rebuttable presumption, stating that every commercial intermediary has an employment contract.[354] Specific legal provisions regulate the employment contract of a commercial agent relating to payment of variable salary in the form of provisions. There is also a specific regulation on dismissal compensation for the loss of clients.
In **Liechtenstein**, as follows from a contract of commercial representation, the commercial agent undertakes to act as an intermediary between his or her employer and a customer or concludes businesses of every kind outside the premises of the employer for the account of the owner of a trading, manufacturing or other business managed in a commercial manner against payment of a salary.[355] The principal consequences of belonging to this sub-group are that special provisions of the Liechtenstein Civil Code apply and that the general provisions on employees apply only secondarily.[356] With regard to public law employment protection, the Employment Act generally does not apply to this sub-group.[357]

5.7. Seamen

Since seamen are working under particular circumstances, some countries have implemented special regimes. Seamen are classified as employees with an 'employment contract or relationship' (**Belgium**[358], **Bulgaria**, **Denmark**, **Estonia**, **Finland**, **Ireland**, **Luxemburg**, the **Netherlands**, **Norway**, **Poland**[359] and **Portugal**). As a consequence, in some countries, regular employment law applies in full (the **Netherlands**), or at least secondarily (**Finland**, **Greece**, **Norway** and **Poland**). Some of the countries reported to have special provisions and/or laws for seagoing personnel (**Belgium**[360], **Bulgaria**[361], **Estonia**[362], **Finland**, **German**, **Greece**, **Luxemburg**[363], the **Netherlands**, **Norway**[364], **Poland** and **Portugal**[365]). These provisions and/or laws contain some specific items for seamen, for instance, dismissal protection that applies to white collar workers also applies to white collar seamen (**Denmark**), differences in working time (**Ireland**[366]) and differences with regard to the right to holiday and holiday pay for seamen (**Norway**).

In **Denmark**, seagoing seamen are regulated by the so-called Danish Seamen's Act.[367] This Act determines that the ship is both a workplace and a home for the crew. Moreover, the Act

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353 The period of notice shall be one month for the first year of the contract, two months for the second year commenced, and three months for the third year commenced and subsequent years. The parties may not agree on shorter periods of notice, unless the agency activities of the commercial agent are considered secondary. If the parties agree on longer periods, the period of notice to be observed by the principal must not be shorter than that to be observed by the commercial agent. The period of notice must coincide with the end of a calendar month.
354 Article 4 of the Belgian Contract of Employment Act of 3 July 1978.
355 § 1173a Article 78(1) of the Liechtenstein Civil Code.
356 § 1173a Article 100 of the Liechtenstein Civil Code.
357 Article 3f of the Liechtenstein Employment Act (*Arbeitsgesetz*).
358 Belgian Act of 3 May 2003 (sea fishermen) and Belgian Act of 3 June 2007 (seafarer). See also the statutory order of 7 February 1945, as changed by law of 17 June 2009.
359 Law of 23 May 1991 on Employment on Sea Going Vessels.
360 Belgian Act of 3 May 2003 (sea fishermen) and Belgian Act of 3 June 2007 (seafarer).
361 A special order for the specificities of the employment relationships of seamen is issued by the Council of Ministers.
362 Estonian Seafarers Act.
363 Article 72 of the Luxemburg Law of 9 November 1990.
364 See the Norwegian Act on Fishermen No. 43 (*Lov om ferie for fiskere*).
365 Article 9 of the Portuguese Labour Code states that *"the general rules of the Code may be applied to employment contracts under a special regime if consistent with the specificity of these contracts"*. Thus, among others, special legal regimes are foreseen for staff of the Merchant Shipping (Decree-Law No. 74/73) and to work on board of fishing vessels (Law No. 15/97).
366 Part II of the Organisation of Working Time Act 1997 (Minimum Rest Periods and Other Matters relating to Working Time) does not apply to persons engaged in seafaring or other work at sea.
367 The Danish Seamen's Act (742/2005).

lays down different provisions for blue- and white-collar seamen. In particular, the Act gives provisions on, *inter alia*, the disciplinary authority, reasons for being released from the contract, illness in foreign harbours. As far as white collar seamen are concerned, the Act relies on the rules laid down in the Danish White-Collar Workers Act (see Chapter IV, paragraph 3.1.). The Act thus gives white-collar seamen the same legislative protection as other white-collar workers under the White-Collar Workers Act. Additional protection is regulated by collective agreements (also in **Greece**). A separate law on employment contracts for seamen also exists in **Finland**[368], where the definition of an 'employee seaman' follows the same system as the Finnish Employments Contracts Act.[369] This is similar in **Norway**, where there are no particular definitions of the term employee or employer with regard to seamen and where the definitions in the Working Environment Act are applied.
In **Greece**, maritime employment contracts are regulated by special rules taking into account the particular features of their work; the basic source is the Greek Private Maritime Law Code. Particular provisions for seamen in the **Netherlands** are contained in the Commercial Code[370] for employees such as captains and seafarers in sea navigation[371], since they might work in different countries. Also International Labour Organisation conventions offer protection for those categories of employees, e.g. the ILO Maritime Labour Convention 2006. According to Articles 396 and 397 of the Netherlands´ Commercial Code, seamen have an employment contract. That means that the provisions of labour law as mentioned in the Netherlands Civil Code also apply to them, except where stipulated otherwise. The latter can also be said for **Poland**, where the Law of 23 May 1991 on employment on sea-going vessels applies as well as regular employment law. A mariner may be employed under an employment contract for an indefinite period, for a fixed term or for a particular voyage.[372] The law concentrates on conditions for conclusion and termination of a contract with a mariner.

5.8. Household Employees

The notion of 'household employees' can cover different types of 'household work', depending on the type of work the employee was hired for. The notion of 'household employee' includes baby-sitters, cleaners, domestic workers, health aides, housekeepers, nannies or private nurses.
Household employees may be governed by special provisions and/or statutes (**Austria**[373], **Belgium**[374], **Finland**[375], **Greece**, **Lithuania**, **Portugal**[376] and **Sweden**), whereas in other countries, they may be classified as employees within the scope of national labour law. They may be exempted from some statutory protection such as working time that applies to regular employees (**Greece** and **Sweden**).

In **Belgium**, the contract of a household employee always includes a trial period of fourteen days. Household employees are entitled only to a restricted salary for a limited period in the

368 Finnish Seamen's Act (423/1978).
369 Finnish Seamen's Working Hours Act (296/1976), Finnish Seamen's Annual Holiday's Act (443/1984) and the Finnish Seamen's Pay Security Act (1108/2000).
370 *Wetboek van Koophandel*.
371 See Articles 396 to 452p of the Netherlands Commercial Code.
372 Articles 26-34 of the Polish Law of 23 May 1991.
373 Austrian *Hausgehilfen- und Hausangestelltengesetz*. It contains in particular provisions on (maximum) working time, work place security, holidays, termination of the employment contract.
374 Article 108 and following of the Belgian Act of 3 July 1978 governing Individual Labour Contracts.
375 Finnish Act on Employment Relationship of Household Employees 951/1977 Section 2(1) Subparagraph 6.
376 Article 9 of the Portuguese Labour Code foresees that *"the general rules of the Code may be applied to employment contracts under a special regime if consistent with the specificity of these contracts"*. Among other types of work, domestic work is subject to a special regime, approved by Law 235/92, applied when a person undertakes, upon remuneration, to provide to another person, under its direction and authority, activities connected with the special needs of a family unit or its equivalent and of its members, as preparation of meals, laundry, housework, supervision and care of children, elderly and sick persons.

event of sickness. Legal protection in the event of dismissal on false grounds is not applicable to those employees.
Finland primarily applies the provisions of the Act on Employment Relationship of Household Employees. However, if these provisions do not cover a particular subject, the regular employment provisions apply. Obviously, the idea is to reconcile the special conditions of household work with protection for household workers. The Household Worker's Act provides an exception to the Working Hours Act, stipulating that household workers are excluded from the application of working hours. However, the regulation of household workers' working hours follows the logic of the general regulation. There are provisions relating to the effect of collective agreements on regular working hours, overtime, emergency work, work at various times of the day, and on weekly resting periods. The matter of generally binding collective agreements is also covered. In general legislation, the dismissal period is covered by optional provisions. In the case of household workers, there is also an optional provision, but if this option is not used, the position of the household worker might be weaker. Concerning cancellation of the employment contract, the main rule follows the general provision in the Employment Contracts Act.

In **Greece**, household employees are defined as living in their employer's house, performing their work for the purpose of meeting the housekeeping needs or personal needs of their employer.

In **Lithuania**, the contract to supply personal services is a special type of employment contract whereby an employee undertakes to supply personal household services to an employer.[377] Services can be provided to the employer or to the members of his or her family, his or her personal guests or other related people as per request of the employer. The scope of services is limited to the household – this is a mandatory requirement for this type of contract.

In **Sweden**, persons carrying out housekeeping work for others are covered by special legislation and are exempted from parts of the statutory employment protection.[378] Instead, they are covered by the (1970) Act on Working Time in Housekeeping Work. Section 12 of this Act states that employment contracts, as a main rule, should be of an indefinite duration. The employment contract can be terminated by the employer or the employee without objective reasons for dismissal. Notice periods apply, ranging from one month upwards. With regard to working time, Section 2 states that the ordinary working time should be 40 hours a week (working time could be increased with up to twelve hours a week if the work involves caring for children or other persons in need of care and if the person in the household responsible for the care of these persons is occupied with work outside the home). Overtime work is allowed subject to payment of overtime allowance. Section 9 states that there should be a nightly resting period each day and that the employee should have at least 36 hours of continuous leave/rest from work every week, preferably during the weekend.

5.9. Family Workers

Eurostat defines family workers as: *"[…] persons, who help another member of the family to run an agricultural holding or other business, provided they are not considered as employees".*

Some countries (explicitly) recognise family workers by law (**Finland**, **Ireland**, **Luxemburg** and **Sweden**). In **Finland**, a family worker falls within the scope of the definition of an

[377] The specificities of this type of contract are established by the Resolution No. 1043 of 19 August 2003 of the Lithuanian Government.
[378] Section 1 subsection 2 of the Swedish (1982:80) Employment Protection Act and the (1970) Act on Working Time Etc. in Housekeeping Work.

employee, provided that the ordinary prerequisites are fulfilled. The special consequence of being a family worker is that the person falls outside of the scope of the Working Hours Act.[379] In **Ireland**, only Part II of the Organisation of Working Time Act 1997 (Minimum Rest Periods and Other Matters relating to Working Time) is applicable. The Unfair Dismissals Act 1977 does also not apply to a person employed by a close relative (i.e. spouse, parent, son, daughter, brother, sister, grandparent, grandchild) whose place of employment is a private dwelling, house or farm in or on which both reside.
Luxemburg law recognises two categories of family workers: (a) the spouse and partner and (b) family undertakings. In respect of the first group, social law has introduced a special statute for persons helping out their independent spouse or partner, without having themselves another professional activity or function within the undertaking[380]. Some labour law provisions, especially concerning daily and weekly work time limits[381], do not apply to family undertakings. Family members in small undertakings are thus employees without being able to benefit from some protective rules like regular employees.

5.10. Young Workers

The position of young workers regarding the protection of safety and health is regulated in Directive 94/33/EC.[382] As a result, some countries have a special regulation for the group of young workers, the age depends on the law of the relevant country (**Austria**[383], **Belgium**, **Bulgaria**, **Finland**, **Ireland**, **Latvia**, **Luxemburg** and **Portugal**). Young workers are often governed by standard regulations of labour law, except for some special rules on working time, minimum wage and occupational health and safety (e.g. in **Belgium**, **Bulgaria Finland**, **Latvia**, **Luxemburg** and **Portugal**). The Young Worker's Act[384] in **Finland** applies to work carried out by a person younger than 18 years in an employment relationship. If not stipulated otherwise in the Young Worker's Act, the work is subject to the general provisions of the work, e.g. the Employment Contracts Act and all other general labour law.

In **Ireland**, the Protection of Young Persons (Employment) Act 1996 sets the minimum age for normal working at 16 years. 14 and 15 year olds are allowed to work during school holidays and for a limited amount of time during term time. The National Minimum Wage Act 2000 states that employees under the age of 18 may not be paid less than 70 per cent of the national minimum hourly rate of pay. The Labour Code in **Portugal** defines an under-age employee as a person younger than 18 years.[385] Therefore, the Portuguese Labour Code also regulates the position of young workers.[386] These rules cover, among other issues mentioned above, professional training, schooling and education.

5.11. Other Special Legal Provisions of Categories of Workers

This paragraph describes some special legal provisions of categories of workers that are only recognised in a small number of countries.

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379 Finnish Working Hours Act No. 605/1996. This follows also from Article 17 of Directive 93/104/EC. See Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time *OJ* L 307, 13.12.1993, p. 18-24.
380 Article 1(5) of the Luxemburg Social Security Code.
381 Articles L. 211-2 and L. 211-3 of the Luxemburg Labour Code.
382 See on young workers Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work, *OJ* L 216 , 20.08.1994, p. 12-20.
383 Austrian *Kinder und Jugendlichen Beschäftigungsgesetz*. The Act contains special provisions for employees up to eighteen years with varying degree depending in the actual age of the employee regarding: working time, workplace security and the kinds of work allowed.
384 Finnish Young Worker's Act (1998/1993).
385 As follows from Articles 122 to 129 of the Portuguese Civil Code.
386 See Articles 66 to 83 of the Portuguese Labour Code.

In **Cyprus** the Law on Port Workers states that a port worker is a person employed in any port in connection with the loading, unloading, movement or storage of goods, or in connection with the preparation of ships, aircraft or other vessels for the receipt or discharge of goods. Mine workers and domestic servants are also regulated by special laws, principally in order to ensure adequate levels of health and safety in the workplace. These provisions do not alter the existence of an employment relationship.

Umbrella undertakings[387] in **France** are regulated as follows. A worker negotiates an assignment with a client, who then signs an employment contract with an umbrella undertaking, which then concludes a service provision contract with the client. The client pays the umbrella undertaking for the service. The umbrella undertaking then pays part of this amount, after deducting administrative costs, both employer's and employee's social security contributions (this is approximately half the gross amount) in the form of a salary to the umbrella employee. After a certain period of time without an assignment, the employment contract is terminated. The umbrella employee is covered by the general social security scheme. The bodies responsible for managing local unemployment funds may refuse to pay unemployment benefits for contributions made when working as the employee of an umbrella undertaking justified by the fact of lack of subordination.[388]

Romania has special provisions on salaried attorneys[389]. On one hand, these are independent with regard to their profession but on the other hand are subordinated to an undertaking, mostly a law firm, as far as labour conditions are concerned, including working time and discipline. The law deliberately stipulates that this does not concern a contract of employment and is not subject to the Romanian labour legislation, but to the special regulations of the Solicitors Board. Another category of employee is recognised in Romania, namely independent contractors who are working on the basis of a civil contract. As long as their working place is within the beneficiary's headquarters, they benefit from the legislation regarding the protection of health and safety. They can also benefit from other special regulations, e.g. in case of drivers, from regulations relating to resting time. Moreover, they benefit from regulations against discrimination and equality of treatment between men and women.[390]

6. The Entertainment Industry, Media and Sport: National Law, Judicial Rulings and Social Dialogue

The entertainment industry, media and sports are in particular sectors that may require special regulations in some respects. Positions within those sectors may be performed either on the basis of an employment contract to which general labour law applies, or on the basis of a civil law contract, i.e. as a self-employed person. Whether the individual is employed on the basis of the former or the latter contract shall depend on the actual situation of the individual and the work that will be done.

