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Social Security of the Self-employed in
Sweden
- a Normative Analysis

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1. Introduction

1.1 Objectives of the Study

The overall objective of this study is to identify the normative contents of the legal rules shaping the status of self-employed workers in the Swedish social security system and how these contents change when underlying condition governing employment change.

In order to achieve this objective it is first of all necessary to put social security and self-employment into their societal context. Secondly, the basic characteristics of self-employed workers, and the differences between self-employed workers and employees relevant to social security, have to be identified.

Thirdly, a brief description of the status of self-employed workers in Swedish social security schemes, with focus on the relevant differences between self-employed and employees, is needed. To achieve an overall view of the normative contents of the regulations in the social security system, the studied schemes will be compared to each other.

The method used for the analysis of the legal material is the theoretical model of Basic Normative Patterns within the Social Dimension of Law.

1.2 Limits of the Study

The study is not an overall description of the protection against social risks offered to, or used by, self-employed workers, e.g. are private insurance schemes not included. Instead it is aimed at three mandatory social security schemes: sickness benefit, unemployment benefit and old-age pension. These three schemes are chosen on the basis of their importance in the social security system and on the fact that they represent different kinds of labour market related social risks.

1.3 Disposition

The study begins with a theoretical background, putting social security and self-employment in its societal context and introducing the model of Normative Patterns and the Normative field and basic theories of labour market flexibility (Chapters 2 and 3).

In Chapter 4 the notion of self-employment and the differences between self-employed workers and employees relevant to social security are identified. Chapter 5 contains a very brief overview over the occurrence of self-employment, including statistics and factors that in different fields of the social sciences are seen as determinants of self-employment.

Positive Swedish law is examined in Chapters 6-9 beginning with the concept of employee in Swedish law, followed by the sickness benefit, the unemployment benefit and old age pensions. Chapter 10 contains a general analysis of the social security of the self-employed in Sweden. Finally, an analysis using the model of Normative Patterns and the Normative Field is made, including predictions of the future development.

1.4 Future Research

This study represents research in progress. The final objective is to make a comparative study of a number of European countries, representing different welfare state regimes, and of European Community law. Some sections of the study are therefore in a preliminary version.

2. Social Security and Normative Patterns

2.1 Introduction to Social Security

In modern western society, “earning a living” is almost synonym with remunerated work. All, but a very small minority, survive through providing their labour on the *labour market*, or through living in a household where someone else is a breadwinner.

The idea of a market for labour is rather young, with its roots in 18-th century liberalism and the development of industrial society. At the core of the liberal legal order we find the freedom of contract. Under the freedom of contract, commodities change hands on a market according to the laws of supply and demand.

In pre-capitalist society most people lived in a rather stable social status and most households were fairly self-sufficient and/or guaranteed a minimum of social protection through paternal feudalism or urban guilds. Even though subsistence was intimately tied to providing one’s labour “the commodity form was absent in the sense that the majority of the people were not dependent entirely on wage-type income for their survival”.¹

Thus, labour was not a commodity in two senses; i) people did not sell their labour on a supply-and-demand type market and ii) people were not entirely dependent on remunerated work for their survival. Even pre-capitalist society had markets for labour and people dependent on wage-work for their subsistence, but industrial development and the breakthrough of liberalism turned selling one’s labour on the labour market into the dominating form for distribution of resources in society and thus of subsistence for the individual.²

In many ways, this development changed society in ways that are widely recognised as improvements, e.g. through increasing productivity and the possibilities for class-circulation. But it also created a new problem: What to do with those who for different reasons have no labour to sell, or no one willing to buy it?

On one hand, the prospect of non-market incomes threatens the functioning of a labour market built strictly on the free contract and supply-and-demand. On the other hand, in a society where remunerated work is the dominant form of subsistence and distribution, people who can not work due to e.g. sickness or invalidity are left out, a situation considered unacceptable by most people.³

Even though most people are reluctant to regard labour as a commodity of the same kind as others commodities, the question of how “de-commodified” labour should be, and by what means, has remained one of the most controversial political questions of the past one and a half centuries.

Social security law should be seen in this context, as an instrument compensating for the commodification of labour. Social security offers means of subsistence to people who, for various reasons, lack the possibility to support themselves through remunerated work.

¹ Esping-Andersen (1990) p 38

² Christensen (1998a) p 9

³ Esping-Andersen notices that “the pure and undiluted labour commodity that we associate with *laissez-faire* probably never existed in real life. Neither did it, in fact, in any serious theory of *laissez-faire*.” Esping-Andersen (1990) p 41.

2.2 Social Risks and Social Security

2.2.1 Social Risks

In its very broadest sense, social risks are all risks that are related to existing social conditions and the way society is formed. Most often, social risks are seen as events in life that cause a loss of earnings or special costs and any situation where a person lacks the means necessary for a decent existence.⁴ This definition includes e.g. inability to work due to invalidity, unemployment, medical care, pensions and special costs for the upbringing of children.

As this study is focused on sickness benefit, unemployment benefit and old-age pensions for self-employed workers, this section will focus on the social risks leading to a loss of earnings affecting those who for various recognised reasons are not working.

At the core of this notion of social risk we find incapacity of work due to sickness or invalidity and lack of earnings due to the decease of the household breadwinner. Unemployment, a social risk brought to existence by the establishment of a labour market, should also be included in the core of the notion.⁵ Outside the core we find events such as old age and maternity. These are not risks in the classical sense, but normal events in the life of a human being.

The social risks can only be understood if they are related to the labour market. It is not the illness or the old age as such that cause a lack of earnings, but the fact that the sick or old person can not earn an income from work. Thus, when the labour market changes the social risks change as well.

2.2.2 Social Security

There is no widely accepted definition of social security. However, most people would agree that social security is arrangements that are aimed at protecting people from social risks. In its broadest sense, social security includes all types of benefits and all services, such as medical care, offered to people in order to *prevent* the social risk, *restore* the situation preceding the social risk, or *compensate* for the social risk.⁶ This study is focused on social security in a more narrow sense, namely cash benefits to people who run the social risks of loss of earnings due to sickness, unemployment or old-age.

Social security can be organised in many different ways. In this study each social security scheme will be divided into four components:

1. *The personal scope*: Who should be offered protection?
2. *The social risk*: Against what should protection be offered?
3. *The benefit*: In what form should the protection be offered?
4. *The financing*: How, and by whom, should social security be financed?

The Personal Scope

The personal scopes of social security schemes are commonly defined in terms of residency, citizenship or professional status. In some countries there is one broad universal scheme for all residents, citizens or workers. In other countries there are different schemes for different categories, most often divided in professional categories and/or according to the branch of business. Even the workers families are generally protected in some way, if they are not protected in their own right.

⁴ Pieters (1993) p 30f

⁵ Christensen (1998a) p 12

⁶ Pieters (1993) p 2ff and p 38

The personal scope also decides whether the scheme should be mandatory or voluntary. A voluntary scheme can either include a possibility to opt-out of the scheme or be based on voluntary adherence to the scheme. Many times, schemes that are mandatory to one group of workers, e.g. full-time salaried employees, are voluntary to others, such as part-time and self-employed workers.

Typically, the scope is limited by a qualifying period, a requirement for how long a person must have been a resident, a citizen or of a certain professional status to be covered by the social security scheme. In schemes aimed at workers the personal scope often includes a minimum level of activity. Part-time workers or workers on short-term contracts might be excluded from the schemes.

One should bear in mind that a personal scope that at first seems very generous could be seriously limited by other components of the scheme.

The Social Risk

The notion of social risk has been explained above. The exact definition of the social risk given in legislation has great impact on the number of people who will actually receive benefit. One example of this is the minimum degree of damage a person must have suffered to be entitled to benefit. Does the scheme cover a person whose working capacity has been reduced by one fourth or one fifth?

The definition of the social risk normally includes that the event should have arisen involuntarily. A worker who voluntarily leaves his job has no right to unemployment benefit. In cases such as old age and maternity the involuntary nature has no relevance.

The right to benefit might be connected to a demand that the damaged person should try to reduce the damage, e.g. an unemployed person who is not trying to find a job might forfeit his right to benefit.

The Benefit

Benefits can be constructed in a wide variety of ways. Firstly, one has to distinguish between social assistance and social insurance schemes.⁷ Social assistance schemes grant benefits only to people in need and include a means test of the potential beneficiary. In social insurance schemes, the insured has a legal right to benefit at the occurrence of the social risk without any means test. In reality, the borderline between social assistance and social insurance schemes is blurred. Benefits to people with children that are awarded regardless of family income, is one example of schemes located in the grey area.

Social assistance schemes guarantee individuals or families with low income or no income a minimum-level of subsistence. Social assistance is calculated in accordance with the need of the individual or family.

Social insurance schemes can have flat-rate benefits but are more often related to previous earnings. Often, the benefit is calculated as a percentage of prior earnings. Another method is to relate the benefits to paid contributions. Often, older workers, or people who have worked many years, are entitled to higher benefits than are younger workers.

⁷ Pieters (1993) p 6f

Many times, social security schemes have traits of both social assistance and social insurance through a mix of benefits aimed at different groups.

Another important question is during what period of time the claimant is entitled to benefit. Today, almost all social security systems contain waiting days and there is normally a maximum number of days that the benefit can be paid. Sometimes the benefit is reduced after a certain period of time.

The Financing

Generally, social security systems are financed through taxes and contributions. Contributions can be divided into employer's contributions and contributions paid by the protected persons themselves. It is, however, not possible to draw a sharp line between taxes and contributions. Often contributions are not earmarked for the social security scheme but rather function as a special pay-roll tax.

Contributions can either be the same for all individuals and all branches of business or related to whether a certain category of persons or a certain branch of business runs a higher risk than others.

2.3 Normative Patterns and the Normative Field

2.3.1 Normative Patterns in Social Security

As noted above (2.1), modern social security was born in the normative conflict between the idea of a free market for labour and the desire to protect those who lack the possibility to support themselves through remunerated work.

A theoretical model that gives room for existing conflicts between different norms is the theory of normative patterns.⁸ The theory is based on the idea that different basic normative patterns can be distinguished in the multitude of legal norms. These patterns reflect social ideas about what is just and how legal relations ought to be shaped.

Different fields of law have different normative patterns. The theory has been developed for the *social dimension of law*, i.e. labour law, social security law, tenant law and family law.

One of the patterns identified in the theoretical model is the *Market Functional Pattern*. The Market Functional Pattern is the normative pattern underlying market economy, expressed in the freedom of contract and the freedom of trade. In the Market Functional Pattern distribution is the result of bartering on the individual level. The pattern is dynamic and aims at continuous shift in achieved positions.

Another basic normative pattern is *Protection of Established Position*. A person who has established a certain position in society, e.g. a job, a level of earnings or a rented home, "should not be deprived of that position without a just cause"⁹. The Protection of Established Position is a conservative pattern and constitutes a barrier against redistribution of rights and resources that are a part of someone's already established position.

⁸ The model has been developed within the research programme *Normative Development within the Social Dimension* led by Professor Anna Christensen and Professor Ann Numhauser-Henning at the Faculty of Law at Lund University, Sweden. This presentation of the model is primarily based on Christensen (1998a).

⁹ Christensen (1998a) p 7

Finally, there is the pattern of *Just distribution*. This pattern represents the idea that “resources should be distributed or redistributed in accordance with some material principle of justice” e.g. equal distribution, distribution in accordance with need or distribution in accordance with seniority.^{10 11}

The rules in the social dimension of law are shaped by the constant conflict between these patterns. “These patterns do not make up a system, they cannot be ordered into a hierarchy and there are no principles of superior dignity determining what normative pattern should get the upper hand.” Instead, the normative patterns constitute a normative field where the patterns are “like magnetic poles seeking to attract the legal rules”.¹²

The “magnetic powers” of the patterns vary, both between different legal rules and over time. A certain normative pattern can sometimes dominate a particular type of legal rules, but there are always modifications caused by other normative patterns.

As noted above, selling one’s labour on the labour market is the dominating form of distribution of resources in modern western society. Thus, the distribution of resources is clearly dominated by the Market Functional Pattern.

People who for different reasons have no labour to sell are therefore left out when resources are being distributed through remunerated work and thus have no means of subsistence. Social security is aimed at protecting these individuals from the effects of the market functional pattern. The very existence of mandatory social security schemes therefore represents a movement away from the market functional pattern. The construction of social security schemes decides how far and in what direction – protection for established position or just distribution – this movement will go.

2.3.2 Practical Manifestations of the Normative Patterns in Social Security Schemes

The Market Functional Pattern

As noted above, the very existence of mandatory social security schemes can be seen as a deviation from the market functional pattern. When the market functional pattern is the dominant pattern the social security schemes are limited to minimal schemes, i.e. social assistance schemes with a narrow scope, a limited number of covered social risks and low-level means tested benefits.

According to the market functional pattern, protection against social risks that are more easily foreseen, e.g. old age and maternity should be left to the private insurance market. Limits to the benefit, such as waiting days and limited periods of entitlement, are all signs of an influence from the market functional pattern.

The market functional pattern speaks against financing mandatory social security schemes with taxes or universal contributions. Instead, each individual should carry their own risk, e.g. through occupational schemes entirely financed through contributions from the protected. A public pension scheme constructed in accordance with actuarial principles is very close to the market functional pattern.¹³

¹⁰ Christensen (1998a) p 7

¹¹ It can be questioned whether *distribution according to seniority* really is an expression of the pattern Just distribution. I believe that it rather is an expression of the Protection of Established Position.

¹² Christensen (1998a) p 8

¹³ Christensen (1998a) p 13f

Protection of Established Position

When the personal scope of a social security scheme is defined, the pattern of protection of established position expresses itself in different schemes for different professional groups in order to minimise the redistribution effect and protect the status of different occupational groups. Another expression is demanding a minimum level of activity excluding part-timers and workers on short-term contracts who have a less established position.

The recognised social risks should be broadly defined and partial damages to the established position should entitle to benefit.

A benefit construction that indicates a strong influence from the pattern of protection for established position is benefits calculated as a percentage of previous earnings. Benefits related to paid contributions are also regarded as influenced by the protection of established position even though the influence from the market functional pattern is evident. This hybrid is called *accumulated entitlement*.¹⁴

Just Distribution

As the pattern Just distribution is the only pattern aimed at redistributing resources on the collective level, universal schemes, or universally financed schemes aimed only at people in need, are clear expressions of just distribution.

Generally, this leads to flat rate and means-tested schemes. In this respect, the difference between just distribution and the market functional pattern is that schemes influenced by just distribution can offer more than only basic subsistence. The more generous the basic benefit, the closer to just distribution.

2.3.3 Three Welfare State Regimes

Different countries have constructed their social security systems in different ways. To give an overview of different types of social security systems the three welfare state-regimes identified by Esping-Andersen will be used.¹⁵ After the characteristics given each regime by Esping-Andersen, a short characteristic according to the theory of normative patterns will be given.

The Conservative Welfare State Regime

In the conservative welfare state rights are attached to class and status. Different professional groups have different systems and the workers families are often included in the personal scope. The aim of the conservative welfare state is to protect the acquired standard of a certain group, not to redistribute between different groups.

The work incentive in the conservative welfare state regime is weaker than in the liberal and social-democratic regimes. Sometimes such regimes are discourage women from entering the labour market through different kinds of family benefits. Examples of countries with conservative welfare regimes are Germany, France and Italy.¹⁶

¹⁴ Christensen (1998a) p 14

¹⁵ Esping-Andersen (1990)

¹⁶ This group can be divided further. Esping-Andersen talks about a *corporatist* and an *etatist* conservative welfare regime, depending on the degree of government involvement. Giddens (1998) divides this group into a *Middle European System* and a *Southern European System* where the latter is similar in structure to the first but less comprehensive and paying lower levels of support.

The conservative regimes tend to be heavily influenced by the protection of established position, leaving little room for the market functional pattern. Including the families of workers in the personal scope is a sign of influence from the pattern of just distribution.

The Liberal Welfare State Regime

The scope of social security in the liberal welfare state regime is universal but in practice only aimed at a low-income clientele with demonstrable objective needs. The benefits are generally low, flat rate and means-tested offering only a very basic protection. Most people therefore rely on private insurance for protection, a strategy both passively and actively promoted by the lawmakers.

In the liberal regime there is a strong desire not to pervert the mechanisms of the free market. High benefits are considered to destroy the work incentive and social security should therefore provide only for the most needy. The liberal regime is sometimes referred to as the *residual welfare state*. The prime examples of the liberal welfare regime are the United States, Canada and Australia, with the United Kingdom as the best European representative.

The emphasis in the liberal regime is clearly upon the market functional pattern, while the protection of established position is left to the private insurance market. The occurrence of schemes with a universal scope, however, demands an explanation. A very important principle of the liberal dogma is the desire to promote fair competition. If some groups are covered by existing social protection while others are not, the result is unfair competition.¹⁷

The Social Democratic Welfare State Regime

Social security systems in countries belonging to the social democratic welfare state regime are universal in their scope. All different groups belong to the same social security system. The benefits are tailored to meet the higher level of expectations of the middle classes, usually in the form of acquired standard protection. The scope of social security in the social democratic regime is individual and in general not extended to workers families.

Like the liberal welfare state regime, the social democratic is aimed at creating a strong work incentive. For example, the individual scopes, not including the workers families, are considered to encourage double-income households. The prime examples of the social democratic welfare regime are Sweden and Norway.

