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Annette Thörnquist

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False Self-Employment and Other Precarious Forms of Employment in the ‘Grey Area’ of the Labour Market

Annette Thörnquist*

The aim of this article is to discuss the problem of false (bogus) self-employment and other precarious forms of employment in the ‘grey area’ between genuine self-employment and subordinate employment in Sweden. Why has this area developed in a longer and shorter perspective? How does the use of disguised and ambiguous forms of employment affect workers, industrial relations and regular labour standards? Examples are given from the construction, road haulage and cleaning industries. The article indicates that work in the grey area has become more and more common in recent years, not only in the context of east-west labour migration, but also among Swedish workers. The author also discusses this development.

1 INTRODUCTION

In Sweden, as well as internationally, it has become more and more common in certain sectors that employers engage self-employed workers instead of employees in order to have a ‘flexible’ workforce without employment security and thus reduce labour costs.¹ In principle, self-employed persons should work as autonomous subcontractors who own their means of production, work independently in order to accumulate capital and serve several clients.² In practice, however, self-employed persons often have only one client, and they work under similar conditions as employees, but without the rights and protection that employees are entitled to under labour law and collective agreements (dependent self-employment). In many cases, the employers have contracted out work to their former employees to transfer costs, risks and

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* Associate Professor of History, affiliated researcher at the Research Institute for Migration, Ethnicity and Society, REMESO, Linköping; Linköping University. anette.thornquist@bredband.net.


responsible to the workers.\textsuperscript{3} If the purpose is to conceal an employment relationship, it is possible to talk about ‘false self-employment’. In other words, this notion refers to employment disguised as self-employment in order to circumvent collective agreements, labour laws, payroll taxes and social security contributions.\textsuperscript{4} The use of self-employment for these purposes appears mainly in labour-intensive industries, such as construction, transport and the service sector. False and dependent forms of self-employment can thus be described as phenomena in the ‘grey area’ between subordinate/dependent employment and genuine/independent self-employment.\textsuperscript{5} Another phenomenon that appears in the grey area, for example in transport and cleaning, is that employers transfer costs, risks and responsibilities in production to the employees, but still within the framework of an employment relationship. For example, employees may be required to bear the costs of transport, tools and other equipment used at work.\textsuperscript{6} In theoretical terms, this can be regarded as a form of objectively ambiguous employment.\textsuperscript{7} This too means a drift away from the regular employment relationship, in which the employer alone should carry all costs and risks in the production. The workers have an unclear employment status, which implies blurred borders between the employer and the employees, as well as between self-employment and employment. In practice, the workers have to pay for working.

Work in the grey area undermines the notion of employee, and thereby also collective agreements, labour laws and other statutory rights that workers are entitled to within a regular contract of employment. Workers who are subjected to precarious forms of employment in this area are mainly those who are already in a weak position in the labour market, including many migrant workers. The expansion of the grey area is a problem not only for trade unions and workers, but also for law-abiding employers and the state, as it involves unfair competition, market disturbances and tax evasion. The aim of this article is to discuss the presence of false self-employment and other grey area phenomena in


\textsuperscript{7} International Labour Organization, supra n. 4, at 27–30.
the Swedish labour market, including the problems arising from these practices for the workers, industrial relations and labour standards. Examples are given from the construction, road haulage and cleaning industries. The article relates to the author’s earlier research within this field, as well as to empirical and theoretical findings within a current study with a focus on the road haulage industry. The empirical parts in these studies are centred on in-depth interviews with the social partners and authorities.

The article proceeds as follows: In section 2, the expansion of the grey area and the central concepts implied in this metaphor will be discussed in a post-war historical perspective. Section 3 presents some Swedish reforms that imply risks for expansion of the grey area. In section 4, the presence of disguised and ambiguous forms of employment are illustrated with examples from the construction, road haulage and cleaning industries. Section 5, finally, includes a summing-up discussion.

2 THE EXPANSION OF THE ‘GREY AREA’ IN A POST-WAR PERSPECTIVE

Let us take a closer look at the notion of the grey area and other central concepts used in this article. A person who performs paid work is either employed or self-employed, and these two categories of employment are governed by quite different branches of law, namely labour law and contract law respectively. Hence, the relationship between a self-employed person and a client is a purely commercial contract between formally equal parties and based on the rationales of free market forces and unlimited competition. The purpose of labour law, on the other hand, is to protect the weaker party in the employment relationship. In Swedish as well as in EU labour law, there is no conceptual category in between these main forms of employment, such as ‘lavoro parasubordinate’ in Italy.

