Working in a Cross-Border Situation

A Study on the Concepts of Employment and Self-Employment

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Abbreviations

AD	Arbetsdomstolens domar
CJEU	Court of Justice of the European Union
DS	Departementsskrivelse
ELFS	European Labour Force Survey
EU	European Union
FEUF	Fördraget om Europeiska Unionens funktionssätt
LAS	Lag (1982:80) om anställningsskydd
MBL	Lag (1976:580) om medbestämmande i arbetslivet
NJA	Nytt juridiskt arkiv
RH	Rättsfall från hovrätterna
SOU	Statens offentliga utredningar
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

Abstract - Swedish

Syftet med denna uppsats är att undersöka möjligheten att bemöta missbruket av egenföretagande genom att applicera arbetstagarbegreppen i Sverige och i EU. Den fria rörligheten för tjänster och arbetare inom den interna europeiska marknaden öppnar upp för gränsöverskridande arbete mellan EU:s medlemsstater och det kan hävdas att egenföretagande kan användas för att kringgå nationella arbetsrättslagar, kollektivavtal och Utstationeringsdirektivet. Genom att applicera arbetstagarbegreppen i Sverige och EU är det till viss mån möjligt att erkänna några egenföretagare som arbetstagare och på så sätt ge dem arbetsrättsligt skydd. Denna uppsats undersöker ytterligare möjligheten att reglera arbetsvillkor för egenföretagare genom kollektivavtal och den möjliga konflikten med den fria rörligheten och konkurrensregler inom EU. Resultaten från denna uppsats visar att svensk lagstiftning tillåter kollektivavtal för beroende uppdragstagare som i sin tur möjliggör för att reglera arbetsvillkoren för egenföretagare. Det råder däremot en osäkerhet om det är i konflikt med EU:s konkurrensregler, Artikel 101 FEUF, som enligt EU-domstolen endast tillåter kollektivavtal för falska egenföretagare. Det blir även en fråga om arbetstagarbegreppet och tolkningen av de svenska begreppen arbetstagare och beroende uppdragstagare i förhållande till EU:s tolkning av falska egenföretagare. Resultaten i uppsatsen visar även på möjligheten att bemöta missbruket av egenföretagande, dock så är möjligheterna begränsade på grund av de egenskaper som kännetecknar egenföretagande som har många likheter men även skillnader gentemot traditionella anställningar.

Keywords:

Self-employment, concept of employment, free movement, posted workers directive, social dumping.

1. Introduction

1.1 Background

During the last three decades, the labour markets all around the European Union (EU) have gone through changes. In order to meet rapid and radical changes in production organizations that require more flexible management of the labour force, atypical employments have become more common.[1] As a part of this trend, throughout Sweden and the EU, the use of self-employment as an alternative to employment is growing.[2] In the EU, approximately 15% of the workforce is self-employed and in Sweden it is about 10%.[3] One definition of self-employed, which is used by the European Labour Force Survey (ELFS), is as follows:

"Self-employed persons work in their own business, farm or professional practice. A self-employed person is considered to be working during the reference week if she/he meets one of the following criteria: works for the purpose of earning profit; spends time on the operation of a business; or is currently establishing a business. A self-employed person is the sole or joint owner of the unincorporated enterprise (one that has not been incorporated, i.e. formed into a legal corporation) in which he/she works, unless they are also in paid employment which is their main activity (in that case, they are considered to be employees)."

What it means is that a self-employed is a person who has his or her own company and offering services, rather than taking up traditional employment. This can offer flexibility and economic advantages to both the self-employed and the clients he or she is offering services to. This phenomenon can be seen in several different industries, such as construction, aviation, transportation and agriculture as well as in different service industries. The reasons for the increase in use vary. In Sweden for example, self-employment has been encouraged through changes in legislation in recent years, making easier to start one's own company.[4] This trend can also be observed at EU level, where atypical employments and self-employment are encouraged to tackle economic problems and high unemployment rates.[5] What has also driven these changes is a new fluctuating market that has a higher need for

[1] Alain Supiot, *Beyond Employment – Changes in Work and the Future of Labour Law in Europe*, 2001, p. 1.3.
[2] Supiot, *Beyond Employment – Changes in Work and the Future of Labour Law in Europe*, 2001, p. 3-4.
[3] Eurostat (Ifsa_egaps), 2011.
[4] See for example Government Bill to Parliament, prop. 2008/09:62.
[5] Green Paper, *Modernizing labour law to meet the challenges of the 21st Century, COM/2006/708 Final. See also* European Employment Observatory Review. *Self-employment in Europe 2010*.

numerical flexibility.[6] New technologies and more specialised patterns of consumer demand have also influenced the increase in small businesses and network forms of production.[7]

What this means is that a part of the working population is not legally regarded as employees. They are self-employed, running their own business and providing goods or, mainly, services. As a result, the self-employed are not protected by any labour laws or collective agreements. They do not enjoy the labour rights given to employees, such as employment protection, collective bargaining rights or the right to take collective action. All of these might be considered as fundamental labour rights. The Swedish and EU legislation, which are built on a binary system consisting of either being an employee or a self-employed, leave a gap for those self-employed who in practice and reality might function as employees. Even though the self-employed might be dependent on one employer, both financially and in *de facto* subordination, just like an employee, he or she is still considered to be self-employed. Some scholars have raised the issue of the divide that exists between different self-employed persons.[8] A self-employed person who for instance is independent on his or her principal and functions as a true entrepreneur and competes on the free market, can be considered a genuine or independent self-employed. However, some self-employed persons can be said to function in a grey zone between employment and self-employed, being dependent on one single principal and in many ways resemble and function as an ordinary employee.[9] But due to them being self-employed, they lack the labour law protection enjoyed by employees. Because of the risk of abuse of self-employment as a way to undermine and circumvent labour laws and social security laws, a lot of research today is focusing on this type of work, sometimes naming it as "false or bogus self-employment".[10]

In recent years, indeed, there has been a lot of discussion about the use of the so-called false self-employment, where workers who should be legally recognized as employees according to case law are registered as self-employed in order for employers to evade labour laws, social

[6] Mia Rönmar & Ann Numhauser-Henning, *Flexicurity, employability and changing employment protection in a global economy – A study of labour law developments in Sweden in a European context, 2012, p. 2-4.*
[7] IZA research report, p. 18.
[8] Andalberto, *Economically dependent /quasi subordinate (parasubordinate) employment: legal, social and economic aspects*, 2003.
[9] Muehlberger and Pasqua, *Workers on the border between Employment and Self-employment*, 2009.
[10] See for example Román, Concepción, Emilio Congregado, and José María Millán. "Dependent self-employment as a way to evade employment protection legislation." Small Business Economics 37.3 (2011): 363-392.

security laws, costs connected to employment and collective agreements.[11] Thus, they miss the protection and rights they should have had if they were employees, and employers evade their legal obligations and social contributions. This phenomenon happens on both a national and a transnational level, with self-employed working and offering their services across borders within the EU with the aid of the free movement of services. This has for example been observed in Sweden, where workers from the Baltic States and Eastern Europe work as self-employed in construction and transportation.[12] These workers are often mediated by an intermediate party, a temporary works agency for example, which in a way functions as a middle man between a company and a self-employed. Some reports show that it is not unusual that some workers are forced into self-employment in order to get an occupation.[13] Reports also show that in some cases, employers force their employees to register as self-employed in order to continue working.[14] Thus they often do not have a choice in the matter due to their economic situation.

As mentioned, self-employment can be used transnationally within the EU with the support of the free movement of establishment and services. Normally, EU legislation such as the Posted Workers Directive[15] would be applicable when EU citizens are posted to work in another EU Member State. However, if the worker is registered as a self-employed, this legislation does not apply. This is because of them not legally being regarded as workers or employees; they are running their own business and competing on the free market. They are providing their services according to the free movement of services within the EU, in accordance with Arts. 49-62 Treaty on the Functioning of the European Union (TFEU) and the 'Services Directive'.[16] This however raises questions of labour rights for self-employed persons working transnationally within the EU and the possible abuse of self-employment in order to circumvent labour protection laws and collective agreements. Some argue that if the self-employed in reality might function as employees, working across borders, should they not be

[11] Muller, *Cross border mobility of "bogus" self-employed workers: a lack of legal framework coupled with protection of economic rights*, in European Labour Law Journal, volume 5 (2014) No 3-4. See also Buschoff & Smith, *Adapting labour law and social security to the needs of the "New Self-employed – comparing the UK, Germany and the Netherlands*, 2009.
[12] Thörnquist, *False (bogus) Self-employment in East-Western Labour Migration – Recent trends in the Swedish construction and road haulage industries*, REMESO Institute for Research on Migration, Ethnicity and Society, 41, 2013.
[13] Ibid.
[14] Ibid.
[15] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.
[16] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

protected by national labour laws in the frame of Posted Workers Directive? It might be argued that the use self-employment in a cross-border situation can be a way to circumvent both EU legislation and national labour laws and collective agreements and thus resulting in social dumping.[17]

The main issue here is that the self-employed persons are not legally regarded as employees. Of course, in some cases the use of self-employment is a free made choice by individuals, who, for whatever reasons, for instance want to be able to work without being subordinate to an employer, and do not want to work as employees. But, there is an obvious risk of abuse in those cases where some employers want to evade their legal obligations towards employees. One possible way to secure the protection of the self-employed is to prove in court that they actually fall under the concept of employment. In Swedish law, a distinction is made between employment agreements and contract work agreements. Contract work agreements can be said to be equal to self-employment. It entails that a labour provider produces a particular result or performs a particular task, in contrast to employment agreements where the worker, for a particular period of time, makes his or hers entire labour available and is under subordination towards the employer.[18] The entire scope of labour protection in Sweden, whether it is by law or collective agreements, is dependent on the concept of employment which makes it important for workers to fall under its protection.[19] In Sweden, there is a way to determine whether a performing party is legally considered an employee according to the concept of employment. However, there is not a strict concept or definition of employment. Instead, the civil law notion of employee is determined through linking together certain factors or circumstances, also known as the theory of dispositive facts.[20] This theory opens up for the possibility of contractors or self-employed workers to secure their rights as employees, if a court should find them to be so. There is also in Sweden the possibility of being regarded as a dependent contractor[21], which entails performing activities for someone as a contractor

[17] Muller, *Cross-border mobility of "bogus" self-employed workers: A lack of legal framework coupled with protection of economic rights.* European Labour Law Journal, Volume 5 (2014), no. 3-4.
[18] Källström, *Employment and contract work*, Comparative Labour Law & Policy Journal, Volume 21, no. 1, fall (1999) p. 157.
[19] Källström, *Employment Agreements and Contract Work in the Nordic Countries.* Scandinavian Studies in Law vol. 43, (2002), p. 77-78.
[20] Ds 2002:56. See also Westregård, *The notion of "employee" in Swedish and European Union law. An exercise in Harmony or Disharmony?* In *Globalization, fragmentation and employment law: a Swedish perspective*, 2016, p. 188.
[21] In Swedish, *Beroende/jämställda uppdragstagare.*

but being dependent on one principal.[22] The dependent contractor therefore differs from normal contractors who are independent in relation to their principal and might be considered to be genuinely self-employed. Swedish legislation can therefore in a way be said to acknowledge and protect those self-employed who function in said grey zone, being dependent on one principal – the dependent self-employed.

There is however not only the Swedish concept of employment to take into consideration. Sweden is a part of the EU and is thus obliged to follow its regulation. Just like in Sweden, there is not a strict definition of the concept of employment in the EU. Instead, it varies between different articles in the TFEU and different Directives. There is also the issue with different terms being used, for example the two terms worker and employee. On top of this, the definition of a worker or employee is sometimes delegated to Member States by the EU regulation, resulting in an incoherence within the EU.[23] Case law from the Court of Justice of the European Union (CJEU) can however be studied in order to make out a definition on the concept of employment in different areas of EU legislation. This becomes important when discussing work carried out transnationally within the EU, because just like with the Swedish concept of employment, it opens up for the scope of labour protection given by the TFEU and Directives.

The Swedish and EU concepts of employment can thus be of aid when tackling possible abuse of self-employment when used transnationally within the EU. If a self-employed person falls under the umbrella of the concept of employment, the self-employed becomes subject to the protection and scope of labour law protection, collective agreements and possibly the Posted Workers Directive. But the issue is larger than that. As mentioned above, self-employment can be used transnationally within the EU with the aid of the free movement of services. This makes it not only a question of labour law or the concept of employment. Consideration must be taken to the free movement regulations and the competition laws of the EU when tackling the abuse of self-employment. In Sweden for example, much of the regulation on labour protection is given by collective agreements, such as with minimum wages, and if the social partners would attempt to regulate the working conditions of the self-employed, questions regarding restriction of the free movement or breaking competitions rules arises. At least if

[22] Adlercreutz, *Arbetstagarbegreppet*, 1964.
[23] Barnard, *EU Employment Law*, 2012, p. 144-150.

the social partners regulates the conditions of self-employed persons, if they are not ruled as employees by a court, since then they are still regarded as service providers.

1.2 Purposes

The first purpose of this thesis is to investigate the possibility to combat the abuse of self-employment in a cross border situation, by applying the concepts of employment in both Sweden and the EU. If a self-employed person, performing work transnationally within the EU, is legally acknowledged as an employee, he or she can become subject to the scope of labour protection through laws, collective agreements and EU regulations such as the Posted Workers Directive. This could be a way to combat abuse of self-employment, and by doing so, preventing social dumping.

The second purpose of this thesis is to investigate the possibility to regulate the working conditions of the self-employed through collective agreements in Sweden, in the event a self-employed person is not legally acknowledged as an employee by a court. Questions arise regarding such collective agreements compliance with the free movement of establishment and services, as well as the competition rules of the EU. This could be a way to combat the abuse of self-employment and preventing social dumping, without acknowledging self-employed persons as employees.

1.3 Research questions

How is the concept of employment constructed in Swedish and EU law?

Can a self-employed worker, from another Member State, perform work in Sweden and be regarded as an employee and thus be subject to Swedish labour laws and collective agreements, as it happens when applying the Posted Workers Directive?

Can the social partners in EU Member States regulate terms and conditions of self-employed workers through collective agreements, without restricting the free movement of services or be in conflict with competition laws?

1.4 Method and materials

The main method that has been used in this thesis in order to fulfil the purposes and answer the research questions is the legal dogmatic method.[24] Legal dogmatic method in legal studies means the study of the system of norms, and the interpretation of norms.[25] By following this method, it becomes possible to determining *de lege lata*, also known as determining the law. This has been done in this thesis by studying all the relevant legal sources, such as legislation, preparatory work, case law and doctrine.

What has been of importance to this thesis is mainly the concept of employment. This is because of the legal possibility for self-employed persons to be regarded as employees. In order to investigate this, one must understand how an employee or a worker is defined. This has been done by studying Swedish doctrine, preparatory work and mainly precedents from the Labour Court and the Supreme Court. Since there is no exact definition in Swedish law, but rather a process of linking together certain factors in order to establish who is an employee or not, the Labour Courts rulings on this matter have been studied to see how it has been done and to see which circumstances have been of importance. Further, the work of Adlercreutz, who about 50 years ago studied the Swedish concept of employment, has also been of great importance since it has influenced today's interpretation of the concept.[26] Even though the work is quite old, it is still of importance since not much have changed. The case law and the work of Adlercreutz have contributed with an understanding of how Swedish courts have ruled in cases where there has been disputes regarding employment agreements versus contract agreements, as well as cases concerning dependent contractors. Continuing, preparatory work has also been vital for the same reason.

Another major part of this thesis has been the study of the EU concept of employment. Just like with the Swedish concept, the main focus has been on case law from the CJEU. There have been several disputes in the CJEU regarding the terms worker, employee and self-employment, which have given an understanding of the complexity of deriving a concept of employment in EU law. This is because there is no real uniform concept of employment in the EU, it rather varies between different Articles in the TFEU and different directives. However, it has been possible, through the study of case law, to pin out central aspects of employment

[24] Kellgren & Holm, *Att skriva uppsats i rättsvetenskap – råd och reflektioner*, 2007, p. 46-47.
[25] Kellgren & Holm, *Att skriva uppsats i rättsvetenskap – råd och reflektioner*, 2007, p. 47.
[26] Adlercreutz, *Arbetstagarbegreppet*, 1964.

that can be said to conclude an EU concept of employment. The work of Barnard has also contributed to these findings.[27]

Since the purposes and research questions in this thesis also aim to investigate collective agreements for the self-employed, compliance or possible conflict with free movement of establishment and services, as well as EU competition law, this area has also been studied. This has mainly been done through research on case law from the CJEU where there has been disputes regarding restrictions on the free movement. Through this investigation, an understanding of to what extent Member States can impose restrictions on the free movement, and for what purposes. The same goes for EU competition law, were one case has been of particular importance since it dealt with collective agreements for self-employed workers.

When EU law is studied, one must understand the hierarchy between the different types of legislation. EU law consists of primary law, secondary law and supplementary law.[28] The primary law consists of the Treaties, which give the competences between EU and the Member States, in other words the Treaty on the EU and the Treaty on the functioning of the EU. The secondary law consists of unilateral acts, conventions and agreements that have been created with the support of article 288 TFEU. Some examples of secondary law that has been used in this thesis are directives, white and green papers. The supplementary law includes case law from the CJEU, international law and general principles. According to article 263 TFEU the primary law has primacy over secondary law. The general principles in the supplementary law are to function as fundamental values or principals and can complete the primary law.[29] Further, case law from the CJEU has had an important part in this thesis. EU law should primarily be interpreted by national courts, but according to article 267 TFEU, national courts should request a preliminary ruling by the CJEU if there is any uncertainty regarding the EU law.

The main method in this thesis has been, as mentioned, legal dogmatic method. However, comparative method has also been used to a certain extent. Comparative method aims to compare different legal systems in order to get a better understanding of both the researchers own legal system, in this case Sweden's, and another which in this study has been the EU

[27] Barnard, *EU Employment Law*, 2012.
[28] Hettne & Otken Eriksson (editor), *EU-rättslig metod*, 2012, p. 40-41.
[29] Hettne & Otken Eriksson (editor), *EU-rättslig metod*, 2012, p. 44 and p. 64-65.

legal system.[30] Comparative method has been of importance to this thesis since it has helped in getting a better understanding of both the Swedish and the EU concepts of employment. In part, a comparison between these two concepts has been done in the analysis which has contributed to an understanding of not only the concepts, but also of the complexity of EU law and the still disharmonized legal systems of EU Member States.

