Italian Labour Law e-Journal
Issue 1, Vol. 13 (2020)
ISSN 1561-8048
https://doi.org/10.6092/issn.1561-8048/10997

Who counts as an employer in Sweden?

Annamaria Westregård*

Abstract

In this article, the concept of the employer is analysed for Swedish conditions from a variety of perspectives. The special difficulties that face the private sector are charted, as are the principles of the legal subject in triparty contracts with temporary employment agencies, platform work, and umbrella companies. Found to go hand in hand with the concept of employee, the concept of the employer in the Swedish public sector is now far closer to the standard concept in the private sector due to the principles of the functional concept of the employer. The concept of the employer in tax law and social

Keywords: Employer; Triparty contracts; Temporary employment agencies; Platform work; Umbrella companies.

1. Introduction.

The question of who is an employee and who is an employer may not seem complicated at first glance since both are parties in the employment contract, but the answer can be difficult to determine. The reason for identifying someone as either an employee or self-employed in a binary system is to decide whether labour legislation and collective agreements are applicable, which they are not if the performing party is self-employed. The reason for identifying the employer is to determine who will carry out employer's responsibilities.

How the terms employment, employee, or employer are defined in Sweden varies between the different parts of the legal system, whether labour law, social security legislation, tax law etc. Legislation is interpreted according to the sources of the statutory acts. If the interpretation of the statutory act is unclear, the *travaux préparatoires* are important sources, with the findings of public inquiries about new legislation drawn up as Government white papers (SOU) or particularly in Bills to Parliament (*proposition*). The content of statutory act is clarified by caselaw, and here the Labour Court's rulings are of special interest. The

* Associate Professor and Senior Lecturer in Business Law, School of Economics and Management, Lund University, Sweden. This article has been submitted to a double-blind peer review process.

doctrine in the legal literature has an impact, especially the arguments about to interpret the other sources[1].

Far more effort has gone into identifying the employee than the employer. That is because in Swedish legislation the employer is normally not identified. The concept of the employer only mirrors the concept of the employee for example in Section 1 (2) of the 1976 Co-Determination Act (1976:580), which identifies the employer as 'the party on whose behalf the employee performs work'. The Labour Court has said that the employer is 'the physical or legal person who has concluded a contract with another (physical) person so that this person must perform work under such circumstances that an employment contract is called for[2].

Sweden has a binary system where the performing party is employed or self-employed. Anyone who is not an employee is self-employed, and thus only the employees with employers who have principals. The concept of the employer in Sweden cannot be defined independently of the concept of the employee. To separate the employee from the self-employed, lists based on the legal sources are presented by various legal authorities. Common to all areas of legislation is that the definitions are based on core criteria so important that they all must always be present if a relationship is to count as an employment[3]. These core criteria are *a contract by which a performing party must personally perform work on behalf of another party*.

Then, depending on the situation and the legislation, Adlercreutz, Malmberg, Bruun, and other authorities, add other circumstances of importance for the overall assessment. The circumstances are based on binding legal sources as caselaw and on the *travaux préparatoires*. The circumstances are not all important simultaneously in all situations: the criteria and their relative importance (if some are fulfilled but others are not) in each case varies, and their importance is described (if described at all) in the legal sources as the legislative preparatory work, caselaw, and doctrine. The result of the overall assessment in individual cases also depends as always on the situation, and how the court evaluates the evidentiary facts. These lists of circumstances of importance vary depending on the author and most include for example[4]:

- work is performed under the principal's leadership and control (employment)

[1] See R. Fahbeck, T. Sigeman, *European employment and Industrial relations Glossary: Sweden, 2001*, in Sweet & Maxwell, London, 2001, 286 ff.

[2] Labour Court ruling 1984 no 141; Lunning L., Toijer G., *Anställningsskydd: En lagkommetar*, 11th ed., Wolters Kluwer, Alphen aan den Rijn, 2016, 41.

[3] Originally Adlercreutz A. G, *Arbetstagarbegreppet*, Norstedts, Stockholm, 1964, 186, 276 ff.) and later Malmberg J., Bruun N., *Hållfast arbetsrätt för ett föränderligt arbetslivs*, 111 n. 63, identified the set of relevant circumstances or criteria, all them fundamental prerequisites (*grundrekvisit*); also Westregård, A., *The Notion of `employee´ in Swedish and European Union Law. An Exercise in Harmony or Disharmony?*', in Carlson, L., Edström, Ö., Nyström, B. (eds), *Globalisation, Fragmentation, Labour and Employment Law – A Swedish Perspective*, Iustus, Uppsala, 2016 185-2014; Westregård, A., *Collaborative economy – a new challenge for the social partners* in *Vänbok till Niklas Bruun*, November, Iustus, Uppsala, 2017, 427-438; Westregård A., *Delningsplattformar och crowdworkers i den digitaliserade ekonomin—En utmaning för kollektivavtalsmodellen*, in Nyström B., Arvidsson N., Flodgren B. (eds.), *Modern affärsrätt*, Wolters Kluwer, Alphen aan den Rijn, 2017.