The civil law notion of employee was introduced in the 1930s, but there is no statutory definition of the concept. Instead, it has developed through cases in the courts and in preparatory works for laws and ordinances. Over the decades,
the notion, and thus the personal scope of labour law, has been successively widened to comprise a continuously broader range of employees. Self-employed workers who are legally deemed to be ‘dependent contractors’ should be considered as employees and covered by labour laws and collective agreements, as codified in the Act on Co-determination in Working Life, MBL (976:580) – the principal Swedish collective labour market act. In unclear cases, the true employment status of a worker should be assessed on a case-by-case basis with regards to all relevant circumstances. Ultimately, it is up to the courts to decide if a person should be regarded as employed or self-employed. In practice, however, relatively few cases are taken to court.\textsuperscript{12} The social partners and the authorities make an overall assessment on the basis of the set of criteria used by the courts, such as the worker’s degree of subordination and economic dependence in relation to the employer or the client, the form of payment, as well as who carries out the work, issues the invoices and bears the costs of tools, working material and transport.\textsuperscript{13}

Like many other forms of precarious employment in today’s labour market, disguised and ambiguous forms of employment relationships are not new phenomena. Ever since organized labour relations, collective agreements and labour legislation began to gain ground in the early twentieth century, various ways of circumventing these regulations have appeared in the labour market. Work in the grey area between subordinate employment and genuine self-employment has long been used both as a \textit{mode of exploitation} in the relationship between capital and labour and a \textit{strategy for survival} among workers, for example in times of unemployment and labour market conflicts.\textsuperscript{14}

Ultimately, the presence of these phenomena is related to the balance of power in the labour market. Like many other forms of precarious employment in working life today, such as fixed-term and part-time contracts, on-call work and zero hours contracts, the use of false self-employment and other arrangements in the grey area reflects pre-Fordist and sometimes even pre-capitalistic forms of exploitation that have been revitalized in the post-Fordist labour market. Work in the grey area has always involved risks of intense exploitation – and self-exploitation. In practice, the workers are more or less forced to exploit themselves. Thus, the intertwined relationships between self-employment as a mode of exploitation and a strategy for survival have always been a complex

\textsuperscript{12} Rönnmar, \textit{supra} n. 9 at 161.

\textsuperscript{13} SOU 1975:1, \textit{supra} n. 11 at 721; Adlercreutz, \textit{supra} n. 2, 228 ff; Engblom, \textit{supra} n. 4 at 150–156, Rönnmar, \textit{supra} n. 9 at 159–160.

issue for the trade unions to address.\textsuperscript{15} Subordinate employment was the dominant form of employment within the Fordist regime of accumulation in the Western welfare states during the prosperous decades after World War II. The material basis for this regime was standardized industrial mass-production, governed by economies of scale and vertical integration of the production chain.\textsuperscript{16} Moreover, labour relations were characterized by organized interests and a relative balance of power in the labour market, as well as welfare benefits that also served the purpose of keeping consumer demand high also in times of unemployment. The ideal type of the Fordist worker was the tenured, full-time employed white, male industrial worker. Despite fundamental changes in the mode of organizing production and work after the heyday of Fordism, the notion of \textit{standard employment}\textsuperscript{17} has in fact been based on this ideal type ever since.

In the wake of the international industrial crisis that broke out in the West in the mid-1970s, which also was the ‘crisis of Fordism’, new ways of organizing production, work and economic activities developed, based on the principles of flexible specialization and vertical disintegration, including downsizing of the organizational structure through outsourcing and networking between companies in order to spread risks and gain flexibility in an increasingly internationalized market.\textsuperscript{18} The new division of labour implied various types of \textit{non-standard employment}, such as part-time and fixed-term employment, work by the hour, stand-by arrangements and self-employment. At the same time, the balance of power in the labour market has changed to the employers’ advantage.\textsuperscript{19}

Since the late 1970s the increasing use of subcontractors has generated a significant increase in self-employment in non-agricultural sectors in most OECD countries, including Sweden.\textsuperscript{20} Moreover, the category of self-employed workers has become increasingly diversified and estranged from the ideal type of genuine self-employment. While traditional groups of self-employed, such as craftsmen and small businessmen who work independently have decreased, the
share of own account and dependent self-employed workers (high-skilled as well as low-skilled) has increased, especially in the service sector.\textsuperscript{21} The increase in self-employment reflects partly the rising demand for high-skill services in post-Fordist production delivered by consultants, lawyers and computer operators and alike, who generally have a comparatively strong position in the labour market due to their specific skills and competence, also in cases where they are dependent on a single employer. As already noted, there has also been an increasing trend towards contracting out activities to low-skilled workers, in the private as well as the public service sector.