Regarding the analysis of the legal sources in this thesis, a theological interpretation has been used. This means that the analysis was carried out with a purposive and utilitarian perspective, in order to reason with the underlying purposes of the legislations, with a focus mainly on the perspective of employees.[31] A macro perspective has also been used in order to get an understanding of the law and the problems with false self-employment from a societal perspective.[32]

1.5 Delimitations

This thesis has been delimited to the study of labour law. Self-employment and the concept of employment can be studied from the perspective of several different legal areas. It would for example have been interesting to view the problems from a social security law, company law or tax law perspective in order to get a more complete understanding of the issue of abuse of self-employment. It would have been especially interesting to study the abuse of self-employment through a social security law perspective due to the focus on social dumping. This problem has to a certain degree almost been more up to discussion by the EU than a labour law perspective. However, it seems more relevant to focus only on the problem from a labour law perspective.

Further, this thesis is delimited to focusing on posting of workers when it comes to cross-border work. There are different forms of cross-border wok that are regulated through the EU, but here the focus is on the posting of workers and more specifically the circumvention of this form of cross-border work through the use of self-employment. Continuing, one could also investigate several different EU directives and their contents regarding the protection of self-employed workers, however this thesis takes on a more general perspective on self-employment in relation to traditional employment.

[30] Bodgan, *Komparativ rättskunskap*, 2012, p.26-27.
[31] Kellgren & Holm, *Att skriva uppsats i rättsvetenskap – råd och reflektioner*, 2007, p. 47-48. See also Hydén & Hydén, *Rättsregler*, 2011, p. 156-157.
[32] Hydén & Hydén, *Rättsregler*, 2011, p. 27.

1.6 Disposition

This thesis starts by the investigation of the concept of employment in Sweden. The reason for this is because the main way to tackle the abuse self-employment in Sweden is to see if the self-employed in question can be regarded as an employee according to doctrine and case law. Over the years many cases regarding this matter has been ruled by the Swedish Labour Court, and the importance that can be taken from the case law is the reasoning of the court and the circumstances they use to determine whether an employment is at hand or not. Further on, this chapter also brings up the Swedish term dependent contractors, which is a term used for describing workers who function in many ways as employees in terms of dependency, but do not have the same legal standing. They are in essence contractors who are dependent on one principal. The third chapter investigates the concept of employment in the EU. In EU law, a distinction is made between workers and employees, which is why both of these concepts has been investigated. The concept of employment within the EU also varies between different articles in the Treaties, and between different directives. What is essential in this chapter is the way the CJEU determines whether or not a performing party is to be legally regarded as a worker or an employee, and eventually to see how this differs from Swedish case law. This chapter also contains an investigation of self-employment in the EU in contrast to employment.

The fourth chapter investigates the free movement of services and workers in the EU, with a focus on self-employment. As described earlier, false self-employment across the borders within the EU also becomes a question of free movement of services, which is why this chapter takes a look at how the CJEU have ruled when different Member States have imposed restrictions in order to tackle the abuse of cross-border self-employment. This chapter also tries to put self-employment in the light of free movement of workers within the EU, to see the possibility for them to be regarded as workers and get the protection given by the Posted Workers Directive. Lastly, this chapter explores the possibility to conclude collective agreements for self-employed workers, without restricting the free movement and EU competition laws.

The thesis ends with an analysis and a conclusion were the purposes and research questions are discussed in relation to the findings.

2. The Swedish Concept of Employment

2.1 The civil law notion of an employee

2.1.1 Definition

In Swedish civil law, there is no statutory definition of employee or employment. The reason for this, from a legislative view, stems from the will of the legislators to avoid employers to circumvent legislation. If there would exist a statutory definition, it would be possible for employers to simply organize their organizations and manage their contracts in a way that would deviate from that definition, and by doing so, evade labour laws. Instead, the concept is derived from general principles developed by the Supreme Court and the Labour Court.[33] With this, it is not as easy to set up agreements and contracts in order to evade the concept of employment. This concept developed by the courts has basically the same meaning in all labour laws and the civil law. However, in order to understand the concept of an employee, when deciding whether an employment is at hand, one must see to the purpose behind the law in question. This is because even though the concept has a general meaning, it can vary depending on the purpose of the legislation. This is also the case when the concept is used in collective agreements, although the most widely used concept derives from the Co-determination Act (MBL).[34] This means that when determining if a performing party is to be considered as an employee or not, one must take into consideration what law, for example the Employment Protection Act (LAS)[35] or MBL, and which collective agreement that is to be applied, when weighing the different factors in that particular case.[36]

In Swedish civil law, a performing party can be determined to fall under the concept of an employee, a contractor or a dependent contractor. And with these notions, different laws apply. Because of this, it is of importance to be able to determine if someone works as an employee, a contractor or a dependent contractor. If a performing party and an employer come to an agreement about work and a contract of employment is concluded, several different labour laws become applicable. But if it is a question of a contract for services for example, it becomes a matter of civil law, and no labour laws if it is between a contractor and an outsourcer.[37] However, if it is a contract for a dependent contactor, some labour laws becomes applicable. One example of this is the difference between LAS and MBL. According

[33] Ds 2002:56, p. 85.
[34] Lag (1976:580) om medbestämmande i arbetslivet.
[35] Lag (1982:80) om anställningsskydd.
[36] Källström & Malmberg, 2013, p. 27.
[37] Ds 2002:56, p. 76.

to the 1 § 1 p. LAS, which states that employees are protected by this law. There are however some exceptions from this given by the 1 § 2 p. LAS, excluding among others family members and business executives. In MBL on the other hand, the 1 § 2 p. states that the law also includes dependent contractors and not only employees.[38]

The main way to determine whether a performing party is an employee or not, is through an assessment on the circumstances in the given case by a court.[39] These circumstances can vary from case to case, and it can be said that the way a court rules on this matter is by taking a typical employment or a typical case of a contractor, and compares this to the case in question to see which of these cases most likely is at hand.[40]

Apart from these circumstances that the courts uses to make an overall assessment, some basic requisites must first be met. In order for an employment contract to exist, a contract for performing some type of work for another party must be in place. This work should then be carried out personally and there must be a voluntary commitment for the contract. Regarding the requisite that the work should be carried out personally, it is stated that an employee can only be a physical person, and not a legal one. However, this does not hinder the court from seeing through false arrangements where companies are used in order to circumvent legislation.[41]

There are many views regarding which circumstances the court should take into consideration whether determining the existence of an employment, and as stated earlier, it can vary quite a lot from different cases. But in 1975 the Labour Law Committee presented a list of circumstances that should be taken into consideration.[42] This list has also been confirmed by a more recent preparatory work.[43] Apart from the different circumstances stated, it is also said that an overall assessment should be done. It is not the case that a certain number of circumstances must be met, or that some are more important than others.[44] This also means that the concept of employment can vary from different sectors, which might have different

[38] Ds 2002:56, p. 82.
[39] Källström & Malmberg, *Anställningsförhållandet – Inledning till den individuella arbetsrätten*, 2013.
[40] Sigeman, *Semesterrätt,* 1991, p. 33.
[41] Ds 2002:56, p. 110-111.
[42] SOU 1975:1, p. 722.
[43] Ds 2002:56.
[44] SOU 1975:1 p. 723.

conditions and needs. Instead, one must see to the particular case and make an overall assessment on the basis of the circumstances in that case.

But in general, the following circumstances is said to be of importance: 1) the performing party delivers the work personally, regardless if it is mentioned in the employment contract or if it must be assumed to be provided between the parties, 2) the performing party has as far as possible performed the work by herself, 3) the commitment implies that the performing party makes herself available for work that is yet to be presented, 4) the relationship between the two parties is of a more prolonged nature, 5) the performing party is unable to simultaneously perform similar work of importance for others, regardless if it is because of a prohibition or due to the working conditions, for example due to work time, 6) the performing party is, concerning the deliverance of the work, in subordination in regards to directives and control, no matter if it concerns the performance of work, work time or the work place, 7) the performing party is considered to use machines or tools provided by the principal in order to perform work, 8) the performing party is rewarded remuneration by the principal for direct costs, for example journeys, 9) the remuneration for the performed work is partly given in the form of a fixed salary, 10) the performing party is economically and socially equal to an employee,[45] 11) changes in the legal relationship, 12) situations where circumvention is suspected, 13) the purpose behind the legislation, 14) customs and practice in the industry, 15) type of tax bill.[46]

It is generally said that in order to determine whether or not a performing party is a contractor, the opposite of each of the above circumstances are to be taken into account.[47]

One important thing to remember is that the two parties, for example a performing party and a principal, cannot on their own decide what type of contract is in place. It does not matter completely what the two parties choose to call their arrangement; the important thing is what has actually been agreed upon in the contract. The reason for this is that otherwise it would be possible to avoid labour laws simply by outsourcing to contractors.[48] However, the view of the parties is not ignored by the court. The parties are free to come to an agreement about the performing party being a contractor instead of an employee. There is no legal obligation to

[45] SOU 1975:1, p. 722 & prop. 1976/77:90, p. 20.
[46] Ds 2002:56, p. 116.
[47] SOU 1975:1, p. 722 and SOU 1993:32, p. 228.
[48] Ds 2002:56, p. 112.

always enter an employment contract. [49] Further on, if a performing party and a principal has labelled their agreement as an employment contract, but in reality the performing party function as a contractor, the court usually accepts the contract in order to protect the weaker part and grant him or her protection given by mandatory legislation.[50]

2.1.2 Criteria for assessment

As mentioned above, it is possible for a court in Sweden to determine whether or not a performing party is to be considered as an employee through making an overall assessment by taking into account several different circumstances in the case in question. This method has its origin from the case *NJA 1949 s. 768*. Here, the court developed the method by investigating different circumstances in order to determine if a performing party falls under the civil law concept of employment. In the following sections, the circumstances used by Swedish courts will be presented with case law. For reasons of consideration for the reader, have the circumstances presented above been concentrated into a few main topics.

What should be mentioned here is the general weighing or balancing between the different circumstances. According to preparatory work, not all circumstances are of similar importance. Which ones are important varies from each case. The preparatory works also states that just because one criteria might in a case mean that an employment contract is at hand, does not necessarily mean that it is a contract agreement if it is absent. What they try to point out is that the assessment is not to be made mechanically by the courts. Instead, the courts should behold all cases individually, and see to those circumstances that are important in that particular case.[51]

Contract of Employment

One of the basic circumstances that must be met in this method is the existence of a contractual relationship between the parties.[52] There are no formal requirements regarding how the contract has been concluded. The contract can be concluded in writing, orally or by implicit acquiescence.[53] This is confirmed by a case from the Labour Court, *AD 1982 nr 105*. In this case a parent had been performing some work for a preschool once a month, and in return was offered a lower fee and the dispute was whether this parent was to be considered as

[49] Ds 2002:56, p. 112.
[50] Ds 2002:56, p. 113.
[51] SOU 1975:1, p. 723-724.
[52] Sigeman, *Arbetsrätten – en* översikt, 2010, p. 26. See also DS 2002:56, p. 110.
[53] DS 2002:56, p. 110.

an employee or not. The court took in consideration that the parent had signed a contract with the Municipality regarding the arrangement. They also stated that the parent had actually performed work at the preschool, and functioned as a locum tenens during vacations. This lead the court to rule in favour of the parent being regarded as an employee, affirming also the collective agreements were to be applied. One interesting aspect mentioned by the court was also that there does not have to exist any form of declaration of intention between the parties. This has also been stated by the Court in the case *AD 1981 nr 131*.

When determining whether a performing party is an employee or a contractor, the type or labelling of the contract is of some importance of the court. This can be seen in the following case, *NJA 1949 s. 768*. In this case, three farmers who had performed work for a lumber mill claimed to have been employees to the principal and thus was entitled for vacation claims. The court stated that when determining whether a performing party is covered by the civil law notion of an employee, guidance is to be taken from what has been contracted between the parties and thereafter consideration is to be taken to different circumstances in the case. However, this differs from what the Labour Court states. In *AD 1990 nr 116* for example, the Labour Court stated that how the concerning parties have decided to label their contract does not affect the ruling. Instead, consideration is to be taken to the actual facts and circumstances in order to decide. This means that the assessment differs from traditional interpretation of contracts, where main consideration is taken to what has actually been contracted.[54]

It is however of some importance to the Labour Court as well, but not crucial, as can be seen for example in *AD 2005 nr 16*. The dispute was whether a person was an employee or a contractor. The court stated that how the parties had chosen to label or interpret their agreement was not decisive for the determination. Rather, actual facts and circumstances were important. In this case, the court ruled that the performing party was in fact an employee, not a contractor, mainly due to the fact that she had prior to the contract agreement been employed several times and that her situation had not changed remarkably with the new agreement.

In the case *1981 nr 58* the court confirms that the concerning parties' labelling or interpretation does not play a crucial part, and they also show that even if the performing

[54] Ds 2002:56, p. 115.

party starts out as a contractor according to both parties, it can change over the course of time. In this case a painter started out as a contractor for a municipality. But over time, more and more assignments were given to the painter and the control over the work laid at the municipality. Because of this, the court ruled that an employment was at hand and that the municipality thus needed just cause for ending the employment.

In some cases the performing party in question might function as an employee, but an employment contract does not exist. This can for example be the case with apprentices or trainees. The general rule is that they are a type of employees, and thus they fall under the protection of the civil law concept of employee.[55]

In the case *AD 1995 nr 132* there was a dispute whether a youth trainee was an employee or not. At this point in time, there was a law that allowed for a special form of trainee for youths to perform work without functioning as an employee.[56] The trainees were exempted from the concept of employee. It was however possible to be regarded as an employee if it could be proved that the law in question was used for economic gains and that false information had been submitted in order to circumvent labour laws. In this particular case, everything was in order and the trainee was not an employee according to the court. But the case still shows that trainees for example are employees as a main rule, but that exceptions can be made. These exceptions are not however to be used in order to circumvent labour laws.

This can also be seen in the case *AD 2012 nr 59*. The dispute in this case was that a person had been appointed an apprenticeship at a company after finished education as a government controlled skill-enhancing measure. This measure exempts the apprentice in question from being an employee according to 4th chapter 6 § Social Services Law.[57] The court said in this case that the apprentice was covered by the civil law notion of an employee because the person had performed work equal to other apprentices at the company but who had not been appointed their apprenticeship as a skill-enhancing measure. But according to the court it had not been shown that the exemption had not been used in order to obtain economic advantages nor to avoid collective agreements. Because of this, the apprentice was not considered to be an employee.

[55] Källström & Malmberg, *Anställningsförhållandet – Inledning till den individuella arbetsrätten*, 2013, p. 35.
[56] Lag (1992:32) om ungdomspraktikanter.
[57] Socialtjänstlag (2001:453).

Personal duty, the employers control and labour management

One of the most obvious circumstances that is generally associated with employment is subordination. This is the key aspect of employment. It is the employer who control the work and manage the labour force. And as a result, an employee has a duty to perform the work assigned by the employer with certain limits according to the employment contract and reach of the collective agreement.

In the case *AD 1990 nr 116* the dispute was whether a parking guard with investigative duties was an employee or a contractor and if the termination of the contract had just cause. The case was complicated due to the fact that there had once existed an employment contract that had been terminated by the employee and was later rehired under two contracts, one employment contract and one contract as a contracting consultant which were later terminated by the company. The court stated that the person had performed work under the control of the company and had been entitled to a salary and remuneration. The court could not find any circumstances that would point to the performing party being a contractor and was thus considered as an employee.

However, the lack of control for the employer does not necessarily mean that a performing party is not an employee, as seen in *AD 1981 nr 172*. In this case two performing artists were under the belief that they were employees and thus entitled to vacation pay. The two artists had been contracted to perform during a tour. The contract stipulated that they should perform the work on their own. The municipality in charge of the tour was responsible for time and place. They also supplied materials and controlled the work places. The municipality stated that the artists were not controlled and no subordination existed. This had no matter according to the court, since the artists were two professionals who knew their trade, and had been given the confidence of controlling their own work. The court came in the end to the conclusion that the artists were employees.

The circumstance that there is a lack of control for the employer, that stems from a competence or expertise with the performing parties, have been discussed several times by the courts and their conclusions have been that this does not necessarily mean that an

employment does not exist.[58] These cases also show that an employee does not need to be controlled on a continuous basis.

The case *NJA 1996 s. 311* dealt with the subject if a man who was a complementary part in a limited partnership could be considered as an employee and thus earn the right to take part in the state wage guarantee system. The court discussed the issue of the performing party not being the legal counterpart who had entered a contract for work, but rather through a company. Thus, it was not the performing party himself who was obligated to perform the work. They discussed however the legal possibility to see through arrangements with companies as a way to circumvent mandatory legislation. Thus, the court went on to look at all the circumstances in the case in order to determine whether the performing party could be regarded as an employee. What was of importance here regarding the type of work performed, it can be seen that the court took notice of the fact that the work performed was not predetermined. The contract in question did not stipulate a specific mission that was to be performed. Instead, the work performed changed over time, at the will of the principal. This was a circumstance that spoke for the performing party being an employee, which finally was the court's ruling. This assessment has later been maintained.[59]

Connected to this matter is the question if someone who is an employee can refuse work assigned by the employer, or does this speak in favour of a performing party being a contractor? This was discussed in the case *AD 1987 nr 21*. Here, the plaintiff argued that a writer was to be regarded as an employee for a magazine company. The court ruled that the writer was not an employee. One circumstance that was of importance for this ruling was the fact that the writer was able to on his own decide over his work. He was not forced by the principal to perform work. He decided what to do, and when to do it.

This assessment can also be seen in the case *AD 1989 nr 39*. Here, a journalist, who was not in the position of being able to deny work given by the principal, was determined to be an employee.

[58] See for example NJA 1973 p. 501, NJA 1996 p. 311 and RH 1998 nr 73.
[59] See for example RH 1998 nr 73.