[4] Adlercreutz A. G., n. (3), 1964, 186, 276 ff.; Ds. 2002:56 *Hållfast arbetsrätt för ett föränderligt arbetslivs* 111 n. 63; Källström, K., Malmberg J., *Anställningsförhållandet,* Iustus, Uppsala, 2019, 26; Sigemen T., Sjödin S., *Arbetsätten: En översikt,* Wolter Kluwer, Alphen aan den Rijn, 2017, 31: Inghammar, A. *The Concept of "Employee": The Position in Sweden, Restatement of Labour Law*' in Waas B., Heerman van Voss G, *The Concept of Employee*, Hart Publishing, Oxford, 2017, 686; Lunning L., Toijer G., n. (2), 27.

- whether the workload is measured by duration (employment) rather than specific duties (self-employment)
- whether the performing party only has one principal (employment) or two or more (self-employment)
- machinery and equipment (the self-employed provide their own equipment)
- form of payment (employees are paid a salary)
- social criteria and industry practices (varies between industries)
- the parties' intentions (the contract is of some interest, but in cases of false self-employment the Labour Court ignores it)
- if the contracting party that is going to perform the work is a company (an argument for self-employment) or physical person (employment).

If the core conditions are met and an overall assessment of the other criteria results determines that the relation is an employment, then definition of the concept of the employer reflects that definition.

In this article, the concept of the employer is analysed from a variety of perspectives. Section 2 considers the special difficulties of the private sector, highlighted in concern groups, triparty contracts with temporary employment agencies, platform work and umbrella companies. Section 3 analyses the concept of the employer in the Swedish public sector, and Section 4 addresses the concept of the employer in tax law and social security legislation, which differs from labour law analysed. There are conclusions in Section 5.

2. The concept of the private sector employer.

2.1. The legal subject.

The concept of the employer in Swedish legislation is based on the principle of the legal subject. The legal or physical person who concludes the employment contract is regarded as the employer. For trading partnerships (*handelsbolag*), limited partnerships (*kommanditbolag*), limited companies (*aktiebolag*), and closely held companies (*fåmansaktiebolag*) the legal person is contractually part of the employment contract. It is the company, not the shareholders, which is regarded as the employer. That is why the assignation of shares not is regarded as a change of employer. If the corporate form is sole trader (*enskild firma*) then the owner of the company also is the employer[5].

If it is unclear whether it is a physical person or his company that is the employer, it is the employer's responsibility to clarify for the employee who is the employer. In the caselaw, the Labour Court has tried to identify who concluded employment contracts[6]. Directive 91/533/EEC Article 2.2 (a) (14 October 1991) spells out the employer's obligation to inform the employee about the conditions applicable to the contract and the identities of the parties, this is implemented in Section 6 c of the 1982 Employment Protection Act (SFS 1982:80). The information from the employer can be of some help in identifying the real employer,

[5] Lunning L., Toijer G., n. (2), 41.
[6] *See* Lunning L., Toijer G., (2), 49 ff. and, for example, Labour Court ruling 1976 no 128 and 1995 no 84.

but if there are any doubts as to whether the information is correct, the written information is only one proof among others in the court's evaluation of evidence[7].

2.2. Concern groups.

The employer's responsibilities are limited to the specific legal person who is party to the employment contract. If an employee is employed in a subsidiary in a concern, the employers' responsibilities do not stretch beyond the subsidiary, who have all employer responsibilities. Normally the employee has no claims on other companies in the concern, not even on the controlling company[8]. There are very few exemptions in the statutory regulations[9]. The social partners, at an industry level, can agree in a collective agreement that the concept of the employer in that specific industry is extended to concerns.

If the structure of a company changes and it unbundles its holdings or is divided into subsidiaries the result might be different responsibilities for the new employer. With a 'new' minor employer the employee's employment protection could be inferior to what it was with the 'old' major employer[10]. If the company is divided into smaller subsidiaries the possibilities of e.g. a transfer are more limited. Only jobs in the (smaller) subsidiary where the person is employed will be suggested. In cases of redundancy the selection category will be limited to that subsidiary. As the order of selection is based on the length of service this will be of disadvantage to employees with a long employment in the former company as the selection category in the subsidiary is smaller.