In addition to applicable general labour law, some countries (**Norway** and **Portugal**) have special provisions and/or regulations relating to the position of persons and guaranteeing

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387 Umbrella undertakings are not temporary-work agencies.

388 Article L. 1251-60 of the French Labour Code. Law No. 2008-596 formalises and secures the wage portage, a system in which individual consultants sell their services to companies and are hired as employees of a separate portage undertaking whose role is simply to collect payments from the customers and pay its employees' salaries, along with the attendant charges incumbent upon an employer. The wage portage is a unity of contractual relations organised between an umbrella undertaking, an independent contractor and a customer undertaking.

389 Romanian Law regarding the organisation and the undertaking of his profession of attorney of 1995.

390 Romanian Law No. 202/2002 regarding equality of chances between men and women in labour relationships.

their rights working in the entertainment industry, media and/or sport (**Belgium**, **Bulgaria**[391], the **Czech Republic**, **Finland**, **Greece** [392] , **Hungary**, **Italy**, **Latvia**, **Luxemburg**, the **Netherlands**, **Norway**, **Portugal**[393], **Romania**[394] and **Spain**). In principle, people working in those sectors are deemed to be employees as long as the criteria for being an employee are fulfilled. This means that individuals working in those sectors are also covered by social security as well as tax law that is applicable to regular employees (that is the case in e.g. **Greece**, **Latvia**, **Luxemburg**[395], the **Netherlands**[396], **Portugal** and **Spain**[397]).
In **Norway**[398] and **Portugal**, those sectors are covered by regular labour law. These sectors have the right to offer fixed-term employment contracts, provided that certain conditions are fulfilled.[399] Temporary agency work is also allowed.[400] According to Section 14-9(3) of the Norwegian Working Environment Act, national trade unions may enter into collective agreements with an employer or employers' association concerning the right to agree temporary arrangements within a specific group of workers employed to perform artistic work or work in connection with sports. If the collective agreement is binding for a majority of employees within a specified group of employees in the undertaking, the employer may enter into temporary employment contracts with other employees who are to perform corresponding work, such on the same conditions. Article 9 of the Labour Code in **Portugal** states that *"the general rules of the Code may be applied to employment contracts under a special regime if consistent with the specificity of these contracts"*.

Austria[401], **Cyprus**, **Iceland**, **Germany**, **Malta**, **Poland**, **Slovakia**, **Slovenia**, **Sweden** and the **United Kingdom** do not have special laws and/or provisions for the entertainment industry, media and sport. Even case law and social dialogue do not contribute to the particularities of those sectors in these countries (in **Sweden** though, collective bargaining can provide flexibility and adaptation in respect of these sectors). The main consequence is that persons working in one of those sectors are classified as employees, provided that the

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391 Special acts enacted by the Bulgarian Council of Ministers and of the Minister for Labour And Social Policy.

392 Tourist guides, technicians of cinema and television are deemed dependent employees irrespective of the particular features of their work performance.

393 Special provisions are foreseen for entertainment professionals, see Portuguese Law No. 4/2008.

394 In the entertainment industry, employment contracts are concluded. These consequences are not always adapted to the particularities of the branch, therefore the professional artists conclude, additionally copyright contracts. The Law concerning the institution of the indemnity for the activity of artists or performers, established a manner of assimilation of the periods when the professional artists have carried out an activity, even in the absence of an employment contract, so that they may benefit from a pension.

395 With regard to sport: Article 1(1)(19) of the Luxemburg Social Security Code.

396 According to Article 5 of the Netherlands Social Insurance Acts for employees (including the Work and Income Act, the Sickness Benefits Act and the Unemployment Insurance Act), artists and those persons who for remuneration carry out work personally may have an employment relationship. According to the Decree on Employment Relationships, the employment of musicians, artists and top athletes, provided that the latter gains maintenance payments, can be classified as employment relationships (Articles 4 and 4a of the Decree on Employment Relationships), meaning that those employees may also be covered by the social security legislation for employees, provided that those persons do have an employment relationship.

397 Spanish social security law knows some specialities for artists, especially in connection with contributions to social security.

398 In Norway the Working Environment Act.

399 Those conditions are: Temporary employment may be agreed upon: a) when warranted by the nature of the work and the work differs from that which is ordinarily performed in the undertaking, b) for work as a temporary replacement for another person or persons, c) for work as a trainee, d) for participants in labour market schemes under the auspices of or in cooperation with the Labour and Welfare Service or e) for athletes, trainers, referees and other leaders within organised sports. See Section 14-9(2) of the Norwegian Working Environment Act.

400 Athletes, trainers and other leaders within organised sports may be offered temporary agency work (Section 14-9(1)(e) of the Norwegian Working Environment Act). See Section 14-9(1)(a) of the Norwegian Working Environment Act. The main reason for allowing temporary agency work is that this is warranted by the nature of the work and the work differs from that which is ordinarily performed in the undertaking.

401 There are some special provisions for actors employed by theatres (*Bühnendienstverträge*) in the Austrian *Schauspielergesetz*.

criteria for being classified as an employee are fulfilled (**Denmark**[402], **Finland**, **Greece**, **Latvia**, **Liechtenstein**[403], the **Netherlands**, **Norway**, **Portugal** and **Romania**). Otherwise, those persons may be regarded as self-employed. With regard to **Germany**, it must be noted that broadcasting has a special position in the sense that it is specifically protected by the German Constitution. As a consequence, labour courts are hesitant to assign employment law status to certain persons who directly influence the content of broadcasts.

Social dialogue does not play any role in safeguarding the particularities of the entertainment industry, media and sport in **Austria** (relating to some actors employed by a theatre[404]), **France**, **Greece**, **Hungary**, **Ireland**, **Latvia**, **Liechtenstein**, **Luxemburg**, **Malta**, **Slovenia** and **Spain**.

6.1. Entertainment Industry

The entertainment industry covers those individuals who are involved in providing entertainment (radio, television and films and theatre).
In the **Czech Republic**, a person working in the entertainment industry is deemed to be a self-employed person. Individuals in these sectors generally use a civil law contract to regulate copyright law. The longer the relationship lasts, the sooner it can be assumed that the parties to the contract have an employment relationship based on the Czech Labour Code.[405] In cases of occasional activities, the parties generally conclude a special type of contract called an agreement on work performance.[406] These individuals have the same legal status with regard to labour law and social security law as any other employee within the meaning of the Czech Labour Code. Collective agreements contain particular provisions on e.g. wages and working conditions. It is worth noting that there is an important provision with regard to individuals under fifteen.[407] According to that provision, any employment activity by these persons is prohibited, except for activities in the field of art, culture, sports or advertising. A similar provision can be found in **Spain**, where employment contracts of artists are covered by a specific regulation allowing artists, for example, to start working before the age of sixteen.

The entertainment industry in **France** and **Luxemburg**[408] (on short-term contracts) is regulated by a system of intermittent employment. In **France**, this sector comprises several professions (artistic performance as well as the administration of such a production), also referred to as the (performing) arts sector.[409] Under the intermittence system, any contract, irrespective of its duration, is presumed to be an employment contract binding an artist or

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402 The wages and working conditions for those persons employed on an employment contract frequently are regulated by a collective agreement.

403 § 1173a Article 1(1) of the Liechtenstein Civil Code. In cases where the status is questionable the classification is left to the judges.

404 The Austrian *Schauspielergesetz* contains in particular provisions on wages, mutual duties, holidays and termination of the employment contract.

405 Section 30 of the Czech Labour Code.

406 Section 75 of the Czech Labour Code.

407 Article 2(6) of the Czech Labour Code stipulates that persons up to 15 years may only perform artistic, cultural, advertising or sporting activity under the conditions laid down in Act. No. 435/2004 Coll., Articles 121-124 of the Czech Employment Act.

408 Meaning *"the stage or studio artist or technician who has his main activity, either for a show undertaking or in the context of a production, such as a cinematographic, audiovisual, theatrics or musical production, and who offers his services in exchange of a salary, royalties or a fee on the basis of an employment contract or a contract of service"*. Whereas the independent professional artist must be independent, the show business intermittent workers or media-industry workers on short-term contracts can either have an independent (freelance) or an employee status.

409 Periods of non-work, unemployment between two contracts and leaves, are indemnified at once by the unemployment insurance. Inactivity is therefore not the same as unemployment since it entitles payment of a replacement income. This replacement income depends on a certain number of hours or fees prior to the period of inactivity; this number differing from the ordinary law.

worker employed in a show, irrespective of his or her position (artist, worker, technician, administrative staff) whether occasional or permanent, private, public, or associative professional.

In the entertainment industry in **Latvia**, the parties to the contract tend to conclude an additional contract regulating intellectual property rights.[410]

In **Luxemburg** labour law some provisions refer to the show business workers on short-term contracts, allowing for fixed-term employment contracts[411] without limitations in terms of renewal or duration[412]. None of these provisions attempt to define the artist or designate the artist as an employee or self-employed person.[413] This law creates two special statutes: The independent professional artist is defined as the person who *"without being in a subordinated relationship, fixes himself the conditions of his artistic services and bears the social and economic risks"*, without having any other professional activity. It is possible to class a freelance artist as an employee.[414]

6.2. Media

The term 'media' refers to a variety of communication tools. Media may include television, radio and newspapers. Individuals working in the media sector are often employed as a freelancer. Countries that have special regulations on media work include **France**, **Latvia**, **Lithuania**, **Romania** and **Spain**.

For defining a professional journalist, press cards are issued by a joint board of journalists and editors in **France**.[415] The purpose of this card is to facilitate the journalist's work and its issue merely requires evidence that the applicant properly meets the definition of a professional journalist as defined by the French Labour Code.[416] This stipulates that a professional journalist is a person whose principal and regular occupation is the practice of his/her profession for remuneration in a press business. The French Labour Code states that this assumes the existence of a labour contract.[417]

As in the entertainment industry, parties in the media sector in **Latvia** tend to conclude an additional contract regulating intellectual property rights.[418]

In **Luxemburg** some provisions refer to individuals working in the media-industry, allowing individuals to conclude fixed-term employment contracts[419] without being limited in terms of renewal or duration[420].

In **Romania**, no specific individual contracts relating to media exist. However, a collective agreement is applicable, laying down specific rights for this category of workers. Thus, journalists, without incurring any consequences, have some special (not employment-related) rights, namely (a) to refuse to write, to prepare or to participate in the production/publication of an article with a content contrary to the current legislation or

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410 This duality of the relationship was reinforced by the Latvian Government with the increased burden of taxation on the results of the intellectual rights.

411 Article L. 122-1(3)(2) of the Luxemburg Labour Code.

412 Article L. 122-5(3)(2) of the Luxemburg Labour Code.

413 In social security law, a special law has been introduced in order to guarantee artists decent revenue despite the fact that they are employed periodically on the basis of short-term contracts. See the Luxemburg Act of 30 July 1999 concerning a) the statute of professional independent and show business intermittent workers and b) the promotion of creative artists.

414 CAAS, 18 October 2004.

415 Article L. 7111-6 of the French Labour Code.

416 Article L. 7111-3 of the French Labour Code.

417 Article L. 7112-1(1) of the French Labour Code.

418 This duality of the relationship was reinforced by the Latvian Government with the increased burden of taxation on the results of the intellectual rights.

419 Article L. 122-1(3)(2) of the Luxemburg Labour Code.

420 Article L. 122-5(3)(2) of the Luxemburg Labour Code.

deontology of the professional journalist; (b) to refuse to reveal the sources of information; (c) to express freely and in public personal opinions with respect to any event or persons, respecting however at the same time the deontology of the profession of journalist; (d) to benefit of the moral and material support of the chief with respect to maintaining the confidentiality of the sources during all phases of a trial in which it may be involved, until passing a final and irrevocable decision; (e) to refuse to sign the material which was amended by the intervention of the editor on the ground of being different of the initial form, etc.; (f) to demand that the article/broadcast to be published/diffused without writing down the signature if it has objective reasons for this demand. In addition to these specific rights, the employment relation is in essence standard, and the employees benefit from standard pension rights.
In **Spain**, journalists are allowed to leave their jobs if the ideological line of the medium they serve changes (the so-called conscience clause).

6.3. Sports

In respect of its physical activity, sports form a sector requiring some special rules. Although sports can be performed either on a self-employed or on an employed basis and almost all general labour law applies, there may be a need for special protection. Only a few countries have special rules for individuals working in the sports sector (**Belgium**, **Finland**, **Hungary**, **Latvia**, **Luxemburg** and **Romania**).

In **Belgium**, the Act of 24 February 1978 aimed to give the professional sportsman more freedom of labour by imposing a maximum term for employment contracts for a definite period. In order to qualify as a professional, the annual threshold for annual salary amounts to 8.505 EUR for sportsmen. Sportsmen accepting an obligation to prepare for, or to participate in, a sports competition or exhibition under the authority of another sportsman is looked upon as a white collar worker with an employment contract. Sportsmen enjoy specific beneficial regulations for social security contributions and for income tax on salary.

The Employment Contracts Act in **Finland** distinguishes between work in an employment relationship and ordinary hobby activities. An employer, the sports club or the organisation managing the team must comply with normal employer duties within labour law as well as other duties relating to the employment relationship, such as tax and social security. There are a couple of cases from the Supreme Court where the court had to consider whether there was an employment relationship and how rights and duties were to be understood.[421]

Act I. of 2004 on Sports in **Hungary** determines that the activity of professional sport is based on a contract of employment between the sports undertaking and the sportsman concerned. The Hungarian Labour Code covers an employment relationship of sportsmen with the following differences: it is possible to conclude a fixed-term employment contract only; there is no trial period; the professional sportsman may be employed on statutory holidays; and where behaviour is subject to discipline, a financial penalty may be imposed.

In **Latvia**, the Law on Sports determines that sportsmen can be employed under an employment contract. However, in reality, sportsmen are predominantly self-employed[422]. With regard to sports, the Latvian Law on Physical Culture and Sports consolidates the civil nature of the contract of the professional sportsmen and allows a trainer to work as a self-employed person.

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421 Cases from the Finnish Supreme Court (*Korkei Oikeus*) 2008:103, 2000:50, 1998:143 and 1997:38.

422 To be employed on the ground of a service agreement is the same as having the status of a self-employed person.

In **Luxemburg** sportsmen or sports trainers of officially approved federations of sports clubs are not employees if it is not their main and regular activity, and if the annual remuneration does not exceed twelve times the monthly minimum wage.[423] Conversely, if these conditions are not met, it does not necessarily imply that they are employees. Special labour law provisions allow individuals to conclude fixed-term employment contracts[424] without being limited in renewal and duration of these contracts[425]. Elite sportsmen and some other persons linked to the sports sector may benefit from special sports holidays.[426] A sportsman in **Romania** concludes an employment contract or a contract of services with a sports.[427]

[423] Article L. 121-1(3) of the Luxemburg Labour Code.

[424] For professional sport: Article 2 of Regulation of 11 July 1989 concerning the application of Articles 5, 8, 34 and 41 of the Luxemburg Law of 24 May 1989 on the employment contract.

[425] Article L. 122-5(7) of the Luxemburg Labour Code.

[426] Article L. 234-8 and following of the Luxemburg Labour Code.

[427] The professional sportsman who has concluded a civil contract with a sport undertaking, participates in a public or private system of pension.

CHAPTER V. COMPLIANCE AND ENFORCEMENT WITH REGARD TO EMPLOYMENT RELATIONSHIPS

1. Introductory Remarks

This chapter focuses on different compliance and enforcement mechanisms that exist in the surveyed countries. The authorities competent for investigating the employment contract or the employment relationship are summarised. Competent authorities include, *inter alia*, the labour inspectorates and tax and social security authorities, as well as judicial bodies like the labour or civil court (Section 2). The settlement of disputes and the enforcement of labour law at national level is explained in Section 3. Reference is made to the 'traditional' ways of dispute settlement in court and also to alternative dispute settlement mechanisms in Section 4. The possibility of prior authoritative ascertainment of the employment relationship is described in Section 5.