The employment rate and the intensity of work

This circumstance deals with the type of work carried out by the performing party, and how the work is being carried out. Sometimes, work can be carried out only for a limited period of time, or the nature of the work can be described as temporary. This raises questions whether a performing party who carries out work only temporarily can be seen as an employee.

This subject was discussed by the Labour Court in the case *AD 1998 nr 11*. In this case a person was carrying out work for a parish. The plaintiff argued that the performing party had been unfairly dismissed. The performing party had for several years been responsible for invoices, salary, bookkeeping and general financial management. It was estimated that the work he performed could be compared to an employment with 40 % work time in relation to a full time employment. Most of the work was performed at the performing parties' home. The court came to the conclusion that the man was an employee at the parish even though it was not full time work. The result from this case is that while work of a more permanent nature generally means that someone is to be regarded as an employee, the lack of it does not necessarily mean the opposite.[60]

Another interesting case that deals with the rate of employment is *AD 1995 nr 26*. In this case, a man who used to be employed as an architect came to an agreement with the employer to continue performing work as a contractor. However, the performing party continued to use the principals' equipment and worked for 40 hours a week, and sometimes over time. According to witnesses, he functioned as a normal employee. This led the court to the conclusion that he was in fact to be considered as an employee.

In the case *RH 1998 nr 73* this matter was discussed once again. The circumstances were in this case similar to the case above. The plaintiff claimed to be working 40 hours a week, however there were doubts about this. The court stated however that it doesn't really matter. Even if the working time would be less than full time, it would still be possible to be considered as an employee.

[60] Ds 2002:56, p. 116.

Number of principals

One circumstance that courts take into account is the number of principals the performing party has, or rather, if the performing party has the possibility to perform work of importance for just one principal or several simultaneously. The question is if the performing party is hindered to perform work for another principal, be it if it is because of a prohibition, or if the performing party doesn't have the time nor the energy.[61] If not, the person is likely to be considered as an employee by the court. It should be stated however that it is not impossible for an employee to have several employers at the same time.[62] This has also been stated by the Labour Court in the case *AD 1979 nr 12*.

Disputes regarding this matter have been ruled upon by different courts. One example is *NJA 1996 nr 311*, which has been described above. In this case, the Supreme Court determined that even though the performing party was delivering services as an owner in a limited partnership, he was in fact regarded as an employee. One of the reasons for this was that he wasn't able to perform any work of importance for any other principals.

Supply of machines, materials and tools

Another aspect to take into consideration is the supply of materials, machines and tools for example. The issue is who it is that is supplying the needed materials to perform the work, the principal or the performing party? Generally, it is said that if the principal is the one supplying the performing party with what is needed, the performing party is more likely to be considered as an employee.

This had been established in case *AD 1995 nr 26*, which has been described above. In this case there was a dispute over one former employee, whom after an agreement continued working for the company but as a contractor. That contract was later cancelled by the principal, and the plaintiff argued that he had been dismissed without cause. The Labour Court had to determine whether he was an employee or not. The court argued, among other circumstances, that during the time the performing party worked as a contractor, he was in fact using the principals' materials. This led the court to determine him as an employee.

[61] Ds 2002:56, p. 117.
[62] SOU 1975:1, p. 723.

This has later been confirmed in the case *NJA 1996 s 311*. In this case, the performing party were also functioning as a contractor, working through his own company. The dispute was whether this performing party had the right to take part in a state controlled wage guarantee system, for employees. When the court was to determine if he was an employee, they argued that the performing party only used one machine that was his own, the rest was supplied by the principal. The court also said that when the circumstances are ambiguous and difficult to make a clear judgement, quite often the ruling is in the plaintiffs' favour, which is what was ruled in this case. This matter has been discussed in the preparatory work. Here, it is stated that when the case is doubtful regarding if an employment exists or not, favour should or could be given to the performing party depending on the circumstances.[63]

One interesting case on the matter is *AD 1981 nr 121*. Here, the court ruled that lorry drivers were contractors, even though the lorries were supplied by the principal. The deal for the drivers was that they could buy the lorries from the principal, but the business, contact with customers, billing and so on was carried out by the principal. Directions regarding how to perform the deliveries were also supplied by the principal. The court discussed whether or not they should use, as they say, the broad interpretation of the concept of employee that exists in MBL. This can be done when there is suspicion of circumvention of mandatory legislation. The court could however not find any evidence of this, and they ruled that the performing parties were contractors, not employees.

Remuneration

Another important circumstance is how the performing party has been paid, for example with a fixed income, billing through ones' own company, remuneration for outlay and costs and so forth. In the case *AD 1990 nr 116* for example there was a performing party working through a sole proprietorship, and thus billing the principal for some of his work. But, he also received a fixed income for fixed working hours and salary for over time. According to the court, the fact that he billed the principal for some of his work did not have a substantial importance to the case, far more important was the fact that he received a fixed income. The court ruled that despite having his own company, he was considered as an employee.

[63] Prop. 1973:129, p. 196 and prop.1975/76:105 annex 1, p. 309.

Regarding remuneration for costs and outlay one can see, from the case *AD 1998 nr 11,* that if the principal pays for computers, telephone bills, postage and travelling for example, that supports the argument that someone is an employee.

Social and economic criteria

This criterion takes a look at the social and economic situation the performing party is in. It aims to compare the performing party to a normal employee, in regards to his or hers relationship to the principal when it comes to dependency.[64]

The Labour Court has several times ruled in cases where this criterion has been discussed. In *AD 1978 nr 7* there was a dispute if a hairdresser, leasing a chair at a hairdressing salon through a company, was an employee or not. This is today a common way to organize the work at hairdressing salons. The court discussed the relationship between the performing party and the principal in terms of social and economic dependency. They stated that the performing party was in several ways dependent on the principal. One of them was that for customers, there were no signs of her being a self-employed. Advertising and prices for example was for the salon as a whole, not for different companies. Further, the performing party had no control over the business, for example regarding bookkeeping. The performing party in question was also young and new on the labour market, and thus took on a very subordinate role in relation to the principal. All of this led the court to find her as an employee.

In another similar case regarding the lease of a chair at a hairdressing salon, *AD 1979 nr 12*, shows the importance of the social and economic criteria. Here, many of the circumstances were similar to the case described above, but the hairdressers in question were not dependent on the principal to the same extent and as a result the court did not find them to be employees. The reasons for this are that the performing parties had their own register, their own bookkeeping and they controlled their working hours and vacation by themselves. Continuing, they were in charge of their own materials and paid taxes on their own. The performing parties also had a lot more experience and were older than the hairdresser in the previous case, which the court took consideration to. In the salon, it was obvious to customers that there were several different businesses, with advertising carried out separately. So even though these two cases deal with the same problem, the circumstances were considerably different.

[64] Ds 2002:56, p. 117.

The same goes in the case *AD 1982 nr 134*, also regarding a dispute about the leasing of a chair at a hairdressing salon. Here the court took considerable consideration to the economic criteria, since the performing party were very dependent in a financial way. Thus, this performing party was not determined to be an employee.

In more recent cases, the economic criterion has not been as important, but mentioned by the Labour Court. On the other hand, more consideration has been taken to the social criteria. In for example *AD 2005 nr 33* the court ruled that a chimney worker was not employee, due to the fact that he had not taken part in any salary negotiations, nor attended any office parties and functioned as other employees, circumstances that the court considered to be of the social criteria.

Circumvention of mandatory legislation and collective agreements

There are cases where the court have not found strong enough evidence to find some performing parties as employees according to the civil law concept, but still discussed the possibility to do so. The main reason for this is when there are suppositions that employment contracts have been avoided in order to circumvent mandatory legislation or collective agreements.[65] This phenomenon occurs quite often in the form of a former employee continuing working under basically the same terms but in the form of a self-employed, and this is something that speaks in favour of intentional circumvention of mandatory law.[66] This was the case in *AD 1994 nr 66*. The court argued that the performing parties in this case had willingly and knowingly entered into contracts where they have conducted business as investigators without employment. Continuing, the court could not find any evidence that the reasons for this arrangement had been to circumvent any laws. For this reason, the performing parties were not found to have been employees.

As a result from this case, there is the possibility to find a performing party as an employee even though the investigation of the circumstances in the case has not found him or her to be so. Despite the fact that the circumstances show that the performing party is a contractor, the fact that the reason for outsourcing to a contractor instead of using an employment in order to

[65] Ds 2002:56, p. 118.
[66] Malmberg, *Anställningsavtalet. Om anställningsavtalets individuella reglering*, 1997, p. 89.

evade labour laws, can make the court find that an employment still exists.[67] But not of course when the concerned parties have entered the arrangement knowingly of the outcome, as seen in the case above.

In one typical case where the question of circumvention of mandatory law arises is when people who used to be employees at a company continues to function as contractors, either by their own choice or if it is the employers will. But in order for this to be possible, to remain as an employee even though the performing party has become a contractor, a real change in relation to the employment has to exist.[68]

One sector where this phenomenon is commonly used is in the media business. In this sector it is not unusual that journalists and other professionals work self-employed or as contractors, and take on contracts for specific cases, instead of being employed. This was the case in *AD 2005 nr 16*. In this case the performing party had worked as a host for a television program. She had previously had several temporary employments with the employer, but for a duration of time she had a sole proprietorship and was a contractor. The plaintiff argued that she had in reality continued as an employee. First of the court stated that even though there didn't exist an employment contract, and that rather the parties had agreed upon continued work as a contractor, that this did not necessarily mean that she couldn't be an employee. When investigating the circumstances the court found that the performing party worked under the same premises as during her recent employments. The salary was the same, the principal had control over the work and she was personally responsible for delivering the work according to the contract. In reality therefore, there hadn't been any real changes in the employment after the transition to a contract for dependent work. Combined with the fact that the performing party had been forced to work as a contractor in order to stay on as a television host, the court found her to fall under the protection of the civil law concept of an employee.

A similar case has recently been ruled upon again in the Labour Court, in the case *AD 2012 nr 24*. This case was similar to the previous one. Just like in that one, this performing party had been employed several times with temporary employment contracts, and later on continued providing work as a contractor with a sole proprietorship. Just like previously, the court stated that in order for her no longer being an employee, there has to have been a real change in the

[67] Ds 2002:56, p. 118.
[68] See for example NJA 1975 p. 199.

terms of her employment. The court found that there had been no real changes. Her pay was similar to before, the employer still had control over her work, she had the same personal duty as before and all materials and supplies needed was given by the principal. Thus, she was considered as an employee by the court.

Combined with the cases described above arises the question of the intention of the parties when for example agreeing to continue working as a contractor. It becomes important whether or not the parties intentionally agree to transform an employment contract to a contract for independent work. In the case *AD 1983 nr 89* the court stated that if the parties intentionally and knowingly agrees upon it, and interprets the contract in that way, and there exists no suspicion of circumvention of mandatory legislation or collective agreements, special notice has to be taken to their intentions.

Customs and practices in different industries

One important circumstance for the courts is the customs and practices in different industries. It is even said to have a decisive role in the courts' rulings.[69] Especially important becomes the customs and practices when they derive from central collective agreements. The reason for this is that it is assumed that the central parties are on an equal level in terms of strength, and thus result in balanced outcomes. This circumstance was first settled in the case *NJA 1949 s 768* where the court stated that guidance can be collected from what is normally occurring and that has become generally applicable.

In the previous section in this chapter many cases in the media industry was highlighted, and in this industry customs and practices have become important for the Courts when ruling if a performing party is an employee or a contractor. In this industry one collective agreement has had a lot of influence on the question on the concept of employment. The collective agreement in question is the so called Freelance Agreement.[70]

One case in this industry is for example *AD 1994 nr 104*. The dispute in this case was whether a performing party was an employee or a contractor. The performing party in question had been employed as a freelance worker according to the collective agreement. The court went on as usual and investigated the different circumstances in the case, but let the collective

[69] Ds 2002:56, p. 120.
[70] Frilansavtalet mellan Svenska Journalistförbundet och Medieföretagen.

agreement influence how they interpreted the circumstances. One example of how they did this, were how they choose to interpret the fact that the performing party had been working for the company for a long time, and that the contract answered for the performing parties main income. According to previous case law studied in this thesis, these two circumstances would have supported the plaintiffs' claim, but in this case it did not have any substantial importance. The reason for this was that according to the collective agreement, the whole idea with freelance workers was that journalists should be able to perform work for a principal on a regular basis and during a longer duration of time without being employed. Neither did the fact that the principal supplied most of the materials used matter, because of convenience for the involved parties. The court ruled that the performing party had been a contractor. Interesting is also the fact that it is possible for this agreement to be applicable in cases were the principal/employer is not bound by the collective agreement.[71]

In the industry for entertainment, movies for example, one can also find evidence for the importance of industry practices, which can be seen in the case *NJA 1992 s 631*. This case was about an actor who had been hired for a day's work for a commercial. The actor claimed that this was an employment, even though it was only for a day. The company claimed that the actor was a contractor. The court took notice to the fact that the duration of the work only lasted for one day, and said that in this industry short time employments were usual. For this reason, the court ruled that the actor had been an employee. According to the court, both parties were aware of the fact that short employments were usual in the industry.

Companies as a contracting party

As it has been described earlier in the thesis, a legal person can never be regarded as an employee. Only physical persons can be employees. It is however possibly for the court to find that an employment still is at hand. Even though it is the company itself that has been contracted to perform work, and not an individual person who in reality is the performing party, the court sees to the circumstances and makes an assessment as usual.

The fact that a company is according to the contract the performing party does none the less influence the courts' assessment. In for example the case *AD 1994 nr 130* the court stated that the fact that the performing parties in question were limited companies, weighed strongly in favour of that an employment wasn't at hand. And even though several circumstances in the

[71] See for example *AD 1987 nr 21*.

case argued for that an employment was at hand, the court found that the persons had been contractors. This could be interpreted as a presumption for contractors in these situations.[72]

In the case *NJA 1996 s 311* this is supported by the fact that the court stated that if someone knowingly and willingly enters a working contract through a company instead of an employment, that person should in a way be unable to claim to be an employee.

As has been described earlier in the thesis, it is also possible for the court to "see through" arrangements were there is a suspicion that a company has been contracted to be the performing party instead of an employee in order to circumvent mandatory legislation or collective agreements, or other circumstances that is strongly in favour of the plaintiffs claim to be an employee. In for example *AD 1995 nr 26* a person who had chosen to be a contractor through a limited company was ruled as an employee by the court. This was because of several circumstances pointed to him being an employee, for example that the person performed most of the work at the principal's office, materials were supplied by the principal and that the performing party worked for about 40 hours a week and was compensated for over time.

In 2013, a very interesting case for this research was ruled upon by the Labour Court.[73] This case shows not only the difficulty with having work outsourced to self-employed regarding the concept of employment, but it also highlights the discussion regarding circumvention of labour laws and collective agreements. The case also shows what has become more common in both Sweden and in the EU as whole, namely self-employed working transnationally. In this case, a polish lorry driver had concluded a service agreement or a contract agreement with a road haulage company. The driver was not paid a salary, instead payments had been made through invoices. The plaintiff claimed that the driver had in reality been an employee to the company and that the company was thus obligated to apply the terms and conditions of a collective agreement, which was to be applied to all employees. The defendant on the other hand was of the opinion that it was a contract agreement and that the polish driver was aware of this situation, due to the fact that he had registered as a self-employed in Poland. The company had conducted their business like this for several years, having no employed drivers and instead using independent and foreign contractors. The plaintiff claimed that the driver

[72] Ds 2002:56, p. 123.
[73] AD 2013 nr 92.

was of the opinion that he had signed a contract of employment, and that in the beginning of the contract, the driver had not started any company. Instead, that was done after the principal was to receive his first payment. According to the court, several circumstances in the case was in favour of him being an employee, such as that the principal supplied the lorry, the driver had agreed to offer his whole labour at the principals disposal for an indefinite time, invoicing was done only to labour related activities and that he had not been able to perform any other activities for other principals during the duration of the contract. The court thus assessed the driver to be an employee and that the collective agreement was to be applied. After this case, the union sued to company again, this time for damages for over a hundred drivers, however it was settled before the taken to the Labour Court.[74] According to Westregård, this case illustrates problems with self-employment in the road haulage industry. According to her, one of the reasons for the dispute being settled before court was that it was difficult for the union to get driver to testify, which might be needed to win a case like this due to the importance of the performing parties' perceptions on the situation, for example if they believe that they were employees or not which was one important fact to the court in AD 2013 nr 92.[75]

[74] Case A 228/12.
[75] Westregård, *Self-employment versus traditional employment – an analysis from the perspectives of the labour market and the individual*, 2015, p. 18-19.

2.2 Dependent contractors

2.2.1 Background and definition

As mentioned in the introductory part of this thesis, Swedish legislation has a legal middle group for those contractors who in many ways function as employees and are dependent on a principal.[76] They are called in Swedish *beroende/jämställda uppdragstagare*, which means dependent/equal contractors. They are in the so called middle group because they cannot be described as employees, and nor can one claim them to be contractors due to the situation work is performed.[77] In 1 § 2 p MBL the dependent contractors are defined as those who "*perform work for others and are not employed but has the position of essentially the same kind as an employee".* The dependent contractors have with this the same rights given by MBL as employees. This means that they enjoy the same rights as employees when it comes to association, information, bargaining, collective action and mediation.[78] So it can be said that with this, the personal scope of labour law has been broadened in order to protect more than just employees.

Dependent contractors have their legal origins from the 1940's with changes in the two laws regarding industrial peace and vacation rights. With the preparatory work to these legislations, it was argued that due to the similarities between employees and dependent contractors, some sort of rights needed to be bestowed to the dependent contractors.[79] They also mentioned what type of workers that were alluded, and examples were given. They mentioned among others travelling salesmen, petrol station directors, agents and partly constructional and agricultural workers. Further on, the preparatory works gave some guidance as to how to draw the line between ordinary contactors, employees and dependent contractors. They stated that guidance should be taken from what has been contracted, but also the actual circumstances in the case. These circumstances could be the nature of the work, the social and economic position of the workers and also the workers own views on the matter.[80] With the governmental report from 1975 it was also stated that the circumstances used to separate an employee from a contractor can function when determining who is a dependent contractor.[81] This was also confirmed in the preparatory work to amendments to the Employment Protection Act in 1993.[82]

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[76] Adlercreutz, *Arbetstagarbegreppet*, 1964, p. 74-75.
[77] Engblom, *Self-employment and the Personal Scope of Labour Law - comparative lessons from France, Italy, Sweden, The United Kingdom and the United States*, 2003, p. 160-161.
[78] Ds 2002:56, p. 125.
[79] Adlercreutz, *Arbetstagarbegreppet*, 1964, p. 74.
[80] Socialstyrelsens utredning 1944 s. 24. See also Adlercreutz, *Arbetstagarbegreppet*, 1964, p. 75.
[81] SOU 1975:1, p. 726.
[82] SOU 1993:32.