The social democratic regime shows a complex normative picture. On one hand, the benefits are heavily influenced by the protection of established position, while the strong work incentive is influenced by the market functional pattern. However, the social democratic social security schemes generally result in a greater amount of redistribution of resources between different groups than conservative and liberal schemes, indicating influence from the pattern of just distribution.

¹⁷According to Esping-Andersen, "it was clearly this, and not ideals of social solidarity, which motivated a universally compulsory unemployment insurance in the United States". Esping-Andersen (1990) p 44.

3. Labour Market Flexibility

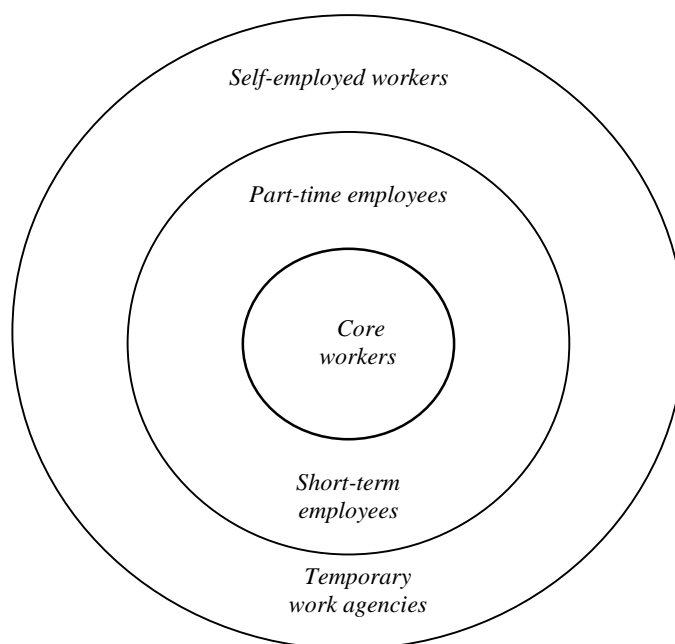
3.1 Typical and Atypical Employment

There are many ways to define labour market flexibility. For the purpose of this study a definition focusing on the shift in the forms of work and labour relationships will be used. I will define the increase in labour market flexibility – of which the increase in self-employment is a part – as the transition from the traditional – *typical* – employment to new – *atypical* – forms of labour.¹⁸

Typical employment is the full-time, non-fixed duration, salaried employee working on premises belonging to and with tools and raw materials furnished by his employer. All other forms of employment are considered more or less atypical. Atypical employment ranges from temporary, part-time and home-working employees to workers who do not have any kind of employment relationship with the principal, e.g. employees working for temporary work agencies and self-employed workers.

A useful way of illustrating this is the model of the flexible firm (figure 3.1)¹⁹. The flexible firm has a core of workers with permanent or long-term employment, possessing firm specific skills. The firm is ready to invest in the core workers and they are subject to more training than other workers are. Outside the core we find different kinds of atypical workers, with a weaker connection to the employer such as part-time workers and workers with short-term contracts. In the most peripheral layer we find self-employed workers, sub-contractors and workers from temporary work agencies, with no employer-employee relationship to the firm.

Figure 3.1



¹⁸ This definition can be found in Numhauser-Henning and Christensen (1996) p 8

¹⁹ Atkinson and Gregory (1986) p 13f

3.2 Dimensions of Flexibility

Labour market flexibility can be divided into a number of different dimensions. A simple and useful division is into numerical, functional and financial flexibility²⁰.

- a) *Numerical flexibility*: a work organisation's²¹ ability to adjust the number of workers or the level of worked hours in line with changes in demand. Rules on dismissal and re-employment have great effects on numerical flexibility together with flexible working hours and overtime, the use of temporary and part-time employees, temporary work agencies and self-employed workers.²²
- b) *Functional flexibility*: a work organisation's ability to change the contents of the work performed, e.g. through assigning existing manpower to new tasks. Greater functional flexibility can be achieved e.g. through hiring persons with a broader range of skills, training existing manpower or strengthening the employer's prerogative.²³
- c) *Financial flexibility*: a work organisation's ability to adjust the cost of labour to changes in profitability of the business, the market prices for the work organisation's products or the productivity of the individual worker.²⁴

3.3 Why Flexibility?

There are many explanations to the trend towards a more flexible labour market in the industrialised economies. New technologies, globalisation and the expansion of the service sector, together with the fact that higher levels of unemployment have made workers more ready to accept atypical work, are the most common.²⁵

Business leaders often refer to increased competition that forces them to slim their operations and respond faster to changes on the market. "Just-in-time" is no longer a mantra only for the production of goods but for the supply of manpower as well.

The forms of flexibility desired vary from sector to sector. In the service sector the need is for numerical flexibility, while functional flexibility is of greater importance to the manufacturing sector.²⁶

Politically, flexibility, at least as a word, enjoys a rather broad support. However, the views on how flexibility should be accomplished vary. Some believe in the dismantling of labour law regulations, while others see education and training with the aim of increasing the workers capacity to take on new jobs as the best way. Resistance to increased flexibility can be found among trade unions.

²⁰ This division can be found in Numhauser-Henning (1993) p 264ff and in Atkinson and Meager (1986) p 6ff

²¹ Atkinson and Meager (1986) use the word "firm". I use the word "work organisation" which I would like to give a wider meaning. A work organisation can be made up of many different legal persons. I also wish to indicate that the increased flexibility does not only occur in private businesses but also in the public sectors and various other organisations.

²² Another word used for numerical flexibility is *external flexibility*. Labour Market Flexibility (1995) p 9.

²³ Another word used for functional flexibility is *internal numerical flexibility*. Labour Market Flexibility (1995) p 11.

²⁴ Atkinson and Meager (1986) p 9 call this *pay flexibility*. Another word used is *wage flexibility*. Labour Market Flexibility (1995) p 12.

²⁵ E.g. Numhauser-Henning (1993) p 258f and Atkinson and Meager (1986) p 2f

²⁶ Atkinson and Meager (1986) p 84

3.4 Self-employment and Flexibility

Different authors have different views on the role of self-employment on a flexible labour market. Atkinson and Meager see self-employment as a separate dimension of flexibility – *distancing* – in addition to numerical, functional and financial flexibility. Distancing is defined as “the displacement of employment contracts by commercial contracts” and “is rather an alternative to flexibility rather than another form of flexibility”.²⁷

In this study self-employment is seen as an integrated part of the three flexibility dimensions above. The use of self-employed workers is in many cases an alternative to hiring short-term employees rather than a definitive decision to let go of a part of the production. Replacing contracts of employment with other kinds of contracts is rather a central characteristic of a flexible work organisation than an alternative to flexibility.²⁸

It is important to remember that self-employed workers can perform their work in many different ways. They can work in the premises of the principal, they can be consultants who share their time between the principal’s premises and their own office and they can be more traditional subcontractors using their own tools and machinery.

Self-employment and numerical flexibility

Self-employment is primarily a way of increasing numerical flexibility. A work organisation that experiences a temporary peak in the workload can use self-employed workers instead of employees. Self-employed workers can often be hired on short-notice and as the contract between a self-employed worker and a principal usually is a commercial contract, and not subject to labour law regulations on e.g. unfair dismissal or longer periods of notice, sometimes easier to disperse of when the job is finished.

Functional flexibility and self-employment

Primarily, functional flexibility is a concern relating to the core workers. But atypical workers, e.g. self-employed, can contribute to a work organisation’s functional flexibility through offering a possibility to change – within the same total number of workers – the composition of the workforce to a workforce with other skills.

Financial flexibility and self-employment

The price on a self-employed’s work is, at least in theory, determined on a market that is more free than the market for wage labour. If the demand for a specific type of work falls self-employed workers can lower their prices faster than the individual or collective wage agreements will be renegotiated. Thus, using self-employed workers can increase the financial flexibility of a work organisation.

On the other hand, an increased use of self-employed workers also makes the work organisation more vulnerable. In periods when the demand for a specific use of work is high, the self-employed workers usually called on by the organisation can choose to increase their prices or work for someone else. Another example is the risk for “corporate amnesia”, e.g. losing firm specific skills, that companies subcontracting a large part of their business are exposed to.²⁹

²⁷ Atkinson and Meager (1986) p 9

²⁸ According to Numhauser-Henning (1993) p 272, replacing contracts of employment with other forms of contracts of work is a central characteristic of the trend towards greater labour market flexibility.

²⁹ Sennet (1998) 46ff

3.5 Labour Market Flexibility and Social Security

That social security and the labour market influence each other is clear. On one hand, most social risks are related to the labour market for which reason the actual and desired conditions on labour market are among the most important factors when social security policy is shaped. On the other hand, labour market decisions, both on the macro- and micro-level, are heavily influenced by social security systems.³⁰ In fact, exactly how strong this influence should be and in what direction it should pull is one of the most crucial issues in social policy debate.

Another evidence of this connection is the fact that welfare state regimes and labour market regimes tend to coincide. Countries with the same type of welfare regime have labour markets that show the same characteristics.³¹

Traditionally, social security has offered protection mainly to employees. The scope of social security law is often defined as salaried employees subordinated to an employer. The legal definitions of the social risks have often taken their point of departure in the permanent full-time employee, sometimes even excluding part-time or temporary workers from protection. The typically employed are also the typically protected.

Thus, it is obvious that changes on the labour market have effects on social security. If the typical employees represent a smaller portion of the workforce, and more people fall outside the scope of social security, the social security systems run the risk of no longer fulfilling their aims. In this respect the self-employed constitute an especially interesting group since they fall outside the traditional scope of social security law.

At the same time, social security is one of the tools the lawmakers can use to influence the labour market in a certain direction. Social security can be used to encourage or discourage certain labour market behaviour. For example, social security has traditionally been used to facilitate the exit of older and less productive workers from the labour market, thus increasing flexibility for the employers.³² A way of encouraging workers to behave more flexible and be ready to change jobs more often is to make sure that they do not lose e.g. an acquired level of entitlement when they change occupation.

The increase in self-employment poses a double challenge to social security law. On one hand, it has to make sure that self-employment does not develop into a way of excluding workers from social protection while at the same time develop a legal framework that guarantees the genuinely self-employed an adequate protection. In addition to this one also has to consider the tension between competition and social protection that is especially relevant to self-employed workers.³³

³⁰ Esping-Andersen (1990) p 146ff

³¹ Esping-Andersen (1990) p 159

³² Esping-Andersen (1990) p 46

³³ C.f. Chapter 4.5.1 below.

4. The Notion of Self-employment

4.1 Introduction and Definitions

There is no widely accepted definition of self-employment. Generally, a self-employed worker can be described as a worker who has no employment relationship or whose formal employment relationship is not recognised because the worker himself is the employer (working owner). The term does not indicate what other kind of contractual relationship there is between the self-employed and those willing to buy his or her services.

The term *Self-employment* should be considered more as a notion with indefinite limits than as a well-defined legal concept, such as *limited company* or *employee*.

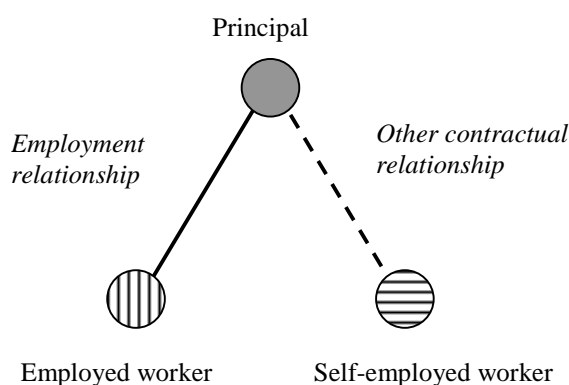
For sure, there exist legal definitions of self-employment. But these definitions are aimed at specific situations – such as taxation, social security contributions or the scope of a labour law regulation – not giving an overall definition of self-employment.

To understand the notion of self-employment it is necessary to be familiar with two other notions: *worker* and *principal*. For the purpose of this paper the two notions will be defined as follows:

- A *worker* is anyone who personally performs work to earn an income, whether this work is performed under a contract of employment or under any other kind of contract. Both employees and self-employed are workers.
- A *principal* is anyone who pays a worker for work performed. Both employers and work organisations using self-employed workers are principals.

As there are two kinds of workers, employees and self-employed, one of the limits to the notion of self-employment has to be the concept of employee. The least common denominator of all self-employed is that they are not employees. To define the notion of self-employment it is necessary to ask under what circumstances the relationship between the worker and the principal is considered an employment relationship and under what circumstances the relationship is considered as something else, thus making the worker self-employed. (Figure 4.1)

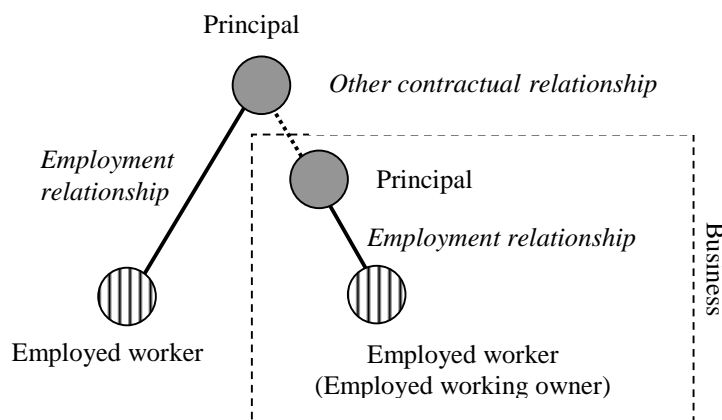
Figure 4.1



The other limit of the notion of self-employment is more difficult to define. At some point a self-employed worker may leave self-employment to become an employee in his own undertaking, thus inserting a principal between the worker and the original principal (Figure 4.2).

An example of this is the working owners of small undertakings. The question to be answered is under what circumstances the working owner of an undertaking is considered an employee in his own business and under what circumstances the same working owner is considered self-employed.

Figure 4.2



4.2 The Distinction between Self-employed Workers and Employees

The distinction between employees and self-employed workers is an issue in many fields of law. This is due to the fact that employees in many cases are considered to need a stronger legal protection than the protection awarded them by ordinary contract law.

Labour law regulations are aimed at guaranteeing employees social protection to make up for that they are, generally speaking, in a weaker bargaining position than the employer. Thus, labour law is also an expression of the desire to de-commodify workers. Therefore the concept of employee is decisive for who is and who is not entitled to the protection, more so as most labour law regulations are imperative provisions which the individual worker can not waive.

The case is similar in social security law where the distinction is often decisive for if a worker belongs to the social security system and if so to which system. The distinction is also important for the payment of social security contributions. Other fields of law where the distinction is important is taxation law, tort law (is it the principal or the worker who is responsible for the damage) and bankruptcy law.

It is easy to find definitions of the concept of employee in legislation, legal practice and doctrine. These definitions are of great help in defining the notion of self-employment, even though it is important to remember that they are normally written in order to define the employee-notion, not to serve as one of the limits to a definition of self-employment.

To find definitions of self-employment is more difficult. Legal practice does not have a lot to offer and legislation even less. Instead one has to resort to doctrine and neighbouring social sciences.

The circumstances that decide whether a worker is an employee or a self-employed can be divided into two main categories: economic circumstances and organisational circumstances.

4.2.1 Economic Circumstances

In most definitions of self-employment the form of remuneration plays an important role. Traditionally the difference has been described as employees receiving salaries and self-employed living of the profits of their undertakings. In line with this employees are often referred to as "wage-earners" and self-employed sometimes called "own-account workers".³⁴

In the statistical definitions used by Eurostat the form of remuneration plays an important role. *Self-employed* are "persons who work in their own business, professional practice or farm for the purpose of earning a profit". *Employee* is defined as "persons who work for a public or private employer and who receive compensation in the form of wages, salaries, fees, gratuities, payment by result or payment in kind".³⁵

However, this distinction is not as easy as it seems. Many times employees' salaries are related to their work performance or to the profits made by the employer. It is also common that self-employed are paid according to the number of hours or days they work, much like salaried employees.

Another way of distinguishing self-employed is the notion of *risk-taking*. A self-employed worker, as opposed to an employee, bears the economic risk of the undertaking.

Vianen defines self-employed as³⁶:

- people leading a business that is not legally incorporated; they gain no salary but the enterprise profits from their income
- other managers that gain profits as well as a salary as a managing director of an incorporated business; the director bears the full risk of the firm.

Pieters and Schoukens believes that it is the question "Who will bear the ultimate (economic) risk when there is any failure in the practice of the activity?" that has to be answered in order to separate the employees from the self-employed.³⁷

But this distinction too can be problematic. One intention of a principal who wrongfully labels workers who really are employees self-employed can be to transfer more of the economic risk of the undertaking to the workers. To use the sole fact that workers bear the economic risk of a business failure as an indication that they are self-employed can therefore be dangerous.

Therefore, I would like to add *chance* as an indicator of self-employment. A genuinely self-employed worker does not only carry the risk of business failure but also has the chance to make a profit if the undertaking is successful.

The chance to make a profit has to be something more than just the chance to receive payment for the performed work. For example, the worker should reap the benefits of an increase in his productivity. However, this is also possible for piecework in employment relationships. A stronger indicator could therefore be the possibility to increase his prices when market demand for his work increases.

Another economic circumstance that sometimes is said to indicate self-employment is that the worker invests not only his labour but also his capital in the work. An example of this is found

³⁴ This can also be found in other languages than English. The word *salarié* in French and *löntagare* in Swedish both stem from the words for wage in the two languages.