2. Investigating the True Nature of the Employment Relationship by Independent Bodies

There are different authorities competent for investigating the true nature of the employment relationship across the countries. Investigating the 'true nature of the employment relationship' is necessary for ascertaining whether there is an employment relationship or not. That task may be assigned to administrative authorities, such as tax and social security authorities, or to judicial bodies such as labour, civil or administrative courts. The investigation of the employment relationship with regard to social security and tax law is not in scope of this paper.

With regard to labour law cases, i.e. not considering social security and tax law, the courts in **Austria** do not have the power to investigate the true nature of the employment relationship independently: unlike in public law, there is no inquisitorial system. The party that based a claim on an employment contract has to state and to prove the facts that constitute a contract of employment. This does not mean that the courts are bound by the label of the contract or other formal documents, e.g. the category in social or tax law. The court has to decide whether the relationship is characterised by subordination. Subordination is demonstrated mainly through the reality of the relationship, and this reality has to be stated and proved by the relevant party. However, if parties 'agree' on the contract being an employment contract or the worker being self-employed, then the court has no power to investigate whether this is consistent with the reality of the relationship.

2.1. Administrative Bodies

Administrative bodies, e.g., labour inspectorates (**Belgium**, **Bulgaria**, the **Czech Republic**, **Greece**, **Hungary**, **Italy**, **Latvia**, **Lithuania Luxemburg**, **Norway**, **Portugal**, **Romania**, **Slovakia** and **Spain**), tax and social security authorities (**Austria**, **Denmark**, **Germany**, **Iceland** and the **Netherlands**) or other authorities (**Cyprus**, **Estonia**, **Finland** and **Ireland**) are competent to investigate the true nature of an employment relationship.

2.1.1. Labour Inspectorates

Labour inspectorates have the power to investigate the true nature of the employment relationship, either at their own initiative or following a complaint of an individual concerned (**Austria**, **Belgium**, **Bulgaria**, the **Czech Republic**, **Greece**, **Hungary**, **Latvia**, **Lithuania**, **Luxemburg**, **Norway**, **Poland**[428], **Portugal**, **Romania**, **Slovakia Slovenia** and **Spain**). In case an employer violates the provisions of labour law, the labour inspectorates are, in some countries, competent to impose an administrative fine (**Bulgaria**, the **Czech Republic**, **Latvia**, **Lithuania**, **Poland** and **Romania**). Moreover, decisions of the labour inspectorates may be reviewed by the Director of the State Labour inspectorates (**Latvia** and **Norway**); by the civil courts (**Bulgaria**) or the administrative courts (the **Czech Republic** and **Latvia**[429]). The decision of the State Labour inspectorate Director in **Norway** may be reviewed by the Ministry of Labour and Inclusion.[430] Labour inspectorates may also bring a case before a court (**Belgium**, the **Czech Republic**, **Latvia**[431], **Luxemburg**, **Norway**, **Poland**, **Slovakia** and **Slovenia**).

In general, labour inspectorates have an important role in determining whether the proper legal regime is being applied, in accordance with the correct qualification of the contract, and if the rights and duties of the employee are being respected (**Belgium**, **Luxemburg**, **Malta**, **Portugal** and **Slovenia**). Other labour inspectorates have the competence to prohibit an employer to further perform the activity in the event of infringement on the aforementioned issues (**Slovenia**) or to force the employer to conclude an employment contract if those bodies have ascertained that there is indeed an employment relationship between the parties concerned (**Latvia**[432]).

The labour inspection in **Romania** registers all employment contracts.[433] The competence of the labour inspection is limited to employment relationships. The national labour inspection may also inform the competent authorities about any deficiencies related to the correct application of legal decisions in force. One of the main tasks of the labour inspection is to ensure technical assistance to employers and employees for the prevention of professional risks and social conflicts and may initiate proposals addressed to the Labour Ministry for the improvement of existing legislation and preparation of new Acts in the field.

In **Iceland** the inspectorates are also competent to investigate the nature of employment relationships. Iceland's legislation requires an employment relationship between the employee and the employer for the full duration of the time spent working in Iceland.[434] Employers provide the Directorate of Labour with all relevant materials and information, including employment contracts, in order for the Directorate to supervise and assert that the stipulations of the law are followed. In collaboration with the trade unions, the Directorate of Labour takes up the role of Labour inspectorates in these cases, assessing the nature of employment relationships and verifying if individual employment contracts are in accordance with collective agreements.

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428 Article 13 of the Polish Law on National Labour Inspectorate. Any paid work can be controlled by National Labour Inspectorate as far as health and safety at work is concerned.

429 The decision of the Director of the State Labour Inspectorate may be reviewed at the administrative courts in three instances (district court, regional court and Supreme Court).

430 Section 18-6(7) of the Norwegian Working Environment Act of 17 June 2005 No. 62.

431 Under condition that the employer ignores the administrative acts issued by the Latvian State Labour Inspectorate requiring to comply with certain obligations.

432 The Latvian State Labour Inspectorate may issue administrative acts obliging the employer to perform particular tasks and obligations.

433 As long as the parties register the contract to the Labour Inspectorate, the inspector assumes that there is an employment relationship, and recommends them any necessary changes, in order to align the contract to the legal provisions.

434 Icelandic Act No. 45/2007.

2.1.2. Tax and Social Security Authorities

Since tax and social security authorities have a mandate for, respectively, collecting taxes and social security contributions from employers and/or working individuals, these bodies may also play a role in investigating whether an individual works under an employment contract or has an employment relationship or whether the individual must be categorised as a self-employed person (**Austria**, **Belgium**[435], **Denmark**, **Iceland**, **Italy**, **Latvia**, **Lithuania**, **Luxemburg**, the **Netherlands** and **Portugal**[436]).

In **Germany**, with regard to the existence of 'employment' (*Beschäftigung*) within the meaning of social security law, a specific administrative procedure was introduced within the German Social Code IV. The parties to a relationship can apply to an administrative body in order to decide upon the existence of 'employment'. The general purpose of the relevant provision is to offering a fast and uncomplicated tool for determining the existence of 'employment'. Its main advantage is reduction of risks arising from an erroneous qualification of the underlying relationship.

In **Belgium** and **Denmark**, tax authorities play a crucial role in controlling the true status of self-employed persons. One of the tasks of the tax authorities is to verify whether a person is working on an employment basis and therefore liable to paying income tax. The decision made by the tax authority has implications for the person's legal status in relation to social security and labour law matters. If a worker in **Belgium** is considered to be a self-employed person for the tax authorities, there is a rebuttable legal presumption that the worker is also a self-employed person for social security authorities. Similarly, in the **Netherlands**, tax and social security authorities investigate the true nature of the employment relationship in relation to the question whether the individual is self-employed or not. The relationship of a person (i.e. the provider of the services) to the client cannot be seen as an employment relationship if the provider of the service has a Declaration of Income Tax Status.[437] This declaration contains the view of the Netherlands Tax Authority on the self-employed person's income. It makes clear whether levies and premiums must be withheld. This declaration can be requested from the Netherlands Tax Authority in case the person has one or more clients to whom services are provided. This declaration is valid for one year and it is annually renewable.[438]

Whereas in **Belgium** and the **Netherlands** the question whether the individual is self-employed or not plays an important role, in **Lithuania** the question of employed or self-employed is answered in the light of illegal work.

Social security as well as tax authorities in **Austria** can independently investigate the true nature of an employment relationship, but only if it concerns social security or tax law matters respectively. Social security authorities may investigate the nature of the contract in case of doubt about whether the person is to be treated as a self-employed person. If the person concerned is categorised as self-employed, he or she is obliged to individually pay social security contributions. If the person concerned can be categorised as an employee, the employer is obliged to pay social security contributions for the employee. Tax authorities may also investigate whether the person concerned has to pay tax wages or income tax. The

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435 Article 3 of the Belgian Royal Decree No. 38 of 27 July 1967.

436 According to Article 248, No. 2 of the new Code of Social Security Welfare Contribution (*Código dos Regimes Contributivos do Sistema Previdencial de Seguranca Social*), approved by Law No. 110/2009, Portuguese social security authorities may also play a role in investigating whether an individual works under an employment contract or whether the individual must be categorised as a self-employed person. However, please note that the new Code shall enter into force only on 1 January 2010.

437 Article 6(1)(e) of the Netherlands Social Insurance Acts. The legislation that falls under this term is the Netherlands Work and Income Act, the Netherlands Sickness Benefits Act and the Netherlands Unemployment Insurance Act.

438 If the person requests such a declaration three times consecutively, then the Tax Authority will provide that declaration automatically.

same can also be said for **Iceland** and **Latvia**. Tax authorities in **Iceland** emphasise the need to strengthen rules on VAT register listings and deny individuals the option of registration if they cannot demonstrate self-employment status. Refusal can be submitted to the Tax Ruling Committee in the last instance of appeal within the administrative bodies' on the Tax Ruling Committee. Social security authorities also have the power to investigate and determine the true nature of the relationship, in order to ascertain occupational injury benefits. Relating to this issue, the last instance of appeal within the administrative bodies is the Social Security Ruling Committee. Although the authorities can investigate and determine the nature of employment relationships, these bodies only have the power to do so when the issue arises in cases submitted to them and within the legal scope of their authority. Furthermore, appeals against decisions made by authorities regarding employment status can be lodged with the district civil courts. In turn, appeals against their decision can be submitted to the Supreme Court. The State Revenue Office in **Latvia** is competent to investigate the nature of the employment relationship with regard to tax matters. The Office is not competent to force the employer to conclude an employment contract where those bodies have ascertained that there is an employment relationship between the parties concerned.

In **Italy**, permanent co-ordination among social security administration, tax administration and the police[439] facilitates the battle against bogus self-employment. Permanent co-ordination means mandatory data sharing between these institutions, also relating to significant activities, its own inspection know-how and knowledge. The institutions must also prepare a joint programme of inspections.[440]

2.1.3. Other Authorities

A few countries have put authorities other than above mentioned in charge of investigation of the employment relationship (**Cyprus**, **Finland**, **Ireland**, **Latvia** and **Sweden**).

In **Cyprus**, two bodies, namely the Redundant Employees Fund as well as the Director of the Ministry of Labour's Social Insurance Department, may investigate the true nature of an employment relationship. The Redundant Employees Fund, responsible for providing compensation to employees made redundant, has the power to investigate the true nature of a relationship in order to decide whether the person claiming redundancy was working on the basis of an employment relationship and is therefore eligible for redundancy pay. The Director of the Social Insurance Department of the Ministry of Labour investigates the true nature of the relationship following a complaint lodged by an employee claiming that his or her employer has not been paying social security contributions. In such a case, the Ministry will determine whether there is an employment relationship and force the employer to pay social security contributions.

The Administration of Health and Safety Protection Act in **Finland**[441] deals, *inter alia*, with questions whether a certain contractual relationship is an employment relationship and thus covered by Finnish labour law. Another body is the Labour Council, a tripartite body with an objective chairman, two other neutral members and an equal number of members representing the social partners. The tasks of the council are partly administrative and partly semi-judicial. Concerning the latter task, the labour protection authorities, confederations of employers or employees and courts, can request advisory opinions from the Labour Council. The advisory opinions concern the application and interpretation of key statutes in labour

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439 Italian Legislative Decree No. 124 of 2004 gives a framework for inspection proceedings.

440 Legislative Decree No. 123 of 2007 gives ways to easily recognise self-employed persons and/or undeclared workers. Act No. 133 of 2008 introduces the *libro unico* that in lieu of the previous documentations and/or registers related to hiring, attendance, payroll books, should make the inspections proceedings easier.

441 Its activity is dominated by giving advice and guidance in order to secure compliance with labour law.

law. As part of this task, the Council often decides who is an employee and who is an employer. If the conflict is rooted in matters governed by the Finnish Occupational Safety and Health Act or other labour laws, then it falls within the jurisdiction of the civil courts, meaning three instances with a possible appeal to the Finnish Supreme Court.
The Rights Commissioner Service of the Labour Relations Commission in **Ireland** investigates the true nature of an employment relationship.[442] Appeals against its decisions can be lodged with either the Employment Appeals Tribunal or the Labour Court.
Sweden has no Labour inspectorates. Instead, a large part of control and enforcement of labour law legislation and collective agreements is carried out by the trade unions, together with some government authorities, such as the Working Environment Authority and the Discrimination Ombudsman.

Other competent authorities are individual employment disputes commissions[443] (**Estonia**).

2.2. Judicial Bodies

2.2.1. Labour Courts/Industrial Tribunals

In **Belgium**, **Cyprus**, **Finland**, **France**, **Germany**, **Hungary**, **Ireland**, **Luxemburg**, **Malta**, **Poland**, **Portugal**, **Romania**, **Slovenia**, **Sweden** and the **United Kingdom** labour courts/ industrial tribunals are entitled to investigate the true nature of a(n) (employment) relationship.

The decisions of the labour inspectorate in **Belgium** can be reviewed in the labour court, whereas the decision of the labour court can be reviewed by the labour court in appeal procedures. The judgements of the labour court in appeal procedures can be reviewed by the *Cour de Cassation*.

Appeal is possible in **Cyprus** against the decisions of the Redundant Employees Fund as well as of the Director of the Social Insurance Department of the Ministry of Labour when lodged with the Industrial Disputes Court. This body is entrusted with adjudicating on matters relating to labour law and has the power to comprehensively review any decisions of either body and to judge the true nature of the employment relationship. The Industrial Disputes Court is competent for disputes between a person claiming to be an employee and another who is allegedly the employer, i.e. not only in appeals to decisions of the above mentioned body. Appeal against decisions of the Industrial Disputes Court can, in last instance, be lodged with the Supreme Court on a point of law.

In **Denmark** and **France** industrial tribunals are entitled to investigate the true nature of an employment relationship. Decisions of the Industrial Arbitration Court in **Denmark** are final. In general, industrial tribunals deal with cases involving collective agreements. In **France**, decisions may be challenged in a court of appeal, where all aspects of a decision are re-examined, both in respect to facts and law. Decisions in last instance by either a court of first instance or a court of appeal may form the object of an appeal before the Court of Cassation.

In **Finland**, disputes related to collective agreements, to the exclusion of any other issues, are settled In the Labour Court. The court is competent to decide whether a person is an employee and covered by the collective agreement. The labour court is a tripartite body. One

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442 Who is competent depends on the statute under which the investigation is carried out.

443 Individual labour Disputes Commissions are the institutions, that are working under the Ministry of Social Affairs. The tasks of the Commissions are to solve disputes that arise form the individual labour relations. It is for an employee to decide if he or she brings a case to the court or to the commission. As the praxis shows, employees bring their case mostly to the commission. Its decision is binding, but can be reviewed by the courts. If a person will not turn to the court during 30 days, after the decision of the commission has made, the decision of the commission is final and has to be complied with like a court decision.

part is independent, one part represents employee organisations and one part represents employer organisations. There is a single Labour Court for the whole country, where it is theoretically possible to appeal, however, in practice, the labour court is the only instance. The above mentioned negotiation pattern generally functions as an effective filter. The time for processing a case in the labour court amounted to about five to six months during the past few years and the number of cases to about 150 per year.

In **Germany**, the Labour Courts have customary powers when deciding upon the (non-) existence of a contract of employment. However, the ruling principle is the so-called principle of party presentation, as opposed to the principle of *ex officio* examination. That means that the court can base its decision exclusively on demonstrable facts put forward by the parties.