2.2.2 The use of dependent contractors

There has however been a lot of discussion regarding the actual use of dependent contractors over the years, and some have argued that the concept isn't needed, due to the broad concept of employment that has been derived over the years, and that a lot of performing parties who belong to the so called middle group can fall under the protection of the civil law notion of an employee.[83] However it has also been argued that there can be positive sides to having a broad concept of a dependent contractor, in order to be able to adapt to changes in the labour market.[84]

The governmental report from 2002 also discussed dependent contractors and the possible need for a new type of middle group in order to have a system that can adapt to changes in the labour market, with for example the growing need for flexibility, and to extend the personal scope of labour law. However, the report could not find that there was a need, since Swedish legislation has dependent contractors.[85] The report also discussed the apparent issues with having clear definition of workers whom belong in the so-called middle group. It would be difficult to have a predictable legislation with clear signs or circumstances that would distinguish between employees, contractors, dependent contractors and a possible new type of worker in the middle group. The report further stated that it was possible to protect and ensure rights for dependent contractors with current legislation according to the MBL, for example with collective agreements concerning workers in the middle group.[86] Here it should be mentioned that the EU commission, in the green book from 2006, drew attention to the need of legislation concerning the middle group. The Swedish government answered in 2007 that there still was no need for further legislation, due to the existence of dependent contractors, supported by the report from 2002.[87]

In the preparatory work to the Co-determination Act in 1975, it was already then described that the use for dependent contractors could be questioned. However it was still included in the legislation as a security measure, to ensure the personal scope of the legislation for workers who are in between being employees or contractors.[88] Another example of the questioning of the need for dependent contractors in Swedish legislation is a statement from

[83] See for example *AD 1985 nr 57*.
[84] Ds 2002:56, p. 126. Sigeman, SvJT 1987, p. 613. Bergqvist, *Medbestämmandelagen*, 1997, p. 45.
[85] Ds 2002:56, p. 134.
[86] Ds 2002:56, p. 134.
[87] Arbetsmarknadsdepartementets synpunkter på grönboken, 2007.
[88] SOU 1975:1, p. 725.

the Labour Court who in a case stated that many of the workers who earlier would have fallen within the concept of dependent contractors would today fall under the civil law notion of employees, due to the widening of that notion.[89]

There has not been taken many disputes regarding dependent contractors to court, but there have been some regarding salesmen and franchisers. In the case *AD 1980 nr 24* there was a dispute over the employment status of salesmen. The company in question had decided to continue their business with no employed salesmen, instead they were given the choice to continue as contractors, purchasing sewing machines from the company and then selling them on their own. The union stated that the company tried to circumvent the collective agreement, and vetoed against the decision. The court stated that salesmen who purchase goods and are not in subordination to a principal, are in general to be considered as contractors. However, consideration can be taken to the social and economic status of the contractor, and their dependency on the principal, and in that way be considered as dependent contractors. The court could not in this case find evidence that it was so, and thus the salesmen was considered as contractors and MBL was not applicable.

As mentioned above, the employment status of franchisers has been discussed.[90] In one case, *AD 1994 nr 130*, the dispute was if some former employees should be subject to a collective agreement. The Court could not in this case find any of the workers to be neither employees nor dependent contractors and the main reason for this was that the collective agreement did not regulate dependent contractors. Instead, the agreement regulated workers according to the civil law notion of an employee. However the court discussed the possibility for franchisers to be considered as employees, and stated that they are in general to be considered as contractors.

[89] AD 1985 nr 87. See also Engblom, 2003, p. 161.
[90] See for example Sigeman, *Arbetsrätten – en översikt*, 2010, p. 38. Here, Sigeman argues that franchisers should be regarded as dependent contractors.

3. The Concept of Employment in the EU

3.1 The different concepts

When studying EU labour laws, one might get the impression that there is a uniform concept of employment throughout the treaties and directives. However this is not correct. Within the EU, there is no uniform concept of employment. In different articles and directives the concept changes. Sometimes the term worker is used, sometimes they refer to all who are performing work, and sometimes the term employee is used. [91] Continuing, the same term can be used in different directives and still bear different meanings due to the interpretation of the CJEU.[92]

This, together with the transformation on the labour market concerning the changing nature of employment relationships with the growing use of atypical employments, causes problems for member states when trying to identify the personal scope of different legislations.[93] Barnard speaks of the growing use of for example zero hour contracts, part time and fixed term contracts, agency work, seasonal work, homeworkers and self-employment as results stemming from the changed employment relations within the EU, and as a result, the traditional divide between dependent employees and independent self-employed is breaking down.[94]

This change has also been noticed by the EU Commission who has stated that the original purposes of labour law, which has been to offset inherent economic and social inequality between employment relationships, has been built on a traditional model of employment. According to the Commission, it used to that all employments was assumed to involve permanent, full-time employment contracts with single entity employers with obligations towards their employees. This has however changed, and with this labour laws also must adapt and change, just as the world has changed with rapid technological progress, globalization and flexibility.[95]

Self-employment is a typical example of this change in employment relations. Barnard describes the issue by comparing employees with self-employed. According to her, self-

[91] Cavalier & Upex, *The Concept of Employment Contract in European Union Private Law*, 2006, p. 601.
[92] Cavalier & Upex, *The Concept of Employment Contract in European Union Private Law*, 2006, p. 602.
[93] Barnard, *EU Employment Law*, 2012, p. 144.
[94] Barnard, *EU Employment Law*, 2012, p.144.
[95] COM(2006)708 final.

employed persons do not enjoy labour protection due to the belief that they are independent, in contrast to employees who are dependent on an employer. Thus, since the self-employed are not in a subordinate position towards their principal, labour law protection has not been viewed as necessary.[96] She also describes the fundamental difference between self-employed and employees, which she states to be that employees sell their labour while the self-employed sells a product. The employees are given a contract of services, while the self-employed are given a contract for services.[97]

The issue with the belief that all self-employed are independent towards their principal has also been noticed by the Commission. In the Green Paper mentioned earlier, the Commission recognizes that there is such a thing as "economically dependent work" meaning work performed in a grey area between traditional subordinate employment and independent self-employment, being self-employed working economically dependent on one principal.[98] All of this creates problems for member states, many of which have different concepts of employment, using both the term worker and the term employee. And as mentioned earlier, even the EU is using different terms in different articles and directives. As a result, implementation of EU law can be complicated, when interpreting the personal scope of the legislation.

In the following sections, the EU concept of worker will be investigated, as well as the terms employee and self-employed in order to get an understanding of the meaning. The research has its main focus on case law from the CJEU.

[96] Barnard, *EU Employment Law*, 2012, p. 145.
[97] Barnard, *EU Employment Law*, 2012, p. 145.
[98] COM(2006)708 final.

3.2 The concept of worker

As described above, a uniform concept of worker doesn't exist within the EU, or rather, no definition at all. The meaning of the term worker varies from different legislations, and thus in order to understand the meaning of it, one must see to the legislation in question and the area in which it is to be applied.

Yet, it can be said that the term worker is closely connected to Article 45 in the TFEU, which governs the free movement of workers within the EU. However, no further explanation is given in order to interpret what worker actually means according to the article. Instead, EU law delegates the meaning of the term to national laws, in most cases anyway.[99] Further, there is also Article 48 TFEU which stipulates that the European Parliament and the Council shall adopt such measures in the field of social security as are necessary to provide freedom of movement for workers. However, as the CJEU has stated, the meaning of the term worker in Article 48 does not necessarily have the same meaning as when used in Article 45.[100] But what makes it even more complex is that sometimes the EU uses an autonomous meaning of the term that is to be used by all member states.[101]

This is so from a ruling by the CJEU, in which the court insisted on having a wide meaning of the term worker within the EU and that it must be defined in accordance with objective criteria that distinguish the employment relationship by reference to the rights and duties of the persons concerned. It was in the case *Lawrie-Blum*[102] the court made this statement, and claimed that there is an essential feature of an employment relationship. The court said that the essential feature is that "for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration".[103] This case was about a trainee teacher who was under the control and direction of a school during the activities. He also received remuneration for the activities, activities that benefited the school with an economic value. The court found here that three basic criteria thus were fulfilled. Further on, the court has also stated that it is up to national courts to decide or determine whether or not there is a relationship of subordination in cases like this.[104]

[99] Cavalier & Upex, *The Concept of Employment Contract in European Union Private Law*, 2006, p. 602-604.
[100] C-85/96, *Martinez v Freistaat Bayern*, 1998, para. 31.
[101] Cavalier & Upex, *The Concept of Employment Contract in European Union Private Law*, 2006, p. 601.
[102] C-66/85, *Lawrie-Blum v Land Baden-Württenberg*, ECR2121, 1986.
[103] C-66/85, *Lawrie-Blum v Land Baden-Württenberg*, 1986, para. 16-17.
[104] C-337/97, *Meeusen v Hoofddirectie van de Informatie Beheer Groep*, ECR I-3289, 1999, para. 15.

In the case *Walgrave and Koch*[105] the CJEU discussed what they called the sphere of employment. In this case, regarding the prohibition of discrimination, the court stated that protection is given to all in the sphere of economic activities which have the character of gainful employments or remunerated services, and so covers all work with no regard to the actual legal nature of the relationship between the parties. [106] This has later been confirmed in the case *Sotgui v Deutsche Bundespost.*[107] The court stated here it does not matter if the legal relationship between the employer and the employee involves a public law status or a private law contract. That is immaterial.[108]

Continuing regarding economic activities, the court has ruled in several cases and by doing so giving meaning and requirements for who is to be regarded as a worker. In for example *Donà v Mantero*[109] it was stated that a worker has to be engaged in a genuine and effective economic activity for a certain period of time in order to be regarded as a worker.[110] What constitutes a genuine and effective economic activity has also been decided by the court in several cases. Among these cases it can be seen that atypical types of work can fall under this description. For example, athletes in the case *Union Royale*[111] and prostitutes in *Aldona Malgorzata*.[112]

The court's rulings also show that the work does not have to be performed in traditional forms, for example full time work. Different types of training programs[113] and apprenticeships[114] are also viable as genuine and effective economic activities.

However there are some cases where the court has found activities not to fall under the description genuine and effective. In one case for example the court stated that activities that is not performed under normal conditions might not be considered as work. In one case activities performed as part of a drug rehabilitation programme were not considered as work. The reason for this was that activities pursued under national rules intended to provide work

[105] C-36/74 *Walrave and Koch v Union Cycliste Internationale*, ECR 1405, 1974.
[106] C-36/74 *Walrave and Koch v Union Cycliste Internationale*, ECR 1405, 1974, para. 21.
[107] C-152/73 *Sotgui v Deutsche Bundespost*, ECR 153, 1974.
[108] C-152/73 *Sotgui v Deutsche Bundespost*, ECR 153, 1974, para. 5.
[109] C-13/76 *Donà v Mantero*, ECR 1333, 1976.
[110] C-13/76 *Donà v Mantero*, ECR 1333, 1976, para. 12.
[111] C-415/93 *Union Royale Belge de Société de Football Association v Bosman*, 1995.
[112] C-268/99 *Aldona Margorzata Jany and others v Staatssecretaris van Justitie*, ECR I-4921, 2001.
[113] C-109/04 *Kranemann v Land Nordrhein-Westfalen*, ECR I-2421, 2005. See also C-10/05 *Mattern v Ministre du Travail et de l'emploi*, ECR I-3145, 2006.
[114] C-188/00 *Kurz, née Yüce v Land Baden-Württenberg*, ECR I-10691, 2002.

for the purpose of maintaining, re-establishing or developing the capacity for work of persons who are unable to take up employment under normal conditions cannot be regarded as an effective and genuine economic activity.[115] It might also be the same for activities performed as part of a community-based religion as seen in one case. But here the court still found the activities to be work even though the performing party did not receive any remuneration, however the religious order provided materials.[116] It is also possible to count activities performed under a job-creation scheme as work.[117]

Regarding the extent of the work, it can be seen from the court's rulings that the scale of the activities matter. There has to be some extent to the activities and not only be marginal. In the case *Raulin*[118] the court stated that the economic activity must be of a larger scale. The activity cannot be performed on such a small scale that it is to be regarded as purely marginal and ancillary.[119] This raises however questions regarding the possibility for part-time activities to be regarded as work, but the CJEU generally finds part-time workers as workers.[120]

The CJEU did an interesting assessment in one of their rulings. In *Vatsouras*[121] it can be seen that the court tends to assess someone as a worker, even though many circumstances speaks against it, or if the circumstances are weak. According to Barnard, this might mean that the court tries to find people as workers, by favouring findings that support that argument, even though much speaks against it.[122] In this case a person was ruled as a worker despite him being rewarded a limited amount of remuneration and a short duration during which the activities was performed. The reason for this was that by an overall assessment, the activities could be found as professional, and thus allowing the person to be found as a worker.[123]

In conclusion, the CJEU has established three factors that define the term worker, according to Article 45 TFEU. The factors are that a person must perform services of some economic value for and under the direction of another person in return for which he receives

[115] C-344/87 *Bettray v Staatssecretaris van Justitie*, ECR 1621, 1989, para.17.
[116] C-196/87 *Steymann v Staatssecretaris van Justitie*, ECRR 6159, 1988.
[117] C-1/97 *Birden v Stadtgemeinde Bremen*, ECR I-7747, 1998.
[118] C-357/89 *Raulin v Minister van Onderwijs en Wetenschappen*, ECR I-1027, 1992.
[119] C-357/89 *Raulin v Minister van Onderwijs en Wetenschappen*, ECR I-1027, 1992, para.10.
[120] Barnard, *EU Employment Law*, 2012, p. 149.
[121] C-22/08 and C-23/08 *Vatsouras v Arbeitgemeinschaft*, ECR I-4585, 2009.
[122] Barnard, *EU Employment* Law, 2012, p. 149.
[123] C-22/08 and C-23/08 *Vatsouras v Arbeitgemeinschaft*, ECR I-4585, 2009, para. 30.

remuneration.[124] Continuing, the services performed must be real and effective rather than being purely marginal and borderline.[125]

This interpretation and meaning given to the term worker by the CJEU can be said to have a wide interpretation. And this wide interpretation of the word is to be used in cases involving the free movement of workers according to Article 45 TFEU.[126] The reason for this was established by the CJEU early on. In one case regarding this matter the court stated that because it involves the interpretation of a fundamental freedom of the EU, and because it was the intention of the court that member states should not be able to use a restrictive definition and thus limit the free movement of workers to a degree of their choosing.[127] And this has further since been established by the court, for example in the case of *Levin* where the court stated that there could be no reliance on national law and that the concept of worker should have an EU construction.[128]

According to Cavalier and Upex one can detect a difference between the meanings of the word worker depending on the purpose of the EU law in question. For example, with the free movement of workers. They mean that the term worker has been given a wide interpretation in cases of the free movement of workers because then the legislation has a purpose of harmonization of regulation. They compare it to other EU legislation, for example the social security system, which aims for coordination between member states. They mean that when the legislation aims for coordination between systems or regulations in member states a wide interpretation of the term worker is not used. Then it is more up to each member state to define the term. But, when the legislation has a purpose of harmonization, an EU interpretation of the term is needed, and used in the case of free movement of workers.[129] According to Gyulavári the reason for having a wide definition of the term worker in cases of free movement of workers, is that this is a fundamental right, as opposed to EU legislation

[124] C-66/85 *Deborah Lawrie Blum v Land Baden-Württemberg* (3 July 1986) Rec 2121, para. 17.
[125] St Clair Renard, *Fri rörlighet för tjänster: tolkning av artikel 49 EGF*, 2007, p. 55-56. See also Cavalier & Upex, *The Concept of Employment Contract in European Union Private Law*, 2006, p. 607.
[126] Cavalier & Upex, *The Concept of Employment Contract in European Union Private* Law, 2006, p. 606.
[127] C-75/63 *MKH Unger, wife R. Hoekstra v Bestuur der Bedriijfsvereniging voor Detailhandel en Ambachten à Utrecht* (19 Mar 1964) Rec 347, para. 51.
[128] C-53/81 DM Levin v Secrétaire d.Etat à la justice (23 Mar 1982) Rec 1035
[129] Cavalier & Upex, 2006, *The Concept of Employment Contract in European Union Private Law*, p. 605.

that is more of a secondary role, which tend to allow member states to make their own definitions.[130]

As has been mentioned earlier, the term worker has different meanings in different directives. Sometimes one can see the term used in a directive, without any definition. But in some directives, for example the Framework Directive on Safety and Health[131], a definition of the term is given in Article 3 (a). In some directives, for example the Posted Workers Directive, reference is made to national law, stating that the term is to be defined by national law in the member state that the worker is posted in. All of this raises questions regarding when a national definition of the term is to be used, and when an EU definition is to be used, especially when the directive in question offers no definition. This is according to Nielsen open to question. He also argues that it is questionable to use analogies between different areas of EU law. [132]

One interesting case from the CJEU highlights further the issue with the definition of the term. The court stated in this case that the definition of employee in the Directive on Information and Consultation[133], may not be formulated in a way that weakens the concept of employee, even though the directive states that it is up to member states to define the term. [134]

[130] Gyulavári, Tamás; *Traps of the past: Why economically dependent work is not regulated in the member states of Eastern Europe*, European Labour Law Journal, Volume 5, no 3-4, 2014 pp. 267-278, p. 269.
[131] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.
[132] Nielsen, 2002, p. 157. See also Westregård, *The notion of "employee" in Swedish and European Union law. An exercise in Harmony or Disharmony?* In *Globalization, fragmentation and employment law: a Swedish perspective*, 2016, p. 197.
[133] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation.
[134] C-176/12 *Association de médiation sociale*, EU:C:2014:2.