³⁵ Eurostat (1996) p 64

³⁶ J.G. Vianen in Schoukens (1994) p 1

³⁷ Schoukens (1994) p 7

in an ILO-resolution from 1990, aimed at promoting self-employment, where the earnings of the self-employed are said to “represent a return on capital as well as labour, entrepreneurial skill and risk taking, whereas the wage employee receives a payment for his or her labour”³⁸.

Since many of the new categories of self-employed are working with services directed at companies, where the need for investment in capital such as machinery or marketing is less than in manufacturing or consumer services, there are good reasons to be careful with this indicator of self-employment. The existence of investment in capital can in some cases be an important indicator of self-employment but the opposite, that a worker has made no or very small investments in capital, should not be used as an indicator of employee-ship.³⁹

4.2.2 Organisational Circumstances

The organisational circumstances have to do with the degree of independence of the worker. The more independent the worker is from the principal, the more likely it is that the worker is considered self-employed.

According to Bercusson “[t]he very concept of self-employment is translated often in terms of independence of the workers concerned. The notion of independence derives from the contrast with dependent workers – employees. Independent workers are not dependent on an employer – they are self-employed.”⁴⁰

This independence can manifest itself in different ways. Traditionally, the degree of the worker’s subordination to the principal has been considered a very important factor when deciding whether a worker is an employee or not.

Subordination is the classic core of the concept of employee and an important part of all employment contracts. The *employer’s prerogative* gives the employer the right to give orders about how the work should be performed and the working hours and make other management decisions. Towards self-employed workers the principal lacks this right. Generally speaking the self-employed workers have greater freedom as to how and when the work is performed. The contract between the two often only speaks of what work should be performed and/or by what date it should be finished.

However, it is becoming more and more difficult to distinguish between the subordinated employees and the “free” self-employed. Modern management practices many times give employees a lot of freedom as to how to perform the work. Flexible working hours gives many employees a lot of influence over their working time while others have no specified working time at all. High skilled employees, with higher skills than the managers supposed to supervise their work, are often less subordinated than low skilled self-employed.

Thus, the lack of a relationship of subordination or regulated working hours can not be taken as proof that a worker is not an employee even though it generally speaks in that direction. I would therefore like to grant increased importance to the principal’s possibilities to move the worker to new tasks within the frame of the contract. If the principal has the right to move the worker to tasks not explicitly stated in the contract that is a strong indicator of an employment relation.

³⁸ ILO (1990b) , Section 3

³⁹ In some branches of business it is considered normal that the employees own machinery, even very expensive. An example is the Swedish forest industry where workers can own machinery worth up to 500 000 EUR and still be considered employees.

⁴⁰ Bercusson (1996) p 482

If a task that could not be foreseen emerges and the principal needs to redirect existing manpower to perform the task, it is normally possible for him to do so with the employees whereas having a self-employed perform the task requires a renegotiation of the contract.

Another circumstance, seen as an alternative to classic subordination, is the degree of the workers *integration* in the undertaking of the principal. The higher the degree of integration, the more likely it is that the worker is regarded as an employee.

A long duration of the work indicates a high degree of integration. So does the fact that the worker is using tools, machinery or raw materials furnished by the principal. If the principal has the powers to co-ordinate the work with the work performed by others, this is also a sign of a high degree of integration.⁴¹

A circumstance that, although not new, has gained importance in recent years is *economic dependence*.⁴² There are no clear definitions of what economic, or financial, dependence is but references are often made to the principal being the workers dominant source of income. That a worker, over a long time, earns almost all his income from a single principal should be considered an indicator of the worker being an employee.

Bercusson believes that subordination in the classical sense is the most important circumstance when the degree of dependence is to be decided, but that economic dependence also is important. "Employees are dependent on their work for subsistence, paid for by the employer. In this sense of economic dependence it is not clear that self-employed workers are any less dependent economically on their work for subsistence, paid for by their clients or customers".⁴³

Pieters and Schoukens pose, apart from the above cited question on economic risk, four questions that has to answered in order to determine whether a worker is an employee or self-employed:⁴⁴

- *Do we have a bond of personal subordination (instructions to be followed and supervision) between the person carrying out the job and the person commissioning the task?*
- *Is there any economic dependence between both parties?*
- *Do we detect an integration in the company by virtue of the fact that the person carrying out the job can only do so by using the facilities provided by the employer?*
- *Are working hours already fixed beforehand?*

It is important to understand the difference between economic dependence and the above mentioned economic circumstances. In the case of economic dependence the form of remuneration is of no importance. The important thing is the practical consequences of the relationship between the worker and the principal.

4.2.3 Comments on the Distinction between Self-employed Workers and Employees

The circumstances distinguishing self-employed workers from employees can thus be summarised as follows:

Economic circumstances

- the remuneration is in the form of profits from business, rather than as a salary;
- the worker bears the economic risk of the business, with a chance to make a profit;
- the worker might have invested capital in his work;

Organisational circumstances

⁴¹ Transformation in Labour and Future Labour Law in Europe (1999) p 19

⁴² Transformation in Labour and Future Labour Law in Europe (1999) p 17f

⁴³ Bercusson (1996) p 482

⁴⁴ Schoukens (1994) p 7

- the worker is not subordinated to the principal and can not be moved to tasks not explicitly stated in the contract;
- the worker is not deeply integrated into the principal's undertaking;
- the worker is not economically dependent of the principal.

Obviously, it is not possible to draw any strict line between the economic and organisational circumstances or between the different circumstances within each category. It is also important to bear in mind that none of these circumstances should be seen as a necessary or sufficient condition.

One can argue that *administrative circumstances* should be added to the economic and organisational circumstances mentioned above. If a worker is registered as self-employed with administrative agencies or for tax purposes he is often supposed to be self-employed in other situations as well. Another administrative circumstance is if a worker has an incorporated business.

Two arguments speak against this. The first is that at least some of the economic and organisational circumstances are often included in the provisions for administrative or tax registration as self-employed. The second is that the mandatory nature of the concept of employee provides that a dispute over the status of the worker in the end has to be settled using the economic and organisational circumstances.⁴⁵ That a worker has an incorporated business or pays his own taxes and social security contributions does not automatically make him self-employed in other situations. If he in other respects is an employee he will usually be considered as such.

The practical impact of such administrative circumstances should, however, not be underestimated. In most cases the status of the worker is not determined by the courts but in the interaction between workers, principals and authorities, where there is not much room for a test of the status according to all relevant circumstances. Instead, administrative registration is decisive.

4.3 The Distinction between Self-employed and employed working owners of corporations

The distinction between self-employed workers and working owners employed in their own corporation is basically the same as the distinction between self-employed and employees. When a self-employed worker becomes an employee in his own corporation he "returns" to employee-status. The alternative to being self-employed is being an employee – someone else's or one's own.

In practice, this is often a question that is up to the worker himself to decide. Is he, for example, going to take his remuneration out of the company as a profit or as a salary? Taxation might be one of the most important factors when a worker decides whether to still be self-employed or whether to be an employee in his own business. However, one has to bear in mind that the concept of employee often is an imperative provision for which reason it is not solely up to the worker himself to decide whether he is an employee or not. There are even situations when the fact that a worker is formally employed by his own business, does not stop him from being considered an employee in someone else's business.

⁴⁵ This is the case in e.g. Germany and Sweden. Halbach et al (1994) p 37f and SOU 1993:32 p 215ff

That a worker has other workers employed in his business does not necessarily stop him from being considered self-employed.

The practical consequences of being self-employed or working owner of one's own corporation varies. Often, labour law provisions do not apply to managers and working owners. The same is true for social security.

4.4 Different Categories of Self-employed

As mentioned above the term *self-employment* does not indicate any specific kind of contractual relationship between the self-employed and the principal. Therefore, there are many different categories of self-employed workers, working under different kinds of contracts. Sometimes the kind of contract or the nature of the relationship has importance for the social protection of the self-employed worker.

In German law there are three different categories of self-employed: those working under a business contract (*Werkvertrag*), those working under a free contract of services (*freier Dienstvertrag*), and persons similar to employees (*arbeitsnehmerähnliche Personen*).⁴⁶ The last category are freelance workers or home workers, with either a free contract of services or a business contract, who are economically dependent on a main principal and in need of social protection. This category of self-employed workers fall within the scope of some labour law and social security law regulations without being considered as employees.⁴⁷

In Italian social security law the scope of some regulations has been extended to workers who do not fill the requirements of subordination of the concept of employee but who are considered to be in a similar state of dependence, primarily economically, as employees.⁴⁸

At the International Labour Conference in June 1998 a draft convention on *contractual work* was presented. Contractual work was defined as work performed for a user enterprise, by a worker personally, under actual conditions of dependency or subordination "similar to those that characterise an employment relationship..." The proposal, which in the end was not adopted, was aimed at granting the contract workers sufficient social protection.⁴⁹

Neither the German nor the Italian regulations nor the ILO-proposal applies to all self-employed. The groups of self-employed most resembling employees are offered special protection while self-employed who are considered in less need of protection are not.

In some cases, the extension of the scope of social protection through adding the self-employed workers most resembling employees, is done in order to prevent misuse of self-employment. When workers are wrongfully used as self-employed, in order to fall outside the scope of social protection regulations, law makers wishing to prevent misuse can either widen or remake the concept of employee or extend the scope of the regulations to include groups of workers outside the concept of employee.

⁴⁶ Transformation in Labour and Future Labour Law in Europe (1999) p 11

⁴⁷ Halbach et al (1994) p 40f

⁴⁸ Treu (1998) Sec. 16.

⁴⁹ ILO (1998a) and (1998b)

4.5 Differences between Self-employed workers and Employees Relevant to Social Security

The purpose of this section is to outline the differences between self-employed and employees that are relevant to social security and that can be deduced from the characteristics of self-employment identified above. Important to bear in mind are the great differences between different groups of self-employed, for which reason the observations below are very general.

4.5.1 The double Nature of Self-employment

The most important problem concerning social security and self-employed workers stems from the double nature of the self-employed. On one hand they are workers and on the other hand they are businesses. Self-employed workers are at the same time parts of the labour market and of the markets for goods and services.

The normative patterns governing the labour market are different from the normative patterns governing the markets for goods and services. As noted above, social security is aimed at the de-commodification of workers, making them less dependent on the forces of the free market than they otherwise would have been. The idea – whether it is expressed by the pattern of protection of established position or of just distribution – is that labour is not a commodity.

The goods and services produced by businesses, however, are commodities. An effective exchange of commodities is generally considered to presuppose free markets with fair competition, where elimination is the ultimate consequence of failure. The task for the lawmaker becomes to offer the person engaged in self-employment protection, without protecting his or her business from competition and elimination.

The problem can be simplified and summarised as follows:

- If self-employed workers are awarded benefits to compensate periods of lack of earnings or lesser earnings than normally, part of their business risk is transferred to the social security system, protecting the self-employed from competition and elimination.
- If self-employed workers are *not* included in the social security systems the competition on the markets for goods and services is not threatened, but the self-employed workers are commodified and unprotected.

In the second scenario, the difference between employees and self-employed workers is greater than in the first scenario. As exclusion from, or adherence to different, social security schemes, offering different benefits and demanding different contributions, has effects on the price of work, the relative competitiveness of employees and self-employed workers might change.

The construction of social security schemes, together with e.g. tax regulations, is also of importance for the risk for *statute shopping*, workers looking for the most suitable statute, either voluntarily or forced by a principal who wants to avoid social security contributions.⁵⁰

4.5.2 Differences Relevant to the Social Risks

As many parts of social security are aimed at protecting workers from loss of earnings, the fact that economic risk taking is a part of the notion of self-employment constitutes a relevant difference between self-employed workers and employees. A self-employed worker can not expect to enjoy a linear flow of earnings. It is therefore often difficult to establish when a self-

⁵⁰ Schoukens et al p 12f

employed worker suffers from a short period of lesser earnings or when a damage in the form of loss of earnings is present. Self-employed are generally expected to have some margins to survive shorter periods of lesser or no earnings.

Another relevant difference is the higher degree of independence and thus higher degree of control of their work, enjoyed by self-employed workers. Being in a managerial position, self-employed workers have better possibilities to control the situation than other workers have. Self-employed, being their own managers, are sometimes in a situation where they themselves make the formal decision that causes the social risk to occur. In practice this difference has led to the institution of stronger control-mechanisms in social security schemes for self-employed workers than for employees. The simple fact that self-employed workers do not have a superior that can verify their loss also increases the need for control by the authorities.⁵¹

Both the naturally more fluctuating incomes and the higher degree of control over their work makes it especially difficult to establish whether a self-employed worker is partially incapable to work or partially unemployed. The same is true for short-term incapacity and short-term unemployment. A definite end to the business is easier to establish than distinguishing between a temporary slow-down and short-term unemployment. Long-term incapacity is more easily verifiable than short-term.⁵²

4.5.3 Differences Relevant to the Construction of the Benefit

The possibilities granted to businesses to dispose more freely over their earnings, most often for tax purposes, often makes it more difficult to establish the earnings of self-employed workers than for employees. If the taxable income is strictly used as the basis from which benefits are calculated, deductions and exemptions granted to self-employed workers for other purposes may result in benefits not corresponding to their actual situation. Pieters notes that many countries have introduced a concept of *social income*, a calculation of earnings only used for social security purposes, in order to get around this problem.⁵³

The fact that the earnings of self-employed workers often are a mix between return on work and return on capital constitutes a difficulty for the calculation of the benefit in social security systems aimed at compensating for loss of earnings from work. It is then necessary to decide how much of the earnings that are return on capital and how much that is return on work.

⁵¹ Pieters and Schoukens speaks of "the inherently more difficult possibility of keeping a check on them" Schoukens et al (1994) p 6

⁵² Schoukens et al (1994) p 20

⁵³ Pieters (1993) p 42

5. The Occurrence of Self-employment

5.1 Statistics

Self-employment accounts for some 15 percent of all employment in the European Union (1997). If the agricultural sector, in which more than half the workforce is self-employed, is excluded the number is 13 percent.⁵⁴

The relative importance of self-employment varies markedly between the North and the South of the European Union. In southern countries such as Greece, Italy, Spain and Portugal self-employment accounts for around or over 20 percent of the employment outside the agricultural sector, while all the other member states show figures below 15 percent and some below 10 percent.⁵⁵

The trends in self-employment are double. Traditional self-employment, most notably in the agricultural sector, is declining, while self-employment in industry and services is increasing in a majority of the Member States. Over the 1990s, growth of self-employment has made a disproportionate contribution to the numbers of workers in the Union, especially during the 1990-94 recession when self-employment grew in 8 of the 15 Member States.⁵⁶

The increase in self-employment has taken place mainly in the service sector, especially services directed to companies (producer services), rather than to consumers (consumer services). Besides that, no general pattern can be distinguished as to what kinds of work the self-employed are engaged in. Among the self-employed we find both highly qualified workers who have chosen to sell their services on the market and unskilled workers that have been excluded from the protection offered by labour and social security law as a consequence of management's measures to reduce labour costs and increase flexibility. Most of the self-employed workers in the European Union, around 60 percent, do not employ anyone but themselves.

Only a quarter of the self-employed workers in the Union are women, compared to 44 percent of the employees (1997). In no country do women account for more than 35 percent of the self-employed workers. The share of women in self-employment is on the rise in all Member States except Germany and the UK.⁵⁷

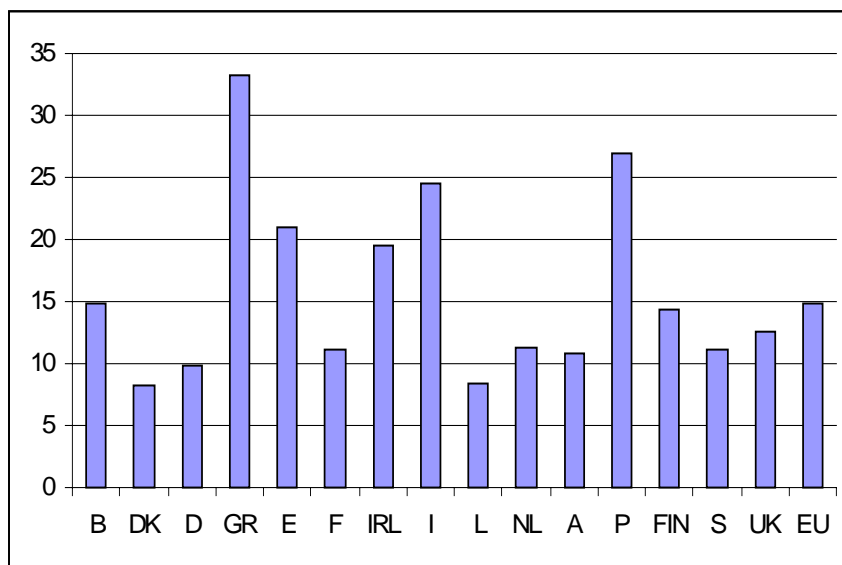
⁵⁴ As a comparison self-employment outside the agricultural sector accounts for around 7 percent of total employment in the United States. *Employment in Europe 1998* p 49

⁵⁵ *Employment in Europe 1997* p 55

⁵⁶ *Employment in Europe 1998* p 49ff

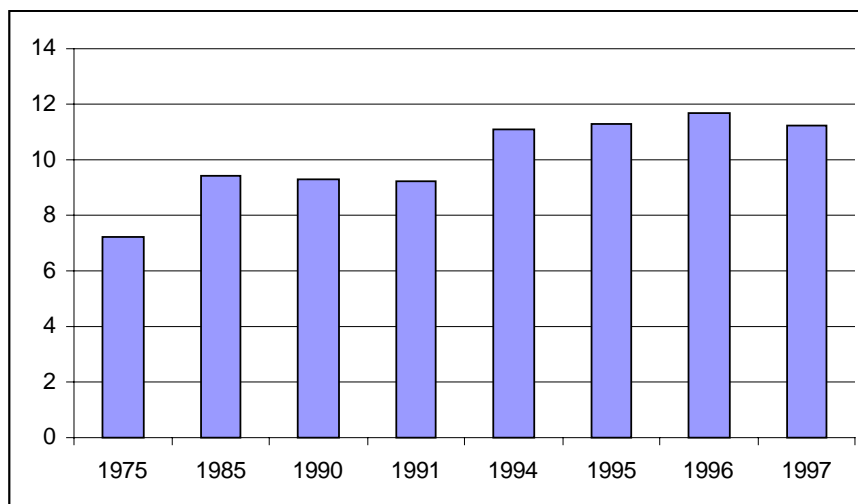
⁵⁷ *Employment in Europe 1998* p 51f

Figure 5.1 Self-employment in the European Union 1997 (% of total employment)
 (Source: *Employment in Europe 1998*)



Sweden has a relatively low share of self-employed workers – 11.2 percent of total employment including the agricultural sector – but is one of the countries experiencing the fastest increase. When total employment fell in the early 1990s, the number of self-employed workers grew.