In **Ireland**, the Employment Appeals Tribunal or the labour court has the power to investigate the true nature of an employment relationship. Appeals against their decisions can be lodged with the High Court. The labour court in **Slovenia** also has the power to investigate the nature of the employment relationship.[444] If the court in Slovenia finds the existence of basic elements of an employment relationship, it may require the employer to give the employee a written employment contract and to enrol the employee in mandatory pension, disability, healthcare and unemployment insurance.

The Industrial tribunal in **Malta** rules on trade disputes referred by the Minister of Social Policy at the request of one or both parties in dispute. A trade dispute as defined by the Employment and Industrial Relations Act is connected with matters such as terms and conditions of employment, or physical working conditions. The decisions of the Industrial tribunal are not subject to appeal, except on points of law; its decisions are binding and cannot be revised within the year the decision was issued.

In cases where the Employment Tribunal in the **United Kingdom** applied the wrong legal test, or reached an unreasonable decision compared with the facts[445], an appeal can be lodged with the Employment Appeals Tribunal.

2.2.2. Civil Courts

The investigation of the true nature of an employment relationship may also take place in the civil court in: **Austria**, **Bulgaria**, the **Czech Republic**, **Denmark**, **Estonia**, **Finland**, **Greece**, **Iceland**, **Ireland**, **Latvia**, **Liechtenstein**, the **Netherlands** and **Norway**. The court in **Bulgaria** must interpret the contract as a whole, taking into account the objective of the contract, usage and good faith.[446]

Civil courts in the **Czech Republic** have the power to investigate the true nature of the employment relationship, but only at the request of one of the parties to the employment contract. The decisions of the district courts may be reviewed by the regional courts.

The civil court in **Denmark**, **Greece** and **Norway** deals primarily with cases involving employment legislation. In **Liechtenstein**, an appeal against the initial judgement of the general court[447] can be lodged with the secondary court[448]. If certain requirements are complied with, a decision of the second instance can be referred to a third instance[449].

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444 Article 4 of the Slovenian Employment Relationships Act.
445 *Edwards v. Bairstow* [1956] AC 14.
446 Article 20 of the Bulgarian Obligations and Contracts Act.
447 *Fürstliches Landgericht.*
448 *Fürstliches Obergericht*.
449 *Fürstlicher Oberster Gerichtshof*.

Civil Courts in **Estonia** have the power to investigate the true nature of the employment relationship. The court system operates at three levels, namely county courts, district courts and the Supreme Court. The decision of the latter is final.

In **Finland**, the civil court can decide upon the nature of the contract. If the action is based on the Finnish Employment Contracts Act or other labour legislation related to the employment relationship, then the competent authority is a general lower-level court. The court also has the power to decide upon the existence of an employment contract, and upon the content thereof. There are three court instances: the general lower courts, the appeal courts and the Supreme Court. However, not all cases can automatically be submitted to the Supreme Court. It depends on the Supreme Court's permission.

Appeals against decisions made by the social security and tax authorities in **Iceland** regarding employment status can be lodged with civil courts and then with the Supreme Court. Like the tax and social security authorities, courts can make a full assessment of the true nature of the relationship in any given case.

In **Ireland**, the investigation of the true nature of a contract can also be considered by the civil courts, for instance in the event of appeal against a decision of the Labour Court or the Employment Appeals Tribunal or the Social Welfare Appeals Office on a point of law to the High Court. The regular court[450], dealing with civil and criminal law, in **Latvia** is competent to investigate the true nature of the employment relationship. In the **Netherlands**, the civil courts, i.e. the district courts, the court of appeal and the Netherlands' Supreme Court can evaluate the actual duties performed by the employee in addition to the name of the contract indicated in the contract itself or his or her payslip.[451] In **Norway**, the civil courts are the only competent bodies for investigating the true nature of the employment relationship.

2.2.3. Administrative Courts

Administrative courts of only a few countries are competent to investigate the true nature of the employment relationship (**Austria**, **Latvia** and **Lithuania**). In **Austria**, administrative courts can, in appeal, investigate all relevant facts of the case, provided that the case is based on social security or tax law matters. The cases can be reviewed twice.[452] Administrative courts in **Latvia** can review the decisions of the Labour inspectorate and its Director in three instances (in **Lithuania** in two instances).

2.2.4. Criminal Courts

In **Belgium**, the investigation of the true nature of the work relationship may also take place in the Criminal Courts. The reason is that all labour laws contain criminal sanctions on infringements (except for the Act on the Contract of Employment of 3 July 1978) and their application is subject to the condition of the existence of an employment contract or, in many cases, the existence of a working relationship where the worker performs labour under the authority of the principal without an employment contract.

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450 In Latvia, there are no civil or criminal courts. Therefore, regular courts settle disputes with regard to civil and criminal law.

451 HR 8 April 1994, *NJ* 1994, 704, *JAR* 1994/94 (Agfa/Schoolderman); HR 14 November 1997, *NJ* 1998, 149, *JAR* 1997/263 (Groen/Schoevers).

452 For social security matters first by the *Landeshauptmann* and then by the *Bundesministerium*, and by the administrative court (*Verwaltungsgerichtshof*). For tax matters the case can be reviewed first by the *Unabhängigen Finanzsenat*, i.e. a body similar to a court, and then by the administrative court (*Verwaltungsgerichtshof*).

3. Settlement of Disputes and/or Enforcement of Legislation at National Level

This section deals with a variety of dispute settlement mechanisms with regard to individual employment contracts or employment relationships, starting with alternative dispute settlement mechanisms, like mediation, conciliation and/or arbitration. This section also provides an overview of dispute settlement in the different courts (labour, civil and/or administrative). Finally, dispute settlement by administrative authorities, like Labour inspectorates and/or other institutions is described.

According to the Commission's Green Paper, *"Enforcement mechanisms should be sufficient to ensure well functioning and adaptable labour markets, to prevent infringements of labour law at national level and to safeguard workers' rights in the emerging European labour market".*[453]

3.1. Alternative Dispute Settlement

3.1.1. Mediation

Dispute settlement concerning the employment relationship by means of mediation is foreseen in **Austria**, **Belgium**[454], **Greece**, **Hungary**, **Liechtenstein**[455], **Luxemburg**, **Poland**, **Portugal**, **Romania**, **Slovakia**[456], **Slovenia** and the **United Kingdom**.

In **Austria**, if appropriate, rules of civil procedure oblige the judge to direct the parties towards institutions qualified for extrajudicial settlement of conflicts. The underlying premise of the Act on Mediation, which introduced this provision, explicitly points out that the word 'mediation' was deliberately avoided to leave room for other methods of alternative dispute resolution. Mediation in civil matters – that is, conflicts that fall within the jurisdiction of civil courts and include employment disputes – is governed by the new Act on Mediation[457] effective as of 1 May 2004. Mediation is based on the parties' voluntary agreement, in the course of which a trained and neutral intermediary (the 'mediator') attempts to bring the parties together by accepted methods, enabling them to mutually resolve the conflict. Eventually, parties are expected to reach a mutually acceptable settlement. Mandatory employee rights cannot be waived in a mediation procedure. A mediation procedure suspends limitation periods. For certain matters of the employment contract, special negotiation procedures are in place, but these are mandatory (regarding the commencement of the procedure) and are discussed as a conciliation procedure.

The Labour inspectorate in **Greece**[458] can perform a mediator role in case of a dispute.

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453 Commission Green Paper, Modernising labour law to meet the challenges of the 21st century, COM(2006) 708, p. 14.

454 See the Belgian Act of 21 February 2005.

455 The area of employment law is not explicitly mentioned, but it is covered by the general possibility to settle a dispute by means of mediation.

456 Act Nr. 420/2004 Coll. on mediation in Article 1/2 allows mediation to solve the labour law disputes. However, mediation is unusual. The reasons for rejecting the mediation are different, e.g. for the parties the court has more authority; a mediator cannot solve very complicated problems.

457 *Bundesgesetz über Mediation in Zivilrechtssachen* (*Zivilrechts-Mediations-Gesetz*) BGBl No. I 2003/29.

458 That procedure is used for establishing whether there is an employment relationship (between the employer and the employee). The procedure is rather informal and there are not particular rules. The employee may request the mediation of the Inspectorate which has the duty to call the employer in order to try to settle the dispute.

The Industrial Mediation and Arbitration Service in **Hungary**[459] is competent with regard to collective labour disputes.[460] The basis of the Industrial Mediation and Arbitration Service can be found in the Hungarian legal system.[461] Any dispute arising in connection with employment relationships (collective labour disputes) between the employer and the works council or between the employer (the employer's interest representation organisation) and the trade union, which does not qualify as a legal dispute, must first be settled by means of negotiations between the parties concerned. Negotiations must commence when the party initiating the talks submits a written statement to the other party. The action serving as the basis of the dispute is not executed during the time of the negotiations, within a limit of seven days. Parties refrain from taking any action that may jeopardise an agreement. If negotiations do not lead to an outcome, the parties may, jointly, ask a mediator to settle the dispute. The mediator may request details from the parties, to the extent deemed necessary, during negotiations.[462] Upon conclusion of the negotiations, the mediator issues a written summary of the parties' positions and the negotiation results, and delivers a decision to the parties.

Liechtenstein[463] regulates mediation in the Civil Law Mediation Act. Once mediation has started, time limits for filing rights and claims affected by mediation are frozen. These services may be assessed as efficient and effective.
The Labour inspectorate in **Luxemburg** has an informal mediation role, meaning that it may, through advice and consultation, attempt to resolve problems.[464] Mediation bodies are of increasing importance, but mediation is still unusual in labour law disputes.[465]
In **Belgium** and **Poland**, dispute resolution may take place in mediation proceedings. Those resolutions take place on a voluntary basis and may be initiated if the dispute concerns the employment relationship.
In **Portugal**, employees and employers are allowed to resolve labour disputes through mediation.[466] Labour mediation covers all labour disputes, except those relating to labour accidents or indispensable rights. Labour mediation aims to be a faster and less expensive way to resolve disputes.[467]
In **Romania**, the law concerning mediation and the profession of mediator stipulates the possibility of extrajudicial dispute resolution. This law is not applicable in resolving labour conflicts, since the mediator of common law is not competent to assist parties in the settlement of labour disputes. Mediation is regulated as a way of resolving conflicts of interest (and not of conflicts of rights), by Law No. 168/1999. The mediation procedure in individual employment relations is not used in order to establish whether there is an employment relationship, but only for settling certain individual disputes (e.g. disputes regarding the equal opportunities).

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459 The Industrial Mediation and Arbitration Service has a competence to settle collective/industrial disputes. Without legal regulation the order of procedure is based on the Rules of Organisational and Operational Procedures. Apart from this, the processes out of court are regulated in the Hungarian Act LV of 2000 on Activity of Mediation. This process would be a preventive process in an individual legal dispute between an employer and employee.

460 The control over the operation of the Industrial Mediation and Arbitration Service is carried out by the National Council for the Reconciliation of Interests.

461 Processes out of court are regulated in the Hungarian Act LV of 2000 on Activity of Mediation.

462 In such event the deadline specified in Subsection (3) of Section 194 for the provision of information shall be extended by the deadline prescribed for the disclosure of data, not to exceed five days.

463 Article 18(1) of the Liechtenstein Civil Law Mediation Act. The exact procedure is neither regulated in the Civil Law Mediation Act nor in the Ordinance hereto; it is left to the practice of the mediators.

464 The Labour Inspectorate guarantees the application of labour law in general.

465 As the legislator did not want to extend the competence of the National Conciliation Authority nor (for reasons of independence) those of the labour inspectorate, an individual conciliation authority was created by law in 2007. It can deal with all individual disputes concerning labour law or occupational safety and health. The prescription term of all court actions is suspended during the conciliation procedure. The details of the procedure are to be defined by a decree. Until now, this authority has not been established; especially the necessary civil servant posts were not created.

466 With the assistance of a qualified professional included in the official lists created for this purpose.

467 Labour mediation was implemented in December 2006 and therefore it is too early to accurately evaluate its efficiency and effectiveness.

Individual labour disputes in **Slovenia** are settled by mediation of a labour inspector on the condition that both parties agree on mediation. According to the Slovenian Labour inspectorate Act, a labour inspector can issue a decision prohibiting the employer from further performance of its activity if the inspector detects, during an inspection, that the employer did not conclude an employment contract or civil law contract in accordance with applicable legislation or the collective agreement.
In respect of mediation, the Advisory Conciliation and Arbitration Service in the **United Kingdom** provides a mediation service to assist with the resolution of individual employment disputes that have not reached the point where a tribunal claim could be made, or where parties indicate no wish to seek a judicial decision on their difference.[468]

3.1.2. Conciliation

Conciliation of labour law disputes concerning individual employment relationships is possible in **Austria**, **Belgium**, **Denmark**, **Latvia**[469], **Poland** and the **United Kingdom**.
Austria has conciliation procedures in individual labour law for disputes regarding paternity /maternity leave, leave relating to social care duties, vacation leave and termination relating to employment of apprentices. Here, the conciliator cannot pass a binding decision. Parties must commence the procedure and attempt to reach a solution, otherwise they cannot proceed to court. The *Bundeseinigungsamt*, a body consisting of employee and business representatives, is responsible for mediation of disputes between social partners in course of collective bargaining.[470] Mediation is voluntary and has no significant role. If the parties to the dispute agree, the *Bundeseinigungsamt* can pass a binding judgement. The *Schlichtungsstelle*, a body consisting of one professional judge, two employee representatives and two business representatives, is responsible for mediation of disputes between a single employer (enterprise) and a works council in the course of bargaining certain plant agreements.[471] This procedure is mandatory and the decision is binding. The practical significance for the bargaining is high, because bargaining takes place within the context of the *Schlichtungsstelle* decision. Each party can call upon the *Schlichtungsstelle*'s intervention.

In **Belgium,** each sector of private industry has a Joint Committee that may resolve individual labour disputes if parties accept the competence of the Joint Committee. In theory, but almost never in practice, this procedure may be used to establish whether there is an employment relationship (between the employer and the employee) or not. In the case where this procedure is used for determining the existence of an employment relationship, there is no specific procedure, except otherwise provided in a collective labour agreement. The Joint Sectoral Committees are an important channel for settlement of disputes.

The **Danish** Act on the Labour Court and Industrial Arbitration Courts and collective agreements oblige the parties to participate in a joint meeting in all kinds of employment cases involving collective agreements. A key aspect of this conciliation procedure is that it is carried out in a joint committee featuring representatives from both the employer and the employee organisation (the parties to the collective agreement). The joint meeting (as well as the Labour Court and an Industrial Tribunal Court) is entitled to decide whether a person in question is carrying out work as an employee or as self-employed. However, only a very small group of cases is about raising questions on the distinction between employee and self-employed. Both the employer and the employee must comply with a decision made by

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468 Qualitative survey feedback also showed that commissioners and parties involved in the mediations were satisfied or very satisfied with the service they received in 95 per cent of the cases.
469 The Latvian Law on Labour Disputes, Articles 4, 5 and 6.
470 Article 153 and following of the Austrian Labour Constitution Act.
471 Article 144 of the Austrian Labour Constitution Act.

the joint committee. Only if the organisations fail to settle the dispute during the conciliation meeting, the dispute is referred to the Labour Court or an industrial arbitration court.

In **Poland**, dispute resolution may take place in conciliation commissions and mediation proceedings. These resolutions of disputes take place on a voluntary basis and can be initiated if the dispute concerns the employment relationship. In practice, this process is very rare.