3.3 Employment and self-employment

In this section case law from the CJEU regarding self-employment versus regular employment has been studied. EU regulation concerning the self-employed comes from Article 49 TFEU, giving free movement for people who wish to establish themselves as self-employed. Article 56 TFEU can also be applicable if the self-employed is only temporarily providing services in another Member State. This is opposed to Article 45 TFEU, regulating the free movement of workers.

So per definition, the self-employed are not regarded as workers. They are rather service providers. However, Article 49 TFEU does not define the term self-employed. Instead, its definition comes from a case from the CJEU, *Jany*.[135] In this case the court explained the difference between workers and the self-employed and thus providing a definition. The court stated that the self-employed provides work without subordination in the relationship with the principal. It is also the self-employed who are responsible for their own success or failure regarding their business. Further, they are paid directly for the service that they provide.[136] This case was about a group of Czech and Polish women working as prostitutes in the Netherlands. The prostitutes paid rent for access to the premises, and received a monthly income for which they paid taxes. The court came to the conclusion that the women were self-employed. According to Barnard, this case shows that Article 49 TFEU permits individuals to engage in a wide range of economic activities in other Member States and still be considered as self-employed.[137] The CJEU has expanded on this and stated in the case *Barkoci and Malik* that self-employed could conduct activities of an industrial or commercial character, activities of craftsmen, or activities of the professions of a Member State.[138]

The Commission has also made a few statements regarding the status of self-employment in the Green Paper *Modernisation of Labour Law*.[139] As mentioned earlier, the Commission has taken notice to the issue with the so-called grey zone between employment and self-employment, where some self-employed can be placed. Due to their dependency on one principal, the Commission argues that they cannot be seen strictly as ordinary self-employed, who in essence are supposed to be independent.

[135] C-268/99 *Jany and others vs Staatssecretaris van Justitie*, ECR I-8615, 2001.
[136] C-268/99 *Jany and others v Staatssecretaris van Justitie*, ECR I-8615, 2001, para. 34 and 70.
[137] Barnard, *EU Employment* Law, 2012, p. 151.
[138] C-257/99 *R v Secretary of State for the Home Department, ex p. Barkoci and Malik*, ECR I-6557, para. 50.
[139] COM(2006) 708, final.

This problem is highlighted in the case *Allonby*.[140] This case was about a group of teachers who used to be employed by a college. However, after a decision by the college that teachers had to engage themselves in self-employment in order to continue to work, one teacher claimed that her rights regarding equal pay according to Article 157 TFEU had been infringed.[141] The court had to determine whether she could be considered as a worker or not, and so they stated that the term worker in Article 157 TFEU had a broad, union meaning.[142] Continuing, the court took input from its former case law regarding the term worker, albeit it was case law concerning free movement of workers according to Article 45 TFEU. The court repeated its former case law, describing the key aspects of the term, which were that someone is considered as a worker if he for a certain period of time performs services for and under the direction of another person in return for which he receives remuneration.

This lead the court to state that it was not the intention of the authors of the Treaty that the term worker in Article 157 TFEU should include independent service providers who are not in subordination to the one who receives the services.[143] However, the court cited from a former ruling stating that if the independence was merely notional and disguising an employment relationship, it did not exclude the possibility for someone who under national law is a self-employed to be regarded as a worker within the meaning of Article 157 TFEU. The court discussed the possible independence in the case, and said that it is necessary to consider the limitations imposed on their freedom to choose their timetable, place and content of their work. Continuing, the court argued, with help from former case law, that the fact that the teachers had no obligation to accept an assignment from the principal didn't matter, regarding their independence.[144]

According to Barnard, the *Allonby* case suggests that courts should be prepared to look behind labels attached by parties themselves regarding their relationship, and by doing so, see to the actual facts in the case concerning the dependence of the self-employed.[145] This is something that the CJEU have touched upon earlier in the case of *Danosa*.[146] In this case, a member of a

[140] C-256/01 *Allonby v Accrington Rosendale College*, ECR I-873, 2004.
[141] Barnard, *EU Employment* Law, 2012, p. 152.
[142] C-256/01 *Allonby v Accrington Rosendale College*, ECR I-873, 2004, para. 61.
[143] C-256/01 *Allonby v Accrington Rosendale College*, ECR I-873, 2004, para. 68.
[144] C-357/89 *Raulin*, ECR I-1027, 1992, paras. 9 and 10.
[145] Barnard, *EU Employment Law*, 2012, p. 153.
[146] C-232/09 *Danosa v LKB Lizings SIA*, ECR I-000, 2010.

board of directors argued to be considered as a worker according to the Pregnant Workers Directive.[147] The court said in this case that it was not ruled out that she could be regarded as a worker even though she was a member of the board of directors, because that did not say anything about her subordination. Instead, the court considered the circumstances that lead to her becoming a member of the board. Circumstances mentioned were the nature of her duties, the context in which those duties were carried out, the scope of her power, the extent of supervision and under what premises she could be removed from the board.[148]

In another interesting case from the CJEU, the court considered a director of a company, of which he was the sole shareholder, as a self-employed.[149] The court stated its previous case law regarding the term worker and what it holds regarding effective and genuine activity, for a certain period of time, under the direction of another person in return for remuneration.[150] However, the court clearly stated thereafter that in order for someone to be regarded as a worker, a relationship of subordination must exist, which they did not find any evidence for in this case. For this reason, the CJEU found him to be self-employed rather than a worker.[151]

This blurry status of self-employed persons who are dependent on one principal, and their personal scope in terms of labour rights, has been, as mentioned, studied by the EU Commission. In their Green Paper, the Commission discussed labour protection for dependent self-employed and made comparisons to UK law. In the UK, a distinction is made between employees and workers. Employees enjoy full labour protection, whilst workers enjoy only some rights. The dependent self-employed are included in the group of workers. The independent self-employed however has no labour protection. The Commission took notice of this, and concluded that similar distinctions between employees, workers, dependent self-employed and independent self-employed have been made in several member states. They claim in the Green Paper that economically dependent workers often are given protection regarding discrimination, health and safety, minimum wage and collective bargaining rights whilst protection against dismissal still is something restricted to employees.[152]

[147] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)
[148] C-232/09 *Danosa v LKB Lizings SIA*, ECR I-000, 2010, para. 47.
[149] C-107/94 P.H. Assher v Staatssecretaris van Financiën, Judgement of the Court 27 June 1996.
[150] C-107/94 P.H. Assher v Staatssecretaris van Financiën, p. 25.
[151] C-107/94 P.H. Assher v Staatssecretaris van Financiën, p. 26.
[152] COM(2006)708, final.

Barnard makes a comparison here to EU law, and concludes that a similar nuanced approach is used for self-employed.[153] The Commercial Agents Directive[154] for example gives basic employment protection to the self-employed regarding remuneration, damages for termination of contracts, and the possibility to transform fixed-term contracts into indefinite duration. This approach to give some employment rights to dependent self-employed is supported by others. Deakin and Morris argue that real independent self-employed should not be granted any labour protection, since they truly are entrepreneurs responsible for their own business. [155]

[153] Barnard, *EU Employment* Law, 2012, p. 154.
[154] Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents.
[155] Deakin & Morris, *Labour* Law, 2009, p. 150.

4. The Free Movement of Services and Workers and Competition Law

4.1 The free movement of workers

In 2006, the European Parliament raised the issue of false self-employment within the EU as a way to circumvent the Posted Workers Directive, and the two regulations regarding social security, Regulation 883/2004 and Regulation 987/2009. In a resolution, they stated the following, urging the Commission to: "*initiate negotiations with the Member States as a matter of urgency, with the aim of establishing transparent and consistent criteria for determining the status of "workers" and "self-employed persons" in employment law"*.[156] The reason for this encouragement was that the European Parliament feared that self-employment could be used as a way to circumvent Article 3 Posted Workers Directive, regarding minimum standards for workers. Continuing, the European Parliament also urged Member States to establish a difference between the different types of self-employed persons, namely the genuine entrepreneurs who work independently for several different principals and the dependent self-employed who are economically dependent on one principal and under subordination and for remuneration.

The aim of the Posted Workers Directive is to ensure fair competition and to guarantee the rights of workers.[157] Article 3 states that posted workers are to be guaranteed a set of minimum rights in the Member State in which the work is carried out. The posted workers are to be given terms and conditions given by law, regulations, administrative provisions and/or collective agreements. The rights given concerns maximum work periods, minimum paid annual holidays, minimum pay, conditions of hiring-out of workers, health and safety, protective measures of pregnant women and equality between men and women and other provisions of non-discrimination.

Article 1 of the Posted Workers Directive clearly states that the Directive is applicable for situations of employment, however as mentioned earlier in the present study the Directive does not define the term employee. Instead, Member States have the full competence to define who is a worker according to the Directive. The issue is however that the self-employed are by definition not employees, which means that they are excluded from the protection of the

[156] European Parliament resolution on the application of Directive 96/71/EC on the posting of workers (2006/2038(INI)), P6_TA(2006)0463.
[157] Nyström, 2011, *EU och arbetsrätten*, p. 145-146.

Directive. They are free to set the price of their choosing for the services they provide and on their own determine their working hours.

As a result of the European Parliaments resolution on the issue, an Enforcement Directive on the Posted Workers Directive has been adopted by the Parliament.[158] The Enforcement Directive aims "*to prevent, avoid and combat abuse and circumvention of the applicable rules by undertakings taking improper or fraudulent advantage of the freedom to provide services enshrined in the TFEU and/or of the application of Directive 96/71/EC*".[159] Continuing, Recital 10 in the Directive states that the implementation of the Directive may assist Member States in identifying workers falsely declared as self-employed.

Article 1 in the Enforcement Directive states that the directive established a common framework of a set of appropriate provisions, measures and control mechanisms necessary for better and more uniform implementation, application and enforcement in practice of Directive 96/71/EG, including measures to prevent and sanction any abuse and circumvention of the applicable rules and is without prejudices to the scope of Directive 96/71/EG. Continuing, the Directives aim is to guarantee respect for an appropriate level of protection of the rights of posted workers for the cross-border provisions of services, in particular regarding the terms and conditions of employment given by Article 3 Directive 96/71/EG. While at the same time facilitating the exercise of the freedom to provide services and supporting the function of the internal market. Lastly, Article 1 also states that the Directive shall not affect in any way the exercise of fundamental rights as recognized in Member States and at Union level, nor does it affect actions covered by the specific industrial relations systems of the Member States, regarding for example the right to negotiate, conclude and enforce collective agreements.

In order for Member States to be able to determine whether or not a genuine posting of workers is at hand and in order to prevent circumvention and abuse, Article 4 § 2 offers a number of circumstances, but not limited to, that it to be taken into account in order to make the assessment. The circumstances are as following:

[158] Directive 2014/67/EU of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No. 1024/2012 on administrative cooperation through the Internal Market Information System, as adopted by the European Parliament on 16 April 2014.
[159] Recital 7 in the Preamble to Directive 2014/67/EU.

A) *The place where the undertaking has its registered office and administration, uses office space, pays taxes and social security contributions and, where applicable, in accordance with national law has a professional license or is registered with the chambers of commerce or professional bodies.*
B) *The place where the posted workers is recruited and from which they are posted.*
C) *The law applicable to the contracts concluded by the undertakings with its workers, on the one hand, and with its clients of the other.*
D) *The place where the undertaking performs its substantial business activity and where it employs administrative staff.*
E) *The number of contracts performed and/or the size of the turnover realised in the Member State of establishment, taking into account the specific situation of, inter alia, newly established undertakings and SMEs.*[160]

Paragraph 3 offers a list of circumstances in order to assess whether a posted worker carries out work in a Member State other than the one in which he or she normally works.

A) *The work is carried out for a limited period of time in another Member State.*
B) *The date on which the posting starts.*
C) *The posting takes place to a Member State other than the one in or from the posted worker habitually carries out his or hers work according to Regulation (EC) No 593/2008 (Rome I) and/or the Rome Convention.*
D) *The posted workers returns to or is expected to resume working in the Member State from which he or she is posted after completion of the work or the provision of services for which he or she was posted.*
E) *The nature of activities.*
F) *Travel, board and lodging or accommodation is provided or reimbursed by the employer who posts the worker and, if so, how this is provided or the method of reimbursement.*[161]

These circumstances are so to be taken into account, however the failure to satisfy one or more of the factual elements in the two paragraphs does not preclude a situation from being a posting of workers. This is stated in § 4, which says that the assessment is to be made and

[160] Directive 2014/67/EU, Article 4 § 2.
[161] Directive 2014/67/EU, Article 4 § 3.

adapted to each specific case and specificities of the situation.[162] Continuing, § 5 states that the above mentioned circumstances can be used in order to make a determination whether or not a performing party is to be considered as a worker or not according to Directive 96/71/EG, together with the facts relating to the performance of the work, subordination and the remuneration of the worker, notwithstanding how the relationship is characterised in any arrangement, whether contractual or not, that may have been agreed between the parties.[163]

Apart from what has now been mentioned, the Enforcement Directive mainly focuses on administrative duties, inspections and control mechanisms for governmental authorities, and cooperation between Member States, in order to prevent and sanction abuse and circumvention of EU law and to protect the internal market.

Something that is worth mentioning in this context regarding the concept of employment is the Swedish implementation of the Posted Workers Directive and the Enforcement Directive. In the Swedish preparatory work to the implementation of the Posting of Workers Directive, it was stated that the term worker should have the same meaning as it does in the Co-determination Act and the Vacation Act.[164] Further, in the preparatory work to the implementation of the Enforcement Directive, the issue with who is to be regarded as a worker according to the Posting of Workers Directive, have not been discussed. However, the authors were aware of the problem.[165]

So with this new directive, it can be said that Member States now have new opportunities to tackle the use of false self-employment in a cross-border situation, mainly when it comes to administrative measures to simplify cooperation between Member States. But the issue is larger than that. Self-employment is not primarily a question of labour law or social security laws, at least not when used in a cross-border situation. Due to them not being employees or workers, but rather service providers, it becomes a question of the free movement of establishment and services according to Articles 49-62 TFEU.[166]

[162] Directive 2014/67/EU, Article 4 § 4.
[163] Directive 2014/67/EU, Article 4 § 5.
[164] SOU 1998:52, p. 82-83.
[165] SOU 2015:13, p. 61-62. See also SOU 2015:38 and SOU 2015:83.
[166] Muller, *Cross-border mobility of "bogus" self-employed workers: A lack of legal framework coupled with protection of economic rights*, 2014, p. 310.

4.2 The free movement of establishment and services

4.2.1 The concept of services

Articles 49-62 TFEU guarantees the free movement of establishment and services within the EU. It is primarily self-employed persons who are the target of this legislation, giving natural persons the right to register and act as service providers transnationally.[167] There is also the Services Directive which addresses service providers.[168] Article 49 TFEU is the corner stone of the free movement of establishment, stating that restrictions are prohibited. The second part of the article also states that the freedom of establishment includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings[169]. There is here also a reference to Article 54 TFEU, which gives that companies or firms shall for the purposes of the chapter on freedom of establishment be treated in the same way as natural persons.[170]

Article 56 TFEU states that restrictions on the free movement of services shall be prohibited[171], and in Article 57 TFEU services are defined. The article contains four activities that shall in particular be regarded as services, and they are activities of an industrial character, activities of a commercial character, activities of craftsmen and activities of the profession.[172]

The purpose of the Services Directive is to eliminate any barriers between Member States regarding the free movement of services.[173] This is to strengthen the integration of the peoples of Europe and promote balanced and sustainable economic and social progress.[174] This Directive, which addresses service providers, and define them as any natural person who is a national of a Member State, or any legal person, as referred to in Article 54 TFEU and established in a Member State, who offers or provides services.[175] Continuing, the Service Directive also defines the term service, stating that it is any self-employed economic activity, normally provided for remuneration, as referred to in Article 57 TFEU.[176]

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[167] Muller, *Cross-border mobility of "bogus" self-employed workers: A lack of legal framework coupled with protection of economic* rights, 2014, p. 310.
[168] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.
[169] Article 49 TFEU.
[170] Article 54 TFEU.
[171] Article 56 TFEU
[172] Article 57 TFEU.
[173] St Clair Renard, *Fri rörlighet för tjänster: tolkning av artikel 49 EGF*, 2007, p. 260.
[174] Recital 1, Directive 2006/123/EC.
[175] Article 4 (2), Directive 2006/123/EC.
[176] Article 4 (1), Directive 2006/123/EC.