3. Triparty contracts.

3.1. Temporary employment agencies.

In the early 1990s, temporary agency workers first appeared in the Swedish labour market. Initially there were legal questions about on whose behalf employees were working—for the temporary work agency or the end user[11]. According to the principle of legal subject have the Labour Court and also doctrine pointed out the importance of who are the parties in the contract[12]. This mean that in most cases will the temporary work agency be the employer.

---

[7] *See* C-253/96 - Kampelmann m.fl. mot Landschaftsverband Westfalen-Lippe m.fl. ECLI:EU:C:1997:585 and Lunning L., Toijer G., (2), 323 ff.

[8] Lunning L., Toijer G., (2), 41.

[9] See, for example, how length of service is counted in Sections 22 and 25 of the 1982 Employment Protection Act.

[10] Lunning L., Toijer G., (2), 41.

[11] Directive 2008/104/EC of the European Parliament and of the Council on temporary agency work was implemented in the Agency Work Act (SFS 2012:854) and its definitions. Section 5 § 1 and 2 of the Temporary Work Act: '1. Temporary work agency: Any natural or legal person who employs temporary agency workers in order to assign them to user undertakings to work under their supervision and direction; 2. User undertaking: Any natural or legal person for whom, and under the supervision and direction of whom, a temporary agency worker works temporarily.'

[12] Labour Court ruling 2006 no 24; see also Lunning L., Toijer G., (2), 55; Selberg N., *Arbetsgivarbegreppet och arbetsrättsliga ansvar i komplexa organisationer: En studie av anställningsskydd, diskriminering och arbetsmiljö*, Media-Tryck, Lund, 2017, 191–2.

The parties to the labour market took an active approach to the situation, and in a relative short time they had included Temporary agency work in the collective agreement system[13]. The result is that the temporary employment agencies now forms a separate branch of industry where the employees are employed by temporary employment agencies, which take full employment responsibility for them. There are still some responsibilities for the end user in the 1977 Work Environment Act, see below in section *Double employer responsibility in triparty constructions*.

Thus, in contrast to many other countries, Sweden gives temporary agency workers a level of security approaching that of 'regular' employees. Collective agreements seem to have solved most problems related to who formal parties to the employment might be.

3.2. Platform work.

In Sweden, as elsewhere, online platforms have a variety of business models. If the platform only brings together the platform worker and the service consumer[14], the service consumer could be the employer or the platform worker could be self-employed. In more established platform companies goes all contact between service producers and consumers via the platform. The platform also has a clear set of rules for how services should be provided, price setting, and so on. The platform provides the service, which the platform worker then performs[15]. There have not yet been any cases in the Swedish Labour Court about who is the employer in this situation, but it is likely that the platform will be judged as the employer.

The collaborative economy differs greatly from what is customary in the Nordic model, where collective agreements are the self-evident and most important regulatory instrument. One problem is that the platforms' representatives claim that platform employees are self-employed. Since they argue they are not employers and thus have no employers' responsibilities, they also have no interest in joining employers' organisations or regulating working conditions in collective agreements. Until the employers take on a more organised form, there will be no collective agreements. A single employer can of course also conclude collective agreements on a local, company level (an application agreement). Sometimes the

[13] In 2000 the Employers' Organisation for the Swedish Service Sector (Almega) and all LO organisations made a collective agreement for blue-collar workers, LO's collective agreement on general employment conditions with Almega Temporary Work Agencies. See also the collective agreement for white-collar employees between the Union and the Academic Alliance with the Almega temporary work agencies on general employment conditions. The Swedish Association of Graduate Engineers represents the Academic Alliance; the Academic Alliance includes a variety of associations for professional occupational groups, including university teachers (*Akademikerförbundet SSR, Sveriges universitetslärarförbund*), physiotherapists (*Sveriges Arbetsterapeuter, Fysioterapeuterna*), scientists (*Naturvetarna*), and engineers (*Sveriges Ingenjörer*).

[14] Here the term *platform workers* is used in the same meaning as service provider in and *service consumer* here is used in the same meaning as in Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A European agenda for the collaborative economy*, Brussels 2 June 2016 COM (2016), 356 final p. 3

[15] *See* De Stefano V., *The rise of the "just-in-time workforce": On-demand work, crowdwork and labour protection in the "gig-economy"*, ILO, *Conditions of Work and Employment,* 71, 2016, 1; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A European agenda for the collaborative economy*, Brussels 2 June 2016 COM (2016), 356 final.

parties use an already existing collective agreement for another industry[16]. Such arrangements do not contribute to creating an industry of their own for platform workers.