The Advisory Conciliation and Arbitration Service in the **United Kingdom** plays an important role in conciliating employment disputes before the case is referred to the Tribunal.[472] According to their annual report[473], the Advisory Conciliation and Arbitration Service has reached or exceeded the targets set by the Business, Enterprise & Regulatory Reform (BERR, now BIS). It provides that the statutory individual conciliation performance is measured by reference to the potential number of hearing days eliminated by conciliation in net cleared Employment Tribunal cases.[474]

3.1.3. Arbitration

Arbitration is another form of dispute settlement. Arbitration is not common and agreements on arbitration are allowed only after a legal conflict has risen in **Austria** and **Belgium**[475]. In **Austria**, arbitration agreements cannot be arranged between the employer and the works council. In **Belgium**, arbitration is only used to settle a dispute between an employer and employee with a high hierarchical position in the enterprise.

A collective agreement may stipulate that arbitration will be used for the settlement of labour disputes in **Slovenia** (individual labour disputes)[476] and the **Netherland**.

In **Denmark**, arbitration plays an important role in settlement of disputes between an employer and employee if the case involves a collective agreement. However, the case will only be referred to the Industrial Arbitration Court if parties to the collective agreement have not been able to settle the case through the joint meeting procedure.

Undertakings in **Norway**[477] may enter into agreements of arbitration in case of termination of an individual employment contract with a chief executive.[478] Arbitration is performed as a result of an agreement between the parties to a dispute. Arbitration is known as an effective and efficient tool.

In **Latvia**, the law explicitly precludes the resolution of an employment dispute by means of arbitration.[479] In **Greece** too, arbitration is not allowed as a tool for settling individual labour disputes.[480] Arbitration in the **Czech Republic** is only possible in case of collective labour law disputes.[481]

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472 http://www.acas.org.uk/index.aspx?articleid=356
473 http://www.acas.org.uk/CHttpHandler.ashx?id=919&p=0
474 Excluding Local Authority equal pay and other extraordinary multiple cases.
475 Article 13 of the Belgian Contract of Employment Act 3 July 1978 and Article 1678 of the Belgian Civil Procedure Code.
476 Article 205 of the Slovenian Employment Relationships Act. In such a case, the collective agreement shall lay down the composition, the procedure and other issues relevant to the work of the arbitration. The employer and the worker in Slovenia have to agree on the settlement of a dispute by arbitration when such a dispute arises.
477 The system of arbitration is not regulated in the Norwegian Working Environment Act and the form may vary depending on the agreement between the parties.
478 Section 15-16(1) of the Norwegian Working Environment Act.
479 The Latvian Law on Labour Disputes, Article 7
480 Article 867 of the Greek Civil Procedure Code.
481 In the Netherlands it is possible to bring a dispute before an arbitration board.

3.1.4. Negotiation

In **Finland**, it is possible that the parties to a collective agreement have agreed to a certain pattern for settling disputes concerning the application of the collective agreement and settle the dispute by means of negotiation. If there is such a clause, then the Labour Court will handle a case only when the parties have negotiated as stipulated.[482]
In **Denmark** and **Sweden**, many disputes are settled in negotiations and consultations between the employer and the trade union. The Swedish Labour Court only tries a case if all possibilities to resolve the dispute by way of negotiation, both at local and national level, have failed.

3.2. Judicial Settlement in Courts

Judicial settlement in individual employment law cases can take place in civil courts (**Austria**, **Bulgaria**, the **Czech Republic**, **Denmark**, **Estonia**, **Finland**, **Greece**, **Iceland**, **Italy**, **Latvia**[483], **Liechtenstein**, **Lithuania**, the **Netherlands** and **Norway**), industrial tribunals (**Cyprus**, **Denmark**, **France** and **Malta**) and labour courts (**Belgium**, **Denmark**, **Germany**, **Iceland**, **Ireland**, **Norway**, **Poland**, **Portugal**, **Romania**, **Slovenia**, **Sweden** and the **United Kingdom**).

3.2.1. Civil Courts

In **Austria,** the courts are organised into panels composed of professional and lay judges. With regard to labour disputes, a special act applies, namely the Austrian Act on Employment and Social Courts[484], regulating the procedure of civil law cases. Employment law disputes in **Bulgaria**[485], the **Czech Republic**, **Denmark**, **Estonia**[486], **Finland**, **Greece**, **Iceland**, **Italy**, **Liechtenstein**, **Lithuania**, the **Netherlands**, **Norway** and **Slovakia**[487] are also settled by civil courts. There are different ways of enforcing labour law rights, one way by the initiative of the individual (**Austria**, **Bulgaria**, **Denmark**), the other by the initiative of the individual and/or other authorities such as tax and social security authorities (the **Czech Republic**, **Estonia**, **Finland**, **Greece**, **Iceland**, **Latvia**, **Liechtenstein** (in part), the **Netherlands** and **Norway**).

In **Finland**, labour law, including disputes related to generally binding collective agreements, is referred to civil courts. The important exception is that disputes related to collective agreements are referred to the Labour Court. The rules of procedure for the civil courts give the parties opportunities to reconcile or for the plaintiff to withdraw the claim. There may be a threshold for the individual employee (or a smaller employer) due to the burden of costs. The rule of thumb is that the party who loses the case pays all costs of the procedure, also for the other party. The amounts can be considerable in relation to e.g. an employee's income. However, unionised employees can usually get legal assistance from their union. The amounts can be considerable related to e.g. an employee's income. However, unionised employees can usually receive legal assistance from their union. The two latest labour law cases in the Supreme Court took one and a half years from the original verdict to the verdict in the third instance, i.e. the Supreme Court.

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482 Labour Court Act Section 11(2).
483 In Latvia, labour disputes are mostly settled by regular courts dealing with, *inter alia*, civil law.
484 Austrian *Arbeits- und Sozialgerichtgesetz*.
485 Concerning collective labour disputes, the civil court is competent only, to declare a strike unlawful.
486 As the main number of individual labour disputes will be dealt with by the Individual Labour Disputes Commission, the Courts will solve mainly disputes that have so-called fundamental importance.
487 As regards the labour law cases this is despite the fact, that judicial settlement in labour law cases take place in civil courts and last very long. According to statistics of the Ministry of Justice of the Slovakia in the year 2008 the courts in Slovakia have finished 81 937 civil law cases (inclusive labour law cases), but only 1650 were from labour law area. The average length of the civil proceedings is about 14 months. The longest are in labour law cases – about 37 months.

The procedure for disputes arising from the employment relationship in **Liechtenstein** is generally covered by the Civil Procedure Act. If the disputed amount does not exceed 30.000 francs, the case is settled in a specific procedure. A settlement hearing is not mandatory.[488] The court establishes the facts *ex officio* and appraises the evidence at its discretion.[489] The circumstance that the court establishes the facts *ex officio* is a significant deviation from the ordinary civil procedure[490]. This means that: the court may account for facts that were not alleged by any party; may hear evidence that neither of the parties had requested to be admitted as evidence; is obliged to interrogate the parties when objective reasons cast doubt on the completeness of their allegations and motions to take evidence.

In the **Netherlands**, parties to a collective agreement may provide in that agreement that a dispute may be referred to a civil court and all labour law disputes are settled by the civil court. In **Malta**, a compulsory settlement through reference to the industrial tribunal is also possible.

3.2.2. Labour Courts/Industrial Tribunals

Labour courts deal with disputes in relation to employment relationships in **Belgium**, **Cyprus**, **Denmark**, **France**[491], **Germany**, **Ireland**[492], **Iceland**, **Luxemburg**, **Poland**, **Portugal**, **Romania**, **Slovenia**, **Spain** and **Sweden**. In six countries dispute settlement by labour courts is effective (**Belgium**[493], **Cyprus**, **France**, **Ireland**[494], **Luxemburg**[495] and **Sweden**). This cannot be said for **Portugal**, where the labour courts' main problem is the delay in resolving disputes, which affects the courts' efficiency and effectiveness. This corresponds with a major problem of jurisdictional justice in Portugal.

Enforcement of labour law provisions may, in some countries, be dependent on the initiative of individuals (**Denmark**, **France**, **Germany**, **Malta**, **Romania** and the **United Kingdom**), whereas in other countries, enforcement may also be initiated by other authorities, including the labour inspectorate or tax and social security authorities (**Belgium**, **Cyprus**, **Denmark** (with regard to collective agreements), **Hungary**, **Ireland**, **Luxemburg**, **Poland**, **Portugal**, **Slovenia** and **Sweden**).

Different conditions must be fulfilled before a claim can be referred to a labour court/industrial tribunal: the claim must concern labour law (**Ireland** and **Sweden**); an employment relationship is a condition for admissibility of a claim (**Luxemburg**[496] and **Portugal**); the claim must concern a subordinate relationship established with a view to enter into employment contracts, from contracts legally qualified as equivalent to employment contracts or from traineeship contracts (**Portugal**); the claim must concern an employment contract (**Romania**) and the claim must concern the notion of 'employee' (**Sweden**).
The Labour Court in **Denmark** deals with employment cases involving infringement on obligations laid down in a collective agreement. The Labour Court deals especially with a large amount of payment claims. The Court is competent to decide whether a person is

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488 § 1173a Article 71(1) of the Liechtenstein Civil Code.
489 § 1173a Art. 71(2) of the Liechtenstein Civil Code.
490 *Rechtsfürsorgeverfahren.*
491 Article L.1421-1 of the French Labour Code.
492 Irish Labour Court and the Employment Appeals Tribunal.
493 This system functions good since the labour courts work quick and are cheap. Trade unions provide free legal assistance for their members submitting a dispute to the labour court.
494 Those procedures are effective, since employees can present their own cases or avail of their trade union or use solicitors, which can be expensive as costs are not awarded. See Case C-268/06, *Impact v Minister for Agriculture and Food and Others*, [2008] ECR I-02483, paragraph 73 of Advocate General Kokott's Opinion.
495 The national labour courts work efficient. Hearings take place and judgements are issued in quite short delays, i.e. several months for a procedure without incidents. Legal action is affordable, due to the proximity of the court, the absence of court fees and a large system of legal aid.
496 Article 25(1) of the Luxemburg Code of Civil Procedure.

working as an employee or an employer. The notion of the contract does not play an important role, except in rare cases.
In **Cyprus**, the file must be lodged within one year from the date of the alleged incident. The Industrial Disputes Court is composed of a judge and two lay members, each representing the employers and workers' sides and they are selected from a list submitted by the employer's organisation and the trade unions.
The Appellate Court Bucharest in **Romania** decided that a certain compromise clause was valid, because the contract in which it was inserted was not an employment contract, but a civil one.[497] In that case, the competent courts are civil courts. In Romania, specialised courts for labour law are active only at the first level of jurisdiction. As the High Court of Cassation and Justice asserted, a conflict is a labour conflict if it has a direct connection with the execution of an employment relationship, regardless if it is invoked.[498]

If a worker requests judicial protection, the competent labour court in **Slovenia** is obliged to organise a settlement hearing. If settlement is not successful, a main hearing has to be arranged. The Slovenian rules on civil procedure encourage adoption of compromises (settlements) in the labour court, an idea that was also adopted by the Labour and Social Courts Act.[499] The Slovenian Labour Court is free to decree a settlement hearing (the decision depends on the actual circumstances of the case; if the extrajudicial alternative dispute resolution was not successful, or in the case where the legal situation is clear, the court will probably not decide to organise a settlement hearing). If no settlement is reached, the court also immediately sets the date of the main hearing.

In **Sweden**, only a few cases from the Labour Court involve questions regarding the notion of 'employee' and the distinction between an employee and a self-employed worker. Disputes may be resolved before being submitted to the courts. The jurisdiction of the Labour Court is the widest possible, encompassing all kinds of labour disputes concerning application of labour law legislation. The Labour Court is a tripartite body comprised of judges with a judicial background and of members representing both sides of the labour market. The representatives of the social partners constitute the majority of the court in most instances. The Labour Court acts as a Supreme Court in labour disputes. It is also the first instance in all proceedings filed by an employers' organisation or a trade union.[500]
In **Finland**, the Labour Court handles disputes relating to collective agreements; the court does not rule on generally applicable collective agreements.

3.3. Labour Inspectorates and other Institutions

Labour inspectorates and/or other institutions play an important role when it comes to the settlement of disputes in labour law cases in three countries (**Belgium**, **Ireland** and **Norway**) with regard to disputes in individual labour law. The Labour inspectorate in **Belgium** possesses very great powers. The Labour inspectorate can play a role in deciding whether there is an employment relationship, but its decision is subordinated to the judgement of the (labour) courts if one of the parties does not accept the decision. The Belgian labour law is related to the criminal law, with the exception of the Belgian Act on Employment Contracts of

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497 Romanian Decision No. 1333, 6 April 2006. According to the contract, the debtor obliged himself to organise several tennis events for the creditor, in exchange to a certain payment per month. The court considered this contract as being a civil one; therefore the parties were free to negotiate the competence of an arbitrator to settle any dispute between them.

498 Romanian Decision No. 6549/5 July 2006.

499 Article 26 of the Slovenian Labour Code.

500 In the majority of the cases the Labour Court serves as the first and only instance, leaving no room for appeal. The Labour Court decides on about 200 cases each year, for which reason only a small proportion of all Swedish labour disputes reaches its courtroom. The main reason for this is that in order for the Labour Court to try a case all possibilities to solve the dispute by way of negotiation must have been tried and ruled out.

3 July 1978, because all labour laws contain criminal penalties. The labour inspection can draw up a policeman's report, which could lead to criminal prosecution of the employer.[501] In **Ireland**, disputes arising under labour law can be referred to a Rights Commissioner. With regard to conflicts of interest[502], such disputes, if both parties agree, can be submitted to the Labour Relations Commission. The industrial relations officers will attempt to reach a conciliated resolution. If this result cannot be achieved, the dispute can be referred to the labour court for a non-binding adjudication. In order to ensure better compliance with employment rights across the economy, the Irish Government established the National Employment Rights Authority in February 2007. Its inspectors were granted extensive powers to promote, encourage and secure compliance. The National Employment Rights Authority inspectors, however, have no adjudicatory functions. Although the Inspectorate has no role in determining whether there is an employment relationship, the inspector would have to form a view as to whether one existed before exercising his or her powers.
The labour inspection authority in **Norway** offers guidance in employment issues to individuals as well as employers. In practice, the labour inspection authority will often settle disputes by simply informing the parties about the applicable legislation and even more in cases where the labour inspection authority issues orders and decisions as to how a matter is to be solved, e.g. in cases of social dumping. The labour inspection authority may issue fines and, in serious cases, submit cases to the police authorities. The labour inspection authority may order continuous coercive fines for each day, week or month that passes after the expiry of the time limit set for implementation of the order until the order is implemented. A coercive fine may also be imposed as a single payment fine.[503] If orders are not complied with within the time limit, the labour inspection authority may fully or partially suspend the undertaking's activities until compliance with the order has been proved. In the event of immediate danger, the labour inspection authority may suspend those activities that are associated with the dangerous situation, even if no order has been issued.[504]

4. Ascertaining in Advance the Legal Nature of an Employment Contract in an Authoritative Way

In some countries, there is a possibility to ascertain in advance whether an individual has an employment contract or not. This can be done by declaration, decision or certification, in five countries (**Germany**, **Ireland**, **Italy**, the **Netherlands** and **Romania**).