Interestingly, the Services Directive also gives a list of legal areas, on which the Directive has no impact on. One of these areas are labour law. In Article 1 (6) it is stated that: "*This Directive does not affect labour law, that is any legal or contractual provision concerning employment conditions, working conditions, including health and safety at work and the relationship between employers and workers, which Member States apply in accordance with national law which respects Community law. Equally, this Directive does not affect the social security legislation of the Member State.*"[177] This means, according to Muller, that the Directive does not affect the definition of self-employed workers resulting from national provisions defining employees. Member States are thus free to on their own determine under which conditions a worker is to be defined as an employee.[178] Further, the Directive does not affect the exercise of fundamental rights, nor the right to negotiate, conclude and enforce collective agreements and to take industrial action.[179]

4.2.2 Restrictions on the free movement

There have not been any cases in the CJEU regarding the possible abuse of the free movement of establishment and services through self-employment in order to circumvent labour laws. However, there has been several cases concerning some actions taken by Member States. These actions have often been made in order to stop the use of false self-employment, with the motive of preventing social dumping and the circumvention of labour laws, such as the Posting of Workers Directive. And every time, the CJEU has found that the measures taken by Member States have been constituted as restrictions on the free movement.[180]

Before we move on to investigating the cases involving restrictions of the free movement in the context of self-employment, it is necessary to investigate the content of the TFEU and how the CJEU have ruled generally, and see to what extent it is possible to restrict the free movement of establishment and services. According to Article 52 TFEU it is possible for Member States to restrict the free movement of establishment and services on grounds of public policy, public security or public health. However, through the rulings of the CJEU, more exceptions have become valid. The exceptions in Article 52 TFEU can thus be said to a sort of framework for what kind of exceptions that can be decided by Member States. Further,

[177] Article 1(6), Directive 2006/123/EC.
[178] Muller, *Cross-border mobility of "bogus" self-employed workers: A lack of legal framework coupled with protection of economic rights*, 2014, p. 311-312.
[179] Article 1(7), Directive 2006/123/EC.
[180] Muller, *Cross-border mobility of "bogus" self-employed workers: A lack of legal framework coupled with protection of economic rights*, 2014, p. 316.

a condition for exceptions is that a test of proportionality is made, to see if the exception is in proportion to its effect.[181] The purpose of the exceptions in Article 52 TFEU is said by the CJEU to be that Member States should have the possibility to deny some persons the right to dwell in their country.[182] Thus, the exceptions generally only apply to actual physical movement between borders. But, when it comes to services, it still applies, with the exception of grounds on economic reasons.[183]

From CJEU case law, one can see that the exceptions are to be interpreted restrictively, and the meaning of the terms is laid down by the CJEU.[184] And when it comes to the exception public policy, there is a possibility for a certain degree of variance between Member States, due to cultural, social and religious differences.[185] Continuing, the exception public policy has seldom come to be admissible when it comes to the free movement of services. There has to be genuine and serious threats to public policy, which seldom arises with the movement of services.[186]

One exception that can restrict the free movement is public interest, which has no support in any treaty. Instead, it is the CJEU that has developed this principle.[187] It was in the case *van Binsbergen* the principle was first introduced by the Court.[188] This case concerned a demand for residence in the Netherlands to be able to work as an agent for private persons in social cases. The Court found that in some cases demands like this could be just, depending on the nature of the work in order to secure work ethics. Since this case, the Court has expanded on the term public interest, giving it a wide interpretation, and it can be said to contain protection for the individual, protection for public interest, market protection and protection for cultural, historical and artistic interests.[189] There are also, through case law from the CJEU, some conditions that must be met in order for public interest to be applicable. They are that the measure is to be justified by overriding reasons, the measure shall not be met by other provisions, the purpose cannot be achieved by less powerful measures and the measure is to

[181] St Clair Renard, *Fri rörlighet för tjänster: tolkning av artikel 49 EGF*, 2007, p. 212.
[182] C-355/98 Commission vs Belgium REG 2000, s.I-1221, p. 29.
[183] St Clair Renard, *Fri rörlighet för tjänster: tolkning av artikel 49 EGF*, 2007, p. 216.
[184] C-352/85 Gouda and others (1991) ECR I 4007, p. 11. See also C-484/93 Svensson & Gustavsson REG 1995 s. I-3955, p.15.
[185] C-36/75 Rutili v Ministère del'Interiur (1975) ECR 1219. See also St Clair Renard, 2007, p. 216.
[186] St Clair Renard, *Fri rörlighet för tjänster: tolkning av artikel 49 EGF*, 2007, p. 217. See also C-38/96 Calfra REG 1999 s.I-11, p. 20-28.
[187] St Clair Renard, *Fri rörlighet för tjänster: tolkning av artikel 49 EGF*, 2007, p. 219.
[188] C-33/74 van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid (1974) ECR 1299, p. 12.
[189] St Clair Renard, *Fri rörlighet för tjänster: tolkning av artikel 49 EGF*, 2007, p. 220.

be effective in order to achieve its purpose.[190] Some cases can be highlighted here. In four cases the CJEU has stated that social protection for workers is subject to public interest.[191] Further, economic balance in social security systems has also been found to be subject to public interest.[192]

Continuing, social dumping is also said to be subject to public interest. This can be seen in the highly debated case of *Laval*.[193] In this case the union had taken collective action against Laval, in order to secure that minimum wages, according to a collective agreement, for some posted workers. The Court found however that the actions were not justified, partly because the company was already obliged to follow the rules regarding minimum rights according to the Posted Workers Directive.[194] Another important aspect that must be mentioned regarding restrictions to the free movement is the test of proportionality that must be done in order to determine whether a restriction is justified.[195] This can for example be seen in a statement from the Advocate General in Laval: Mengozzi stated that collective actions are not to be disproportionate in relation to the protection of workers and prevention of social dumping.[196]

Now, as mentioned in the beginning of this section, there has not been any case from the CJEU that has dealt with abuse of self-employment. There have however been several cases where Member States have imposed restrictions regarding self-employment in cross-border situations, which have been found to be unlawful.

This was the case in *Commission v France*.[197] The Commission had lodged a complaint against France, because the latter had imposed a presumption of salaried status on performing artists who were recognized as service providers and established in their Member State of origin, where they usually provided similar services. France had also made the grant of a license to performing artists' engagements agencies, established in another Member State, subject to the need of engaging artists. The reason for these restrictions were in part to combat concealed employment among the artists, and claimed it to be justified by two overriding

[190] St Clair Renard, *Fri rörlighet för tjänster: tolkning av artikel 49 EGF*, 2007, p. 231.
[191] C-369/96, 376/96 Arblade REG 1999 s. I-8453, p. 36, C-272/94 Guiot REG 1996 s. I-1905, p. 16 and C-63/81 Seco v EVI (1982) ECR 223, p. 10.
[192] C-159/99 Smiths and Peerboms REG 2001 s. 5473.
[193] C-341/05 Laval un Partneri Ltd. v Swedish Building Workers' Union, REG 2007 I-11767.
[194] For more information regarding the Laval-case, see for example Nyström, *EU och arbetsrätten*, 2011, p. 150-153.
[195] See Article 5 TEU.
[196] Nyström, *EU och* arbetsrätten, 2011, p. 151.
[197] C-255/04 Commission v France (2006) ECR I-5251.

requirements in the public interest, social protection and campaign against concealed employment. The CJEU stated the following:

"*Firstly, with regard to social protection of the performing artists in question, it is certainly not inconceivable that, in the same way as employed persons, self-employed workers, such as service providers, may need specific measures to afford them a certain degree of social protection (see, to that effect, with regard to freedom of establishment, Case C-53/95 Kemmler [1996] ECR 1-703, paragraph 13). Thus, the social protection of service providers may, in principle, be one of the overriding requirements of public interest which may justify a restriction on the freedom to provide services.*"[198]

Regarding combating concealed employment the Court made the following statement:

"*With regard, secondly, to the objective of combating concealed employment, the fact that performing artists are normally engaged on an intermittent basis and for short periods by different show organisers cannot, of itself, mean that a general assumption of concealed employment is well founded. That is particularly so in this case because the performing artists in question are recognised as service providers, established in their Member State of origin, where they usually provide similar services.*"[199]

The Court finally agreed with the Commissions suggestion as to how to deal with the problem, which was to establish a system of *ex post facto* control, together with deterrent penalties would suffice to combat concealed employment.[200]

In a similar case, Greece had imposed a mandatory system for characterizing service contracts between tourist and travel agencies as employment contracts.[201] The tourist guides from other Member States, who performed services as self-employed, were thus by law determined to be employees. The reason for this restriction to the free movement were public interest, specifically to maintain industrial peace in the supply of tourist services, which is an important part of the Greek economy, and thus protect the function of the national economy.

[198] C-255/04 Commission v France (2006) ECR I-5251, p. 47.
[199] C-255/04 Commission v France (2006) ECR I-5251, p. 52.
[200] C-255/04 Commission v France (2006) ECR I-5251, p. 53.
[201] C-398/96 Symvoulio Epikrateias (1997) ECR I-3091.

The CJEU found however that this was an economic aim, which could not constitute a reason relating to public interest and restrict the free movement.[202]

In a more recent case, Belgium had imposed a requirement, for self-employed persons from other Member States, to make a prior declaration via a website of their service provisions.[203] Belgium wanted to secure that the self-employed worked under the same constraints as workers posted to Belgium according to the Posted Workers Directive, and thus fight against false self-employment and the circumvention of the directive.[204] The CJEU found that this requirement was *a priori* a restriction to the free movement.[205] And the court could not find that a general presumption of fraud is not sufficient to justify a measure that compromises the objectives of the TFEU.[206] Belgium had also failed, according to the Court, to prove that the *a priori* restriction was necessary to achieve the objectives of public interest, nor did the requirement pass the test of proportionality.[207]

Interestingly, the Advocate General gave an important statement prior to the ruling of the CJEU regarding the situation, explaining the difficulty with economically dependent self-employed workers or subordinate self-employed persons, and their possible need of labour protection.[208] The CJEU further explained the difficult situation, explaining that since the EU has not harmonized the cross-border supply of the self-employed, measures and restrictions could be justified if it meets an overriding requirement in the public interest, and that interest is not already protected in the Member State, and the measure is appropriate in achieving the objective and it does not go beyond what is necessary.[209] In this case the CJEU also for the first time acknowledged combating social security fraud could constitute a legitimate objective, and thus detect false self-employment, which supports the objectives of preventing unfair competition, social dumping and protection of self-employed workers.[210]

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[202] C-398/96 Symvoulio Epikrateias (1997) ECR I-3091, p. 23, 25.
[203] C-577/10 Commission v Belgium, judgement of 19 December 2012.
[204] Muller, *Cross-border mobility of "bogus" self-employed workers: A lack of legal framework coupled with protection of economic rights*, 2014, p. 317.
[205] C-577/10 Commission v Belgium, judgement of 19 December 2012, p. 40.
[206] C-577/10 Commission v Belgium, judgement of 19 December 2012, p. 53.
[207] C-577/10 Commission v Belgium, judgement of 19 December 2012, p. 55 and 56.
[208] Opinion of Advocate General Cruz Villalón delivered on 19 July 2012 in *Commission* v *Belgium*, op. cit., point 4.
[209] C-577/10 Commission v Belgium, judgement of 19 December 2012, p. 44.
[210] Muller, *Cross-border mobility of "bogus" self-employed workers: A lack of legal framework coupled with protection of economic rights*, 2014, p 318. See also C-577/10 Commission v Belgium, judgement of 19 December 2012, p. 45.

According to Muller, these cases show that it is possible to extend the scope of public interest when it comes to restrictions of the free movement of services. However, they seldom pass the test of proportionality. According to her, the CJEU often rules against measures taken by Member States, because of the possibility of less restrictive measures that can fulfil the same purpose. [211] This is supported by three cases from the CJEU, in which the court has made statements regarding this matter.[212]

4.2.3 Collective agreements' compliance with competition law

One possible and interesting solution to the situation of false self-employed workers, might in Sweden be collective agreements for the self-employed, or at least in Sweden for dependent contractors.[213] This is however not as easy as it sounds. Since, as with most problems in this thesis, self-employed persons are not legally regarded as employees, it becomes questionable as to its compliance with competition law, specifically Article 101 TFEU, and the free movement of services. Article 101 TFEU states that agreements which may affect trade between Member States and have as their objective or effect of prevention, restriction or distortion of competition within the internal market shall be incompatible with the internal market. Article 101 (3) however gives exceptions to the rule, stating that the provisions of paragraph 1 may be declared inapplicable if the cases of any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, or any concerted practice or category of concerted practices. This opens up for collective agreements, without being in conflict with competition law. But, as described earlier, it is not that easy when it comes to self-employed persons.

This can be seen in the case *Kunsten.*[214] In the Netherlands, it is possible for service providers to join trade union or employers' or professional association, and they may in turn conclude collective labour agreements in the name and on behalf of the service providers, not only employees. The dispute in this case was over a collective agreement regarding minimum fees for self-employed, and its possible conflict with Article 101 TFEU. The CJEU stated that a provision of a collective labour agreement in so far as it was concluded by an employees' organization in the name, and on behalf, of the self-employed services providers who are its

[211] Muller, Cross-border mobility of "bogus" self-employed workers: A lack of legal framework coupled with protection of economic rights 2014, p. 318-319.
[212] C-319/06 *Commission* v *Luxembourg* [2008] ECR I-4323, p. 90, C-168/04 *Commission* v *Austria* [2006] ECR I-9041, p. 52, C-244/04 *Commission* v *Germany* [2006] ECR I-885, p. 41.
[213] See section 2.2.
[214] C-413/13 FNV Kunsten Informatie en Media (2014).

members, does not constitute the result of a collective negotiation between employers and employees, and cannot be excluded, by reason of its nature, from the scope of Article 101(1) TFEU.[215] However, the court also said that this is not the case if the service providers are in fact false self-employed.[216]

The problem here is whether or not a self-employed can be regarded as an undertaking, as written in Article 101 TFEU. The court therefore discusses the possibility to be regarded as an employee or worker according to EU law, and thus gaining the status of an undertaking.[217] They for instance state that even though someone is regarded as a self-employed according to national law, he or she can still be regarded as an employee within the meaning of EU law, if the independence of the self-employed is merely notional and disguising an employment relationship.[218] The Court also said that it was up to the national court to determine whether or not the self-employed could be regarded as undertakings, given settled case law regarding the concept of employment in EU law.[219] Lastly, the CJEU said that in order for a collective agreement, regarding minimum fees for self-employed, not to fall within the scope of Article 101 (1) TFEU, it has to concern service providers that work under similar conditions as workers and thus being false self-employed.[220]

If we now put this in a Swedish perspective, one possibility to tackle the abuse of self-employment is to include the self-employed in collective agreements. This can be done by the social partners by including for example dependent contractors in their agreements. With the Co-determination Act, the Swedish concept of employment have been widened and covers, in part, the self-employed through the use of dependent contractors.[221] In Sweden, there are no obstacles in having collective agreements with regards to competition law. Section 2 in the Competition Act makes an exception for agreements between the social partners regarding employment conditions and salary, and this exception includes the dependent contractors.[222] One might however wonder if this is in compliance with EU competition law, since in a way, it can regulate competing prizes for contractors on the free market. According to Malmberg

[215] C-413/13 FNV Kunsten Informatie en Media (2014), p. 30.
[216] C-413/13 FNV Kunsten Informatie en Media (2014), p. 31.
[217] C-413/13 FNV Kunsten Informatie en Media (2014), p. 33-37.
[218] C-413/13 FNV Kunsten Informatie en Media (2014), p. 35.
[219] C-413/13 FNV Kunsten Informatie en Media (2014), p. 37.
[220] C-413/13 FNV Kunsten Informatie en Media (2014), p. 42.
[221] See section 2.2 for information regarding dependent contractors.
[222] Källström, *Employment Agreements and Contract Work in the Nordic Countries*, 2002, p. 79.

however, there should not be any conflict with what has been established by the CJEU regarding this matter.[223]

4.3 The conflict between free movement of services and free movement of workers, in the light of social dumping

With the creation of the Services Directive, there was much fear that the Posting of Workers Directive could be circumvented. The reason for this was that a general principle of country of origin was to be applied to all matters regarding providing of services. This would have meant that no Member State could have regulated the provision of services and regulated terms and conditions for the workers performing the work, as they could before according to the Posting of Workers Directive. Instead, the laws of the service provider's country of origin was to be applied. For this reason, the Services Directive was given a few derogations, giving situations where the principle of country of origins was not to be applied and thus restricting the free movement.[224] One of these derogations concerns the posting of workers, according to Article 17 (1)(a). However, according to critics, this derogations has, instead of securing labour rights for posted workers, created a separate category of employees employed by service providers, since there are specific conditions that must be met for a worker to be considered as a posted worker.[225] But generally, this derogation opens up for regulation of posted workers again, even though it is carried out through service providers. It can also be seen as a measure against social dumping. One of the fears of the Services Directive was also that it would undermine the labour market models of Member States, since there are many different arrangements for the setting of pay and other terms and conditions of work and collective bargaining for example.[226]

This issue can be exemplified through the case of *Rush Portuguesa*, a case which is said to have been one of the reasons for the making of the Posted Workers Directive.[227] This case was about the terms and conditions of Portuguese workers, established in Portugal, performing work in France. The CJEU gave in this case a clear ruling regarding protection of Member States labour market models, and protection against social dumping. They stated that

[223] Malmberg, *Collective Agreements and Competition Law in Sweden*, 2001, p. 195.
[224] Neal, *The Country of Origin Principle and Labour Law in the Framework of the European Social Model*, 2006, p. 54-55.
[225] Bruun, *The Proposed Directive on Services and Labour Law*, 2006, p. 29.
[226] Neal, *The Country of Origin Principle and Labour Law in the Framework of the European Social Model*, 2006, p. 55-57.
[227] C-113/89, Rush Portuguesa Lda v Office national d'immigration (1990) ECR I-1417.

EU law poses no obstacle to collective agreements embodying labour standards being made mandatory on all employers and workers in a Member State, including workers from other Member States.[228] Collective agreements can thus be used by Member States as a way to prevent the risk of social dumping that comes with the free movement of services, but only if the collective agreement is made mandatory. But, there are problems regarding collective agreements if undertakings are excluded from affiliation to agreements, or affiliation is made more difficult for undertakings established in another Member State.[229] This problem is highlighted in the case *Commission v Germany*.[230] In this case, the CJEU condemned German law that prevented hiring out of employees among undertakings unless they were party to collective agreements for the industry, and undertakings could be party to the collective agreements only if they had a subsidiary in Germany employing workers. It was not the affiliation to collective agreements that was the problem however, it was the requirement to have an establishment, as a condition for affiliation that was an infringement on the freedom to provide services.[231]

If we now try to put this in the perspective of self-employment in a cross-border situation, several issues regarding protection of social dumping arises. First of all, self-employed persons are not covered by the Posting of Workers Directive, because by definition, there are no natural or legal person actually posting the self-employed. It is however up to Member States to define the term worker in the directive, giving them an opportunity to tackle abuse of self-employment.[232] But some argue that because of the lack of a European-level definition of a worker, the case law regarding protection against social dumping from *Rush Portuguesa*, and the opportunities given by both the Services Directive and the Posting of Workers Directive to handle the same problem, becomes in a way irrelevant. This is because of the self-employed fail to come within the scope of EU protections, simply by evading national Member States definitions of employees or workers.[233] Because even though it is possible to

[228] C-113/89, Rush Portuguesa Lda v Office national d'immigration (1990) ECR I-1417, p. 18. See also Bercusson & Bruun, *Free Movement of Services, Temporary Agency Work and the Acquis Communautaire*, 2008, p. 286.
[229] Bercusson & Bruun, *Free Movement of Services, Temporary Agency Work and the Acquis Communautaire*, 2008, p. 286.
[230] C-493/99, Commission v Germany, (2001) ECR I-8163.
[231] Bercusson & Bruun, *Free Movement of Services, Temporary Agency Work and the Acquis Communautaire*, 2008, p. 287.
[232] Bruun, *The Proposed Directive on Services and Labour Law*, 2006, p. 26.
[233] Neal, *The Country of Origin Principle and Labour Law in the Framework of the European Social Model*, 2006, p. 70-71.

restrict the free movement of services, for the protection of workers as an overriding reasons relating to public interest, the self-employed are not workers in that sense.[234]

5. Analysis

5.1 Comparing the concepts of employment in Sweden and the EU

Even though there aren't any statutory or strict definitions of employment, in neither Sweden nor the EU, it is still possible to make out what the concept holds. Through the study of case law, one can see how both Swedish courts and the CJEU defines the concept of employment by investigating different circumstances in the case and then making an assessment. This is done in Sweden according to the theory of operational facts, which has been described in chapter two. There are several different circumstances or facts that Swedish courts take into account when determining whether a performing party is to be considered as an employee or a contractor. The CJEU operates similarly in cases that deal with this matter, however there are differences. And since Sweden is a part of the EU, consideration must be taken to EU case law, especially when dealing with transnational work, which this thesis aims to target. It is also relevant in the discussion about self-employment, due to the fact that self-employed persons may provide services transnationally within the internal market of the EU. In section 5.2 in the analysis, the possibility for the self-employed to be regarded as employees or workers, in both Sweden and the EU will be analysed. In this section however, focus lies on a comparison between the Swedish concept of employment and the EU concept of employment, to see what similarities and differences there are.