Figure 5.2 Self-employment in Sweden (% of total employment)
 (Source: *Employment in Europe 1998*)



5.2 Determinants of Self-employment

Several factors have been considered decisive for the occurrence of self-employment in an economy and for the increase in self-employment.

Macro economic studies point at the *increased unemployment* which has “pushed” people to enter self-employment. Unemployed workers are more likely to enter self-employment than employed or economically inactive. In addition to this all EU member states have “start-up schemes” for unemployed wishing to start their own business.⁵⁸ ILO-statistics from the 1980s show that countries with high unemployment generally experienced a larger increase in self-employment than countries with low unemployment rates.⁵⁹

Structural change leading to an increase of the service sector and a decrease in the manufacturing sector is another explanation. The service sector has higher rates of self-employment than other non-agricultural sectors. Therefore, the shift from manufacturing to service employment increases self-employment. At the same time, self-employment’s share of the service sector is growing.⁶⁰

There are also *changes in employer behaviour*. More flexible organisation of production, the “contracting out” of service functions, the growth of franchising and similar developments contributes to the growth of self-employment. There are also signs of a greater number of “pseudo” self-employed workers whose self-employment is a way to circumvent labour, social security and taxation regulations.⁶¹

In addition to this *changing demographic structures* and *attitudinal changes* are sometimes used to explain the increase. Propensities for self-employment vary between different types of individuals. Hence, factors such as growing female economic activity and an ageing population have influenced the overall self-employment level.⁶² Attempts to create an “enterprise culture” have in some cases led to attitudinal change favourable to self-employment.⁶³

de Wit gives an overview of the *personal characteristics* that psychologists, sociologists and economists see as determinants of self-employment.⁶⁴

Psychological characteristics are a desire to be personally responsible for solving problems, for setting goals, and for reaching these goals by their own effort, a belief that the outcome of an event is within their own personal control and understanding and a less averse attitude towards risk than the population in general.

Sociologists point at factors such as *displacement*, the *environment’s valuation* of the option of self-employment and the *availability of resources*. It is asserted that people that have experienced negative social displacements – for example refugees and unemployed – have larger probability to become self-employed. Also skilled workers that become frustrated in their current jobs, can take up self-employment as an alternative. It is important how the

⁵⁸ Meager (1993) Meager also points out that thriving small businesses may require a growing economy and that a slowdown in the economy, which is often the reason for increased unemployment, might influence the number of self-employed in the opposite direction, and that their net effect is indeterminate.

⁵⁹ ILO (1990a) p 18

⁶⁰ Meager (1993) and ILO (1990a) p 9ff

⁶¹ Meager (1993) and ILO (1990a) p 15ff

⁶² Meager (1993)

⁶³ Meager (1993)

⁶⁴ de Wit (1993) p 7f

environment values the option of self-employment. One can think of the influence of the family (self-employed individuals have often self-employed parents), the ethnic group and the society at large (in the Anglo-Saxon countries self-employment is considered higher valued than in some other countries). Finally, persons who want to try self-employment must have the financial resources to do so.

When *economists* look at the personal determinants of self-employment they point at the chance for higher income, the better opportunities for self-employed to avoid taxes (higher taxes thus giving more self-employment), entrepreneurial ability, attitude towards risk and the availability of resources.

6. The Concept of Employee in Swedish law

6.1 Introduction

As mentioned above the concept of employee is very important for the definition of the notion of self-employment. This is also the case in Swedish law. It is therefore necessary to describe the concept of employee in Swedish law.

Swedish legislation does not contain any strict definition of “employee”. Instead it has been left to the courts to define the concept. The concept of employee has also been a common theme in Swedish jurisprudence.

The concept of employee used in Swedish law can be described as a common core, sometimes referred to as the private law concept of employee, around which the concepts of employee found in various fields of law are formed. The core is, however, in itself flexible and possible to adjust to each specific situation.

6.2 The Core Concept of Employee

6.2.1 Basic Provisions of an Employment Relationship

For an employment relationship to exist two basic provisions have to be fulfilled. The first basic provision of an employment relation is the existence of a contract between the employer and the employee. In Swedish law there are no formal requirements for employment contracts. An orally concluded contract or a contract concluded through the actions of the parties is as valid as a written contract.⁶⁵

The second basic provision is that the party to the treaty that is to perform work, the worker, is a natural person. This provision does not mean that the existence of a legal person on the work-performing side of the contracts rules out that it can be a contract of employment. It is possible to “see through” a legal person to find the natural person actually performing the work.⁶⁶

6.2.2 An Imperative Provision

The concept of employee is an imperative provision. The peremptory nature is due to the fact that most regulations where the concept of employee is found are aimed at guaranteeing employees social protection. The reason employees are considered to need this protection is that they are in a weaker bargaining position than the employer. In order to prevent “underbidding” it is necessary to grant the employees rights that they can not waive.

If the concept of employee was an optional provision – leaving to the employer and worker to freely decide whether the worker was to be considered an employee, thus included in the scope of social protection legislation, or not – many mandatory labour- and social security law regulations would lose their effect.

In a 1979 ruling the Swedish Labour Court stated that the fact that both parties to a contract wanted the worker to be considered self-employed, and that the concerned worker might have voluntarily agreed to this, did not have any deciding effect on the ruling.⁶⁷

However, if it is clear that it is an initiative of the worker to label and word the contract as something else than an employment contract, that the worker was not in a dependent position when the contract was concluded and

⁶⁵ SOU 1993:32 p 219ff

⁶⁶ SOU 1993:32 p 224

⁶⁷ AD 1979 nr 155

that the contract is not an attempt to circumvent social protection legislation the intention of the parties should be considered as an important factor when the nature of the contract is decided.⁶⁸

It is the content of the contract that decides whether a person is to be considered an employee or a self-employed. The label the parties have chosen for their relationship is considered to be of no or only a limited importance. In deciding the content of the contract the wording of the contract is considered to be of less importance than the actual practice between the two parties.⁶⁹

In a 1977 ruling the Labour Court stated that a worker was to be considered an employee despite the existence of a contract labelled “entrepreneur contract” with a wording indicating that the worker was self-employed, due to the fact that the character of the relationship was that of an employer-employee relationship. The worker had earlier been employed by the employer and the relationship between them had not changed since the signing of the entrepreneur contract.⁷⁰

In a 1979 ruling, concerning two hairdressers who rented space in a hairdressing-saloon to carry out their business, the Labour Court held that the question whether the hairdressers were employees or self-employed should be decided by the practice between the parties even though the contract stated that the two hairdressers were self-employed.⁷¹

6.2.3 Circumstances Indicating Whether a Worker is an Employee or Self-employed

As mentioned above, Swedish legislators have left to the courts to define the concept of employee. In the preparatory works of the 1976 *Co-Determination in the Workplace Act* the circumstances that in legal practice and jurisprudence have been said to draw the line between employees and self-employed workers were listed.⁷²

Circumstances indicating that a workers is an employee are:

1. He is obliged to perform the work personally, whether this is stated in the contract or presumed by the parties to the contract;
2. He has in fact, completely or almost completely, performed the work personally;
3. His contract includes putting his labour to the disposal of the other party for arising tasks;
4. The relationship between the two parties has a more lasting character;
5. He is prevented from performing similar work of any significance for someone else, whether this is due to a restriction in the contract or a practical consequence of the actual conditions of the work, such as a lack of time or energy for other work;
6. He is in the performance of the work subject to specific orders or control as to how the work is performed, the working time or the place of work;
7. He is supposed to use machinery, tools or raw materials furnished by the other party to the contract;
8. He is compensated for his expenses, i.e. for travel;
9. The remuneration for the performed work is, at least in part, paid as a guaranteed salary;
10. He has economically and socially the same status as an employee.

Circumstances indicating that a worker is self-employed are:

1. He is not obliged to perform the work personally but has the right to let someone else perform the work under his responsibility, either in whole or partially;
2. He is in fact letting someone else perform the work under his responsibility;
3. The work under the contract is limited to specified tasks;
4. The relationship between the two parties is of a temporary nature;
5. Neither the contract nor the actual conditions of the work stops him from performing similar work of any significance for someone else;

⁶⁸ AD 1979 nr 12

⁶⁹ SOU 1993:32 p 225

⁷⁰ AD 1977 nr 39

⁷¹ AD 1979 nr 12

⁷² SOU 1975:1 p 721f

6. He decides for himself – within the restrictions necessary due to the nature of the work – how the work is performed, the working time and the place of work;
7. He has to use his own machinery, tools or raw materials;
8. He has to cover his own expenses;
9. The remuneration for the work performed is solely dependent on the economic performance of the business;
10. He is economically and socially of the same status as a self-employed in the concerned branch of business;
11. He holds a permit or an official authorisation for his business or has incorporated his business.

6.2.4 Method of Interpretation

None of the above mentioned indicators is a necessary or sufficient provision for the existence of an employment contract. It is only through a joined consideration of all the circumstances that the nature of the contract can be determined.

This principle was established by the Supreme Court in 1949. “The question whether someone is an employee or not should be decided through the content of the contract between the two parties, where no single term of the agreement should be considered solely decisive, but all circumstances of the contract and the relationship considered.”⁷³

It is disputed whether any of the indicators are generally more important than the others or not. The technique of joined consideration of all the indicators makes it hard to distinguish the weight each individual indicator has been given in the legal practice.

In the Labour Courts practice from the 1930s and 1940s the obligation to perform the work personally and remuneration in the form of a guaranteed income were considered as the most important indicators. In SOU 1975:1 this opinion was deemed as no longer valid.⁷⁴

In SOU1993:32 the committee argues that “normally a lasting nature of the relationship and the high degree of subordination are considered strong indications of an employment relationship.”⁷⁵

However, the importance of the different indicators varies between different fields of business. It is, for example, in some branches natural that the degree of subordination is low simply because the employee is an expert with more skill than the employer or supervisor. In other branches, such as the forest industry, it is a custom that a worker, even though he owns very expensive machinery, is considered an employee.⁷⁶ The number 10 indicator above, referring to the economic and social status of the worker in the concerned branch of business also indicates the importance of branch practice.

The specific purpose of the regulation to be applied also influences the interpretation. The Swedish Supreme Court has argued that even though a uniform definition of employee is preferable it is not possible to neglect the specific purpose of the interpreted regulation.⁷⁷

The method of interpretation used by the courts has been criticised. Westerhäll argues that the method makes the decisions of the courts less useful as precedents since it is hard to distinguish what circumstances were decisive in each case. She also argues that it is not possible for the administrative social security agencies, that on a daily basis has to draw the

⁷³ NJA 1949 s 768

⁷⁴ SOU 1975:1 p 722f

⁷⁵ SOU 1993:32 p 229

⁷⁶ SOU 1975:1 p 723

⁷⁷ NJA 1982 s. 784

line between employees and self-employed workers to use the time consuming technique of joined consideration.⁷⁸

6.3 Outside the Core

In Labour Law the core concept of employee is used without much modification. In some cases, however, the lawmakers have deemed it necessary either to widen or to narrow the concept of employee. An example is the Co-determination in the Work-place Act that has a broader scope than the core concept in order to prevent circumvention of the act. “The term employee as used in this Act 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.”⁷⁹ Another example is the Employment Protection Act that excludes managers and their relatives from protection.

The concepts of employee used to define the scope of or the right to benefit in social security law are built on the core concept. In some cases the core concept is used practically unmodified, e.g. in the sickness benefit, while other systems, such as the unemployment benefit, have their own definition of employee. Generally speaking, the concept of employee is wider in social security law than in labour law, but as will be shown below there are exceptions to this rule.

Important to notice is that the concept of employee used when the scope or the benefit in a branch of social security is defined may differ from the concept used in taxation legislation regulating the contributions financing the system.⁸⁰

6.4 Taxation Law

6.4.1 Sources of Income

In taxation law, it is often necessary to distinguish incomes earned as employees and incomes earned from the running of a business. Once again, the double nature of self-employed workers constitutes a problem. On one hand, they are physical persons, why the rules should not deviate too much from the rules applying to employees. On the other hand, they run businesses and therefore the rules should not deviate too much from the rules applying to other businesses.⁸¹

Swedish taxation law distinguishes between two sources of income that involve remuneration for work: *income from employment* and *income from business*.⁸² Income from employment is primarily earnings from work as an employee but also serves as a residual category for earnings that do not fit into any other category.⁸³

Income from business is earnings from independent and professionally run businesses with the aim of making a profit.⁸⁴ Circumstances indicating *independence* are several principals, a large number of assignments, the fact that the worker uses his own tools or machinery, the fact that the worker is not performing all of the work personally and some degree of economic

⁷⁸ Westerhäll (1985) p 24

⁷⁹ Co-Determination in the Workplace Act, Article 1

⁸⁰ Westerhäll (1985) p 27

⁸¹ Lodin et al (1999) p 341

⁸² The third category of earnings, earnings from capital, does not involve remuneration for work.

⁸³ E.g. pensions, other taxable benefits and earnings from hobbies. Lodin et al (1999) p 98ff

⁸⁴ Lodin et al (1999) p 220

risk-taking.⁸⁵ These circumstances correspond well with the core concept of employee presented above.

To be considered as *professionally run* the business must show some degree of regularity and extent and aimed at providing goods or services to the public.⁸⁶ The provision that the business must be aimed at making a profit draws the line between business and hobbies. It is the aim to make a profit that is decisive. The question whether the business is in fact profitable or not is of no relevance.⁸⁷ The method of interpretation used is a joined consideration of all relevant circumstances.⁸⁸

A physical person running a business in the legal form of a private firm or non-trading partnership will get all his incomes from the business classified as income from business. He can not earn income from employment in his own business.⁸⁹ If two or more persons are running a business in the legal form of a trading partnership, all incomes that they earn from the business is considered income from business.⁹⁰

The definitions of the sources of income do not correspond with the classification of earnings into *earnings from works as an employee* and *earnings from other gainful employment* found in social security law.

6.4.2 Notices of Assessment

All legal and physical persons hold notices of assessment. In Sweden there are two different notices: employee notice of assessment (*A-skattsedel*) and business notice of assessment (*F-skattsedel*).

Any legal or physical person running a business or intending to run a business can apply for a business notice of assessment. The definition of business used is the same as for income from business. The holder of a business notice of assessment pays his or her own taxes and social security contributions and a principal making use of a worker who holds a business notice of assessment is not obliged to collect taxes or pay contributions for that worker. However, if the business notice of assessment is used in a relationship that is obviously an employer-employee relation the notice has no relevance.⁹¹

All who do not hold a business notice of assessment hold an employee notice of assessment. A physical person who combines work as an employee with running a business can hold both an employee and a business notice of assessment.⁹²

As noted above, the notice of assessment decides who has to collect or pay taxes and pay contributions. However, the notice of assessment does not automatically decide what source of income the earnings belong to. The holder of a business notice of assessment can pay taxes and contributions on incomes earned as an employee.⁹³

⁸⁵ Lodin et al (1999) p 222

⁸⁶ Lodin et al (1999) p 223f

⁸⁷ Lodin et al (1999) p 220

⁸⁸ Lodin et al (1999) p 101

⁸⁹ Lodin et al (1999) p 341f

⁹⁰ Lodin et al (1999) p 359f

⁹¹ SOU 1996:100 p 62

⁹² SOU 1996:100 p 63

⁹³ SOU 1996:100 p 65

The notice of assessment does not decide whether a worker should be considered as an employee or as a self-employed worker in labour or social security law. Despite this and despite the fact that the notice of assessment does not decide what source of income earning should be classified in, a business notice of assessment must still be considered as the strongest signal of the status of a worker. In the everyday relations between workers, principals and authorities, a business notice of assessment is the most important feature of a self-employed worker.

7. Sickness Benefit

7.1 Sickness Benefit and Self-employment

The purpose of sickness benefit is to protect workers from the loss of earnings due to incapacity of work caused by sickness. Employees and self-employed are, at least in general, equally likely to fall sick. Despite that, most countries either exclude self-employed workers from the sickness benefit or give them a less favourable standing.