3.3. Umbrella companies[17].

A new business model rapidly adopted in Sweden is a version of the umbrella company (*egenanställningsföretag* in Swedish)[18]. Umbrella companies are similar to temporary employment agencies in their operations, with the difference that a temporary employee works when the employer decides, while the umbrella company worker of an umbrella company decides when to work and then 'hires' an employer.

Umbrella companies in Sweden have a special design: the umbrella company worker (to bee) bids for work, and, if successful, arranges both the work and the remuneration with the client. The umbrella company worker (to bee) then makes sure the client has signed a contract with the umbrella company. The umbrella company and the umbrella company worker the signs a short fixed-term employment contract for the duration of the assignment. The client is invoiced by the umbrella company when the work is done. Once the client has paid the umbrella company, the performing party is credited, after deductions for tax, social security contributions, and the umbrella company's commission[19].

In the collaborative economy, platforms use umbrella companies as middlemen. Umbrella companies are also used in more traditional industries such as journalism, the arts, etc. The business model is popular among workers who do not want to have responsibility for their own company, for example arranging to pay taxes, social fees, and other administrative responsibilities.

Swedish umbrella companies have a trade association, where membership is predicated on companies taking responsibility for the performing parties for the time they are working[20]. According to the intention of the parties are umbrella company workers employees, and have a short fixed-term employment contracts for the duration of the assignment. The generous possibilities for fixed-term employment in Sweden are essential for the umbrella companies' business model[21].

Even if the intention of the parties is that there is a short fixed-term employment contract so is the legal problem that umbrella companies do not have a roll of an ordinary employer.

---

[16] *See* more about industrial relations in Sweden in Westregård A., *Sweden,* in Liukkunen U., *Collective Bargaining in Labour Law Regimes A Global Perspective Ius Comparatum –Global Studies in Comparative Law*, Vol. 32, Springer, Berlin, 2019.

[17] *See* also Westregård A., *Looking for the (fictitious) Employer – Umbrella companies: The Swedish Example*, in Chesalina O., Becker U. (eds.), *Social Law 4.0: New Approaches for Ensuring and Financing Social Security for Digital Age*, 2020, pending.

[18] SOU 2017:24 167. According to the branch organization, the number of umbrella companies employees grew from 4,000 in 2011 to 44,000 in 2017, and increased by 31 per cent in 2016, http://www.egenanstallning.org/index/news (accessed 30 March 2019); see also Eurofound, *New forms of employment*, (Publications Office of the European Union, 2015).

[19] *See* SOU 2017:24, 161 ff., 198; Swedish Tax Agency, www.skatteverket.se/privat/skatter/arbeteochinkomst/inkomster/egenanstallning (accessed 30 March 2019); Eurofound, n. (18), 2015, 120.

[20] http://www.egenanstallning.org/ (accessed 30 March 2019).

[21] This is possible due to Sections 5 and 5(a) of the 1982 Employment Protection Act (1982:80).

It is the umbrella company worker and the client that have control of the assignments, when and how the work will be carried out. The umbrella company's role is to administrate taxes, social security fees, invoice the client and pay remuneration. One could ask if the umbrella company worker could manage without the umbrella company and be a self-employed person who carry out the administration himself.

The Swedish Labour Court has not yet had any cases deciding whether umbrella company workers are employees according to the 1982 Employment Protection Act. The concept of employment is wide, and according to the *travaux préparatoires*, in dubious cases shall the concept of employment be interpreted as if there is an employment at hand[22]. The intention is to avoid "false self-employed". As there are an employment contract and as umbrella company takes on employers responsibilities for the duration of the assignments it will very well be the case that the Labour court regards the relation as an employment when it comes to regulate the conditions between the umbrella company and the umbrella company worker. This could be different if the employment have importance in relation to a third party, like order of priority in case of bankruptcy[23]. The interpretation of the concept employment on unemployment benefits have varied so fare in the settled caselaw from the Administrative Court of Appeal, see section 4. Here is seems more urgent to revile "false employees".

Another question is whether umbrella companies are covered by the Agency Work Act (2012:854). That depends on the interpretation of the definition of temporary employment agencies in Section 5 (1). Where an umbrella company is judged a temporary work agency, the consequence is that its employees are entitled to the basic working and employment conditions set down in the end-user's collective agreements and other binding general provisions[24]. Umbrella companies scarcely existed in Sweden in 2012 when the statutory act was passed, and they were not mentioned in preparatory work for the Bill put to Parliament[25]. By the the statutory act, temporary agency work is when a company employs temporary agency workers in order to assign them to work for end-users, under their supervision and direction. If a company instead places its employees to do a particular job under its direction for another company, then that is contract work, which is not covered by the statutory act[26]. Any decision whether a company is a temporary work agency or not must also correspond to the interpretation under the Temporary Agency Work Directive[27].