With regard to the existence of 'employment' (*Beschäftigung*) within the meaning of Section 7 of the **German** Social Code IV, Section 7a, contains an administrative procedure. According to Section 7a sentence 1, the parties to a relationship can apply to an administrative body to decide upon the existence of 'employment'. According to Section 7a sentence 2, the competent collection office can initiate such proceedings as well if the relevant person is either the spouse, partner or an offspring of the employer or the managing partner of a private limited company; the latter provision can be explained by peculiarities of German Social Insurance Law. The general purpose of Section 7a in any event is to provide a quick and uncomplicated tool for determining the existence of 'employment'. Its main advantage lies in the fact that it normally reduces the risks that arise from an erroneous qualification of the underlying relationship.
In **Italy**, the *Riforma Biagi* in 2003 introduced the certification of contracts. The certification is a procedure aimed at certifying whether a contract fulfils the proper subject and form

501 Belgian Act of 16 November 1972.
502 I.e. a conflict about a new issue.
503 See Section 18-7 of the Norwegian Working Environment Act.
504 See Section 18-8 of the Norwegian Working Environment Act. The Inspectorate in principle has only a role in enforcing labour/employment conditions (working time regulation, health and safety etc.) and does not decide whether there is an employment relationship or not.

requirements set out by the law. The certification activities can be carried out by the Labour Office, Paritarian Institutions[505], and special commissions set up by Universities and their Labour Law Chairs/Research Units. The subject matter of certification is, *inter alia*, all labour contracts. The certification offices provide advice and support both to employer and employee, either for execution or for changes in the contract. Similar in the **Netherlands**, where the Tax Authority can certify a civil contract by giving a Declaration of Income Tax. The relationship of a person (the provider of the services) to the client cannot be regarded as an employment relationship if the provider of the service has a Declaration of Income Tax Status.[506] Such a declaration determines that the benefits of activities should be regarded as profits from business activities[507] or that the activities should be regarded as income at the risks and expense of the undertaking[508]. This declaration is valid for one year, and is annually renewable.

In **Ireland**, the Code of Practice on Employment Status suggests that, if there is doubt as to whether a person is employed or self-employed, the Local Tax Office or SCOPE Section of the Department of Social and Family Affairs should be contacted. After establishing all the relevant facts, a written decision as to the status is issued. Such a decision, although not decisive save for social welfare purposes, is indicative of employee status.
Once a contract is registered by the Labour inspectorate in **Romania**, it is considered similarly for fiscal purposes, for social security contributions and for determining the competence of labour courts in case a dispute occurs. Similarly, the authorisation or registration within the Romanian Trade Registry creates the presumption of conclusion of civil contracts, and if not relating to employment contracts, for activities for which it obtained registration. In practice, the only cases where legal disputes relate to the nature of the relation between parties are those where no written contract was available and no authorisation or registration was provided.
The legal nature of an employment contract cannot be officially ascertained in advance in most other countries (**Austria**, **Belgium** (not yet), **Bulgaria**, **Cyprus**, the **Czech Republic**, **Denmark**, **Estonia**, **Finland**, **France**, **Germany**, **Greece**, **Hungary**, **Iceland**, **Ireland**, **Latvia**, **Liechtenstein**, **Lithuania**, **Luxemburg**, **Malta**, **Norway**, **Poland**, **Portugal**, **Slovakia**, **Slovenia**, **Spain** and **Sweden**).

In the future, social ruling will become possible in **Belgium**, but the relevant Act is not yet applicable. The 'social ruling' will only be binding for social security authorities. The programme Act of 27 December 2006, title XIII, 'Nature of the labour relations', aims to eliminate, at least to a certain extent, the uncertainties with regard to the true nature of the labour relationship. This Act provides for the establishment of a 'Commission on labour relations', including both a Legislative Committee and an Administrative Committee.

5. Ascertaining Employee Status in Individual Cases: Social Dialogue and Collective Bargaining

Only in a few countries, social dialogue and collective bargaining play a role in ascertaining employee status in individual cases (**Austria**, **Finland** and **Sweden**). In **Austria**, social dialogue plays an indirect role in ascertaining employee status in individual cases. The

505 A paritarian institution means that it is jointly managed by the representatives of employers and employees.
506 Article 6(1)(e) of the Netherlands' Social Insurance Acts. The legislation that falls under this term is the Netherlands' Work and Income Act, the Netherlands' Sickness Benefits Act and the Netherlands' Unemployment Insurance Act.
507 Declaration of Independent Contractor Status.
508 Declaration of Income Tax Status.

panels of the courts for labour law and social security law are partly composed of members of the social partners. The social security institutions are managed by the social partners and are thus indirectly competent to ascertain employee status according to social security legislation. Social partners or works councils can submit a claim to ascertain the employee status of a certain number of workers.[509]

In **Finland**, when negotiating and applying collective agreements, the focus is on the employment relationship. This can lead to questions as to whether an individual falls outside the scope of an employment relationship. At work place level, the status of a person performing work would probably be raised, if it is indeed raised, by a shop steward. The initiative would probably be taken by the person performing work and feels that he or she was placed under a false label to the individual's detriment.
In **Sweden**, trade unions and employer's organisations can also assist their members in disputes on the notion of the 'employee'.

In most countries, social dialogue mechanisms and collective bargaining do not play any role in ascertaining the employee status in individual cases (**Belgium**, **Bulgaria**, **Cyprus**, the **Czech Republic**, **Denmark**, **Estonia**, **France**, **Germany**, **Greece**, **Hungary**, **Iceland**, **Ireland**, **Italy**, **Latvia**, **Liechtenstein**, **Lithuania**, **Luxemburg**, **Malta**, the **Netherlands**, **Norway**, **Poland**, **Portugal**, **Romania**, **Slovakia**, **Slovenia**, **Spain** and the **United Kingdom**).

[509] Article 54 of the Austrian Employment and Social Courts Act (*Arbeits- und Sozialgerichtsgesetz*).

CHAPTER VI. ROLE OF SOCIAL DIALOGUE AND COLLECTIVE BARGAINING

1. Introductory Remarks

The leading features of this chapter are social dialogue and collective bargaining. Both instruments can play a role in guaranteeing rights to individuals working under an employment contract or having an employment relationship. Reference is made to obstacles that trade unions experience when securing particular categories of working people (Section 2). The question whether trade unions (can) represent particular categories of working people at all, plays an important role. Therefore a distinction is made between trade unions that represent those categories and trade unions that do not. In most countries, trade unions are not allowed to, or simply do not, represent particular categories of working people. Nevertheless, in many countries trade unions may and do represent those particular categories.

2. Obstacles of Trade Unions in Securing Worker Representation and Collective Rights for Particular Categories of Workers

2.1. Trade Unions Representing also Special Categories of Workers

Apart from employees working under an employment contract, trade unions in **Austria**, **Denmark**, **Germany**, **Ireland**, **Italy**, **Liechtenstein**, **Lithuania**, the **Netherlands**, **Romania**, **Sweden** and the **United Kingdom** may represent specific categories of self-employed professionals and economically dependent workers.

In **Austria**[510] and **Belgium**[511], collective agreements may, in principle, be concluded only for employees. Nevertheless, in **Austria** there is a new provision in the Austrian Workers Chamber Act, according to which the membership to the chamber[512] is extended to include economically dependent, so-called employee-like persons.[513] These persons are self-employed from a legal point of view, whilst some labour law statutes are also applicable to these persons[514], but they cannot be subject to collective agreements.
Trade unions in **Denmark** are, in principle, only able to conclude collective agreements on behalf of employees. The concept of an employment contract is, however, rather inclusive and the trade unions conclude many collective agreements on behalf of atypical workers. This is also due to the fact that many atypical workers and self-employed persons are members of trade unions. Employers in some sectors are more reluctant to conclude collective agreements than employers in other sectors, e.g. on temporary agency work. According to unwritten labour law principles, a trade union is entitled to take industrial action in support of a collective agreement for all types of work carried out on an employee basis. Accordingly, a trade union is not entitled to take industrial action in support of a collective

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510 Article 1 of the Austrian Labour Constitution Act (*Arbeitsverfassungsgesetz*). The same can be said for plant agreements and generally for worker representation on the plant level: only employees are represented by works councils and only employees are legitimised to elect the members of the works councils and may be elected as employees' representatives.

511 Article 2 of the Belgian Act on Collective Labour Agreements of 5 December 1968.

512 I.e. *Arbeiterkammer*: a state body that lobbies for the interests of employees and is actually – not legally – in close cooperation with trade unions

513 Article 10(1) of the Austrian Workers' Chamber Act (*Arbeiterkammergesetz*).

514 E.g. Labour and Social Security Procedure Act; Anti-Discrimination Act.

agreement covering work carried out on a self-employed basis, e.g. different kind of freelance work. This restriction in the right to take industrial action is based on a general prohibition against collective agreements between self-employed persons. It is left up to the labour court to decide in each case whether the work is carried out on an employee or a self-employed basis. The labour court has permitted the right to take industrial action in support of a collective agreement covering freelance work in the media sector. The decision of 24 August 2007 (A2007.293) was in line with a decision issued by the Competition Board ruling that the specific kind of work was not to be considered as being carried out on a self-employed basis.

In **Finland**, the Federation of Professional and Managerial Staff [515] has experienced problems with getting employers to conclude collective agreements. However, there has been a development and collective agreements have been concluded for several sectors. It seems that the relevant employer federations are not prepared to sign agreements that are as comprehensive as normal sector-wide agreements.[516]
In **Iceland**, the trade unions have not faced any obstacles in securing worker representation for special categories of workers.

In **Germany**, trade unions are statutorily empowered to represent both employees and 'employee-like persons'. A collective agreement in **Liechtenstein** may include freelance personnel and specific categories of self-employed professionals if the contracting associations are authorised to do so according to their statutes. The authorisation of the associations to create rules effecting third parties is legally limited to employment contracts.[517]
In **Ireland**, two specific groups of largely self-employed persons (e.g. taxi drivers and postmasters) have their own trade union. The Irish Medical Organisation also has a large number of self-employed doctors as members. Other professionals, such as solicitors, can be members of what the Trade Union Act 1941 refers to as 'excepted bodies' which can function like a trade union without having to comply with the licensing requirements.
The obstacles in **Italy** are related to the decline in trade union membership and collective bargaining coverage. New types of contracts are not subject to collective bargaining agreements. This has created a growing wage inequality between employees and self-employed. The representation gap was only partially filled by civil society organisations. The trade union *Nuove Identità di Lavoro* [518] is aimed at representing atypical, unprotected workers and advocates specific legislation clearly defining the scope and rights of workers subject to employment contracts different from traditional hiring. The problem is that *Nuove Identità di Lavoro* is a form of representation without actual bargaining power.

In **Lithuania**, the Law on Trade Unions allows persons working under an employment contract as well as persons who are not covered by labour law, e.g., civil servants, freelancers, the self-employed, to organise and to join trade unions.[519] In addition, the Lithuanian Law on Trade Unions allows trade unions to organise activities on the ground of

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515 White-collar workers of a higher level.
516 http://www.ytn.fi/neuvottelu
517 *"The provisions of the collective employment contract concerning conclusion, content, and termination of the individual employment relationships shall be directly applicable during the contract's duration to the participating employers and employees, and may not be contracted away unless otherwise provided for by the collective employment contract",* § 1173a Article 105(1) of the Liechtenstein Civil Code. In this case the enforcement can only be effected by influence of the associations, so that a direct claim by the freelance and self-employed professionals against their contracting partner is not possible. However, concerning economically dependent persons, an analogous application of protective collective employment contract provisions with normative effect is to be considered.
518 A trade union created in 1998.
519 Article 1(1) of the Lithuanian Law on Trade Unions.

profession or any other ground.[520] However, under Lithuanian law, the right of the union to represent members and to conclude collective bargaining agreements or to initiate strikes is explicitly granted to the employees' trade unions by the Lithuanian Labour Code and to civil servants, by virtue of special provisions in the Law on Civil Service. If the members are not covered by employment legislation, there is no possibility of initiating collective bargaining. Sectoral bargaining in Lithuania is rather an exception. Finding the counterpart would constitute major practical obstacles for the unions. A few years ago, the Lithuanian Journalist Union was able to reach a sectoral agreement in the media sector that regulated, *inter alia*, questions on royalties, i.e. issues not relating to labour law[521], but this was achieved mainly due to the dual nature of the legal relationship of journalists with an employment contract.

In the **Netherlands**, rights for e.g. freelance personnel and specific categories of self-employed professionals may be laid down in collective agreements. Normally, trade unions represent employees. However, this does not mean that there are no trade unions representing particular categories of employees. An example is the Alternative Trade Union[522]. This trade union represents teachers, temporary agency workers, Europeans, i.e. all persons who are willing to live and work within the European Union, freelancers and flex workers[523]. Problems they face include a shortage of members and substantial differences between special categories of workers.

In **Romania**, *"the citizens may associate freely in political parties, in trade unions, in employers' organisations and in other forms of association".*[524] However, *"the employee and the public servants have the right to create trade union organisations and to adhere to these. The persons who exercise in terms of law a trade or a profession independently, the cooperative members, the farmers, as well as the persons in course of qualification are entitled, without any restriction or previous authorisation, to adhere to a trade union organisation".*[525] The law therefore distinguishes between the right to create a trade union, which is granted only to employees, and the right to belong to an existing trade union, which may be exercised by other persons as well. This is why this provision of the Romanian Trade Union Law was challenged before the Constitutional Court, ruling that there was no discrepancy between the provisions of the law and those of the Constitution.[526]

In **Sweden**, self-employed persons increasingly become trade union members. Some professional unions, for instance organisations for dentists and architects, have a high proportion of self-employed workers among their members, and some white collar unions, e.g. in the engineering sector, have witnessed a rapid increase in the number of self-employed members. The 'Swedish Model' of industrial relations, characterised by a high degree of autonomy of the social partners, a high organisation rate[527] and collective bargaining as the main instrument for regulation of employment conditions and employment relationships, helps trade unions to organise new categories of workers. The Swedish (1976:580) Co-determination Act provides a general right of negotiation for all trade unions, having at least one member within a workplace, and additional rights of negotiation and co-determination are granted to trade unions bound by a collective agreement with the employer. Trade union recognition is automatic in Sweden, and collective agreements can be forced through by trade unions taking industrial action towards the employer.

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520 This explains why not only unions of public servants exist but also trade unions like Lithuanian Journalists Union, Vilnius Taxi Drivers Union, Lithuanian Doctors' Union or even the union uniting the heads of public hospitals.

521 See http://www.eurofound.europa.eu/eiro/2007/02/articles/lt0702029i.htm

522 Alternatief Voor Vakbond.

523 I.e. persons working on the basis of fixed-term employment agreements.

524 Article 40(1) of the Romanian Constitution. Therefore, the freedom of association in trade unions it is not limited to the category of employees or public officers.

525 Article 2 of the Romanian Trade Unions Law.

526 Resolution No. 469 from 4 December 2003.

527 A trade union organisation rate of about 73 per cent today.

In the **United Kingdom**, trade unions have been keen to reach out to non-traditional groups: the problem has been getting access to these workers. In sectors as the telecom industry, where trade union membership was traditionally relatively high, workers have continued their membership once their work was contracted out via agencies. Therefore trade unions such as the Communication Workers Union have been able to work with their members in these sectors where the workplace as the traditional site of organisation has gradually changed.

2.2. Trade Unions Not Representing Special Categories of Employees

Particular categories of workers, such as freelance personnel, specific categories of self-employed professionals and economically dependent workers are in most cases not represented in the following countries: **Austria**[528], **Belgium** (sometimes), **Bulgaria** (including civil servants)[529], **Cyprus**, the **Czech Republic**, **Estonia**, **Ireland** (sometimes), **Latvia**, **Luxemburg**, **Malta**, **Norway**, **Poland**, **Portugal**, **Spain** and **Slovakia**.

With regard to freelancers, specific categories of self-employed professionals and economically dependent workers constitute a problem in **Belgium**, because these people are rarely a member of a trade union. Trade unions represent these persons only to a minimal extent. Some persons are organised in professional associations, but these are not trade unions. These categories of workers are not subject to collective bargaining agreements. This is also the case in **Latvia**.