One of the reasons for this is obvious. For most employees the earnings is dependent on the amount of time they have worked, why even a short period of sickness results in a loss of earnings. In general, self-employed are considered to have more control over their work and better possibilities to make up for the lost earnings.

Short-term sickness benefit is a benefit that is often calculated as a percentage of prior earnings. Like in other social security schemes where the right to or size of the benefit is dependent on earnings, there is the problem of defining the self-employed workers' earnings.

In many countries, the sickness benefit system includes regulations that make employers carry some of the cost for short-term sickness among their employees, mainly through sick pay. Through sick pay, the burden to control the short-term sickness is transferred from the social security administration to the employers. Sick pay is also considered to create economic incentives for employers to improve the working conditions. Naturally, the same rules can not apply to self-employed workers, as there is no employer who can exercise control.

7.2 Introduction to the Swedish Sickness Benefit

The Swedish sickness benefit is made up of sickness allowance and sick pay. The sickness allowance is universal and awarded to all workers and unemployed workers. The sick pay, paid by the employer, is paid only to employees and only the first two weeks of sickness. After the first two weeks, employees also receive sickness allowance

The sickness allowance regulations are a part of the 1962 *National Insurance Act*, an act that also includes medical care, old age pensions, parental allowance and some other benefits.⁹⁴

7.3 The Scope of the Sickness Benefit

The general scope of the National Insurance Act, expressed by the notion of *insured* is very wide. Insured are all Swedish citizens and all others who are resident in Sweden. Swedish citizens are insured even if they are not resident in Sweden. If an insured person leaves Sweden for less than a year he is still considered insured.

All persons 16 years or older are registered with the *social insurance office*.⁹⁵ It is the responsibility of the social insurance office to make sure that all insured are registered. A person that moves to Sweden from another country is obliged to contact the social insurance office within two weeks.

Being within the general scope of the National Insurance Act and registered with the social insurance office is not enough to be eligible for all the different benefits offered by the act. Instead, each benefit has its own, more narrowly defined scope.

⁹⁴ *Lag (1962:381) om allmän försäkring*

⁹⁵ Swedish: *Försäkringskassan*

Chapter 3 of the National Insurance Act contains the regulations on sickness allowance. To receive sickness allowance a person has to fulfil the conditions of the general scope of the National Insurance Act and have earnings of more than 24 percent of the base amount.⁹⁶

The purpose of the earnings-condition is that only persons who have a reasonably strong connection to the labour market, and who have earnings to lose, should receive sickness allowance. The earnings-condition keeps persons who only work sporadically or young people who take on a part time work during holidays outside the scope of the system. The sickness allowance has its own definition of earnings, *earnings qualifying for sickness allowance*⁹⁷, a definition also used in some other systems under the National Insurance Act, e.g. the parental allowance.

There are also some possibilities for other than workers to receive sickness allowance. Unemployed workers who, due to sickness, are not able to be at the disposal of the labour market (see 8.4 below) are also entitled to sickness allowance

Sick pay

Employees have the right to keep 80 percent of their salary and other employment-benefits during the first two weeks of sickness. The sick pay is paid by the employer.⁹⁸ The Sick Pay Act contains no definition of employee. The preparatory works of the act refer to the labour law concept of employee, a view that has been upheld by the courts.⁹⁹ The exceptions made in some labour laws for employees in leading positions are not valid in the case of sick pay. All employees have the right to receive sick pay from their employer, including working owners of corporations.¹⁰⁰ Employees who fall under the scope of the sick pay do not receive sickness allowance until the two-week sick pay-period is over. After the two-week-period the same rules on sick allowance apply to employees as to other workers.¹⁰¹

7.4 Sickness and Reduced Working Capacity

Sickness allowance and sick pay becomes payable in the event of *illness* that *reduces the working capacity* of the insured. The sickness benefit is only aimed at temporary reductions in the working capacity. If the reduction is permanent, the worker is instead eligible for invalidity pension.

The definition of *illness* has a medical core and includes both physiological and psychological conditions. Normal ageing, pregnancy or giving birth to children is not considered as illness.

More difficult to decide is whether, or how much, the illness reduces the *working capacity* of the insured person. Working capacity is defined as the insured person's ability to support him or herself through gainful employment. A person who is sick, but who's working capacity is

⁹⁶ Currently 8 736 SEK (~970 EUR)

⁹⁷ *Sjukpenninggrundande inkomst (SGI)*

⁹⁸ The regulations on the sick pay are found in the Sick Pay Act – *Lag (1991:1047) om sjuklön.*

⁹⁹ Prop 1990/91:181 p 38f and RÅ 1997 not 221

¹⁰⁰ SOU 1998:34 p 27

¹⁰¹ When the sick pay was introduced in 1991, the argument used was that the old order, with sickness allowance paid for by contributions from all employers, did not make individual employers enough economically responsible for working conditions with a negative impact on the workers' health. Naturally, the sick pay was connected to the employer-employee relationship, where the employer's prerogative gives the employer the right to decide how, where and when the work is performed. However, the introduction of the sick pay coincided with fiscal problems why the desire to improve government finances must be considered as a deciding factor for the reform.

unreduced, or reduced by less than one fourth, has no right to sickness allowance or sick pay. The same illness may reduce the working capacity of different insured to different degrees.¹⁰² It is also important to bear in mind that what is considered *full* working capacity varies from person to person.

In recent years the lawmakers have also stressed that it is only reductions in the working capacity due to illness that gives the right to sickness benefit, not reductions due to economic, social or circumstances on the labour market.¹⁰³ This means that if a worker suffering from illness still has a working capacity but is unable to find a job where the capacity can be put to work he is considered unemployed, not ill.

It is the working capacity that draws the line between the on one hand the sickness allowance and on the other hand the temporary invalidity pension and the invalidity pension. The line is drawn using a step-by-step-model. After the social insurance office has established that the insured person is ill and that it is the illness that reduces the working capacity.¹⁰⁴

- Step 1. *Is it possible for the insured person to perform his ordinary work after necessary treatment and convalescence?* If the answer is 'Yes', the insured is entitled to benefit, if the answer is 'No' step 2 should be considered.
- Step 2. *Is it possible for the insured person to perform the tasks of his ordinary work after some rehabilitation or adaptation of the tasks?* If the answer is 'Yes', the insured is entitled to benefit, if the answer is 'No' step 3 should be considered.
- Step 3. *Is it possible for the insured to receive and perform other tasks for his employer without any extra measures?* If the answer is 'Yes' the insured may receive benefit during necessary treatment and convalescence, if the answer is 'No' step 4 should be considered.¹⁰⁵
- Step 4. *Is it possible for the insured to receive and perform other tasks for his employer after some education, adaptation of the tasks or other rehabilitating measures?* If the answer is 'Yes' the insured may receive benefit during the time necessary for education or rehabilitation, if the answer is 'No' step 5 should be considered.
- Step 5. *Is it possible for the insured to perform other work 'normally occurring' on the labour market without any extra measures?* If the answer is 'Yes' the insured is not entitled to benefit. If the insured can not find such a job, he or she is considered as unemployed, not incapacitated to work. If the answer is 'No' step 6 should be considered.
- Step 6. *Is it possible for the insured to perform other work 'normally occurring' on the labour market after some rehabilitative measure such as education or retraining?* If the answer is 'Yes' the insured may receive benefit during the time necessary for such education or retraining. If the insured after that period is unable to find a job, he or she is considered as unemployed, not incapacitated to work. If the answer is 'No' step 7 should be considered.
- Step 7. *Is the insured person incapacitated to work for a considerable time?* If this is the case, the insured is eligible for either temporary invalidity pension or invalidity pension.

For employees, all seven steps are applicable. For self-employed workers, steps 3 and 4 are not applicable.¹⁰⁶ The practical consequences of this are that self-employed workers are not entitled to rehabilitative measures, education or retraining and benefit during rehabilitation, education or retraining to the same extent as employees. Self-employed workers can only receive such measures or benefit during periods of such measures in order to go back to their

¹⁰² Prop 1996/97:28 p 10f

¹⁰³ It is however, still possible to take some labour market circumstances into consideration, such as if the old-age of the worker makes it very difficult for him or her to find a new suitable job. Prop 1996/97:28 p 9ff

¹⁰⁴ Prop 1996/97:28 p 18ff

¹⁰⁵ According to the Swedish Employment Protection Act, the employer is obliged to try to re-assign the employee to new tasks.

¹⁰⁶ SOU 1998:34 p 45f

ordinary job or tasks or to work normally occurring on the labour market. They are not eligible for benefit in order to re-direct their business.¹⁰⁷

In practice, the difference between step 2 and steps 3 and 4 is not so clear cut as the preparatory works indicate and the practical consequences of the different rules for employees and self-employed workers are therefore hard to determine. One can assume that many self-employed workers investigate step 3 by themselves and try to adjust the business to their new situation.¹⁰⁸

For employees, step 4 is usually the result of a discussion between the employee, the employer and the social insurance office on what measures should be taken to ensure the worker new tasks. In the case of self-employed, no such three-party discussion is possible. However, for self-employed the line between step 3 and 4 and step 5-7 is especially difficult to draw. Re-directing an existing business can very well be considered as finding other work normally occurring on the labour market and not as other tasks within the same business.¹⁰⁹

The difference in the legislation is probably more connected to the labour law rules obliging the employer to try and re-assign workers whose working capacity in their old position has been reduced than any real underlying difference in this respect between employee and self-employed.

However, the problem that today's rules can make it more difficult for self-employed workers to receive education, retraining and rehabilitative measures has been recognised by the government. In November 1997 the government appointed a committee to investigate the problem and in May 1998 the committee proposed that self-employed workers should be included in steps 3 and 4.¹¹⁰

7.5 The Benefit

7.5.1 The Earnings Qualifying for Sickness Allowance

The sickness allowance is aimed at compensating the insured person for the loss of earnings suffered during a period of sickness.¹¹¹ The *earnings qualifying for sickness allowance* (qualifying earnings) is therefore, at least in theory, based on the future earnings of the insured. The task is not to establish how much money the worker has made in the past, but to estimate the insured person's earnings had he not fallen sick.

To determine the qualifying earnings for permanent full-time employees does not pose any serious problems. For atypically employed, with more uncertain earnings, it is more difficult. The solution is to look at the worker's earnings in the past and calculate the qualifying earnings from them.¹¹² For both typical and atypical employees the most important source of information for the social insurance office is salary statements from the employer.

Determining the qualifying earnings for self-employed workers is even more difficult. As is the case with the atypical employees, they have uncertain earnings that can vary considerably

¹⁰⁷ SOU 1998:34 p 51f

¹⁰⁸ SOU 1998:34 p 51f

¹⁰⁹ SOU 1998:34 p 53ff

¹¹⁰ SOU 1998:34

¹¹¹ The sickness benefit can alternatively be paid as compensation for increased expenses for travel to and from work that a worker might experience due to illness.

¹¹² Christensen (1998b) p 38f

over the time. In addition to this, the qualifying earnings only include earnings from work, not return on capital.¹¹³

The earnings of self-employed workers are often a combination of a return on work and a return on invested capital. In the preparatory works of an earlier law concerns were raised over the fact that the earnings of self-employed sometimes is influenced by “economic speculation” and many other circumstances other than the work of the insured.¹¹⁴ The idea that it is the earnings from work that the sick worker has lost that is to be compensated has strongly influenced the regulations on the calculation of the qualifying earnings for self-employed workers.

The starting point for the calculation of the qualifying earnings for self-employed is the taxable earnings. However, the law states *that earnings from the work for the insured's own account may not be calculated at an amount which exceed reasonable remuneration for similar work performed for another person's account.*¹¹⁵

A problem in legal practice is to establish what is meant by *similar work*. It is sometimes hard to find an employee who performs the same tasks as the self-employed worker. Many self-employed also work “overtime” to an extent that is not allowed for employees. The courts have not allowed the qualifying earnings for self-employed to be calculated on a working time that exceeds the legal limit for overtime work for employees. A related question is if the extra time many self-employed spend on administrative work should be included. If it is included a self-employed worker can be awarded a higher qualifying earnings than an employee performing similar work. According to the courts it is possible to “some extent” to award a higher qualifying earnings for self-employed due to their administrative burdens.¹¹⁶

In this respect, working owners of corporations are considered as employees and thus can get qualifying earnings established that exceeds “reasonable remuneration for similar work”.¹¹⁷

There are also some possibilities for self-employed workers to get a qualifying earnings that is higher than the taxable earnings, e.g. if their business is in at start-up stage, heavily indebted or for some other important reasons generating a smaller earnings than it otherwise would. Earnings over 750 percent of the base amounts¹¹⁸ are not included when the qualifying earnings is calculated. The *ceiling* sets an upper limit on the qualifying earnings and the benefit.

7.5.2 Amount, Duration and Waiting days

Full sickness allowance is 80 percent of the qualifying earnings under the ceiling of 750 percent of the base amount. For each day a self-employed worker is sick he receives 80 percent of his yearly qualifying earnings divided by 365. Sickness allowance is paid seven days per week. Depending on how much the illness reduces the working capacity the insured can receive full, three-fourths, half or one-fourth sickness allowance. The sickness allowance is taxable.

¹¹³ Westerhäll (1985) p 19f

¹¹⁴ SOU 1944:15 p 213

¹¹⁵ The National Insurance Act, Chapter 3, Article 2

¹¹⁶ Riksförsäkringsverket (1986) p 1ff and Riksförsäkringsverket (1997) p 34ff

¹¹⁷ SOU 1998:34 p 34

¹¹⁸ Currently 273 000 SEK (~ 30 330 EUR).

There is no limit for how long an insured person can receive sickness allowance. An insured person receiving the benefit either get well and goes back to work, or is transferred to the temporary invalidity pension or the invalidity pension.¹¹⁹

Normally, the sickness allowance has one waiting day. For people who fall sick once again with the same illness there is no waiting day, if the new period of sickness begins five days or less after the first period.

Self-employed can chose either to follow the principal rule, one waiting day, or chose higher number of waiting days, either three or thirty, in exchange for a lower contribution.¹²⁰ If a self-employed worker with a three or thirty day waiting period falls sick again less than 20 days after the end of the first period of sickness, the principal rule is applicable for the second period, i.e. a one day waiting-period.

7.6 Financing

The sickness allowance is financed over the state budget through contributions. Employers pay employer's contributions for their employees while self-employed pay their own contributions.¹²¹

The self-employed's contributions are currently 8.66 percent of the qualifying earnings and other non-monetary benefits. Self-employed workers who have chosen three or 30 waiting-days pay reduced contributions, currently 7.16 percent for those opting for three waiting days and 6.23 percent for 30 waiting days.

There is no connection between the contributions that employers and self-employed pay and the benefits, neither on the individual level or in the government finances. The contributions are not earmarked for the sickness allowance. Some years the cost of the sickness allowance scheme exceeds the contributions, other years the contributions exceed the cost of the scheme.

¹¹⁹ Christensen (1998b) p 42f

¹²⁰ C.f. Chapter 7.6

¹²¹ The regulations are found in the Social Contributions Act (*Lag (1981:691) om socialavgifter*)

8. Unemployment Benefit

8.1 Unemployment Benefit and Self-employment

Unemployment is the social risk most intimately connected to the forces of the free market. As a consequence of this, unemployment benefit is the branch of social security where the conflict between the worker considered in need of protection from the forces of the free market and the business operating according to the laws of supply and demand is most evident.

Consequently, unemployment benefit is the branch of social security that most seldom includes self-employed. In most European countries it is not possible to qualify for unemployment benefit through self-employment. Sweden is an exception.

The supply of work for self-employed is usually not linear, for which reason it is difficult to define unemployment for self-employed workers. Is a self-employed worker, who under a limited period of time do not have any work assigned, unemployed or just experiencing a normal fluctuation in the inflow of assignments? At what point does the unemployment benefit become a way for self-employed workers who otherwise would go out of business to stay on the market, thus hampering competition?

Also the control aspect constitutes a problem. Unemployment benefit is aimed at protecting workers from the economic consequences of *involuntary* unemployment. To determine whether an employee has become involuntary unemployed or not is usually very easy. Did he quit his job or did he get fired? To determine the involuntary nature of the unemployment of a self-employed worker is more difficult. Traditionally, the unemployment of employees has been seen as a consequence of management decisions outside the control of the employee, while the unemployment of self-employed workers has been considered as a result of their own decision to go out of business. Reality, however, is more complex and many self-employed are as exposed to decisions outside their control as are employees.

8.2 Introduction

The Swedish unemployment benefit system has two parts, *the basic insurance* and the *acquired standard protection insurance*¹²² with the same basic scope: unemployed former employees and unemployed former entrepreneurs. The rules governing the Swedish unemployment benefit system are found in the Unemployment Insurance Act and in the Unemployment Benefit Societies Act¹²³. The two acts came into effect January 1, 1998, replacing older legislation with similar content.

8.3 The Scope of the Unemployment Benefit

The basic insurance is a flat rate benefit. The scope of the basic insurance is employees and entrepreneurs who are not members of an unemployment benefit society and members of unemployment benefit societies who do not fill the requirements for the acquired standard protection insurance. The acquired standard protection insurance is voluntary and based on membership in an unemployment insurance society. The benefit is calculated as a proportion of prior earnings. To be eligible for the acquired standard protection insurance the worker also has to fulfil a work requirement.

¹²² Sw: *grundförsäkring* and *inkomstbortfallsförsäkring*

¹²³ *Lag (1997:238) om arbetslöshetsförsäkring* and *Lag (1997:239) om arbetslöshetskassor*.