[22] In Sweden is the legislation interpreted according to the sources of the statutory acts. If the interpretation of the statutory act is unclear, the *travaux préparatoires* are important sources, with the findings of public inquiries about new legislation drawn up as Government white papers (SOU) or particularly in Bills to Parliament (*proposition*). The content of statutory act is clarified by caselaw, and here the Labour Court's rulings are of special interest. The doctrine in the legal literature has an impact, especially the arguments about to interpret the other sources. *See* Fahbeck R., Sigeman T., n. (1), 286 ff.

[23] Employees claims (but not self-employed claims) against their employer for outstanding pay enjoy priority before ordinary creditors according to the 1970 Preferential Claims Act (Förmånsrättslagen 1970:979) or they will have their pay from the state instead according to 1992 Pay Guarantee Act (Lönegaranti lagen 1992:497). It is not up the parties in the employment relation alone to decide if it is an employment where there also are interests of a third party.

[24] Sections 5 (3) and 6 the 2012 Agency Work Act (2012:854).

[25] SOU 2011:5 *Bemanningsdirektivets genomförande i Sverige*; Prop. 2011/12:178 *Lag om uthyrning av arbetstagare* [Government Bill].

[26] SOU 2011:5 p 55; see also Labour Court ruling 2006 no 24 on contract versus agency work.

[27] Directive 2008/104/EC of the European Parliament and the Council of 19 November 2008 on temporary agency work.

3.4. Double employer responsibility in triparty constructions.

Under the 1977 Work Environment Act (Arbetsmiljölagen 1977:1066), a company does have responsibility for other people in the workplace than its own employees. This does not mean that the company also *becomes* the employer of those other people; however, it does take on some of the employer's responsibilities. The construction is unique in the Swedish labour legislation as normally the principle of the legal subject is strict practiced.

The 1977 Work Environment Act Chapter 3 Section 12 (1) stipulates that the person in control of the workplace must also ensure that permanent equipment located at the workplace is safe to use so no one who works there (including those who not are his employees) is exposed to the risk of illness or accident. This means that anyone who has a temporary agency worker to perform work for him has an extensive responsibility for the working environment where the actual work is done. The temporary work agency—the employer—still has responsibility for 'all' measures, including long-term responsibilities such as rehabilitation and competence development. This is called double or shared responsibility[28].

Responsibility for collaborative platforms' working environments is ambiguous in the legislation. The findings of a government white paper *Ett arbetsliv i förändring—Hur påverkas ansvaret för arbetsmiljön?* (SOU 2017:24) were that the special triparty construction makes it unclear if any responsibility could be demanded from some of the collaborative platforms at the moment. It will depend on what control the platform has over the worker and his performance as to whether that worker is accounted a private person, a professional, an employee, self-employed, etc[29].

There has recently been a judgement in the case of an umbrella company's responsibility for the work environment. The Swedish Work Environment Authority imposed financial penalties on an umbrella company for violating the 1977 Work Environment Act Chapter 3 Section 12. A worker had started work before the contract between the umbrella company and the client was signed, and thus was not held to be employed by the umbrella company. The financial penalty on the umbrella company therefore did not apply. The special business model in which umbrella companies operate was of particular importance for the outcome of the case. Employment only exists for the time when there is a signed contract—for the duration of the assignment. Even if an employment contract is signed after the worker has started work, this will not change: the worker will not be regarded as employed by the company according to the rules stated in the 1977 Work Environment Act[30]. This case from Administrative Court of Appeal indicates the difficulties of applying the current legislation on new business models.

[28] SOU 2017:24 *Ett arbetsliv i förändring: Hur påverkas ansvaret för arbetsmiljön?*, 55 [Government White Paper].
[29] SOU 2017:24, 222.
[30] Judgement from Administrative Court of Appeal in Stockholm 30 October 2019 (case no. 5725-18).

4. Public sector employers.

The traditional point of view was that the employer at government level was one legal person. The different public authorities reporting to the government were not independent employers in an employment perspective. This changed with the 1994 Public Employment Act (1994:260). The scope of the statutory act is no longer defined as someone 'employed by the state', but instead, according to Section 1, 'special provisions concerning authorities reporting to the government'[31]. The 'new' concept of the public employer is called *the functional concept of the employer*[32]. This means that the authorities[33] reporting to the government on is operations have many of an employer's _authorities, including human resources policy, decisions about employment, and decisions about redundancy[34]. When it comes to the application of most of the statutory regulations in the 1982 Employment Protection Act, it is not the Swedish state, nor an arm of government, but one part (at a local level) of the authority reporting to the government that has the employer's function. A functional concept of the employer makes the concept of the employer at government level more like the concept of the employer in the private sector.