Unskilled workers who have moved into self-employment more or less involuntarily in order to keep their jobs — or even to get a job — are among those who are most at risk of being forced into the grey area and thus also exposed to poor legal and social protection including precarious working conditions. As mentioned initially, employers sometimes also transfer costs, risks and responsibilities in production to the employees, still within the employment relationship. Like other arrangements in the grey area, working with an ambiguous employment status in this sense is by no means a new phenomenon. Historically, it relates to labour relations prior to modern industrial relations. Later, this practice was revitalized preferably in times of unemployment and labour market conflicts, such as during the inter-war period, when both disguised and unclear forms of employment relationships flourished both as a mode of exploitation and a survival strategy.\textsuperscript{22} In contemporary Sweden — as will be illustrated further below — this phenomenon appears for example in less scrupulous companies in the low-skill service sector and in the shadier parts of the road haulage industry.

3 REFORMS AND RISKS

In Sweden, as in many other welfare countries, social democratic as well as centre-right governments have promoted the establishment of small enterprises through tax relief, start-up grants and juridical support. The centre-right alliance government in office from September 2006 to September 2014 strongly reinforced this policy as part of a broader ‘workfare’ programme aimed at increasing the supply of labour, reducing ‘subsidy-dependence’ and thus saving on social benefit costs. The former Minister for Economic Affairs, Maud Olofsson, even argued that everyone should be born with an F-tax (corporate tax) certificate. This statement appeared in the political debate that preceded a


\textsuperscript{22} Thörnquist, supra n. 14 at 117–120.
liberalization of the regulations on F-tax in 2009, which meant that it has become easier to be registered for F-tax (approved by the Swedish Tax Agency) and start economic activities. Among other things, self-employed persons may have only one client, even if this client is their former employer. Thus, it has become easier for employers to contract out work to former employees and thus also to transfer costs, risks and responsibilities to the workers. Consequently, this reform implied a risk of blurred borders between regular employment and genuine self-employment.

The increase in self-employment in certain sectors can also be related to some other reforms that have been introduced in order to promote entrepreneurship, particularly among women. In 2007, a reform on tax deduction for paid domestic services came into force, the so-called RUT reform (2007:346). The aim was also to curb the widespread practice of undeclared (‘black’) work in this sector. As a result, the demand for ‘white’ services increased significantly, as did the number of small cleaning companies, especially among foreign-born women. Self-employed domestic cleaners sometimes work in an employment-like relationship under other companies or private customers.

Another reform that helps to explain the increase of small cleaning and home service companies is the Act on Systems for Freedom of Choice, LOV (2008:962), which was launched in 2009 to promote customer choice and a diversity of providers in primary health care and publicly funded home-based care for older and disabled persons. As all these reforms also implied incentives for increased labour supply in line with the workfare policy, many formerly unemployed workers have moved into self-employment with the help of public grants to get a job. Yet they are still in a vulnerable position in the labour market. Among small companies with employees established in this context, there are also owners who have little knowledge of the statutory obligations and responsibilities implied in being an employer.

Hence, all these reforms include a potential risk for expansion of the grey area with an increasing number of workers falling outside the personal scope of labour law and collective agreements. At the same time, it should be remembered that the Swedish labour law notion of employee is wide-ranging, as well as

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26 Thörnquist, supra n. 6 (2015), at 25–30; Thörnquist, supra n. 6 (2013), at 62–68.
compelling, in the sense that it overrides agreements between the contracting parties in the labour market.  

4 EXPERIENCES FROM SWEDISH INDUSTRIES

As mentioned initially, the problem of false and dependent forms of self-employment has arisen mainly in labour-intensive industries with low capital costs. In Sweden and many other EU-15 countries, the problem of false self-employment has been strongly related to the use of cheap labour from the newer Member States in the former Eastern Bloc. The construction and road haulage industries provide good examples.

4.1 CONSTRUCTION

In the Swedish construction industry, the problem of false self-employment in east-west labour migration emerged in the years before the enlargement of the EU in 2004. Many genuinely self-employed craftsmen came to work in Sweden. In other cases, however, workers were registered as self-employed in their home countries, but in the view of the Swedish trade unions and the tax authorities, many of them were falsely self-employed engaged by Swedish or foreign companies. As workers from outside the EU did not need work permits to work as self-employed within the EU, recruitment agencies saw lucrative business opportunities in mediating nominally self-employed labour migrants from the candidate countries to be used as cheap labour in the West, which also provided an opportunity for the workers to circumvent the requirement on work permits for employees.