8.3.1 A Different Concept of Employee

The concept of employee in the unemployment insurance differs from other definitions of employee found in Swedish law. The unemployment insurance concept of employee is based on the control that the worker has over his or her unemployment.¹²⁴ The consequence of this concept of employee is that, on one hand, many working owners, who in other situations would be considered as employees, are considered as entrepreneurs under the Unemployment Insurance Act, while on the other, some self-employed who only work for one or two different principals and whose taxes and contributions are paid for by the principal are considered as employees.¹²⁵

8.3.2 The Concept of Entrepreneur

Entrepreneur as it is defined in the Swedish unemployment insurance is a wider concept than the concept of self-employed. All self-employed are considered as entrepreneurs but the concept also includes many working owners who in other cases are considered as employees. The concept of entrepreneur in the unemployment insurance does not correspond with any other concept of entrepreneur in Swedish law.¹²⁶

In the Unemployment Insurance Act *entrepreneur* is defined as “persons who own or are partners – directly or indirectly – in a business where they are personally active and exercise a substantial influence”.¹²⁷

The concept of entrepreneur in the unemployment insurance system should not be confused with any other concepts of entrepreneur, or self-employed, found in labour law, taxation law or other part of social security law. This concept of entrepreneur is valid only in the unemployment insurance.

The provision includes three conditions: i) the worker has to own at least a part of the business, ii) the worker has to be working personally in the business and iii) he has to exercise a substantial influence. If all these conditions are fulfilled the worker is considered to be an entrepreneur.

The definition of the word *business* is taken from taxation law and indicates an independent and professionally run business with the aim of making a profit.¹²⁸

The *ownership condition* can be fulfilled either through being the sole owner of the business or through being a partner. The ownership can be direct or indirect, i.e. if a legal person that is owned by the worker owns the business the worker is considered an owner.¹²⁹

The condition that the worker should be *personally active* in the business indicates that owning the business or a part thereof is not enough to be considered an entrepreneur. The worker has to be involved in the actual running of the business. If an owner or a partner is employed in the business he is normally considered personally active.¹³⁰

¹²⁴ FÖD 1983:18

¹²⁵ SOU 1996:150 p 224ff

¹²⁶ SOU 1993:52 p 335

¹²⁷ The Unemployment Insurance Act, Article 34.

¹²⁸ SOU 1996:150 p 195

¹²⁹ SOU 1996:150 p 195

¹³⁰ SOU 1996:150 p 196

Substantial influence is at hand if the owner or partner exercises an influence on the business that is so strong that the workers decisions, actions or competence effects the economic results of the business. Examples are workers who are majority owners and minority partners who in addition to their ownership are authorised to represent the company and who are either members of the board or managing directors.¹³¹

In a case before the Swedish supreme social security court, an unemployed worker who was a partner, a member of the board and authorised to represent the company in a corporation run by her parents, was not considered an entrepreneur, because she did not take any active part in the running of the business and did not receive any salary, economic compensation for being a member of the board or any part of the profit from the company.¹³² Thus, the worker has to be working in the business to be considered an entrepreneur.

The same business can, according to this definition, have several entrepreneurs. However, co-operatives of employed members and employee-owned business have, in legal practice, been exempted from this. Instead one of the employees are considered as an acting entrepreneur, a status that may rotate between the members.¹³³

The concept of entrepreneur in the Unemployment Insurance Act is an imperative provision. Even if an owner of a business formally is an employee in that business he is to be considered an entrepreneur, if the above mentioned conditions are at hand.¹³⁴

Relatives of the entrepreneur who are employed in the business are considered as employees and fall under the same provisions as other employees, if they do not fulfil the requirements for being entrepreneurs themselves.¹³⁵ However, the unemployment benefit societies are instructed by the Swedish National Labour Market Administration to investigate more thoroughly cases where close relatives of the entrepreneur claim unemployment benefit. For example, to check if the employee has had any income from the employment and if the employer has been paying taxes and social security contributions for the relative.¹³⁶

8.4 Unemployment

Entitled to benefit from the unemployment insurance are *unemployed* workers who are *at the disposal of the labour market*. The latter means that they are physically able to work; ready to accept a job that is suitable according to e.g. their education, work experience and age; and registered with the public unemployment agency. The unemployed has to be ready to take on work for at least 3 hours a day and an average of 17 hours per week.

Unemployed workers have to be ready to accept a job even if it means changing their profession. They also have to be ready to commute to a new job outside their place of residence or even move to other areas where there are suitable jobs. Unemployed who for different reasons e.g. small children, are considered to be more attached to their place of residence, can be exempted.

¹³¹ SOU 1996:150 p 196

¹³² FÖD 1989:22

¹³³ SOU 1996:150 p 206

¹³⁴ Prop. 1973:56 p 188

¹³⁵ Prop. 1992/93:150 Bilaga 8, p 65

¹³⁶ The Swedish National Labour Market Administration's instructions on the unemployment insurance. (AMSFS 1997:13) Section 20

Generally, unemployment can be defined as a situation where lack of work leads to a loss of earnings for the worker. Employees enter unemployment when their employment ends. Thus, the first day of unemployment is the first day when the worker does not receive any income from the employment because it has ended.¹³⁷ In legal practice it is seldom a problem to establish whether or not a former employee has become unemployed.

Unemployment of entrepreneurs is more difficult to define. The inflow of assignments in a business or the demand for the business' products is very seldom linear. Normally, periods with plenty of work are followed by periods of little or no work. Another difference between employees and entrepreneurs is that the entrepreneurs themselves make the final decision to go out of business, even when the real reason is outside their control. In addition to this there is the concern that unemployment benefit can be used to fill in during down periods in less successful businesses or in branches of business who are seasonal to their nature, such as the tourist industry. If the entrepreneurs register as unemployed and collect unemployment benefit, competition can be distorted. Thus, it has been considered necessary to have stricter rules concerning the unemployment of entrepreneurs than the unemployment of employees.

An entrepreneur is unemployed if his personal activity in the business has more than temporarily ceased. In practice this means that his personal activity in the business should have ended permanently. The question whether the personal activity in the business has ended or not should be determined through a joined consideration of all relevant circumstances. There are no necessary or sufficient conditions. The easiest way to prove that the personal activity in the business has ceased more than temporarily is to show that the business has ended. Legal practice and doctrine has therefore come to focus on circumstances indicating the end of the business.

As mentioned above, unemployment has to be involuntary in order to qualify for unemployment benefit. In practice this means that the entrepreneur must have a valid reason to end his business. It is not necessary that the business has gone bankrupt, but it should no longer yield enough profit to give the entrepreneur a sufficient income.¹³⁸

The fact that an entrepreneur has sold the *real estate and inventories* used in his business is considered strong evidence that the business has ended, even though it is not a necessary condition. This circumstance has in recent years become less important. Today unemployed are allowed to keep real estate formerly used in the business and to let it out if the administration of the letting out does not keep the unemployed worker from being at the disposal of the labour market¹³⁹.

Normally, *administrative registrations* of the business as a company or for tax purposes should have been de-registered in order for the entrepreneur to be considered unemployed. However, there are situations where the entrepreneur has to keep his company registered or his tax status as an entrepreneur due to rules in other legislation, e.g. taxation law. This should not disqualify from unemployment benefit.¹⁴⁰

¹³⁷ SOU 1971:42 p 132

¹³⁸ In legal practice annual net profits that fall short of three base amounts (109 200 SEK ~ 12 130 EUR) are considered a valid reason to end a business. SOU 1996:150 p 197

¹³⁹ Prop 1996/97:107 p 105f

¹⁴⁰ Prop 1996/97:107 p 105f

In the Swedish unemployment insurance it is possible for employees who have been full-time employed but now only can find part-time employment to collect unemployment benefit for part-time unemployment. For entrepreneurs there is no such possibility.¹⁴¹ The reason for this is mainly the fear that part-time unemployment benefit for entrepreneurs would distort competition. In addition to this an unemployed entrepreneur is not allowed to continue the business on a smaller scale as a spare-time occupation.^{142 143}

If the business is run by several entrepreneurs, the unemployment should be determined separately for each entrepreneur. A smaller inflow of assignments or a decrease in demand for the business' products may result in a situation where a business that used to provide gainful work for three entrepreneurs only has work for two. If one of them leaves the business his ties to the business must be cut in order for him to be eligible for unemployment benefit. Even if the Unemployment Insurance Act states that it is the *personal activity* in the business that must have ceased legal practice has refused to grant unemployment benefit to entrepreneurs who no longer work actively but who still owns and exercises influence over the business.¹⁴⁴

In the inverse situation, where an entrepreneur sells his part of the business and resigns from his management functions but keeps working in the business, he is still considered an entrepreneur. If his working time is reduced he can therefore not collect benefit as a part-time unemployed.¹⁴⁵

If a worker combines part-time employment with a limited activity as an entrepreneur and loses his job as an employee he is allowed to collect part-time unemployment benefit only if his activity as an entrepreneur does not increase. *Limited activity* as an entrepreneur is less than ten hours a week.¹⁴⁶

Sometimes an unemployed former entrepreneur starts a new business after some time of unemployment. If the period of time between the two businesses is too short he may retroactively lose his right to unemployment benefit. Four months has in practice been considered as a sufficient period of time between the two businesses.¹⁴⁷ The greater the difference as to products, services and field of business is between the old and the new business, the shorter is the required period of time.

8.4.1 Temporarily Dormant Businesses

That an entrepreneur is unemployed only if his personal activity in the business has ended is still the principal rule. However, from January 1 1998, there is a possibility for entrepreneurs to receive unemployment benefit even though their personal activity in the business has only ceased temporarily.

The background to this change is the fact that unemployed entrepreneurs often have a hard time finding a job and that their best chance often is to start a new business, either in the same field as the old business or in a new field. It should therefore be easier for them to come back as entrepreneurs. Concerns have also been raised over the destruction of capital and the

¹⁴¹ SOU 1996/97:107 p 107

¹⁴² SOU 1971:42 p 135

¹⁴³ C.f. Chapter 8.5.3

¹⁴⁴ FÖD 1990:15

¹⁴⁵ FÖD 1993:20

¹⁴⁶ FÖD 1989:31

¹⁴⁷ SOU 1996:150 p 204

selling of real estate and inventories for below market values that is the result of the principal rule's condition that the entrepreneur must have ended his business. The fact that an entrepreneur whose business fails might have to sell machinery, tools and other means of production under the market values in order to receive unemployment benefit increases the economic risk in starting an new business, thus hampering the development of small businesses.¹⁴⁸

Two conditions has to be fulfilled in order for an entrepreneur to receive unemployment benefit even though the activity in the business has ceased only temporarily. Firstly, the intermission must not in any part be the result of a seasonal variation in the business activity. Secondly, during the intermission, no activity can take place in the business. This means that no production of goods or services, and no preparation for such production, can take place. No marketing, no purchases and no sales are allowed, except in order to save goods that otherwise would be spoiled. As is the case with entrepreneurs who have ended their business definitely, unemployed entrepreneurs with dormant businesses are allowed to let out real estate used in the business. The unemployed entrepreneur is allowed to do accounting and other administrative duties that he is obliged to do under the law.¹⁴⁹

As mentioned above, the idea behind the possibility is to make it easier for unemployed entrepreneurs to restart their business. However, as restarting a business usually requires a lot of preparation, an important question is how much preparatory work an unemployed entrepreneur is allowed to do and still be considered unemployed. In the preparatory works of the Unemployment Insurance Act the lawmakers refer to the fact that an unemployed worker has to be at the disposal of the labour market in order to be entitled to unemployment benefit. If an unemployed entrepreneur turns down a job-offer because he is preparing to restart his dormant business he is no longer at the disposal of the labour market.¹⁵⁰

The opportunity to receive unemployment benefit while the business is "dormant" can only be used once for each business.

8.5 The Benefits

8.5.1 The Basic Insurance

Entitled to benefit from the basic insurance are unemployed workers who are either not members of any unemployment benefit society or who are members of a unemployment benefit society but who do not fulfil the membership and work requirements of the acquired standard protection insurance. There are no differences as to how employees and entrepreneurs qualify for or receive benefit from the basic insurance.

The basic insurance is a flat rate benefit. The amount is neither means tested nor dependent on the earlier income of the unemployed worker. In May 1999 the benefit is 240 SEK (~ 26 EUR) per day, five days a week.

The basic insurance has a five-day waiting period when no benefit is paid. The basic insurance can be collected for a maximum of 300 days. For unemployed workers who turn 57 years old before the 300 days has ended, the maximum period is 450 days.¹⁵¹

¹⁴⁸ SOU 1996:150 p 201f and Prop 1996/97:107 p 107.

¹⁴⁹ Prop 1996/97:107 p 108f and SOU 1996:150 p 202f

¹⁵⁰ Prop 1996/97:107 p 109

¹⁵¹ As the benefit is paid for 5 days per week the 300 days is the same as 60 weeks.

It is possible for an unemployed worker to *requalify* for an unlimited numbers of new 300(450)-day periods of benefit. An unlimited number of new periods of benefit can be earned either through regular employment or activity as an entrepreneur or through labour market programs. When a period of benefit is coming to an end, the unemployed is normally offered participation in a labour market program in order to qualify for a new period.

8.5.2 The Acquired Standard Protection Insurance

The acquired standard protection is aimed at workers who are more established on the labour market. In order to be entitled to the acquired standard protection insurance the unemployed worker has to have been a member of an unemployment benefit society (the membership requirement) and, during the time as a member, fulfilled a work requirement.

The benefit is defined as a proportion of prior earnings, in order to protect the acquired standard of the unemployed worker during the time it takes to find a new job.

The membership requirement

The Unemployment Benefit Societies Act regulates the activity of the unemployment benefit societies. According to these regulations the societies are obliged to accept as a member any worker who works within the field of business of the society, with the exception of workers who are members of another unemployment benefit society and workers over the age of 64. Despite that the unemployment benefit societies are run by the trade unions they have to accept non-union members as members of the societies.

It is possible for the unemployment societies to define their field of business as only employees or only entrepreneurs. For example, there are unemployment benefit societies for shop-keepers and fishermen that only accept entrepreneurs as members. Far from all, but an increasing number of the unemployment benefit societies predominantly aimed at employees also accept entrepreneurs as members.

The unemployed worker must have been a member of an unemployment benefit society for at least 12 months before he becomes unemployed. If the worker has switched from one unemployment benefit society to another, the membership periods are aggregated. The membership requirement prevents workers from entering unemployment benefit societies only when unemployment seems imminent.

Before 1997, the membership requirement for entrepreneurs was 24 months, compared to 12 months for employees. Entrepreneurs were considered to have better possibilities to foresee their own unemployment than employees, thus more likely than employees to enter the unemployment benefit societies only when they already knew that they were going out of business.¹⁵²

The National Labour Market Administration had a possibility to grant exceptions from the 24 month-requirement. Entrepreneurs who were members of trade associations, e.g. the Swedish Retail Federation, that organised over 80 percent of the entrepreneurs within their sphere of business and collectively associated their members to an unemployment benefit society, only had to fulfil a 12-month requirement.¹⁵³

¹⁵² SOU 1996:150 p 197f and 208f

¹⁵³ SOU 1996:150 p 197

The arguments presented for changing the rules to a universal 12-month requirement focused on the fact the differences between employees and entrepreneurs, especially between employees and self-employed workers are smaller today than before. Also the fact that the old rules did not treat all entrepreneurs equal, due to the possibility to exempt the collectively associated entrepreneurs from the 24-month requirement, was taken into consideration. In the official government report that preceded the new regulations the equal treatment of entrepreneurs and employees was described as having *a value in itself*.¹⁵⁴

The work requirement

In order to be entitled to the acquired standard protection insurance, the unemployed worker must have worked:

- a minimum of 70 hours per month during at least nine of the last twelve months, or
- a minimum of 450 hours during six consecutive months of the last twelve months and none of the six months less than 45 hours.

In some cases of absence from work, e.g. sickness, parental leave and some full-time education, the twelve months do not have to be twelve consecutive months. Instead, the time that the worker has been absent is deducted and the last twelve months of work are counted. When the working time is calculated, vacations are counted as work.

Not all work is considered work under the Unemployment Insurance Act. Different labour market programs, where the government subsidizes the employment, can not qualify the worker for a first period of benefit. One of the programs that do not qualify for a first period of benefit is the start-up grant for unemployed workers who become entrepreneurs.¹⁵⁵ However, the start-up grant-program can be used to requalify for benefit.

The work-requirement is the same for employees and entrepreneurs. Normally, entrepreneurs are presumed to work full-time in their business. When an entrepreneur applies for unemployment benefit his accountant or someone else with good insight in the business should certify that the declarations the entrepreneur makes about his work in the business are correct.¹⁵⁶

Calculation of the benefit

The benefit in the acquired standard protection insurance is related to prior earnings. Currently the benefit is 80 percent of the prior earnings between a minimum benefit of 240 SEK (~26 EUR) per day and a maximum benefit of 580 SEK (~64 EUR) per day, five days a week.