On the other hand is some areas, determination with notice out of reasons relating to the individual, decided by a special disciplinary board for the government sector. The negotiation of collective agreements is also centralised. The employers' representative in collective agreements at government level is the Swedish Agency for Government Employers, which is also responsible for handling industrial action. When collective labour legislation such as the 1976 Co-determination Act (1976:580) and collective agreements are in operation, the concept of the employer is centralised.

At the municipal level, the local authorities and committees have the function of employer, and the same is true at the regional level. The municipal authority are the employer but employers function are exercised differently depending on what situation it is. In established praxis from the Labour Court, the various statutory regulations are treated differently. The statutory rules about the right to transfer are valid in the whole local authority and not in committees[35]. A collective agreement can change the scope of the employers' obligations. When it comes to redundancy, the collective agreement dictates that selection for redundancy (based on length of service in the statutory regulations) is handled separately by every committee in a local authority or region.

5. Social security and tax law.

The main reason for identifying the *employer* according to the tax- and social security legislation is that according to the 2000 Social Insurance Contribution Act (2000:980)

[31] *See* Lunning L., Toijer G., (2), 46.
[32] Labour Court ruling AD 1999 no 21 where the practice is established; Lunning L., Toijer G., (2), 46.
[33] Examples of authorities reporting to the government are The Swedish tax agency, the Swedish National Courts Administration, Swedish Migration Board etc.
[34] In that case, Labour Court ruling AD 2003 no 10 decided that the 1982 Employment Protection Act (1982: 80) was to be enforced so that the employer was the authority at local level.
[35] Under Section 7 of the 1982 Employment Protection Act, the employer must try to transfer an employee before giving notice; Labour Court ruling AD 1984 no 141, AD 1992 no 130.

employers must pay tax and social fees for their employees. The employer's responsibility for paying tax and social fees in some cases goes beyond the concept of employment. The responsibilities include some independent self-employed without a firm registered with the business authority, who do not carry out work independently[36]. The self-employed pay taxes and social fees themselves. There are no general definitions of the employer in the tax- and social security legislation, as it mirrors the concept of the employee. When needed there is the concept of the employer, defined for example by a statutory rule in the Social Security Act, which stipulates that remuneration under SEK 1,000 (1 Euro is 10,50 SEK) is always regarded as income from employment and that the person (whether legal or natural) paid the remuneration is regarded as an *employer*[37].

The main reason for identifying the *employee* in social security legislation is to decide in the binary legal system which statutory regulation about entrance and the calculation of benefits will apply, as there are different regulations for employees and self-employed. The concept of employment is not interpreted in the same way in tax law, social security as in labour law. As a result, a performing party can be regarded as an employee under the 1982 Employment Protection Act, but as genuinely self-employed under the 1999 Income Tax Act (1999:1229), and thus qualify for Business Tax Certificate approval[38].

The employment concept in social security legislation is based on how it is defined in tax law, where the focus is on whether the individual's income comes from employment or from business operations[39]. In the 2010 Social Insurance Code (2020:110) is an employee defined as someone who has an income from employment and in the 1997 Unemployment Insurance Act (1997:238) refers to tax law when to decide who is self-employed[40].

The concept of employment in tax law (and social security law) is based on the same "core criteria" as in labour law.[41] There has to be a "*contract that a performing party must personally perform work on behalf of another party"*. Other circumstances (or evidentiary facts) are viewed differently compared to labour law (see in Introduction above) when deciding whether the performing party is sufficiently independent for Business Tax Certificate approval[42]. One criterion mentioned in the *travaux préparatoires* and in the doctrine legislation is the extent to which an assignment worker is dependent on the employer and is part of their business[43]. The fact that the employer decides how, when, and where the work is to be done, including on the