In **Bulgaria**, collective bargaining is a mechanism designed only to regulate employment relationships, social insurance relations, and issues of living standards for employees. Thus, specific categories of workers are not accepted as members of a trade union. This is also the case in **Estonia**[530], **Greece**, **Hungary** and **Poland**. Moreover, collective bargaining is not applicable to those categories of workers. Temporary agency workers in **Hungary** have already formed a trade union, but self-employed, freelancers and economically dependent employees remain without any representation.

In **Ireland**, the principal obstacle faced by trade unions in securing collective bargaining rights for categories of workers such as self-employed professionals is the Irish Competition Act 2002. As part of the current social partnership agreement, the Government committed to introducing legislation to exclude voice-over actors, freelance journalists and session musicians when engaging in collective bargaining from the provisions of Section 4 of the 2002 Act. The Government thereby stated that there would be no negative impact on the economy or in the level of competition with regard to the specific attributes and nature of the work involved. Competition restrictions still apply to self-employed professionals such as dentists.

In **Luxemburg**, no efforts were made by trade unions to extend their operating range by including particular categories of employees. If they did so, they would face a legal obstacle, because the legal framework of collective bargaining is restricted in its scope of application to employees and could thus not include a third category of workers. Additionally, they would be confronted with a political obstacle, as the Luxemburg government is opposed to an intermediate solution by introducing a third category of freelance or self-employed professionals and intends to continue the traditional differentiation between independents and employees. The only efforts that have been made consist of some regulation of certain atypical forms of employment. In this context, progress has been made for temporary agency workers and teleworkers.

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528 But economically dependent workers are member of the Austrian Workers Chamber (*Arbeiterkammer*).
529 Article 49(1) of the Bulgarian Constitution and Article 4 of the Bulgarian Labour Code.
530 Persons not working under an employment contract are not covered by the representations rights.

The major problem in **Malta** is that newer forms of employment contracts are not really covered by collective agreements and this often creates problems relating to legal certainty. It contrasts sharply with the clarity relating to those employed under general employment contracts.

The Law on Trade Unions in **Poland** indicates which categories of working persons may become members of trade unions. Employees, members of agricultural co-operatives and people who are parties to an agency contract are entitled to create trade unions. According to the internal statutes of trade unions, persons who carry out work in a cottage industry, retired persons and unemployed persons may join a trade union. A collective agreement must be concluded for all employees employed by employers bound by its provisions.[531] A collective agreement may be applicable to persons who carry out work within an arrangement other than an employment contract.[532] Thus, rights and duties of persons under civil law contracts or co-operating with an employer can be the subject to a collective agreement. Collective agreements cannot be concluded just for the benefit of persons who provide work under civil law contracts. Collective agreements always regulate legal situations of employees and can only additionally cover other categories of working persons.

In **Portugal** there are no trade unions for categories other than legally subordinated employees. Nevertheless, some professional categories, traditionally classified as independent workers or freelancers, may enter into employment contracts, e.g. journalists, being, thereafter, under labour law's scope and also (if intended) of trade unions.[533] However, professional associations[534] such as the Portuguese Bar[535], the Medical Association[536], the Engineers' Association[537] or Architects' Association[538] exist also to promote and stand up for these professional categories.

Legal regulations in **Slovakia** strictly define the term 'employee' in connection with the term 'dependent' work. This implies that there is only a traditional labour contract for dependent employment. New types of contracts are practically not subject to the collective bargaining.
The main obstacle in **Slovenia** is that listed categories of persons performing work are not trade union members. Nevertheless, a single collective agreement for individual professions exists, i.e. for journalists, which also applies for freelancers. Apart from employees, trade unions in **Spain** have only managed to represent the economically dependent self-employed so far, not any other autonomous workers, because of the lack of tradition in that field.

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531 Article 239(1) of the Polish Labour Code.
532 According to Article 239(2) of the Polish Labour Code.
533 Article 442(1)(a) of the Portuguese Labour Code.
534 Not to be confused with trade unions. A trade union is defined as a *"permanent association of employees, for the defence and promotion of its socio-professional interests"*.
535 www.oa.pt
536 www.ordemdosmedicos.pt
537 www.ordemengenheiros.pt
538 www.arquitectos.pt

CHAPTER VII. BOGUS SELF-EMPLOYMENT: THE RISKS OF FALSE LABELLING

1. Introductory Remarks

The final chapter of this Thematic Report focuses on a 'hot issue', namely the problems around and consequences of bogus self-employment. The chapter describes the problem(s) of bogus self-employment in Section 2, followed by an overview of whether there are any legislative attempts to combat bogus self-employment in the surveyed countries (Section 3). Moreover, reference is made to chapter V of this Thematic Report, where the different dispute settlement and enforcement mechanisms relating to labour law are explained (Section 4). Finally, the actual consequences of bogus self-employment are listed in Section 5.

2. The Problem

Bogus self-employment or concealed labour is defined in several ways. One example can be found in an ILO Report that determines that, "*A disguised employment relationship is one which is lent an appearance that is different from the underlying reality, with the intention of nullifying or attenuating the protection afforded by the law or evading tax and social security obligations. It is thus an attempt to conceal or distort the employment relationship, either by cloaking it in another legal guise or by giving it another form. Disguised employment relationships may also involve masking the identity of the employer, when the person designated as an employer is an intermediary, with the intention of releasing the real employer from any involvement in the employment relationship and above all from any responsibility to the workers"*.[539]

A definition of disguised employment can also be found in the Commission's Green Paper. This paper states that, persons described as self-employed may *de facto* not be genuinely self-employed, because either the employer or the workers aims to avoid certain consequences, notably financial burdens, linked to the employment status. According to the Green Paper of the Commission, bogus self-employment, also known as disguised employment, occurs *"when a person who is an employee is classified as other than an employee so as to hide his or her true legal status and to avoid costs that may include taxes and social security contributions. This illegal practice can occur through the inappropriate use of civil or commercial arrangements".*[540]

Other definitions of bogus self-employment or concealed employment can be found in **France** and in **Italy**. In **France**, concealed labour[541] is defined as an activity intentionally hidden in order to avoid payments of taxes or social contributions. It encompasses a wide range of offences: firstly, when employers do not submit their details to the trade, company or professional register; secondly, if they do not declare their activity or receipt at the URSSAF, and finally, when employers misstate the number of hours worked by employees in their company. In **Italy** the notion of bogus self-employment refers to the situation of workers

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539 ILO Report V(1), The employment relationship, International Labour Conference, 95th Session 2003, p. 12.

540 See the Commission Green Paper, Modernising labour law to meet the challenges of the 21st century, COM(2006) 708, p. 10 and 11.

541 It encompasses a wide range of offences: at first, when employers do not register to the trade, undertaking or professional register; secondly, if they do not declare their activity or receipt at the URSSAF, and finally, when employers under declare the number of hours of labour made by employees in their undertaking.

whose status might appear as 'ambiguous' (i.e. although the worker is self-employed, the job that he/she performs seems an intermediate category between employee and self-employed worker). Italian law also defines such work arrangements as 'disguised work'.[542] The disguised work stems from the collapsed distinction between employee/self-employed individual regimes. Disguised work is considered malpractice; workers do not achieve full protection coverage under applicable law and collective bargaining.

In principle, there are two ways to disguise an employment relationship. The first way consists of giving the employment relationship the appearance of a relationship of a different 'legal nature', e.g. civil or commercial. The second way to disguise an employment relationship is through the 'form' in which the relationship is established. This might be the case, e.g. of contracts concluded for a fixed-term or a particular task that are repeatedly renewed without any interruption. In this case, the worker/employee is not entitled to the rights and the benefits normally provided to employees by the law or collective bargaining.[543]

One of the main difficulties regarding self-employment lies in the fact that there are various forms of self-employment, such as contracting, temporary agency work, service provision or supply and the professions. Moreover, new contractual practices have been established, often not covered by legislative provisions: franchising, engineering, factoring, leasing, management contracting, transfer of know-how and software production and supply.[544]
As indicated in Chapters II and II, in order to determine whether the person concerned is an employee or a self-employed person, all elements mentioned therein are important. In almost all countries, except for **Romania** and to a certain extent **Belgium**, practical implementation is decisive for classification of the contract as an employment contract. No pure principle of primacy of facts exists in **Belgium**[545]. As a consequence, the parties' qualification of the employment relationship prevails, except in the case where the facts (working under the authority of another person) undeniably contradict the parties' qualification.

How parties labelled the contract is not a key factor in deciding whether an employment contract has been concluded or not. The contract is qualified by an overall assessment of the actual substance of the relationship. In this respect, there is interesting case law in **Austria**, **France**, the **Netherlands** and the **United Kingdom**.

The **Austrian** Supreme Court has ruled that an employee can invoke his or her 'true' status even if he or she agreed to the false labelling.[546] The *Bundesarbeitsgericht* argued that the behaviour of the employee is against the principle of *bona fide*. As a consequence, the employee does not bear any risk, he or she can invoke his or her true status at any time (within the limitation periods) and the employer must, for example, bear the risk to pay the forgone higher wage due to collective agreements, vacancy, sick pay etc.
On 10 March 1998, the Criminal Court in **France** re-qualified the sub-contracting agreements of two craftsmen into direct employment contracts. Even though these craftsmen were registered as self-employed, the Court considered that they were both bound by subordination to their former co-contractor. [547] In another case[548], the Court re-defined a

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542 Act No. 296 of 2006 refers to the notion of *lavoro non correttamente utilizzato*.

543 ILO Report V(1), The employment relationship, International Labour Conference, 95th Session 2003, p. 12 and 13.

544 A. Perulli, Economically dependent/quasi-subordinate (parasubordinate) employment: legal, social and economic aspects, p. 9 and 10.

545 Cour de Cassation, 23 December 2002, *Journal des Tribunaux de travail* 2003, 271; Cour de Cassation 28 April 2003, *Journal des tribunaux de travail* 2003, 261; Cour de Cassation 8 December 2003, *Journal des tribunaux de travail* 2004, 122; Cour de Cassation 23 May 2004, *Rechtskundig Weekblad* 2004-2005, 1220, with annotation of K. Nevens, *Kwalificatie, bewijslast en bewijsrisico*; Cour de Cassation, 6 December 2004, *Nieuw Juridisch Weekblad* 2005, 21, with annotation W. Van Eeckhoutte.

546 Austrian Supreme Court, OGH 11 October 2007, 8 ObA 49/07z.

547 Subcontracting is defined as an *"operation in which a contractor assigns through a subcontract the responsibility of the execution of a contract to another contractor, called the subcontractor"* (Act No. 97-210 of

contract where two self-employed persons were supposedly working through a temporary work agency with a third person. The Court considered that they were *de facto* working in a direct employment relationship with the supposed client of the temporary work agency. Both cases illustrate the superiority of the actual situation over the literal phrasing of the contract. These also prove the importance assigned to subordination ties when a re-definition case is studied by a court.

The **Netherlands** Supreme Court also looks at the substance rather than just the form of the contract.[549] Two cases illustrate this.
The first case, *Bethesda/Van der Vlies*[550] dealt with a carer of elderly people who worked full-time for about thirty years for a home and nursing institution for elderly people. Therefore she gained board and lodging, as well as a small amount of holiday pay and a small Christmas bonus. The carer alleged that she had an employment contract with the nursing institution. The court ruled that she was right and the nursing institution had to pay remuneration for the last five years with retrospective effect in compliance with the collective agreement for nursing institutions for elderly people.
In the second case, *Van Houdts/BBO*[551], Van Houdts, a bus driver, worked for the organisation BBO until 1995. With three other bus drivers, he concluded an agreement on 24 July 1995 for the establishment of a commercial partnership. BBO was the main client. The commercial partnership ended in 1997 since not all licences were assigned. Van Houdts claimed before the court that he or she had an employment contract from 1 May 1995, alternatively 8 August 1995, until 1 July 1997. He therefore claimed subsequent payment of his or her remuneration. With regard to the actual course of events of the commercial partnership, Van Houdts offered evidence. The court of appeal rejected the offer by stating that the evidence was not relevant for the question whether there was an employment contract between Van Houdts and BBO. The Netherlands Supreme Court, however, ruled that all evidence should be taken into consideration to determine whether Van Houdts could be considered as an employee or not.

An example of bogus self-employment in the **United Kingdom** can be found in the case *Consistent Group Ltd. v. Kalwak*[552] where temporary agency workers had been recruited in Poland and had been provided with transport and accommodation. However, their contracts contained a 'no mutuality of obligation' and substitution clause in an attempt to exclude employee status. The Employment Appeals Tribunal held that it was realistic to regard them as having entered into an obligation of personal service with regard to the temporary work agency. The Court of Appeal rejected Elias J.'s emphasis on the importance of tribunals having regard to substance rather than form when construing work or employment contracts. It ruled that a contractual term cannot be implied while contradicting an express term. It was not the function of the court to recast the parties' bargain. As to whether the terms of the contract excluding employment status were a sham, this requires a finding that both parties intended the contract to create an illusion as to the true nature of their respective obligations. The question of sham agreements was then revised in the Court of Appeal's decision in

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11 March 1997 reinforcing the fight against illegal work). In the frame of a subcontract, the subcontractor is fully free to take any initiative or decision in order to enforce the contract. The fact that the main entrepreneur is providing the needed material does not change the status of the contract. On the contrary, the subcontractor can not solely be a manpower provider unless the subcontractor's undertaking is also a temporary work agency. Similarly, the subcontractor can not only be a provider of building material. Therefore, the elements of a subcontracting contract will differ from the elements of a sales agreement (price fixing, cession, etc.). Furthermore, the subcontractor can not be a representative of the main entrepreneur.

548 Cass. Crim., 14 February 2006.

549 HR 8 April 1994, *NJ* 1994, 704, *JAR* 1994/94 (Agfa/Schoolderman) and HR 14 November 1997, *NJ* 1998, 149, *JAR* 1997, 263 (Groen/Schoevers).

550 HR 12 October 2001, *JAR* 2001/238 (Bethesda/Van der Vlies).

551 HR 15 December 2006, *NJ* 2007, 448, *JAR* 2007/19 (Van Houdts/BBO).

552 [2007] IRLR 560.

Protectacoat Firthglow Ltd v. Szilagyi.[553] On starting work for Protectacoat, S. was told to sign what purported to be a partnership agreement with another man. The contract between P. and the partnership said that P. was under no obligation to provide work for the partnership, the partnership could provide services for others, fees were to be agreed in advance and the partnership was to provide the relevant equipment. The partnership was also to hire a van and tools from P. for which a charge would be levied. In fact, S. was sent out in P.'s van for which no charge was made and S. was told to say that he or she was employed by P.. Another worker who carried out work for other clients was dismissed for this. Payment was made directly to S. and not to the partnership, with tax deducted at source, and S. had to report at P's yard before and after each job. When a dispute arose over a safety issue, S. was dismissed and claimed unfair dismissal. The question then was whether the partnership had a contract for services with P. or whether S. in fact had a contract of service with P. and was thus an employee. The Employment Tribunal found that the partnership agreement was a sham and that S. was an employee. This was upheld by the Court of Appeal which emphasised that the test for a sham had to be sensitive to context, which meant that case law from the commercial world where there are two parties of equal bargaining power might not be relevant. In the field of employment, the reality may well be that the principal/employer dictates what the written agreement will say and the contractor/employer must take it or leave it. Smith LJ said that in a case involving a written contract, the tribunal will ordinarily regard the documents as the starting point and will assess which legal rights and obligations the written agreement creates. However, subsequently it may become necessary to assess whether the parties intended or envisaged that its terms would be carried out as written. The essential terms concern mutuality of obligation and the obligation of the personal performance of work. The Employment Tribunal judge was entitled to conclude that both the partnership agreement and the services agreement were shams in the sense that they did not describe or represent the true intentions and expectations of the parties. Protectacoat wanted the installers to be treated as employees when it came to attendance and control without giving them the rights they would enjoy as employees.