As Sweden opened its labour market in 2004 and 2007 without any restrictions, the Swedish Building Workers’ Union, Byggnads, which actually would have preferred restrictions, assumed that there would at least not be any major problem with false self-employment in the future east-west labour migration. Moreover, after the enlargement of the EU, and in the wake of the Laval case, there were other and easier ways to circumvent Swedish collective agreements and regulations on tax and social security contributions. For example, foreign subcontractors without a permanent establishment in Sweden could easily evade Swedish taxes for their posted workers by constant rotation of

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27 Rönnmar, *supra* n. 9; Engblom, *supra* n. 10.
28 Cf. C. Thörnqvist’s article in this issue.
personnel between the sending country and Sweden. In addition, ‘forum shopping’ between different national systems for taxes and social security contributions within the EU has become a common way of reducing labour costs. Another strategy among foreign subcontractors that has become increasingly common is to conclude Swedish collective agreements for their posted workers but without following these agreements. For example, the workers often have to work substantial hours ‘off the clock’. In other words, the employers use ‘false’ or ‘double’ collective agreements in order to conceal the fact that they are practising wage dumping. Thus, the formal existence of a collective agreement is not always a guarantee against wage dumping.

Despite the increasing use of directly employed or posted workers from the newer EU countries, the problem of false self-employment has increased in certain industries, such as in construction and even more significant in the road haulage sector. How then can this development be explained? In the Swedish construction sector, cases of suspected false self-employment have been closely related to the frequent use of long subcontracting chains. Self-employed migrant workers are often to be found at the end-point of these supply-chains, where their employment status can easily be concealed. Project-based work and the engagement of subcontractors have traditionally been common in construction, but never more so than in recent decades, when increasing international competitive pressure has generated various forms of cost-cutting strategies. In particular, price competition is intense in the public procurement of construction services. Until recently, the main contractors have had no formal responsibility for their subcontractors. Since 31 March 2014, however, the Building Agreement includes a clause stating that the main contractor must ensure (in practice together with Byggnads) that all subcontractors fulfil their payroll liabilities. However, the main contractor is not economically responsible for the subcontractors. Instead, the employers’ association, the Swedish Construction Federation, BI, has set up a fund as a last resort.

Another factor that has facilitated the use of false self-employment in east-west labour migration is that the migrant workers’ A1 (previously E101) forms have also been used to ‘prove’ their employment status. However, an A1 form only shows where a worker is socially insured. From a labour law

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31 Thörnquist, supra n. 29 at 9–11.
32 Interview with Head of the Department of Bargaining, Byggnads Stockholm, 19 Aug. 2015.
perspective, neither an A1 form nor a Swedish F-tax certificate can be used as an
evidence of a worker’s true employment status. It all depends on the worker’s
actual employment conditions in the host country.

Moreover, labour market intermediaries mediating labour from the former
Eastern Bloc to Swedish employers and private individuals have actively
contributed to the use of falsely self-employed migrant workers. These
recruitment agents, who are sometimes self-employed themselves, cooperate with
small as well as large building companies.35 One example is a self-employed
Swedish entrepreneur, who ran an agency in a large town in Sweden and
recruited workers from the newer EU states through a labour market
intermediary in Poland.36 He worked in close cooperation with a real estate
company in the region, which required all contractors they engaged for
rebuilding and renovation projects to use self-employed workers mediated by the
recruitment agency. In 2012, some ten Polish workers were engaged for the
renovation of a public building. According to Byggnads, however, they were not
genuinely self-employed workers. Most of them had registered their companies
shortly before they left Poland to work in Sweden. They were not engaged for
any clearly defined parts of the building project, which independent
sub-contractors should be. Moreover, the union claimed that they worked under
the management and control of the main contractor, who provided them with
materials, tools, transport and equipment. Consequently, Byggnads considered
them to be falsely self-employed.