The Swedish notion of employment is, as said, not strictly defined by law; instead it is constructed through linking together circumstances that either speaks for someone being an employee or a contractor. Preparatory works to Swedish legislation offers some guidance as to what circumstances are important, but what one can make out is that it is not a mechanical process. Even though the process of investigating circumstances in each case has been settled multiple times by both the Supreme Court and the Labour Court, one cannot easily determine whether an employment is at hand or not. Each case is different, and there are different circumstances with varying importance from case to case. But it is possible to see certain tendencies in the courts' judgements regarding this matter. There are some circumstances that are more obvious than other, for example when it comes to subordination, remuneration and

[234] Bercusson & Bruun, *Free Movement of Services, Temporary Agency Work and the Acquis Communautaire*, 2008, p. 291.

supply of materials for example. There are however some circumstances that are more interesting to highlight and analyse. Some of these circumstances are the economic/social criteria. These two circumstances are used by the courts to see in what position the performing party is in relation to the principal when it comes to economic dependency and social standing, and his or her resemblance to an employee. There are two interesting cases from the Labour Court regarding this matter, and they deal with hairdressers working as independent contractors at hairdressing salons.[235] These two cases are interesting to analyse, since the court took into account the performing parties' resemblance to employees when it comes to matters that are perhaps not as solid as contract law, personal duty or the employer's control. In these two cases, which are very similar, the hairdressers rented a chair at the salon, and conducted their own businesses separated from the owner of the salon. The court found one of the hairdressers to be an employee and in the other case the hairdresser was determined to be a contractor. The circumstances were similar, apart from some. In *AD 1978 nr 7* the court took into account that the hairdresser was young and new on the market. She also had little or no control over the premises, marketing and general handling of the business was done by the owner of the salon. She was regarded as an employee due to this. In *AD 1979 nr 12* however, the hairdressers were in much more control. They were also older and much more experienced, and so, the court found them to be independent businessmen. What is interesting in these two cases is that the court took into account the entire social situation in which the performing parties were working. This can also be seen in the case *AD 2005 nr 33* were a chimney worker, who did not participate in office parties, wasn't determined to be an employee, simply because of the fact that he did not socially function as one.

If this is put in relation to the EU case law that has been studied, one cannot find any similar reasoning from the CJEU. Instead, the CJEU is more focused on the actual work performed. The CJEU has established three factors that define the term worker, according to Article 45 TFEU. The factors are that a person must perform services of some economic value for and under the direction of another person in return for which he receives remuneration.[236] Continuing, the services performed must be real and effective rather than being purely marginal and borderline.[237] The same goes for the case law regarding the term employee, albeit with some differences. Regarding the term employee, the CJEU has expanded on the

[235] AD 1978:7 and 1979:12.
[236] C-66/85 *Deborah Lawrie Blum v Land Baden-Württemberg* (3 July 1986) Rec 2121, para. 17.
[237] St Clair Renard, *Fri rörlighet för tjänster: tolkning av artikel 49 EGF*, 2007, p. 55-56. See also Cavalier & Upex, *The Concept of Employment Contract in European Union Private Law*, 2006, p. 607.

concept of employment and included factors such as subordination[238], dependency[239] and the possibility to see through concealed employments.[240] All of these circumstances have similarities in Swedish case law, though perhaps with some variance in degree of importance. For instance, one could say that is it more clearly in Swedish case law that part time workers have greater opportunity to be regarded as employees, in comparison to EU case law were the work performed must not be marginal or borderline. However, it is not impossible for part time workers to be regarded as workers according to EU case law.[241] It is interesting to compare the need in EU case law for real and effective performance of work and it not being marginal, to the Swedish circumstances rate and intensity of work and the type of work performed. It could be interpreted that Swedish case law opens up for a variance in the rate and intensity of work, for example part time work, while EU case law has a stronger focus on the economic activities as such, which can be widely interpreted. This can also be seen in Swedish case law. Another difference is that in Swedish case law, remuneration or salary is not necessary for being regarded as an employee. It is a factor that matters in the courts assessment, but it is not decisive, rather the lack of it indicates that it is not an employment contract.[242] The need for remuneration is however much clearer in EU case law, being established that remuneration shall be received for the performed work. [243]

One subject that should be mentioned is the question regarding how broad or narrow the definition of the concept of employment is. The EU concept of employment can be said, generally, to be interpreted widely, at least when it is regarding the free movement. The reason for this is as not to hinder the free movement by giving the concept a narrow interpretation.[244] This can be seen in the case law studied were Article 45 TFEU is concerned. The majority of the cases that have been studied have concerned Article 45 TFEU, and the concept of employment that has been investigated is tightly intertwined with this article. One might therefore imagine that the EU concept of worker only is to be applied in matters regarding the free movement of workers. But, as can be seen in *Allonby*, the CJEU used the concept of worker according to Article 45, even though the dispute was regarding equal

[238] C-107/94 P.H. Assher v Staatssecretaris van Financiën, Judgement of the Court 27 June 1996.
[239] C-232/09 *Danosa v LKB Lizings SIA*, ECR I-000, 2010.
[240] C-256/01 *Allonby v Accrington Rosendale College*, ECR I-873, 2004.
[241] Barnard, *EU Employment Law*, 2012, p. 149.
[242] Ds 2002:56, p. 111. See also Westregård, *The notion of "employee" in Swedish and European Union law. An exercise in Harmony or Disharmony?* 2016, p. 198.
[243] C-66/85 *Deborah Lawrie Blum v Land Baden-Württemberg* (3 July 1986) Rec 2121, para. 17.
[244] Cavalier & Upex, *The Concept of Employment Contract in European Union Private Law*, 2006, p. 606.

pay.[245] This can be interpreted in a way that gives the concept of worker according to Article 45 TFEU a union wide definition. But the issue is larger than that, as is explained by Cavalier and Upex.[246] They argue that the wide definition of a worker is only to be used in matters regarding fundamental freedoms of the EU, such as the free movement of workers. The reason for this, according to them, is in the light of harmonization of EU law across the Member States. Narrower definitions tend to be used to a greater extent in secondary EU legislation. [247]

What makes it even more complex is how the EU legislation is written in for example directives. One example that has been brought up in this study is the Directive on Information and Consultation, which clearly states that it is up to Member States to define the term employee according to the directive. However, in one case regarding this directive, the CJEU stated that Member States are not to give the term a narrow definition, so as not to weaken the concept of employee.[248] Generally then, it must be said that it is difficult to establish a clear EU concept of employment. One must see to what legislation the terms worker or employee is used in, because of the variance between different EU legislations, and see to the purpose of the legislation in question. But at the same time, Article 45 TFEU provides, in a way, a broad, union wide, definition on the concept of employment.[249] Similarities to this can be seen in Swedish legislation, where the Co-Determination Act offers a wider interpretation of the concept of employment, in relation to the Employment Protection Act for example, with the use of dependent contractors. Dependent contractor has no equivalent in EU law, although both the CJEU and the Commission recognizes the need for a widened concept of employment in order to tackle the abuse of self-employment. The use of dependent contractors is an interesting way to widen the concept of employment in order to give labour rights to certain groups on the labour market that is in need of it and falls outside of the standard concept of employment. There are however issues with it, as will be described in section 5.2.

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[245] C-256/01 *Allonby v Accrington Rosendale College*, ECR I-873, 2004.
[246] Cavalier & Upex, *The Concept of Employment Contract in European Union Private Law*, 2006, p. 605.
[247] Gyulavári, Tamás; Traps of the past: Why economically dependent work is not regulated in the member states of Eastern Europe, European Labour Law Journal, Volume 5, no 3-4, 2014 pp. 267-278, p. 269. See also Westregård, *The notion of "employee" in Swedish and European Union law. An exercise in Harmony or Disharmony?* 2016, p. 197.
[248] C-176/12 *Association de médiation sociale*, EU:C:2014:2.
[249] However, analogies between different EU legislations are questionable, see Nielsen, 2002, p. 157 and Westregård, *The notion of "employee" in Swedish and European Union law. An exercise in Harmony or Disharmony?* 2016, p. 197.

So in conclusion, in Sweden and the EU, the concepts of employment are constructed by linking together circumstances that indicates whether or not someone performing work is to be considered an employee or not. There are some similarities and differences between the Swedish concept of employment and the EU concept. One can also argue, with the abuse of self-employment in mind, that the concepts offer possibilities for false self-employed workers to be regarded as employees. One can however discuss the validity of the circumstances that are being used by the courts, at least in Sweden, due to the fact that they were established for more than 50 years ago, and it could be questioned if they are still valid on today's labour market. The labour market has gone through many changes, with the use of non-traditional forms of employment, for example self-employment. Perhaps, at least according to me, there is a need for updating what circumstances that are to be taken into consideration, to be in better harmony with the current labour market and the challenges we have today. One of these challenges, or opportunities, is cross-border work within the EU. As can be seen in this study, there is a lacking in harmonization of the concept of employment in the EU. Through CJEU case law, a union wide concept of employment can be said to exist, but perhaps it is not enough with the growing use of cross-border work and atypical employments that question the binary employment system.

5.2 The possibility for self-employed to be regarded as workers/employees

The question of self-employment in relation to the concept of employment is a complex question that becomes even more complex when put in a transnational context. In Swedish law there is a divide between employment agreements and contract agreements. Someone who performs work can either be an employee or a (dependent) contractor, and a court can through assessing the circumstances and facts in a case make a determination on the matter and rule whether or not someone is to be regarded as an employee or not. The court sees to several different circumstances in the case, and makes an assessment on the basis of those circumstances. The CJEU works in a similar way, seeing to the circumstances in order to determine whether the performing party is a worker/employee. This is however not an easy process, especially not today with regards to self-employment. There is no clear legal definition of self-employment, which causes problems due to the fact that self-employment today can mean many different things. One can be a genuine self-employed, an entrepreneur offering services to others and competing on the free market. One could also be a self-

employed person who is dependent on one principal, both in terms of subordination and in terms of economical dependency. What they have in common though is that they are not employees, and thus, have no access to the scope of labour law protection. But there is the problem; perhaps should some of the self-employed gain access to the scope of labour law protection due to their situation. So should perhaps be the case if the self-employed person in question in many ways resemble an employee, if he or she for example is dependent on one principal and works under subordination. Today, it would seem, that the best option for these self-employed is to turn to court in order to get a ruling determining them to have the status of an employee.

This can, as mentioned, be done in Sweden, and there is a lot of case law that deals with if someone is an employee or a contractor, and it can generally be said that with the wide definition of an employee, the civil law notion of an employee, it is quite possible for a self-employed to be regarded as an employee, if the right circumstances are met. It is difficult to draw specific conclusions from the Swedish case law on this matter, mostly due to the fact that each case is different. An overall and general assessment on the circumstances in each specific case is made by the courts. But it is still possible to obtain some guidance from the case law concerning how the courts view and treat the circumstances.

There are several different circumstances to take into consideration, all of which offers the possibility for self-employed to be regarded as employees.[250] This analysis will however focus on those circumstances that are of greatest importance for the self-employed, and perhaps, contains the largest problems. The characteristics of self-employment can generally be said to be independency, the nonexistence of subordination and the absence of a fixed salary, or if it is the case of false self-employment, the opposite of those. The findings in Swedish case law show however that if someone can for example prove that she works under subordination, or is dependent on one principal and cannot perform work for any other, or if she receives remuneration in ways that resemble that of an employees, it is possible to be determined as an employee. One must of course see to the case in subject and make the determination from those cases specific circumstances – but the possibility exists. What is more interesting and perhaps more relevant is the economic/social criteria, the risk for abuse in terms of

[250] See all of the circumstances described in section 2.2.

circumvention of mandatory legislation and collective agreements and the existence of customs and practices in different industries and sectors.

As can be seen in the cases AD 1978 nr 7 and AD 1979 nr 12 the social and economic criteria's can have a lot of influence on a court's rulings. As explained in the previous section of the analysis, this circumstance takes a look at how the worker resembles an employee in terms of economic and social dependence. If we hypothetically imagine a self-employed worker from a Member State, performing work in Sweden, wants to claim employee rights in court for example, it would be possible if he or she could prove that the context under which the work is performed resembles that of an ordinary employee, he or she could have a possibility to be acknowledged as an employee. It is however quite uncertain how much of the case law from the two cases that can be transferred to other situations, due to the fact that they concern work for hairdressers, a special industry were self-employment is not unusual, very much because a lot of hairdressers rent or lease a chair at a saloon.

This brings on to the question regarding the existence of customs and practices in different industries and sectors. As can be seen in the case law studied, the Labour Court takes great notice of which industry that the work is being performed in. For some workers, for example journalists, contract or freelance work is accepted to a higher extent than for other workers.[251] This makes it harder at times for journalists to claim being employees rather than contractors, due to the fact that self-employment is used to a higher extent and is sanctioned through collective agreements. Therefore, when discussing the possibility for self-employed workers to be regarded as employees, one must see to the industry the work is performed in, due to differences that occur. One could for example argue that in the construction industry, contract work has become more common, and therefore it might be harder for self-employed persons from other Member States to perform work and be determined to be employees in Sweden. If a case like that would go to court, it would not be impossible that the court would take into account how work usually is performed in the construction industry.

It should however be pointed out that it is possible for the court to "see through" arrangement with self-employment and contract work, if there is a suspicion of circumvention of mandatory legislation and collective agreements. This is an important circumstance when

[251] AD 1994 nr 104.

tackling the abuse of self-employment, because the purpose of the abuse itself is to evade obligations by laws and collective agreements. But as can be seen from the case law studied, if the two parties concerned, the principal and the self-employed, knowingly and willingly conclude a contract agreement with its implications, it is hard to use this circumstance as a way to be acknowledged as an employee.[252] The intention of the parties is very much observed by the courts when they make their rulings. One situation where the question of circumvention of law is brought up is when an employer makes a decision to continue their business without employees, but keeping them on as self-employed. But there is a requirement here that the courts take into account when determining whether those self-employed still is to be regarded as employees, and that is that there cannot have been any major changes to the work performed and the situation under which the work is performed. [253] If there has been major changes to the "employment" with the change to self-employment, it is harder to be recognized as an employee. But if the work continues basically as before the change, it is more likely for the worker to be regarded as an employee.[254]

The intention of the parties can also be problematized further, as explained by Westregård and her analysis on the case AD 2013 nr 92. In this case a self-employed lorry driver was found to be an employee according to the court, much because of the fact that the driver was under the belief that he was in fact an employee. Westregård explains the difficulties for trade unions in winning cases like this if they do not have the support of the self-employed in question, due to the importance of their intentions in the case, regarding whether or not they actually want to be self-employed or employees.[255]

The main issue with self-employed workers being regarded as employees is however in my opinion that today, many self-employed are dependent on one principal, but works without subordination. Subordination is the key or the main characteristics with traditional employment, and that is one circumstance both the Swedish Courts and the CJEU takes into account. Without subordination, it is difficult to be regarded as an employee, especially according to CJEU case law. The CJEU has stated that one cannot be regarded as an

[252] AD 1983 nr 89.
[253] See for example NJA 1975 p. 199.
[254] AD 2012 nr 24.
[255] Westregård, *Self-employment versus traditional employment – an analysis from the perspectives of the labour market and the individual*, 2015, p. 18-19.

employee if there is no subordinate relationship in place.[256] This can be troublesome for those self-employed who are in the so-called grey zone, between employment and self-employment, due to the fact that they often are dependent on a principal, but performs work without subordination.

There is however in Swedish law the possibility to be a dependent contractor and thus earn rights according to the Co-Determination Act. This possibility can be regarded as a way to address the issues with dependent self-employment and as a way to combat the abuse. But there are problems. The use of dependent contractors in Sweden is low, and many dispute over the actual benefits with having it, mainly because of the wide interpretation of the term employee. It is argued that because of that wide interpretation, dependent workers are more likely to be regarded as employees rather than dependent contractors. [257] It is not either clear who the legislators aimed to target with dependent contractors. It is not entirely clear what type of workers that are likely to be dependent contractors. The preparatory work mentions salesmen, franchisers and agents for example. At the same time, if there would be a wide interpretation of the term dependent contractors, the possibility to include self-employed workers would offer great possibilities for those in the so called grey zone.[258] If some self-employed workers were to be regarded as dependent contractors, it would also open up for collective agreements and other rights given by the Co-Determination Act.