[36] Chapter 2 of the 2000 Social Insurance Contribution Act (2000:980); see also Källström K., *Employment and contract work*, in *Comparative Labour Law & Policy Journal*, 21, 1, 1999, 162.
[37] Section 7 Chapter 25.
[38] Westregård A., *Digital Collaborative platforms: A challenge for social partners in the Nordic model,* in *Nordic Journal of Commercial Law*, 1, 2018; Källström K., Malmberg J., n. (4) , 31. In Denmark and Norway the practice in tax law seems to follow the established concept of employment in labour legislation; Hasselbalch O., *Arbejdsretten*, 11th ed., Djøf Forlag, Copenhagen, 2013, Section III, Section 1.2.1; Jenum Hotvedt M., *Arbeidstaker—Quo vadis? Den nyere utviklingen av arbeidstakerbegrepet*, in *Tidsskrift for Rettsvitenskap*, 131, 2018, 42–103 at 51, 58 & 64.
[39] Sections IV and V of the 1999 Income Tax Act (1999:1229).
[40] Chapter 6 Section 2; for calculation of SGI, see Chapter 25 Section 10 of the 2010 Social Insurance Code and Section 34 in the 1997 Unemployment Insurance Act (1997:238) referes the chapter 13 section 1 in the Inocme Tax Act (1999:1229).
[41] Originally Axel Adlercreutz *Arbetstagarbegreppet* (Norstedts 1964 p. 186 and 276 ff.) and later Malmberg J., Bruun N., n. (3), identified the set of relevant circumstances or criteria, all them fundamental prerequisites (*grundrekvisit*).
[42] Adlercreutz A. G., n. (3), 1964, 186, 276 ff.; Ds. 2002:56 *Hållfast arbetsrätt för ett föränderligt arbetsliv*, 111 n. 63; Westregård A., n. (3).
[43] Legislative Bill 2008/09:*62 F-skatt åt fler,* p. 25 f, and A. Westregård A, n. (38), 2018.

employer's premises and with the employer´s tools, does not automatically mean that the assignment worker is under the direction of the employer according to the preparatory work in the tax legislation[44]. Equally, it is also standard for a former employer to be the new company's first and only client, yet even so the business must be considered independent[45]. In addition, particular attention must be paid to the parties' intent, while the number of clients is less important[46]. In labour law most of those criteria indicate that it is an employment, so it is obvious why the same person could be regarded as an employee in relation to the employer but as self-employed in tax law and social security.

It is crucial for the performing parties to know whether they are regarded as employees or not: if the performing parties are regarded as self-employed they are entitled to social security benefits for self-employed which can be less favorably than those for employees[47]. In the unemployment insurance e.g. an employee is regarded as unemployed between assignments and therefore entitled to unemployment benefits. A dependent contractor or a self-employed is entitled to unemployment benefits as self-employed, which means that they will not receive any unemployment benefits between assignments unless they formally register a temporary hiatus in their business activities.

Caselaw from the Administrative Court of Appeal in which the court decides whether dependent contractors are regarded as employees or self-employed according to the 1997 Unemployment Insurance Act varies. The essential criteria is the degree of independence[48]. The main problem for e.g. platform workers, umbrella company workers and other dependent contractors is that they so easily fall between regulations for employees and self-employed depending on how their individual level of independence is judged.

6. Conclusion.

In the private sector, the decision of who out of the two parties rests on the *principle of legal subject*. The employer is defined as the legal subject who has concluded the employment contract and for whom the employee works. In the private sector there are situations where it can be difficult to decide who is the employer and whether the employer's responsibilities go beyond a contract with the legal subject.

[44] Legislative Bill 2008/09:*62* p. 25.

[45] The problem that the statutory rules for Business Tax Certificate approval can result in more people being hired as sole traders, even though they are actually employed—the so-called 'false self-employed'. A Committee of Inquiry to consider new legislation was especially critical of the fact that the former employer can be the new company's only client, and proposed a change in tax regulations to avoid the 'false self-employed' (SOU2018:49 *F-skattesystemet: Några särskilt utpekade frågor*; SOU2019:31 *F-skattesystemet: En översyn*). Any change in the legislation will also affect the scope of the social security regulations, as the social security classification is linked to the tax classification. It is unclear if and when a change will be made, however.

[46] Prop. 2008/09:62 *F-skatt åt fler*, 26–7.

[47] Both entrance and calculation of benefits for employees and self-employed is regulated in the 2010 Social Insurance Code (2010:110) see chapter 6, 25, 27 and 28.

[48] Judgement from the Administrative Court of Appeal in Gothenburg 11 May 2010 (case no. 3059-09); Judgement from the Administrative Court of Appeal in Gothenburg 17 February 2015 (case no. 911-15); see also the Swedish Unemployment Insurance Board (IAF) appeal to the Supreme Administrative Court in the Judgement from the Administrative Court of Appeal in Gothenburg 11 May 2010 (case no. 3059-09), review not granted (case no. 4218-10). See also *Uppdragstagare i arbetslöshetsförsäkringen* 2016:3, 15–16, about the particular difficulties relating to the self-employed.