This case gave rise to a longstanding dispute between the local branch of
Byggnads and the construction company in the autumn of 2012. After central
negotiations between Byggnads and the employers’ association, BI, the parties
eventually came to an agreement that supported the union’s claim. As a result,
cooperation between the real estate company and the recruitment agency was
terminated. This was a significant success for Byggnads, especially for the local
union officers who had pursued this issue with great energy. The agreement was
also of great importance for the future treatment of false self-employment issues
by the social partners.37

False self-employment has also been discussed as an unintended effect of the
Directive 2008/104/EC on Temporary Agency Work, incorporated into Swedish
law in January 2013 (2012:854), which includes a statement on equal treatment
of temporary agency workers in relation to directly employed workers.38

36 Thörnquist, supra n. 29 at 14–15.
37 Ibid.
temporary agency work, 145.
However, new regulations often generate new loopholes. According to Byggnads, building companies tend to engage self-employed workers instead of temporary agency workers to bypass the Directive, and temporary employment agencies have also started providing self-employed ‘subcontractors’. This implies a potential increase in false and dependent forms of self-employment.39

The problem of precarious forms of self-employment concerns not only migrant workers. According to Byggnads, there is also an increasing trend towards more or less involuntary self-employment among Swedish construction workers. Employers sometimes require the workers to be registered for F-tax when recruiting them, in order to evade the Act on Employment Security, LAS (1983:80) and other employer liabilities to reduce labour costs and production risks. The union also estimates that this helps to explain why membership is declining. The employers’ main arguments have been increasing international competitive pressure, price pressure in public procurement, the inflow of workers from low-wage countries and difficulties in predicting economic fluctuations.40

In recent years, the social partners in the construction sector and the Swedish Tax Agency have greatly increased their efforts to curb economic crime, which may have an impact on the possibilities to expand the grey area as well.41 Moreover, the effects of the clause on the responsibility of the main contractor in the subcontracting chain remain to be seen.

4.2 The road haulage industry

Long-distance road haulage has increased dramatically in recent decades, reflecting the development of flexible production concepts with low inventories in keeping with ‘just-in-time’ strategies.42 The transnational road freight transport market within the EU has become increasingly deregulated, aimed at promoting free movement and economic growth within the common market.43 However, this process has also resulted in unintended social effects related to the differences in wages and working conditions within the enlarged EU.44

41 Thörnquist, supra n. 29 at 19–20.
In Sweden, the problem of false self-employment has no doubt been most prevalent in the road haulage industry, especially in the sector for long-distance transport with trucks and trailers. This is also a low-skill sector mostly with exchangeable and vulnerable drivers. As in many other EU countries, the problem of false self-employment has been closely related to the frequent violation of the EU regulations on cabotage traffic (EC 1072/09). This notion refers to the right of non-resident hauliers to carry out three transport journeys in the host country within seven days of the delivery of the international consignment. The aim is to reduce empty journeys, and thus limit transport and environmental costs. The problem is however that many foreign trucks stay for longer periods, carrying out illegal transport at low prices. A recent study has revealed frequent violation of the cabotage regulations in Sweden, and many foreign trucks leave the country only temporarily (systematic cabotage). In addition, Swedish forwarding companies and large transport companies engage hauliers from other EU countries, use cheap labour from the former Eastern Bloc, or from countries outside the EU (e.g., Macedonia and the Philippines), often through complicated networks of subcontractors.

This practice has resulted in dramatic downward pressure on prices in the road haulage industry all over Europe. Since a large part of the production costs are labour costs, the profit margins are low, and the hauliers – many of whom run small and medium large companies – are vulnerable to cut-price competition. As a result, many hauliers in Sweden and other EU-15 countries try to reduce labour costs by replacing their employed drivers with nominally self-employed drivers from the former Eastern Bloc. Even though the problem of ‘unfair’ competition initially concerned long-distance freight transport, it has also spread for example into scheduled road haulage. Consequently, prices have been forced down in this sector too, and hauliers seek various ways to reduce labour costs, including using foreign self-employed drivers.

As in the construction industry, the presence of more or less unscrupulous labour market intermediaries facilitates the recruitment of foreign self-employed workers. The workers are mainly from Poland, Bulgaria, Romania and the Baltic States, but they also come from countries outside the EU. According to the Swedish Transport Workers’ Union, Transport, as well as the employers’ organization, the Swedish Association of Road Haulage Companies, Sveriges

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45 Thörnquist, supra n 29 at 22–23.

46 H. Sternberg et al., Cabotagestudien: A study on trucking deregulation in Scandinavia and beyond (Lund: Lund University, 2015).