Since the overall focus of this thesis includes a wider perspective on the issue with abuse of self-employment, in a transnational context, one must also see to the EU concept of employment. The findings in this study show that there is no clear concept of employment within the EU, but through the rulings of the CJEU case law regarding the terms worker and employee have emerged. It can be said that it is possible for self-employed to be regarded as employees with this case law, but as mentioned, there is a heavy focus on the circumstance subordination. But overall has the CJEU given several rulings on the matter which has made it possible for self-employed to be regarded as employees, especially when it comes to cases where there is suspicion of concealed employments. Just like in Swedish law, the CJEU can look through arrangements of self-employment that conceals employments, and thus, giving

[256] C-107/94 P.H. Assher v Staatssecretaris van Financiën, p. 26.
[257] See for example *AD 1985 nr 57*.
[258] Ds 2002:56, p. 126. Sigeman, SvJT 1987, p. 613. Bergqvist, *Medbestämmandelagen*, 1997, p. 45.

employment rights to them. But the main issue seems to be the abuse of the Posted Workers Directive.

As explained in the background in the thesis, some argue that the Posted Workers Directive can be circumvented through the use of self-employment. This has also been observed by the European Parliament, which is why the Enforcement Directive came into existence. The problem is however that a self-employed person is not a posted worker by definition. There is no one posting the self-employed. It is however possible to be regarded as an employee, due to the fact that the directive delegates the definition of a worker to the Member States. Sweden has for example decided to use the definition of an employee according to the Co-Determination Act and the Vacation Act, and as this study shows, this definition has been interpreted widely and opens up for including some self-employed into the concept of employment, if the circumstances in the case proves it.[259] Continuing, the Enforcement Directive gives more facts or circumstances that can be taken into account when determining if someone is an employee according to the directive and thus earn the right to be covered by the minimum standards given by the directive. One other interesting aspect is if it is truly up to the Member States to define the concept. As has been described, in one of the CJEU's rulings, it was stated that even though the Member States were to define the term worker in the Directive on Information and Consultation, they are not allowed to define it in such a way that it narrows the concept.[260] But even if this was the case regarding the Posted Workers Directive, it cannot be argued that the Swedish definition is narrow. It is also difficult to argue that the Swedish definition is narrow in comparison to the definition from Article 45 TFEU, and thus not restricting the free movement of workers.

But the main issue is still up for discussion. Even if it is possible for self-employed workers to fall under the concepts of employment in both Sweden and the EU, the abuse of self-employment in terms of circumvention of the Posted Workers Directive and collective agreements is still a problem. One can for example imagine a self-employed worker performing activities in Sweden for a limited period of time. Even if he or she in reality would be able to be considered as an employee by a Swedish court, it is unlikely that it would happen according to me. And even it would happen, the Posted Workers Directive would probably still not be applicable, due to the fact that there is no one posting the worker. It can

[259] SOU 1998:52, p. 82-83.
[260] C-176/12 *Association de médiation sociale*, EU:C:2014:2.

however be solved in a different way, as can be seen in the case AD 2013 nr 92. Here, a self-employed Polish lorry driver working in Sweden was considered as an employee according to the Labour Court, and was thus entitled to the rights in a collective agreement. It is hard to draw any conclusions from this case other than the fact that foreign self-employed workers from another EU Member State can be determined to be an employee in Sweden, and that on its own it is one way to tackle the abuse of self-employment and the risk of social dumping.

The second research question of this thesis is if it is possible for a self-employed worker, from another Member State, perform work in Sweden and be regarded as an employee and thus be subject to Swedish labour laws and collective agreements, as it happens when applying the Posted Workers Directive. The short answer to this is yes, but it is complicated. Both Swedish and EU legislation opens up for some self-employed workers to gain the status of employee. And for the false self-employed for example, who according to case law can be determined to be employees, it is quite possible. But one can immediately imagine the difficulties for foreign self-employed workers fighting for their rights when they will perhaps only perform work in Sweden for a short period of time. It can be a costly process, both for the individual or a trade union who aims to protect their members against social dumping for example and claiming the appliance of a collective agreement. Further, there is a major problem with applying the Posted Workers Directive, due to the fact that there is no one officially posting a self-employed worker. But claims for terms and conditions according to collective agreements could be made against the principal that the work is being performed for. The Enforcement Directive is also an opportunity for Member States to better coordinate their work against abuse of self-employment, but as mentioned in the previous section of this chapter, further harmonization on the concepts of employment is needed.

5.3 Labour rights without restricting the free movement

The second purpose of this thesis is to investigate the possibility to regulate the working conditions of self-employed workers through collective agreements in Sweden. Because the self-employed are service providers, rather than employees, collective agreements for them might become a question of restricting the free movement of services, as well as a question regarding competition law. The study has thus taken an aim at to what extent the free movement of services can be restricted by collective agreements, and collective agreements compliance with competition law. The main reason for regulating the working conditions of the self-employed is, according to some, to prevent social dumping. This is because of the risk of undermining labour laws, social security laws and collective agreements, especially when self-employment is used transnationally within the EU. This study has found that it is allowed to restrict the free movement within the EU, for reasons of public interest, amongst other reasons. Public interest is a wide term, which can include several things, such as social dumping. But in order for a restriction to be valid, some conditions have to be met. They are that the measure is to be justified by overriding reasons, the measure shall not be met by other provisions, the purpose cannot be achieved by less powerful measures and the measure is to be effective in order to achieve its purpose.[261] The protection of workers is also said to be a just cause for restricting the free movement. But are the self-employed really workers? Perhaps it becomes a question of why measures are taken and for whom? There have been some cases in the CJEU that have dealt with self-employment and possible restrictions to the free movement. All of the cases have been about Member States that have imposed restrictions to the free movement in order to prevent the abuse of self-employment and social dumping. It is clear however from the case law that all of these measures taken by different Member States have restricted the free movement to a degree that have not been accepted by the court.

The main problem has been that the restrictions have been imposed *a priori*, and fraud among transnational self-employed workers have been presumed.[262] The CJEU has been clear with that *ex post facto* measures are more effective and less intrusive on the free movement when dealing with the abuse of self-employment.[263] One might therefore wonder how collective

[261] St Clair Renard, *Fri rörlighet för tjänster: tolkning av artikel 49 EGF*, 2007, p. 231.
[262] C-577/10 Commission v Belgium, judgement of 19 December 2012, p. 40.
[263] C-255/04 Commission v France (2006) ECR I-5251, p. 53.

agreements for the self-employed would stand with the CJEU in order to prevent social dumping. According to me, such collective agreements would also in a way presume fraud and could be *a priori restrictions*, but instead of the government imposing restrictions, it is made by the social partners, which is for example a common way to regulate the labour market in Sweden. But it is a complicated matter. The free movement of services should at least according to the Services Directive, not have any effect in Member States regulations on labour laws. There are explicit exceptions in the directive which states that the directive should not have any effect on Member States labour laws, at least as long as the labour laws are in compliance with EU law.

As said, measures to tackle the abuse of self-employment are not only a question of possible restrictions on the free movement. If we take collective agreements for example, which in Sweden have an important role in regulating the labour market, they might be in conflict with competition laws, at least in the EU. This is because of the self-employed not being workers or employees by definition, which are the ones normally being protected by collective agreements. In Sweden however, it is possible to conclude collective agreements for dependent contractors, who in a way are self-employed persons. This is in compliance with Swedish competition law.[264] But it might become a more difficult question from an EU perspective. According to Article 101 TFEU, agreements between organisations of undertakings are not subject to the contents of the article. But the question is if self-employed can be seen as undertakings. Undertakings would seem to be workers and employees that are in subordination to an employer for example, something that can be disputed regarding self-employed persons.

One case have been to the CJEU that highlights the problems with collective agreements for the self-employed. In *Kunsten*[265] there was a dispute over a collective agreement, for minimum fees for some self-employed workers, compliance with Article 101 TFEU. In the Netherlands, it is possible for service providers to join trade unions and employers associations, and in turn conclude collective agreements in the name of and for self-employed. The CJEU said the following interesting statement, that a provision of a collective labour

[264] It should also be noted that employers can make adherence agreements with trade unions in Sweden (hängavtal) which is a way to follow some contents in industry-wide collective agreements, without the employer being member of an enterprise federation. This would mean that the self-employed are not included directly in a collective agreement.
[265] C-413/13 FNV Kunsten Informatie en Media (2014).

agreement in so far as it was concluded by an employees' organization in the name, and on behalf, of the self-employed services providers who are its members, does not constitute the result of a collective negotiation between employers and employees, and cannot be excluded, by reason of its nature, from the scope of Article 101(1) TFEU.[266] This would mean that collective agreements with conditions for self-employed persons are in conflict with Article 101 TFEU. But at the same time, the court also said that such collective agreements can be excluded from the scope of Article 101 TFEU if it concerns false self-employment. It becomes a question on the definition of an employee and the notion of false self-employment. The court stated that it is possible for self-employed persons to be regarded as employees according to EU law and thus taking on the role of an undertaking, which would mean that collective agreements would not be in conflict with Article 101 TFEU. The same can according to the court be done by Member States, given their definition of employees. The outcome of this is somewhat unclear however. One can imagine a situation where self-employed workers are defined as employees according to national law, giving them the status of undertakings and thus allowing for collective agreements. But what if they do not fit in to the EU definition of an employee, only by national law? It is not entirely clear whether or not a collective agreement then would be in conflict with Article 101 TFEU. This could for example be the case with Swedish dependent contractors, who in a way fit in under the Swedish definition of an employee, but perhaps not according to the EU definition. It is possible that Swedish collective agreements for dependent contractors are in conflict with EU competition law. But maybe, at the same time, it is a question of how the collective agreement is written, for whom the trade unions are acting on behalf of and the reasons for concluding it. For example if the trade unions are acting on behalf of the self-employed, or on behalf of their member, employees, for the reason of preventing social dumping. According to Grosheide, social partners can act on behalf of workers that resemble employees, and still keep their status as social partners. It is however uncertain if that is the case if they act in the interest of employees to prevent social dumping, but it might be possible in cases where employees are replaced by self-employed and thus wages are suppressed.[267] What makes it more complicated is also the fact that CJEU would allow collective agreements for false self-employed workers, and this raises questions regarding the connection between Swedish dependent contractors and false self-employed. According to Westregård, the concept of a dependent contractor

[266] C-413/13 FNV Kunsten Informatie en Media (2014), p. 30.
[267] Grosheide, *U-turns to set minimum fees for self-employed*, 2015, p. 18. See also Westregård, *The notion of "employee" in Swedish and European Union law. An exercise in Harmony or Disharmony?* 2016, p. 202.

seems to be wider than the EU concept of false self-employed.[268] This could perhaps complicate matters regarding collective agreements for dependent contractors, from an EU perspective.

But it is a complicated matter. Similarities can be drawn to the case *Commission v Germany* were the CJEU ruled that a German law was an infringement of the freedom to provide services. The German law prevented hiring out of employees among undertakings unless they were party to collective agreements for the industry, and undertakings could be party to the collective agreements only if they had a subsidiary in Germany employing workers. It was however not the affiliation to collective agreements that was the problem however, it was the requirement to have an establishment, as a condition for affiliation that was an infringement on the freedom to provide services.[269]

So the question of collective agreements for the self-employed is a complicated question, without a definitive answer. It can be possible to conclude a collective agreement with terms and conditions for the self-employed, a measure to prevent social dumping, and thus restricting the free movement of services, and not being in conflict with Article 101. But there is the question on whether or not the self-employed are to be regarded as undertakings, and if it is enough to use a national definition of an employee to be an undertaking or if it also is necessary to be an employee according to the EU concept of employment. Clear is that collective agreements that contain conditions for false self-employed workers are not in conflict with Article 101 TFEU, but in order to be declared as false one must see to both the national concept of employment and the EU concept of employment. Perhaps it would be beneficial to expand the concept of employment, and expand on the concept of self-employment and create a separate form for those self-employed that are in the grey zone in the binary system consisting of employee and self-employed. Giving rights to some self-employed, who in many ways resemble employees and are dependent on one principal but at the same time have a greater freedom in terms of subordination could be beneficial. But one can imagine the difficulties with creating a new form or type of employee, that on the one hand is an employee but on the other a self-employed. The Swedish dependent contractors is

[268] Westregård *The notion of "employee" in Swedish and European Union law. An exercise in Harmony or Disharmony?* 2016, p. 201.
[269] Bercusson & Bruun, *Free Movement of Services, Temporary Agency Work and the Acquis Communautaire*, 2008, p. 287.

one alternative, but there are problems and issues about the actual use of them and their situation on the labour market.

6. Conclusion

In conclusion, the Swedish and the EU concepts of employment are constructed by linking together circumstances in specific cases that either indicate that someone is an employee or not. There is an abundance of Swedish case law regarding if the work performed by a worker is considered to be employment work or contract work, and by that, if someone is an employee or a contractor. There is a wide range of different circumstances that Swedish courts are to take into consideration and these circumstances have been used for over 50 years. With these circumstances, it is possible to create a civil law notion of an employee. In comparison, the way the EU concept of employment is constructed is similar, however there is not as many circumstances established as valid by the CJEU. Instead, there is a core of circumstances that must be met in order to be regarded as a worker according to Article 45 TFEU. Continuing, the CJEU have developed a deal of case law regarding the division between the terms employee and self-employed, where subordination is one of the key aspects to take into consideration.

The findings in this thesis indicates that the abuse of self-employment in a cross-border situation can be tackled through the use of the concepts of employment. Both the Swedish and the EU concepts offer the possibility for some self-employed persons to be regarded as employees, by seeing to the circumstances in the case. It is however questionable as to what extent it is possible. Today, self-employment and contract work can look different. There are those self-employed who are genuine entrepreneurs, providing services to others and do not wish to work as employees. It is also questionable if they would have the chance to be employees, due to their working conditions. There are however other self-employed persons, who might be labelled as false, who work under very similar conditions as normal employees when it comes to circumstances as subordination, but the work is being performed through a company. For them, it is quite possible to be regarded as employees, but one can imagine the difficulties for a Polish lorry driver for example, performing work in Sweden for a limited period of time, sacrificing time and resources and take his or her case to a Swedish court. There have been a case in the Swedish Labour Court dealing with this issue, but then it was a trade union claiming a company should have applied the terms and conditions of a collective agreement on a self-employed lorry driver. This case shows not only how the Court reasons

regarding the circumstances in the civil law notion of an employee, but it also shows the difficulty for trade unions to take cases like this to court and win, due to the fact that it very much hangs upon the will and intention of the performing party. Due to this fact, it can be difficult for trade unions in Sweden to combat the abuse of self-employment and counter social dumping.

But the issue remains that not all self-employed persons are working in similar conditions, some might be considered as genuine, others as dependent and others as false. The Commission has also addressed this problem, and encouraged Member States in their green paper to legally acknowledge the self-employed persons who work and function in the so called grey zone, and expanding labour protection to others than employees. The Swedish government answered this with stating that dependent contractors is a Swedish answer to this problem. The dependent contractors are a type of contractor that resembles employees in terms of dependency to their principal and have limited access to labour protection, through the Co-Determination Act. The actual use of dependent contractors has however been disputed. It is not entirely clear in the preparatory works as to who is to be regarded as dependent contractors, and it has not been widely used. But it still though a possible way for some self-employed persons to have some labour protection. One important aspect of dependent contractors is that opens up for collective agreements with terms and conditions for the self-employed.

Collective agreements for the self-employed is however not an easy question. From CJEU case law, one can see that several Member States have imposed regulations to control the abuse of self-employed in a cross-border situation, for example the presumption of salaried status. These measures have however been considered to be in conflict with the free movement of services, and *a priori* restrictions, instead of *ex post facto* measures, which is preferred by the CJEU. In Sweden, where much of the regulation is made through the social partners and collective agreements, one can see the possibility to impose measures to tackle the risk of social dumping and abuse of self-employment through collective agreements instead of governmental regulations. The CJEU have ruled upon a case regarding collective agreements for self-employed, and the result from this case is that they are not in conflict with Article 101 TFEU if they concern false self-employed persons. But what false self-employed persons entail is not entirely clear, and one can put it in relation to the broad Swedish civil law notion of an employee as well as dependent contractors. These two Swedish concepts are

probably wider than the EU concept of false self-employed, which could mean that Swedish collective agreements for dependent contractors might be in conflict with Article 101 TFEU.

So it is in conclusion questionable whether collective agreements for self-employed persons in Sweden is possible with regards to Article 101 TFEU. It becomes a question regarding if the self-employed can be considered as false or not, and to what extent the Swedish notion of dependent contractors is in coherence with the EU notion of false self-employed. But it is a possible solution to the problem with abuse of self-employment and the risk of social dumping, which, at least, is a legitimate reason for restricting the free movement of services. It is all in the end a question of conflicting rights within the EU, economic freedoms versus social rights for workers. Transnational workers mobility within the internal market of the EU can be of great economic value to the Member States, but to what extent? The EU have recognized the issue with abuse of self-employment as an alternative to traditional employments and circumvention of the Posted Workers Directive, but there is a greater need of harmonization and coordination between EU Member States in order to fully tackle abuse of self-employment. Perhaps one way forward would also be to clarify the EU concept of employment, due to the unclear situation with several different definitions of workers and employees depending on different EU legislations, and the question of EU law priority over national law.

Abstract - English

The aim of this thesis is to investigate the possibility to combat the abuse of self-employment by applying the concepts of employment in Sweden and the EU. The free movement of services and workers within the internal market of the EU opens up for cross-border work between EU Member States and some claim that self-employment can be used as a way to circumvent national labour laws, collective agreements and the Posted Workers Directive. By applying the concepts of employment in both Sweden and the EU it is to some extent possible to acknowledge some self-employed persons as employees and thus ensuring them labour rights. The thesis also investigates the possibility to regulate terms and conditions of self-employed workers through collective agreements and its possible conflict with the free movement of services and EU competition laws. The findings show that Swedish legislations opens up for collective agreements for dependent contractors, and thus, makes it possible to regulate the terms and conditions of some self-employed persons. It is however uncertain if it is in conflict with EU competition law, Article 101 TFEU, which according to the CJEU only allows for collective agreements for false self-employed persons. It also becomes a question of the concept of employment and the interpretation of the notions of employee and dependent contractor in Swedish law in relation to the EU concept of false self-employed. The results also show the possibility to apply both the Swedish and the EU concepts of employment in order to tackle abuse of self-employment. However, the possibilities are limited due to the nature and the characteristics of self-employment, which has many similarities and differences from traditional employments.

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