3. Legislative Attempts to Combat Bogus Self-employment

A few countries have legislative attempts aimed at combating bogus self-employment (**Liechtenstein**, **Lithuania**, **Portugal** and **Slovakia**). There is a provision against bogus self-employment in **Liechtenstein**. According to Article 2 paragraph 1(a) of the Liechtenstein Act on Posting of Workers: whoever invokes self-employment must, at request, prove this to the competent authorities.[554]

To fight bogus self-employment, in **Slovakia** the definition of 'dependent work' was inserted into the Labour Code.[555] According to Article 11/1 of the Labour Code *"an employee shall be a natural person who in labour-law relations and, if specified by special regulation also in similar labour relations, performs dependent work for the employer"*. According to Article 1/2 of the Labour Code, *"dependent work, which is performed in a relationship where the employer is the superior and the employee is subordinate, is defined solely as work performed personally as an employee for an employer, according to the employer's instructions, in the employer's name, for a wage or commission, during working time, at the expense of the employer, using the employer's tools and with the employer's liability, and also consisting mainly of certain repeated activities"*. Moreover, the Labour Code states that dependent work may be performed only in an employment relationship, a similar working

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553 [2009] IRLR 365.

554 Switzerland has enacted an Act against illegal employment. The Liechtenstein legislator often follows the Swiss legislator concerning employment law. Therefore it is possible that Liechtenstein will introduce a similar act in the future; currently there is not yet any corresponding project in the pipeline.

555 By the Slovak Act No. 348/2007 Coll.

relationship or in exceptional cases defined herein in another form of labour law relationship. Business activity or another gainful activity based on a contractual relationship under civil or commercial law is not deemed to constitute dependent work.[556] Employers, despite the threat of penalty that can be imposed by the Labour inspectorate, in many cases do not respect the new legal regulation.

Denmark holds to a general impression that it is important to combat bogus self-employment in labour law, social security law and tax law. Tax authorities have gradually increased supervision of self-employed persons. Therefore, it is more difficult today than it was ten years ago to carry out work as a 'self-employed' person if the work is, in fact, carried out on an employee-like basis. Furthermore, the Labour court, as well as other courts, has taken a very realistic approach to the distinction between employee and self-employed. This means that a broad range of atypical work contracts are deemed to be de facto employment contracts. The social partners have also attempted to combat bogus self-employment in, among others, the building sector. This is primarily done by means of collective agreements, e.g. provisions on temporary agency work, and the control mechanisms attached to these agreements.

In addition to Article 12(2) of the Labour Code in **Portugal**, the Portuguese Government announced measures in 2008 to fight hazardous employment and fraudulent rendering of services agreements. One of the proposed measures was to impose payment of social security contributions to employers who benefit from services agreements.[557] The Government intended for this legislation to become effective simultaneously with the new Labour Code. However, these modifications were suspended and postponed. In comparison to **Portugal**, **Lithuania** effectively attempted to tackle illegal work. To this effect, Parliament further specified the definition of illegal work in August 2009. Work is illegal, if the work was performed without stipulating if the worker is employed and insured in an employment contract.

In **Austria**, there are neither existing nor planned activities to combat (bogus) false labelling in the field of labour law. But in the field of social security law, the government passed important legislation to combat false labelling and bogus self-employment in the last ten years: On the one hand, administrative and criminal penalties were introduced or tightened. On the other hand, self-employed persons are generally subject to social insurance in the same way as employees, so they also have to pay insurance premiums. The government also tightened the penalties for false labelling in tax law. As a result, these developments reduce the benefits of false labelling to employers. Furthermore, tax and social security officials can assess the true nature of the relationship, which also induces the employer to categorise the relationship as a contract of employment, also in the field of labour law.

In **Iceland**, the Federation of Industry has recently launched a campaign against bogus self-employment, through advertisements in the media. The campaign of the Federation of Industry is both focused on the general public and on those who do not pay taxes on payments received for their work. This would especially apply for self-employed tradesmen. The purpose is to raise awareness and counter tax evasion. In the advertisements, the Federation of Industry points out that every year, Icelandic society is deprived of 40 billion ISK due to what is referred to as the 'black industry'. The Federation also points out why this is negative for society. The Federation's homepage provides further information about the

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556 Article 2/3 of the Slovak Labour Code.

557 The possibility to impose payment of social security contributions to employers who benefit from services agreements is presently foreseen in the new Code of Social Security Welfare Contribution, approved by Law No. 110/2009 (Articles 150, No. 3, 151, No. 2, 153, 154, No. 2, 155, No. 3 and No. 4, 167 and 168, No. 4). However, please note that the new Code shall enter into force on 1 January 2010.

'black industry', its volume and impact, and a special link where information can be submitted about tax evasion.[558]

Sweden makes no legislative attempts in this area either. In a governmental inquiry report from 2002[559] the appropriateness of the current notion of 'employee' was examined. The report found in favour of maintaining the *status quo*. The government saw no need for statutory definition (and thereby perhaps changing the meaning of) the notion of 'employee', or extending the personal scope of labour law to new categories of 'quasi-employees'. Bogus self-employment is therefore tackled by the labour court applying the mandatory notion of 'employee'. The Labour Court makes an independent assessment of the legal nature of the relationship based on the actual situation at hand. The Labour Court is sensitive to attempts to circumvent labour law legislation, and will often find in favour of an employment relationship if the person in question has changed from being an employee of the employer to an 'alleged' self-employed worker.[560]

4. Compliance and Enforcement

With regard to the compliance and enforcement of labour law provisions, Chapter V of this Thematic Report describes the different ways to reveal bogus self-employment as well as ways to combat it.

5. Measures

In all countries self-employment exists.[561] For persons who were classified as self-employed, although they are, *de facto*, workers, the consequences of false labelling may be serious. These individuals may lack important protection, such as certain social security insurances, that they would have enjoyed if they had been correctly categorised as workers. False labelling can enable employers to avoid payment of social security contributions as well as taxes for bogus self-employed persons, but also to circumvent provisions in collective agreements and labour laws. Another consequence that should be mentioned here is that false labelling automatically means illegal work (**Lithuania**).

The employer may benefit from a person being categorised as self-employed with regard to cost of payroll taxes, administrative costs, wage liabilities and an obligation to bargain with unions. Another reason for using the construction of bogus self-employment can be found in **Portugal**, where use of sham agreements relates to the Portuguese system of employment contract termination. The employer may terminate the employment contract only in exceptional cases, such as an employee's severe breach of contract or termination due to objective motives (collective dismissal, discontinuation of position or employee's failure to adapt). Instead, rendering of services agreements may be terminated by the parties, with no limitations of such nature. As a result, a large number of false agreements relating to provision of services arise, which should, *de facto*, be employment contracts. The relevance of this problem becomes evident with the frequency with which disputes over classification of contracts are considered by the courts.[562]

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558 See www.si.is/svort-vinna/stendur-thu-skil-a-thinu (only in Icelandic).

559 Ds. 2002:56 *Hållfast arbetsrätt – för ett föränderligt arbetsliv.*

560 For example, Labour Court judgement AD 2005 No. 16.

561 In Slovenia it is not officially and/or formally known as an existing phenomena and problem.

562 Given the importance of the matter, Article 12(2) of the Portuguese Labour Code already foresees *"as a very serious misdemeanour to perform an activity with the formal appearance of a services agreement but according to typical conditions of an employment contract, in a way that might cause damages to the employee or to the State"*.

5.1. Measures with regard to Labour Law

If the employer has entered into a sham agreement with the individual, the employer can be forced, retrospectively, to pay overtime work, vacation allowances and holiday allowances (**Austria**[563], **Belgium**, **Germany**, **Liechtenstein**, **Poland** and **Portugal**) or Christmas, Easter and annual holiday's bonuses as well as remuneration (**Greece**[564]). The employer in **Norway** can be forced to comply with legal occupational health and safety provisions (administrative order measures). The employer who, *inter alia*, entirely or partially evades its contribution duty by providing false or incomplete information or in another manner, will be charged. The employee in **Luxemburg** will be entitled to damages such as a compensation for the term of notice and income loss due to unemployment.[565]
In **Portugal**, if the contract corresponds, in fact, to an employment contract, termination by the employer is equivalent to unfair dismissal.

5.2. Administrative Measures

One of the consequences of bogus self-employment in some countries is that employers, i.e. former contractors, have to pay all social security contributions as well as taxes retrospectively over the period when such contributions were due (**Austria**[566], **Germany**, **Greece**, **Iceland**, **Ireland**, **Liechtenstein**, **Norway**, **Poland**, **Portugal** and **Slovakia**).

Another consequence for the employer may be that, for intentional false labelling of employees, administrative sanctions, such as penalty payments, are imposed (**Austria**[567], **Belgium**, the **Czech Republic, France**[568], **Germany**, **Italy**, **Liechtenstein**, **Lithuania**[569] and **Slovakia**) even where, as in **Austria,** the employee agreed to false labelling by concluding a contract for services.[570] In **Ireland**, if the Employment Appeals Tribunal finds in unfair dismissal proceedings that a term of the contract contravened any provision of the income tax or social welfare legislation, the Tribunal is under an obligation to notify the Revenue Commissioners or the Minister for Social and Family Affairs (as appropriate) of the matter.
If the employer does not respect the regulation on dependent work, the Labour inspectorate in **Slovakia** is authorised to impose a penalty on an employer for violation of obligations.[571]

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563 In Austria the ex-post payment of 'labour law benefits' has to be adjusted with maybe a higher salary as a self-employed person (Supreme Court, OGH 11 October 2007, 8 ObA 49/07z).

564 If the court concludes false labelling, the risk for the employer is serious. The employer risks that the court qualifies the termination of the contract as void, as he has not respected the conditions provided by the law for a lawful termination of the contract (severance pay). That means he risks paying the employee remuneration for the period during which the contract, after its termination, was not performed.

565 The fact of not giving an employment statute to somebody who should benefit from it is not a criminal offence. However, different criminal offences could be given in case of bogus self-employment, such as: In case an occupational accident occurs, the criminal courts could deal with it if the client is re-qualified as employer and thus should have cared for his employee's safety and health. In case the self-employed person is re-qualified as an employee and his salary was lower than the social minimum wage, the client-employer could be convicted. Infringements to the rules on working time might be detected. The fact of not affiliating as an employer a person that should be affiliated to social security can also be fined.

566 Article 44 of the Austrian Social Security Code and Article 78of the Austrian Tax Code.

567 Article 111 of the Austrian Social Security Code and Article 51 of the Austrian Tax Code.

568 The sanctions when prosecuted for bogus self-employment are the sanctions applied when charged for the use of concealed labour (see Chapter II. Paragraph 2.). A natural person, when prosecuted, may risk three years imprisonment and a fine of 45.000 EUR. The following additional penalties can apply: the ban of practice of the incriminated business for the duration of five years or the seizure of tools, machinery, goods in hand and stocks in trade or the publication and announcement of the judgement or temporary or permanent exclusions from public authority commission. Also when a legal person is prosecuted, he risks a fine of 225.000 EUR. The following additional penalties may be imposed, besides those mentioned above for natural persons: the dissolution of the business; the ban of the practice of the incriminated business; and permanent or temporarily closure of the enterprise affected.

569 Administrative penalties for illegal work (from 3.000 to 20.000 LTL (868 to 5.783 EUR).

570 Austrian Supreme Court, OGH 11 November 2007, 8 ObA 49/07z.

571 Article 19 of the Slovak Act No. 125/2006 Coll. on Labour Inspection.

The Labour inspectorate is authorised to impose a penalty (a) on an employer for violation of its duties up to 33.000 EUR (SKK 1.000.000). In certain cases the penalty may be increased by a factor two, or (b) on superior employees and statutory bodies who, by their own fault, violated their duties, gave orders for such violation, or who concealed facts important for performance of labour inspection, up to four times their average monthly earnings.

5.3. Criminal Proceedings

In **Belgium** and **France**, criminal proceedings may be started against the principal who engages 'bogus self-employed persons' since that causes an infringement of labour law (in **Belgium** there is an exception with regard to the Contract of Employment Act). In **Ireland** and **Norway** there may only be criminal proceedings in respect of failure to comply with record-keeping requirements of employment protection legislation. The sanctions that can be imposed in **France** are the following. A natural person, when prosecuted, risks three years of imprisonment and a fine of 45.000 EUR. A juridical person may also be prosecuted and may be ordered to pay a fine of 225.000 EUR. Additionally, the following penalties may be imposed: the dissolution of the business; to be banned of the practice of the incriminated business; permanent or temporary closure of the enterprise affected (not applicable in the event of employment without a residence permit); temporary or permanent exclusion from public authority commissions; seizure of tools, machinery, goods in hand and stock in trade; publication and announcement of the judgement can apply. Two cases on the re-qualification of contracts should be mentioned here. In the first case, ruled on 10 March 1998, the Criminal Court re-qualified subcontracting contracts[572] of two craftsmen as employment contracts. Even if the two craftsmen were registered as self-employed, the Court considered that they were both subordinated to their former co-contractor. In the second case, ruled on 14 February 2006[573], the Criminal Court re-qualified a contract where two self-employed were supposedly working via a temporary-work agency for a third person. The Court considered that they were, in fact, working in an employment relationship with the supposed client of the temporary-work agency. Both cases illustrate the superiority of the factual situation over the literal dimension of the contract. Also, they prove the importance given to subordination ties when a re-qualification case is studied by a court.
The situation in **Austria** is different. Criminal sanctions can only be imposed for certain violations of social security law and tax law, but not for the violation of labour law. In tax law, a criminal proceeding is started up if the amount subject to payroll tax is at least 75.000 EUR and if the act in question is intentional.[574] The act constituting the offence is lower tax payments.[575] The false labelling as such constitutes no criminal offence, but may result in an administrative penalty.[576] In social security law, criminal proceedings (with varying fines) may relate to non-payment of insurance premiums[577], unjustified failure to pay insurance

[572] 'Subcontracting' is defined as an *"operation in which a contractor assigns through a subcontract the responsibility of the execution of a contract to another contractor, called the subcontractor"* (Act No. 97-210 of 11 March 1997 reinforcing the fight against illegal work). Under a subcontract, the subcontractor is fully free to take any initiative or decision in order to enforce the contract. The fact that the main entrepreneur is providing the material needed does not change the status of the contract. On the contrary, the subcontractor can not solely be a manpower provider unless the subcontractor's company is also a temporary-work agency. Similarly, the subcontractor cannot only be a provider of building material. Therefore, the elements of a subcontracting contract will differ from the elements of a sales agreement (price-fixing, cession, etc.). Furthermore, the subcontractor cannot be a representative (*mandataire*) of the main entrepreneur.
[573] Cass. Crim., 14 February 2006.
[574] Article 53 of the Austrian Tax Code.
[575] Article 33 of the Austrian Tax Code.
[576] Article 51 of the Austrian Tax Code.
[577] Article 153c of the Austrian Criminal Code.

premiums[578] and commercial organisation of illegal work.[579] In **Belgium**, criminal sanctions may be imposed relating to unlawful working relationships with foreigners.[580]
Intentional false labelling of employees in **Germany** is also within the scope of the Criminal Code.[581]

[578] Article 153d of the Austrian Criminal Code.
[579] Article 153e of the Austrian Criminal Code.
[580] A prison sentence, e.g., of one month to one year, a fine of 6.000 to 30.000 EUR multiplied with 2.5 and with the number of the workers concerned in the offence or one of those penalties only.
[581] See Section 266a of the German Penal Code (*Strafgesetzbuch*) Depriving employees of their pay, misappropriation of pay.

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