Åkeriföretag, and the increasingly active Swedish Tax Agency, many of these workers are falsely self-employed.\textsuperscript{48}

However, so far Transport has taken only one case to the Swedish Labour Court. This case concerned a road haulage company with a fleet of over 100 trucks but no employed drivers. Instead the firm hired nominally self-employed drivers, mainly from Poland, through its own recruitment agency which cooperated with Polish labour market intermediaries. A unionized Polish driver, who had worked in this company and who had settled in Sweden, claimed that neither he nor the other drivers were genuinely self-employed. Instead, they worked under the management and control of the haulier. The driver had no own truck, tools or other work equipment. Nor was he contracted for specific consignments. With regard to these and other relevant conditions, the Labour Court came to the conclusion that the Polish driver was to be regarded as employed.\textsuperscript{49} Transport intended to pursue a second case that included the other drivers in this company. However, since none of these drivers was willing to appear publicly, especially not in court, the union withdrew the case. Even though the ruling on the Polish driver set an important precedent, and the Tax Agency later required the haulier to pay over SEK 20 million in unpaid taxes and payroll contributions for the other drivers, the drivers’ refusal to give evidence became something of a victory for the company. Thus, despite increasing control, many hauliers have continued using self-employed foreign drivers.\textsuperscript{50} This case clearly illustrates the complex relationship between false self-employment as a mode of exploitation and a strategy for survival, including the problems for the trade unions dealing with this issue.

A common argument among Swedish hauliers who engage self-employed workers or temporary agency workers from the newer EU countries is that they have, in fact, been forced into this ‘solution’ due to the illegal cabotage traffic and intense price pressure in the procurement of freight transport services. In Sweden, most transport commissions are mediated through large forwarding companies. The employers also claim that in actual fact they protect the Swedish road haulage industry from being completely undermined and out-flagged to low-wage countries.\textsuperscript{51}

\textsuperscript{48} Ibid.
\textsuperscript{50} Interview with investigator, Transport, Stockholm, 15 May 2014.
\textsuperscript{51} Thörnquist, supra n. 29 at 24–26; interview with the Regional President at the Swedish Association of Road Haulage Companies, Stockholm 12 Sep. 2013; interview regional union representative, Transport Gothenburg, 26 Aug. 2014.
In the past few years, Transport and the Swedish Association of Road Haulage Companies have jointly launched several campaigns to curb the problem of unfair competition in the road haulage industry. Moreover, the tax authorities have strongly reinforced control of Swedish hauliers with a number of trucks but no registered employees. The problems in the road haulage industry have also become a heated political issue, recently illustrated by massive truck demonstrations on the Swedish highways under the slogan ‘Sweden stops here’. The immediate reason behind these protests was that a district court had acquitted a Macedonian driver using a counterfeit driving licence.\(^\text{52}\)

The protests against unfair competition and undercutting of wages also concern the extremely precarious working conditions many foreign truck drivers are subjected to. The employment conditions are often informally and arbitrarily organized without any kind of job security, work safety or social protection. The use of long supply-chains and the involvement of international organized criminal organizations complicate labour relations even more.\(^\text{53}\) This predominantly informal part of the labour market also implies work in the grey area. Except for the frequent use of false and dependent forms of self-employment, other arrangements that are not characteristic of the regular employment relationship are common as well. For example, the drivers often get paid per mile, which means work on a piecework basis that is in principle illegal within the EU since it fosters infringements of the rules on driving times, rest periods and road safety. Moreover, the employers often require the drivers to pay for fuel, vehicle repairs and other costs during the journeys, which the employers cover in a regular contract of employment. Loading and unloading, as well as the periods between different consignments, often fall outside the workers’ paid time: sometimes the drivers have to wait at truck stops for days or even weeks. As the drivers are often paid \textit{ex post}, they dare not oppose these conditions.\(^\text{54}\) In these cases, the employers do not force the workers into self-employment. Instead they transfer costs and production risks to workers who are still employed, albeit only informally.

Low-wage competition and intense price pressure in the procurement of transport services have contributed to a lack of clarity in the employment of Swedish drivers as well. As in the construction sector, ‘involuntary’ self-employment has also become more and more common, increasing the risk

\(^{52}\) Sundsvalls Tingsrätt, Judgment 19 Nov. 2011, Case B 2205-14.


of false and dependent forms of self-employment. According to union representatives, many hauliers maintain that if they were obliged to use employed drivers paid in accordance with the collective agreement, they would have little chance of being awarded a contract.\(^55\) In theoretical terms, this illustrates the phenomenon of ‘market failure’, in the sense that actors who comply with laws and collective agreements are not able to compete in a market subjected to unfair competition.\(^56\) This logic has become an argument among an increasing number of Swedish hauliers for distancing themselves from established industrial relations.