For entrepreneurs the benefit is normally calculated as 80 percent of the average of the taxed incomes from the business the past three years. The year under which the entrepreneur goes out of business is not included.¹⁵⁷

Before September 1997 the benefit was calculated from the highest of the taxed incomes for the last three years. But because the income from businesses often vary from year to year, and

¹⁵⁴ SOU 1996:150 p 209

¹⁵⁵ Prop 1996/97:107 p 98f

¹⁵⁶ SOU 1996:150 p 198

¹⁵⁷ The regulations for calculating the benefit for entrepreneurs are found in the Unemployment Insurance Act, Article 37 and in the National Labour Market Administration's instructions on the unemployment insurance. (AMSF 1997:13), Sections 65-66.

that entrepreneurs under taxation law have possibilities to move incomes from one year to another, thus the possibility to “create” a year of high income on which the benefit can be calculated, this method was not seen as giving a correct image of the entrepreneur’s acquired standard.¹⁵⁸

If the business has been carried on for less than three years the benefit is calculated from the taxed income of the years that it has been carried on. The income from the year under which the entrepreneur has gone out of business is only counted if it gives the entrepreneur a higher benefit. This income can only be preliminary for which reason the benefit might be adjusted retroactively if the taxed income from the last year in business turns out to be different than first expected.

For workers who have become entrepreneurs less than twelve months before they enter unemployment there is an alternative way of calculating the benefit. If an entrepreneur earlier has fulfilled a work requirement as an employee, the time as an entrepreneur is not counted and the benefit is based on the unemployed entrepreneur’s income as an employee.

This exception is aimed at unemployed former employees who think of starting their own business. Without the exception they would run the risk of losing the higher level of benefit they acquired as employees if their new business fails, which could have a discouraging effect. The exception gives them a year to build up their business before their benefit is calculated according to the rules for entrepreneurs.¹⁵⁹

According to the instructions of the National Labour Market Administration the benefit can only be based on income from years when the entrepreneur has been a member of an unemployment benefit society.

As is the case with the basic insurance, the acquired protection insurance has a five-day waiting period and can be collected for a maximum of 300 days (450 for unemployed over 57 years old). It is possible to *requalify* for an unlimited numbers of new periods of benefit, either through regular employment or activity as an entrepreneur, or through labour market programs. When a period of benefit is coming to an end, the unemployed is normally offered participation in a labour market program in order to qualify for a new period.

8.5.3 Excepted Branches of Business

Fishermen who are members of the Fishermen’s unemployment benefit society are excepted from some of the rules concerning unemployment benefit for entrepreneurs. Fishermen are considered unemployed not only when their personal activity in the business has ceased more than temporarily, but also in situations when fishing is temporarily not possible due to ice, hard weather, technical problems on their boat, lack of fuel or because of limitations to fishing decided by the EC or the Swedish fishing authorities.¹⁶⁰

This exception has been criticised for being a way to subsidise the fishing industry over the unemployment benefit. An earlier exemption, giving haulage contractors and entrepreneurs in road delivery businesses who ran their business from a haulage central and who were collectively associated to an unemployment benefit society for entrepreneurs a possibility to

¹⁵⁸ SOU 1996:150 p 209f

¹⁵⁹ Prop 1996/97:107 p 112 and SOU 1996:150 p 211ff

¹⁶⁰ The National Labour Market Administration’s Instructions on the Unemployment Insurance. (AMSF 1997:13), Sections 64 and 67.

receive unemployment benefit for temporary intermissions in their business during the months of October-May, was abolished in 1997. The reason to abolish the exceptions was that it not only served as a hidden subsidy, but also distorted competition between entrepreneurs who filled the requirements for the exception and entrepreneurs who for different reasons could not fill the requirements.¹⁶¹

Workers in the cultural sector – actors, musicians, artists – are often entrepreneurs. In practice, however, they are not treated as other entrepreneurs. Partly, this is due to the fact that it is very hard to define unemployment for cultural workers, partly to the fact that the unemployment insurance in this case is used as a hidden subsidy to the cultural sector.¹⁶² The practice has been criticised for helping cultural workers to stay in business instead of entering a career where they can support themselves.¹⁶³

8.5.4 Incapacity to Work and Partial Unemployment

That self-employed workers are not eligible for benefit for partial unemployment can create problems for self-employed who fall ill. If a worker applying for sickness allowance is considered to have a working capacity but is unable to find a job where he or she can put the capacity to work the worker is considered unemployed. In such cases the problem is considered to be the labour market, not the illness, why the social risk is to be covered by the unemployment benefit, not the sickness allowance.

In many cases, workers who are ill are no longer able to continue working full-time at their old job, but yet considered to have a full working capacity in other work normally occurring on the labour market. In such cases, an employee working part-time in his old job while looking for a new job is eligible for unemployment benefit for partial unemployment. As self-employed workers are not eligible for unemployment benefit for partial unemployment, a self-employed worker in the same situation has to suffer a great loss of earnings.¹⁶⁴

8.6 The Financing of the Unemployment Benefit

The unemployment benefit is financed from three different sources: membership fees, government subsidies from employer's and self-employed's contributions and government subsidies paid by ordinary taxes.

The employer's contribution for the financing of the unemployment insurance is currently 5.84 percent of the paid wages. Self-employed workers pay a contribution of 3.30 percent of their earnings.¹⁶⁵

The contributions are the by far most important source of income for the unemployment benefit. Up to 97 percent of the expenses are paid by the contributions. Membership fees are very low and only account for the financing of the administration of the scheme.¹⁶⁶ If the contributions and the membership fees are not sufficient, the government goes in with tax money.¹⁶⁷

¹⁶¹ SOU 1996:150 p 216 ff

¹⁶² E.g. through allowing actors to rehearse a play or a show and receive unemployment benefit up to two weeks before the first showing. SOU 1996:150 p 228 ff

¹⁶³ SOU 1996:150 p 228 ff

¹⁶⁴ SOU 1998:34 p 35 f

¹⁶⁵ The definition of earnings used is the same as in the sickness allowance.

¹⁶⁶ The membership fees are currently between 70-80 SEK (~7,5-9 EUR) per month. Usually non-union members pay a higher fee than union members.

¹⁶⁷ SOU 1996:150 p 144ff and Christensen (1998b) p 88

9. Old age Pensions

9.1 Old age Pensions and Self-employment

Old-age pensions protect people who, as a result of old age, are no longer able to acquire proper earnings.¹⁶⁸ As stated above, old age is not a “risk” in the strict sense of the word, but a normal, most often desired, stage in life. Consequently, old-age pensions differ from other branches of social security.¹⁶⁹

Most public pension schemes include some kind of minimum level pension paid to people who lack of means necessary for a decent existence, but apart from that old-age pension is mainly aimed at redistributing income over the life cycle.

Old-age pensions systems can either grant pensions from the day of retirement, i.e. when the person ends his professional activity, or at a certain age. In the first case a definition of retirement is needed and some of the same problems with defining when a self-employed worker has ended his business occur as in the unemployment benefit. When the entitlement is related to age there are no such problems, instead a possibility to continue the business while receiving pension occur.

There is no general European solution to the issue of old-age pensions to self-employed. Instead there is a great variety of combinations of mandatory and optional state schemes, occupational schemes and private insurance schemes. In many countries the mandatory pensions for self-employed are lower than pensions earned through employee-ship and the self-employed are supposed to rely on private insurance.

9.2 Introduction to the new Swedish Old age Pension-system

January 1, 1999 a new public pension system came into force in Sweden. The new system will gradually replace the old pension system.¹⁷⁰ The most important legislation concerning the new system is found in the Earnings Related Old-age Pension Act and the Guarantee Pension Act.¹⁷¹

One of the most important goals for the pension reform was to create a system economically more durable to demographic variations and economic cycles. The former scheme was benefit related while in the new system it is the pension contributions that are fixed. The principle is that the benefits should never exceed the paid contributions.

Another important feature of the new system is that the pension should be calculated on lifetime earnings. The new pension system is a move away from the acquired standard protection principle towards accumulated entitlement. In the old system, it was the best 15 years that decided the pension.

The new pension system has three parts: the *pay-as-you-go pension*, the *premium reserve pension* and the *guarantee pension*. The first two (the earnings related pension) are related to

¹⁶⁸ Pieters (1993) p 48

¹⁶⁹ Old-age pensions are sometimes even constructed to promote people to leave the labour market in order to give younger workers a chance to enter. Esping-Andersen (1990) p 148

¹⁷⁰ People born earlier than 1937 will receive pension according to the old system. People born between 1938 and 1953 will receive a portion of their pension from the old system and a portion from the new system. Those born in 1954 and later receive their pension entirely from the new system.

¹⁷¹ *Lag (1998:674) om inkomstgrundad ålderspension* and *Lag (1998:702) om garantipension*.

the lifetime earnings of the insured while the last is a (almost) flat rate benefit for persons whose earnings related pension does not reach a certain level.

The Swedish pension system makes no difference between employees and self-employed workers. Both groups are within the scope of the system and both receive the same benefits. The only difference is found in the financing of the system. The self-employed pay their own contributions while the contributions for employees are split between the employees and their employers.

9.3 The Scope of the Pension System

9.3.1 The Earnings Related Pension

The scope of the earnings related pension is, according to the Earnings Related Old-age Pension Act, all Swedish citizens and foreign citizens who are resident in Sweden (*insured*). An insured person who leaves Sweden for less than a year is still considered a resident in Sweden.¹⁷²

According to EC-law the condition that a person must be resident in Sweden to be entitled to benefit is not applicable on citizens of EU member states.¹⁷³

Being insured is however not enough to be entitled to the earnings related pension. Only persons who have worked and earned an income in Sweden are entitled to the earnings related pension.

9.3.2 The Guarantee Pension

The guarantee pension is aimed at persons who are not entitled to the earnings related pension or who receives an earnings related pension that is lower than the guarantee pension. The guarantee pension has a qualification time of three years of insurance.¹⁷⁴ The qualification time is considered necessary to assure that only persons with a real connection to Sweden are eligible for guarantee pension. For citizens of other EU member states it is possible to count periods earned in other member states in order to fulfil the qualification period requirement¹⁷⁵

9.4 Old age

The Swedish pension system is a strict old-age pension in the sense that the grant of pension is not dependent on the discontinuation of work. When an insured person has reached the age of retirement he can start collecting pension and at the same time keep on working. Thus, there are no conditions that a self-employed worker should have ended his business.

The retirement age in the earnings related pension is flexible. The insured can start collecting benefit any time after the month of his 61st birthday, but the longer he waits the larger the pension. It is possible to start collecting the pay-as-you-go and the premium reserve pension at different times.¹⁷⁶

¹⁷² Prop 1997/98:151 p 184ff

¹⁷³ Christensen (1998b) p 134

¹⁷⁴ The definition of the time of insurance is found below (9.5).

¹⁷⁵ The right to count periods of insurance earned in other member states is found in Regulation 1408/71. Prop 1997/98:152 p 56f

¹⁷⁶ Prop 1997/98:151 p 378ff

The guarantee pension can be collected from 65 years of age but can, due to its supplementary nature, only be collected if the pay-as-you-go pension is collected at the same time.¹⁷⁷

The possibilities of part-time retirement are generous. Both the earnings related pension and the guarantee pension can be collected as full, three-fourths, half or one-fourth benefit, though the guarantee pension must be collected at the same rate as the pay-as-you-go pension. It is possible for the insured to change his decision about the rate of the benefit, or his decision to start collecting pension at all, every six months.

9.5 The Benefits

9.5.1 The Earnings Related Pension

The pay-as-you-go and premium reserve pensions are built on accumulated entitlement. Each year the amount of earnings qualifying for pension (qualifying earnings) is established for each insured person. Compared to other branches of social security it is rather easy to establish the qualifying income in the pension system. The pension system is built on the actual taxable income over a lifetime and not on a single year or a prediction of future earnings, as is the case in e.g. the sickness allowance system.

The qualifying earnings can either be earned from *work as an employee* or *from other gainful employment*. The distinction between the two different types of earnings is of importance only when it is decided who should pay the contributions. When the qualifying earnings are calculated it has no real importance.¹⁷⁸

In order to get a qualifying income established for a year the insured has to have earnings of at least 24 percent of the base amount.¹⁷⁹ Years when the income is lower than this, and earnings from years before the year when the person turn 16 years old, are not counted. No right to pension is earned on earnings over 750 percent of the base amount.¹⁸⁰

For each year that an insured gets a qualifying income established the insured earns *pension entitlement*.¹⁸¹ The pension entitlement is equivalent of 18.5 percent of the qualifying income. 16 percent is a right to pension in the pay-as-you-go pension and 2.5 percent is a right to pension in the premium reserve.¹⁸²

The pay-as-you-go pension

The contributions paid to the pay-as-you-go pension are used to finance today's outgoing pensions. The pension entitlement for the pay-as-you-go pension is a fictive amount that each year is multiplied by an index based on the overall salary development.

When an insured person starts to collect pension the size of his annual benefit is, roughly, calculated through dividing his accumulated pension entitlements with the number of years he

¹⁷⁷ Prop 1997/98:152 p 150f

¹⁷⁸ Prop 1997/98:151 p 192f

¹⁷⁹ Currently 8736 SEK ~ 970 EUR

¹⁸⁰ Currently 273 000 SEK ~ 30 330 EUR

¹⁸¹ There are also some possibilities other than gainful employment to earn pension entitlement. Invalidity pension, mandatory military or non-military service, years of staying at home to take care of one's little children and years of studying on university or adult level also gives a pension entitlement calculated from a fictive qualifying income.

¹⁸² Prop 1997/98:151 p 282

is expected to live, based on assumptions of the life expectancy of all men and women in his generation. Thus, the later a person retires – the greater the benefit.¹⁸³

The premium reserve pension

The 2.5 percent of the qualifying income set aside for the premium reserve pension are invested in funds. It is the insured himself who decides what funds the money should be invested in. The funds are private funds run according to ordinary principles of insurance. At retirement the premium reserve pension benefit is calculated in basically the same way as the pay-as-you-go pension benefit.¹⁸⁴

9.5.2 The Guarantee Pension

To be entitled to full guarantee pension an insured person has to have a *time of insurance* of 40 years or more. Time of insurance is earned through residence in Sweden.¹⁸⁵ All years that the insured is resident in Sweden between the age of 25 and 64 years is counted as time of insurance. Time of insurance is also earned for years when the insured is between 16 and 24 years old, resident in Sweden and has got qualifying earnings.¹⁸⁶ If the time of insurance is less than 40 years the guarantee pension is reduced proportionately.

Full guarantee pension is 213 percent of the base amount for single persons and 190 percent of the base amount for married persons.^{187 188}

If the person receiving guarantee pension also receives benefit from the earnings related pension the guarantee pension will be reduced. If the earnings related pension is equal to or less than 126 percent of the base amount (114 percent for married), the guarantee pension is reduced by the full amount of earnings related pension.¹⁸⁹ If the earnings related pension exceeds 126 percent (114 percent) of the base amount the reduction is 48 percent of the exceeding amount.

The purpose of the reduction rule is to encourage work. It is not considered fair that people who have worked a substantial deal, though not enough to be qualified for an earnings related pension above the guarantee level shall receive the same pension as people who have not worked at all.¹⁹⁰

It is important to notice that the guarantee pension is not means tested against other incomes than the earnings related pension.¹⁹¹

¹⁸³ Prop 1997/98:151 p 381f

¹⁸⁴ Prop 1997/98:151 p 424ff

¹⁸⁵ Refugees are allowed to count some of the time spent in their country of origin or other countries than Sweden. There are also possibilities for Swedish missionaries stationed abroad to earn time of insurance.

¹⁸⁶ Prop 1997/98:152 p 47ff and 58ff

¹⁸⁷ The threshold for single persons is currently 77 532 SEK (~8 615 EUR) and for married persons 69 160 SEK (~7 684 EUR).

¹⁸⁸ Cohabitants who have or have had children together or who has been married are considered as married. Homosexuals living in a registered partnership are considered as married. Married couples who have permanently separated are considered as unmarried.

¹⁸⁹ The limits are currently 45 864 SEK (~5 095 EUR) for single persons and 41 496 (~4 610 EUR) for married.

¹⁹⁰ Prop 1997/98:152 p 65

¹⁹¹ Christensen (1998b) p 151

9.6 Financing

The earnings related pension is financed by contributions – mainly from the currently working population, but also from contributions by the retirees themselves during their economically active period – while the guarantee pension is financed through taxes.

As mentioned above the earnings of workers are divided into earnings from work as an employee and earnings from other gainful employment. Depending on the category of earnings different rules apply for the payment of the contributions.

Work as an employee includes both work as an employee according to the labour law concept of employee and cases where workers who are not employed by the principal perform work for the principal's account. If a worker is registered as an entrepreneur in taxation his earnings are always considered as earnings from other gainful employment. Thus, the earnings of self-employed workers are generally classified as earnings from other gainful employment.¹⁹²

There are two different kinds of pension contributions. All workers pay contributions of 6.95 percent of their earnings on earnings up to 806 percent of the base amount, which is the equivalent of a qualifying income of 750 percent of the base amount when the pension contribution has been deducted (the ceiling). In addition to this employers and self-employed workers pay a contribution of 6.40 percent of their salaries and other forms of taxable remuneration, without any ceiling.¹⁹³ The contributions are expected to rise when the system is fully developed – 18.5 percent of the income must be set aside. Today, the gap between the contributions and the entitlement is covered with tax money.

9.6.1 Consequences of Unpaid Benefits

An important difference between employees and self-employed workers is the consequences of unpaid contributions. Even though it is the employee that pays the pension contribution it is the employer who is responsible for collecting the contribution. If an employer neglects to pay employer's contributions for the employees or deliver the collected pension contributions, it does not effect the pension entitlement of the employees. The entitlement is calculated as if the contributions had been paid.