In *concern groups* the principle of the legal subject is strictly applied. In triparty contracts such as *temporary employment agencies* the principle of legal subject also applies, and the temporary work agency is regarded as the employer. In *platform work* there are still no court cases in Sweden to look to for precedent, but it is likely that a platform will be regarded as an employer if the platform takes an active role in determining how the work should be done and when. If the platform only mediates between the platform worker and the service consumer, however, it is more doubtful whether there are any employers at all, or if the service consumer might be the employer. In *umbrella companies* the intention of the parties is that it is a short fixed-term employment for the duration of the assignment. Again, there have not yet been any cases in the Labour Court, but it is likely (or at least not unlikely) that the court will find an umbrella company to be the employer in the relation between the umbrella company and the umbrella company worker. In dubious cases the concept of employment shall be interpreted as if there is an employment at hand, as in accordance with the *travaux préparatoires*. The concept of employment may be interpreted differently in relation to a third party and in other areas of regulation such as social security.

In some particular situations there is a shared responsibility, such as in the 1977 Work Environment Act where the end user also undertakes the responsibility for everyone who work at the workplace.

The employer in the public sector is as a concept more like the employer in the private sector, according to *the functional concept* of the employer. The functional concept decentralizes the employment concept to the authorities reporting to the government at local level. The employer's responsibilities are therefore carried out on the local level. In other respects, the concept is nevertheless a centralized one.

In summary, it is not always easy to determine who is the employer. It is easier in cases where the intention of both parties according to the employment contract is an employment relation (e.g. umbrella companies). The question might then be one of finding 'false employees', in which case there is no employer. If the principal, who is often the stronger party, denies that the relation is one of employment (e.g. collaborative platforms), it instead becomes a question of finding 'false self-employed' and their employer.

Bibliography

Adlercreutz A. G, *Arbetstagarbegreppet*, Norstedts, Stockholm, 1964;
De Stefano V., *The rise of the "just-in-time workforce": On-demand work, crowdwork and labour protection in the "gig-economy"*, ILO, *Conditions of Work and Employment*, 71, 2016, 1;
Fahbeck R., Sigeman T., *European employment and Industrial relations Glossary: Sweden, 2001*, in Sweet & Maxwell, London, 2001;
Hasselbalch O., *Arbejdsretten*, 11th ed., Djøf Forlag, Copenhagen, 2013;
Inghammar, A. *The Concept of "Employee": The Position in Sweden, Restatement of Labour Law*' in Waas B., Heerman van Voss G, *The Concept of Employee*, Hart Publishing, Oxford, 2017;
Källström K., *Employment and contract work*, in *Comparative Labour Law & Policy Journal*, 21, 1, 1999, 162.

Jenum Hotvedt M., *Arbeidstaker—Quo vadis? Den nyere utviklingen av arbeidstakerbegrepet*, in *Tidsskrift for Rettsvitenskap*, 131, 2018, 42;
Källström, K., Malmberg J., *Anställningsförhållandet,* Iustus, Uppsala, 2019
Lunning L., Toijer G., *Anställningsskydd: En lagkommetar*, 11th ed., Wolters Kluwer, Alphen aan den Rijn, 2016.
Nyström B., Arvidsson N., Flodgren B., *Modern affärsrätt*, Wolters Kluwer, Alphen aan den Rijn, 2017.
Selberg N., *Arbetsgivarbegreppet och arbetsrättsliga ansvar i komplexa organisationer: En studie av anställningsskydd, diskriminering och arbetsmiljö*, Media-Tryck, Lund, 2017;
Sigemen T., Sjödin S., *Arbetsätten: En översikt,* Wolter Kluwer, Alphen aan den Rijn, 2017;
Westregård A., *Looking for the (fictitious) Employer – Umbrella companies: The Swedish Example*, in Chesalina O., Becker U. (eds.), *Social Law 4.0: New Approaches for Ensuring and Financing Social Security for Digital Age*, 2020, pending;
Westregård A., *Sweden,* in Liukkunen U., *Collective Bargaining in Labour Law Regimes A Global Perspective Ius Comparatum –Global Studies in Comparative Law*, Volume 32, Springer, Berlin, 2019;
Westregård, A., *Collaborative economy – a new challenge for the social partners* in *Vänbok till Niklas Bruun*, November, Iustus, Uppsala, 2017, 427.
Westregård, A., *The Notion of `employee´ in Swedish and European Union Law. An Exercise in Harmony or Disharmony?*', in Carlson, L., Edström, Ö., Nyström, B. (eds), *Globalisation, Fragmentation, Labour and Employment Law – A Swedish Perspective*, Iustus, Uppsala, 2016.