Another trend in this connection is the use of more or less informal individual labour contracts, which may include a variety of precarious employment and working conditions. These contracts appear mainly among labour migrants, but increasingly also among young Swedish workers in firms where neither workers nor employers are organized, and where the workers are not covered by collective agreements. For example, drivers have been paid on a daily or weekly rate, including twelve or more hours of work per day or over sixty hours per week, sometimes working without pay on Sundays. These contracts also include payment per kilometre and the system of low wages plus tax-free allowances (often used by Eastern European hauliers). Transport works actively to combat all such informal and illegal arrangements, which so far is a limited but worrying trend that implies expansion of the grey area and undermining of collective agreements, labour laws and regular employment standards.\(^57\)

### 4.3 Cleaning

Self-employment is common also in the Swedish cleaning industry. The employers’ association, Almega Service Contractors, estimated that around 5,000 self-employed persons were working on their own account or in limited partnerships in 2013. According to the Almega Home Service Industry, approximately 90% of the companies in the domestic service sector had less than ten employees and the vast majority were self-employed.\(^58\)

According to the trade unions in cleaning, there have been few cases of false self-employment in the Swedish cleaning industry in recent years. On the other hand, the unions fear that many self-employed workers in cleaning and domestic

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\(^{55}\) Interview with regional union representative, Transport, Jönköping, 18 Jun. 2014.


\(^{58}\) Thörnquist, supra n. 6 (2015) at 8–10.
services may have an unclear employment status, as the law allows self-employed persons to work for just one client. For example, in some municipalities in the Stockholm area, a medium-large provider of home-based care and services for older persons uses self-employed workers only. There are also an unknown number of self-employed women from the newer EU states working in domestic services. In general, it is difficult for trade unions and authorities to ascertain the true employment status of self-employed migrant workers who are not registered in Sweden. In many cases, the workers stay for spells shorter than six months to avoid being registered under the Swedish tax regime.\(^{59}\)

However, in cleaning, the expansion of the grey area is not in the first place related to labour migration, but to low-cost competition within the Swedish labour market. Many workers in this industry are in a weak position in the labour market. Moreover, this industry is segregated by gender and ethnicity. Traditionally the vast majority of the workforce consists of female workers, and foreign-born workers make up almost 50% of the workforce, compared to around 16% of the Swedish population as a whole. For those in the weakest position in the labour market, the problem is not primarily the risk of being forced into self-employment, but rather the risk of being subjected to unclear forms of employment and precarious working conditions, such as work by the hour, zero hours contracts, on-call work and sometimes even cash-in-hand payment. Since there are few job vacancies in the Swedish cleaning industry, cleaning is the buyer’s (employer’s) market. The market is highly oversupplied, especially in the metropolitan areas. In the wake of the RUT and LOV reforms, the state and the municipalities have promoted the setting up of small companies in various ways. Moreover, many companies, especially small ones with low profit margins, recruit workers taking part labour market schemes to bring down labour costs. This means that the employers can count on wage subventions from the Public Employment Service of often 80%–85% (up to a maximum sum per day). Thus, the employers can use a tax-funded reserve army of cheap labour, which in fact fosters wage dumping.\(^{60}\)

Moreover, union density is low in cleaning, especially in the domestic service sector. In many small companies, neither workers nor employers are organized, and the workers are not covered by collective agreements. As in the road haulage industry, workers – in this case especially young workers and immigrants – sign individual contracts which often include employment and working conditions in sharp contrast with regular employment conditions. For example, many workers are required to use their own cars and cover all transport

\(^{59}\) Ibid., 19–21.

\(^{60}\) Ibid., 27–30.; Thörnquist, supra n. 6 (2013) at 65–67.
costs between customers, even though they are employed. The employers have sometimes even required them to use their own cleaning equipment and cleaning products.  

If employed workers use their own cars on duty, or have any other kind of outlay, they should be properly reimbursed, as the employer covers all costs in production. Thus, employment arrangements amounting to contract work are used to exploit not only foreign drivers and young drivers on the Swedish roads, but also workers in the Swedish cleaning and home services industries. As in cases where employers contract out work to former employees, the aim is to transfer costs, risks and liabilities to the workers. As mentioned initially, this practice undermines the notion of employee, and the workers are forced into a grey area with blurred borders between employment and self-employment, as well as between employers and employees.

The employers’ arguments for justifying this practice may vary. Let us take a look at a common excuse used among less scrupulous small private service providers within the customer choice system (LOV), introduced in home-based elderly care in over 50% of Swedish municipalities. There are various models for paying the providers engaged in this tax-financed system. In general, the municipalities offer the providers a fixed amount per hour intended to cover wage costs and all other production costs, including journeys between customers. However, the system is often underfunded both in the view of the providers and the trade unions, and the municipalities avoid interfering in labour relations and working conditions in external firms. As the providers cannot invoice the municipalities for journeys specifically, they sometimes use this as an argument for requiring their employees to pay for the journeys.