As mentioned above, self-employed workers are required to pay their own contributions. If a self-employed worker for some reason does not pay his contributions his pension entitlement is established according to the contributions paid.¹⁹⁴ In cases where unpaid contributions has reduced the earnings related pension to a level where the insured can receive guarantee pension, the guarantee pension is calculated as if the insured had received an earnings related pension related to the contributions that ought to have been paid.¹⁹⁵

¹⁹² Prop 1997/98:151 p 191ff

¹⁹³ The pension contributions are calculated on a base consisting of the qualifying earnings plus the pensions contribution.

¹⁹⁴ Prop 1997/98:151 p 292ff

¹⁹⁵ Christensen (1998b) p 150

10. Analysis of the Social Security of the Self-employed in Sweden

10.1 Equal Right to Benefits

That self-employed workers and employees should have equal right to benefits is supposed to be a general principle of Swedish social security law.¹⁹⁶ How great impact this principle in reality has had on the legislation is disputed. The purpose of this chapter is to analyse the differences between self-employed workers and employees and between different categories of self-employed workers found in the three branches of social security studied. The differences found in the personal scopes, the definition of self-employed workers, the social risks and the constructions of benefits are analysed separately.

10.2 The Personal Scope

As noted above, the scope of the Swedish social security system is of a universal character.¹⁹⁷ The personal scope is often defined in terms of residency, but to qualify for anything more than basic protection a work requirement has to be fulfilled. This model is clearly visible in the new pensions system and in the unemployment benefit.

A new (May 1999) government proposal will, if it is accepted by the parliament, accentuate this further in a separate act defining the personal scope of a number of different branches of social security. The proposal is aimed at splitting the branches into schemes with a scope defined in terms of residency and schemes with a scope defined through a work requirement.¹⁹⁸

The universalistic nature of Swedish social security has led to an inclusion in the social security system of groups of workers that in other countries might fall outside the social security schemes, such as managers, owners and members of their families employed in their business and self-employed workers. The advantage of this is obviously that also self-employed workers are guaranteed social protection.

However, since the universalistic approach also includes having the same scheme for all different occupational groups and for all different kinds of workers, the self-employed are referred to schemes primarily aimed at employees. A group that is an exception in a universal scheme is always exposed to the risk of being subjected to regulations that are not adapted to their specific situation. However, with increased political interest in small enterprises the lawmakers have begun to recognise the specific problems facing self-employed workers in the social security systems.

10.3 The Definition of Self-employed Workers

The concept of employee in Swedish law consists of a core that in different fields of law is modified according to the specific situation in that field. Generally, the concept of employee is wider in social security law than in other legislation. Even though the principle is equal protection of employees and self-employed workers, the status of employee is considered as the better protected of the two, why lawmakers have been willing to stretch the concept of employee to ensure protection of workers with an otherwise uncertain status.

In the sickness benefit the core concept, as it has been developed in labour law, is used to define the personal scope of the sick pay, a concept that includes working owners. It can be

¹⁹⁶ SOU 1998:34 p 48

¹⁹⁷ C.f. Chapter 2.3.3 above.

¹⁹⁸ Prop 1998/99:119

questioned whether this definition is the most suitable. As stated above, the arguments most frequently used in favour of sick pay regulations are the desire to transfer the burden of control and to give employers economic incentives to protect the health of their workers. Naturally self-employed workers are excepted, as there is no employer who can exercise control.

However, the same argument, a lack of employer exercising control, can be used for working owners of very small businesses, a group in this case on the employee-side of the line between employees and self-employed. Thus, the definition of employee used to define the personal scope of the Sick Pay Act divides the self-employed along a line that does not correspond to any relevant difference. In the preparatory works of the Sick Pay Act, no motivation for or discussion on the consequences of the chosen definition of employee can be found.¹⁹⁹

In the unemployment benefit the line between employees and entrepreneurs has been more carefully drawn. The definitions of employee and entrepreneur are connected to the difference identified in the social risk. The difficulties are connected to the problem of controlling the self-employment of workers who make their own managerial decisions. Consequently, the definition of entrepreneur focuses on the organisational circumstance of independence, in the sense of not being subordinated to an employer. Thus, working owners are considered as entrepreneurs.

The pension system makes no difference between employees and self-employed in the personal scope, the definition of the social risk or the calculation of the benefit and thus contains no definition of either concept. The only difference in the source of earnings that are the base for contributions and the payment of contributions.

The Swedish lawmakers have chosen not to establish a single overall definition of the concept of employee, but to let each field of law or even each legal rule makes use of a definition that fits the particular situation that the rule is aimed at. From the investigation of the status of self-employed workers in Swedish social security above some conclusions of the advantages and disadvantages of this method can be drawn.

The flexibility in the notion makes it possible to adjust the concept of employee, and thus who should be considered self-employed, according to the situation. When this is done in a way that is connected to the relevant differences between different groups of workers, as is the case in the unemployment insurance, this constitutes a clear advantage.

The disadvantage of this technique is that the same words are given different meanings in different situations why confusion over the status of a worker may occur. This risk is accentuated by the fact that the concept of employee is left undefined in the legal acts and only found in the preparatory works, the legal practice and the doctrine. A worker who is considered an employee in the sick pay regulations might very well be an entrepreneur in the unemployment benefit even though both acts use the word employee. Many workers who hold a business notice of assessment are considered as self-employed both by themselves and by their principals, even though the notice only indicates who is responsible for collecting taxes and pay contributions.

¹⁹⁹ The preparatory works are SOU 1991:35 and Prop 1990/91:181.

A possibility to get around this problem would be to refrain from using words such as ‘employee’, ‘self-employed’ and ‘entrepreneur’ and instead include a list of prerequisites that should be fulfilled in order to fall under the specific regulation.

10.4 The Social Risks

The differences between self-employed workers and employees relevant to the social risks have above been identified as a naturally higher degree of risk taking, an often non-linear flow of earnings and the fact that they – being in a managerial position – have better possibilities to control the situation²⁰⁰. The difficulty to control whether the self-employed workers have suffered a loss due to a social risk is particularly great when it comes to partial damages such as partial unemployment and partial incapacity to work.

In the Swedish sickness benefit self-employed workers appear to have been viewed as equally likely to be struck by a loss of earnings due to incapacity of work caused by illness. No real differences are made in the definition or control of the social risk. There is even a possibility for self-employed workers to be partially incapacitated and keep on working in their business.

Unemployment is the social risk most intimately connected to the forces of the free market, for which reasons the differences between self-employed and employees are greater than in other branches of social security. Compared to other countries, Sweden has chosen a generous path and included self-employed workers in the personal scope of the unemployment benefit. However, the principle that employees and self-employed should be equally entitled to benefit have had to yield for concerns of control and competition expressed in the demand for a permanent end to the business and no right to benefit for partial unemployment.

With that in mind, the new regulation on temporarily dormant businesses must be considered as an extremely interesting development. Two arguments were used in favour of the reform: i) that the easiest way for an unemployed former entrepreneur to return to gainful work often is starting a new business and ii) that the demand for a permanent end to the business leads to a destruction of capital that increases the economic risk of starting a business.

The two arguments show that the lawmakers have added a new factor to the equation: a desire to promote employment in general and small businesses in particular. Evidently, the desire to control against fraud and leave competition undistorted has had to partially yield. In the name of promoting small businesses, the Swedish lawmakers have taken a step in the direction of de-commodification of self-employed workers.

In the old-age pension system, no real social risk is defined. When a worker has reached 61 years of age he or she can start collecting pension, fully or in part, but keep on working. This accentuates the fact that the old-age pension is a form of accumulated entitlement, more considered as the savings of the individual than compensation paid to someone who can no longer work. It also explains why there are no limitations to the use of pension as a temporary fill-in in a business, even though it is possible to temporary collect pension in six-month periods. The pension entitlements are viewed as personal savings and there are no restrictions to the use personal savings in the running of a business.

10.5 The Benefit

In all the three studied schemes, the benefit is constructed with the aim to protect the established position of the workers. It is therefore important to define the position that is to be

²⁰⁰ Cf. Chapter 4.5.2

protected. As self-employed workers generally have more uncertain earnings than employees, but also better possibilities to influence the distribution of earnings over time, it is often more difficult to determine their position.

The sickness allowance and the unemployment insurance both define the benefit as a percentage of the lost earnings between a minimum and a maximum benefit. The definition of the lost earnings, however, differs. While the unemployment insurance does not distinguish between earnings from work and return on capital invested in the business, the sickness allowance does not compensate for earnings that exceed reasonable remuneration for similar work performed for another persons account.

A reasonable explanation to this difference can be found in the social risk. In the case of unemployment, the self-employed worker permanently loses his means of subsistence, while incapacity to work caused by illness only prevents him from work temporarily, while the business can keep on generating return on some of the capital. If one chose to recognise this difference in the social risks, the difference must be considered justified.

An interesting recent development, strengthening the protection of the established position, is the rule that former employees who start-up as self-employed less than twelve-months before they become unemployed are allowed to calculate their benefit from the earnings they had as employees.

In the pension system no such concerns are necessary. Since it is built on accumulated entitlement, the construction of the benefit does not have to take the nature of the social risk into consideration.

In the rules on the duration of and re-qualification for benefits there are no differences between employees and self-employed in the three studied systems. The exception is the possibility for self-employed workers to choose a higher number of waiting days. This is not only an exception from the principle that the same rules should apply to both employees and self-employed but also the only possibility to chose less protection, i.e. partially opt-out, of the Swedish social security system. The explanation to this is mainly historical.

11. Conclusions

11.1 Normative analysis

In Chapter 2, the Social democratic welfare state regime has been identified as showing a complex normative picture. The study of the social security of the self-employed in Sweden confirms this picture.

The universal personal scopes of the schemes, granting protection to all, show an influence from the pattern of Just distribution. For the construction of the protection the pattern Protection of established position is dominant, so dominant that 'protection' in the Swedish welfare system almost synonym with the protection of an established position. Still, the labour market is the dominating form for distribution of resources in society and the social security has strong work incentives indicate influence from the market functional pattern.

Labour is far from totally de-commidified, but there is a vast difference between the market for labour and the markets for goods and services. One important characteristic of Swedish social security and labour market policy is the desire to prevent workers from competing with each other through underbidding. Most important in this respect is the industrial relations structure with its emphasise on collective agreements, but the universal mandatory social security schemes – which does not only offer protection to all workers, but also makes all of them pay contributions – also play an important role. There are no possibilities for e.g. self-employed workers to opt-out and thus stand unprotected but able to compete with lower prices.

The markets for goods and services however show distinctly different characteristics, with price as one of the most important means of competition and elimination as the ultimate consequence of failure.

In many ways, the social security regulations of self-employed workers and employees in Sweden are shaped by the same normative patterns with the same relative strengths in the normative field. In the new Swedish pension system, no relevant differences between self-employed workers and employees can be found. In the sickness benefit there are some differences in the legislation but no that can be explained by different relative strengths of the normative patterns.

In the unemployment benefit, however, there are differences showing a weaker influence from the Protection of established position in the case of self-employed workers than in the case of employees. The explanation is obvious: protecting someone's established position is in conflict with the very idea of a free market. Two distinct normative patterns stand against each other: the desire to protect the established position of the worker engaged in self-employment and the desire not to distort competition through offering businesses protection from elimination.

The main rule in the Swedish unemployment benefit, that a self-employed must have permanently ended his business in order to be eligible for benefit, handles this conflict through separating the two strands of the self-employed's double nature: the worker and the business. The worker is offered a protection of his acquired economic standard, while the business is eliminated. Evidently, the self-employed worker, having to give up the position as a businessman, has less protection of his established position than an employee who is allowed to return to his old profession do.

The new exception from this rule, the temporarily dormant businesses, has strengthened the protection of the established positions of both the worker and the business. Still, the self-employed worker enjoys a weaker protection of established position than employees do.

11.2 The Desire to Promote Self-employment through Social Protection

The conflict between protection and competition is not new and most arguments for and against granting protection to self-employed workers are well known. Yet, the legal development in this area is obviously gaining momentum.

Changes on the labour market always have effects on social security. It is therefore easy to jump to the conclusion that the increased interest from the lawmakers for the social security of the self-employed is a function of the increase in self-employment. One could think that the flexibilisation of the labour market should automatically lead to concerns about the social protection of people engaged in atypical work.

What is shaping the current developments is, however, neither a sudden ideological shift from competition to protection, or mounting pressure to grant atypical workers protection. Instead it is the political desire to promote self-employment that has set things in motion.

This desire in itself does not pull in any specific direction. It does not automatically lead to an inclusion of self-employed workers in social security schemes, or more generous terms, neither does it lead to the opposite.

Some argue that the best way of changing social security regulations to promote self-employment would be to let self-employed workers opt-out of the schemes. They would take greater risks but also have the chance of reaping greater rewards, as they would not have to pay contributions. In addition to this, the competition in the markets for goods and services is increased if self-employed play by the same rules as other businesses. Others argue that more people will be ready to enter self-employment if generous social security protection is offered, thus lessening the consequences of a business failure.

In Sweden, the desire to promote self-employment can not be said to have altered the basic normative patterns of social security and their relative strengths in the normative field, but it is clear that the desire not to meddle with the eliminatory forces of the free market has had to partially yield to the desire to promote self-employment.

The new rule on temporarily dormant businesses, and the possibility for employees who become self-employed to calculate their unemployment benefits from their old earnings, are two good examples of measures of how the Swedish lawmaker have tried to promote self-employment through protection the established position of the workers.

11.3 Predictions on the Future of the Social Security of the Self-employed in Sweden

Another reason that it is not mounting concerns over inadequate social protection for self-employed and other atypical workers that have fuelled the recent Swedish legal development, is the simple fact that these groups are already included in the Swedish social security system. One should bear in mind that Sweden in this respect is far from a representative European country and that this study has been focused on an extreme case.

What could mount, however, is a pressure to get rid of some of the differences within the schemes that do exist. The line between employees and self-employed workers is becoming more and more blurred, why the differences will be more difficult to motivate.

As a member of the European Union, with free movement of e.g. people and services, and a freedom of establishment, laid down in the Treaty, Sweden will inevitably be influenced by and influence the development in other European countries. In the 1999 Employment Guidelines of the European Union the Member States are urged to “encourage the development of self-employment by examining, with the aim of reducing, any obstacles which may exist, especially those within tax and social security regimes, to moving to self-employment and the setting up of small businesses.”

Being the member state where the inclusion of self-employed workers into social security systems have gone most far, the Sweden have some interesting experiences to share.

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SOU 1996:100 Ett nytt system för skattebetalning

SOU 1996:150 En allmän och sammanhållen arbetslöshetsförsäkring

SOU 1998:34 Företagare med restarbetsförmåga

Court Cases

Arbetsdomstolen – Swedish Labour Court

AD 1977 nr 39

AD 1979 nr 12

AD 1979 nr 155

Högsta Domstolen – Swedish Supreme Court

NJA 1949 s 768

NJA 1982 s 784

Försäkringsöverdomstolen – Supreme Social Security Court

FÖD 1983:18

FÖD 1989:22

FÖD 1989:31

FÖD 1990:15

FÖD 1993:20

Regeringsrätten – Supreme Administrative Court

RÅ 1997 not 221

Swedish summary

Sammanfattning

Social Security of the Self-employed in Sweden – a Normative Analysis

Uppsatsen behandlar dels de problem som är förknippade med att egenföretagaren som inte har någon arbetsgivare är inkluderade i socialförsäkringssystem som konstruerats främst med arbetstagare i åtanke (främst kontroll av om arbetslösheten eller sjukdomen verkligen har inträffat) men framförallt de problem som uppkommer ur egenföretagarens "dubbelnatur".

Denna dubbelnatur kan beskrivas som att egenföretagaren å ena sidan är arbetskraft och å andra sidan ett företag. Egenföretagaren tillhör såväl arbetsmarknaden som marknaden för varor och tjänster, två marknader vars spelregler styrs av vitt skilda normativa grundmönster. Medan marknaden för varor och tjänster bygger på fri konkurrens med utslagning som den yttersta konsekvensen av misslyckande finns på arbetsmarknaden lagstiftning som syftar till att skydda arbetskraften från utslagning eller från konsekvenserna av utslagning.

Socialförsäkringar syftar till att skydda arbetskraften från de ekonomiska konsekvenserna i händelse av t ex sjukdom, ålderdom eller arbetslöshet. När det gäller egenföretagare tvingas socialförsäkringsrätten till en balansgång med syftet att samtidigt erbjuda egenföretagaren ett godtagbart skydd i egenskap av arbetskraft, men utan att skydda hans eller hennes företag från den konkurrens och utslagning som är en naturlig del av marknaden för varor och tjänster.

I Sverige, till skillnad mot i de flesta andra länder, har egenföretagare sedan länge inkluderats i samma socialförsäkringssystem som arbetstagare. Särskilt anmärkningsvärt ur ett komparativt perspektiv är att egna företagare har rätt till arbetslöshetsunderstöd. På senare år har önskan att främja ny- och småföretagande lett till att egenföretagare kommit att i än högre grad inkluderas i socialförsäkringarna. Denna önskan är till och med så stark att det traditionella intresset att egna företagarens socialförsäkringsskydd inte får skydda företag har fått vika.

Uppsatsen utgör en förstudie till en avhandling i europeisk och komparativ arbets- och socialförsäkringsrätt. Avhandlingen kommer att behandla EG-rätten samt ett antal nationella socialförsäkringssystem. Under 1999/2000 kommer arbetet att bedrivas vid European University Institute i Florens, Italien.