5 CONCLUDING REMARKS

The aim of this article was to discuss the presence of false self-employment and other arrangements in the grey area of the Swedish labour market, including the implications for workers, industrial relations and regular labour standards. It was argued that work in the grey area between subordinate employment and genuine self-employment has long been used as a mode of exploitation in labour relations, as well as a strategy for survival among workers in times of unemployment and labour market conflict. Like many other forms of precarious employment that have appeared in the post-Fordist labour market, these practices can be regarded as a revitalization of old patterns of exploitation – and self-exploitation – that were common in the pre-Fordist labour market, and even

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62 Ibid., 26; Thörnquist supra n. 6 (2013) at 65ff.
before the rise of modern industrial relations based on collective agreements and labour law.

The problem of false self-employment in Sweden in recent decades has appeared mainly in the context of east-west labour migration, particularly in the construction and road haulage industries. Even though Swedish companies can easily recruit employed workers from the newer EU states as cheap labour, and foreign subcontractors can avoid Swedish collective agreements by ‘shopping’ between different systems for taxes and social security contributions or by concluding ‘false collective agreements’, the problem of false self-employment is still present. The use of long supply-chains and the presence of unscrupulous labour market intermediaries have contributed to this, along with the use of A1 forms to estimate migrant workers’ employment status.

The background to the severe problems associated with false self-employment in the road haulage industry is mainly the illegal cabotage traffic in transnational road freight transport and intense price pressure in procurement of transport services. Many Swedish hauliers have responded to this development by replacing their employed drivers with falsely self-employed workers from the newer EU countries. A similar response to low-wage competition from the newer EU countries and the related price pressure in public procurement of construction projects was identified in the construction industry, albeit to a lesser extent. In the cleaning industry, few cases of suspected false self-employment have been revealed. Instead, there is an increasing tendency among employers in small firms to transfer costs and risks to workers who still are employed. Moreover, work in the grey area in this sector is not in the first place related to low-wage labour migration.

The article indicates that the risk of ‘market failure’ has become an argument among employers for distancing themselves from established Swedish industrial relations and labour standards and thus expanding the grey area. This gives rise to a vicious circle, since it generates further undercutting of prices and wages, worsening the severe market disturbances in these industries. This development also provides a good example of ‘degenerative competition’. In the words of Harvey and Behling, who have studied the British construction industry, ‘the short-term cost advantage of false self-employment has become a major obstacle to long-term productivity gains through skills enhancement, and organizational and technical innovations’. 63 Hence, in principle, employers and workers have a common interest in combating low-wage competition. This was

also an important element in the traditional Swedish model for cooperation and class compromise, including the wage policy based on solidarity aimed also at promoting economic growth and sharing productivity gains.

The labour market controversies on suspected cases of false self-employment related in this article showed that migrant workers’ willingness to appear publicly is of critical importance for the trade unions’ chance to take cases to court. Workers’ reluctance to talk about their working conditions may not only be due to the risks of being fired. Their silence also illustrates the complex relationship between those who exploit workers and those who are being exploited. In other words, it illustrates the intertwined relationships between work in the grey area as a mode of exploitation and a strategy for survival. Employers, labour market intermediaries, workers and customers may all have short-sighted economic interests in using disguised and ambiguous employment relationships. However, those who bear the brunt of these arrangements are the workers in the first place.

The article showed that in the wake of low-wage competition and downward pressure on prices in the construction and road haulage industries, false and dependent forms of self-employment have spread among Swedish workers as well. The practice of outsourcing work to former employees in order to transfer costs, risks and liabilities is one reason behind this development. However, this article also revealed another worrying trend, namely that employers require their employees to carry costs and production risks within the employment relationship, which also means a drift away from the regular contract of employment and undermining of the notion of employee. The use of individual contracts outside the framework of formal labour relations has contributed to such arrangement, which can often be found among foreign truck drivers on the Swedish roads, but increasingly also among Swedish drivers. Individual contracts and ambiguous employment relationships also appear among workers in the cleaning industry, where low-wage competition and market disturbances are generated mainly within the Swedish labour market, not least due to the possibility for employers to use a tax-financed reserve army of cheap labour from the Public Employment Service. Intense price pressure in public procurement of cleaning services, and underfunding of the customer choice system, LOV, introduced in many Swedish municipalities, have in fact also fostered this development. Thus, the state and the municipalities have contributed to the expansion of the grey area as well.